AFRODAD

AFRICAN FORUM AND NETWORK ON DEBT AND DEVELOPMENT

Tax Regimes in the Age of Resource-Backed Loans and Collateralisation

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EXECUTIVE SUMMARY

Background

African countries face huge infrastructure gap. With limited financing sources, they are leveraging on their rich natural resource endowment to close this gap whilst capitalising on the surge in mineral prices. Resource-backed loans (RBLs) and collateralisation of mineral resources fall under these possible financing mechanisms. RBLs are secured by leveraging on a country's natural resources to serve as either a direct source of repayment or as an underlying guarantee of repayment in respect of the loans. They are intended to ensure that governments unlock resources at the present time while the financing is settled later when the resource extraction cycle has been completed. Despite being a seemingly safe financing option (natural resources being available to settle the loan), RBLs have contributed to crippling debt levels in Africa. The failure of RBLs to serve as a viable financial option can mainly be attributed to the manner in which they are designed, which is mainly tilted in the favour of the investors compared to the governments.

This paper explores whether African countries' public finance legal regimes adequately provide for RBLs, using a select countries in Eastern, Western and Southern Africa. Focus countries include:

1. Chad
2. Ghana
3. Kenya
4. Mozambique
5. Nigeria
6. Senegal
7. Tanzania
8. Uganda; and
9. Zambia.

Regional economic community protocols enforcement help minimise RBLs risks

The paper establishes that the three regional economic communities (East African Community (EAC), Economic community of West African States (ECOWAS), and Southern African Development Community (SADC)) are implementing convergence protocols that seek to harmonise public finance management among their respective member states. If member states were effectively implementing their regional commitments as provided for in these protocols, they would have adopted RBLs in a harmonised and coordinated manner. However, this is not the case.

For example, under the EAC Treaty, member states signed the Protocol on the establishment of the EAC Monetary Union in November 2013. With respect to indicators relevant to RBLs:

- The protocol provides that member states should have a ceiling on public debt of 50% of GDP in Net Present Value terms. However, in most cases, RBLs often result in this threshold being breached.

- Members should disclose to the EAC Council of Ministers debt levels on a quarterly basis. If this was being followed religiously, RBLs would not be shrouded in secrecy as is the case at the moment.

- All the member states must adopt a common public debt management framework. If this had been the case, the manner in which RBLs are negotiated would have been uniform across the members states, something which is also not yet happening.

The same is also true with respect to the ECOWAS Treaty. It provides for the harmonisation and co-ordination of national policies in areas such as finance, taxation, economic reform policies and natural resources. This might have also helped ensure that RBLs are handled in a coordinated manner if it had been adopted. Further under its Monetary Cooperation Programme, ECOWAS has a set of macroeconomic convergence criteria that includes measures relevant to RBL. These include having outstanding domestic and external debt to GDP ratio of less than 70%. If this was being adhered to, the negotiation of RBLs would not have resulted in debt sustainability challenges.

The SADC region is also not an exception. Article 21 of the SADC Treaty obliges its member states to coordinate, rationalise and harmonise their macro-economic policies and strategies in finance, investment and mining. The 2006 Protocol on Finance and Investment advocates for Member States to maintain a public debt-to-GDP ratio of not greater than 60%. This would have entailed the need for RBLs to be preceded by an assessment to ensure that the debt-to-GDP ratio ceiling is not breached.

Do countries' legislation allow for transparency in loan and resource exploitation?

Transparency in loan and resource exploitation is provided for in the various pieces of legislation (the constitutions; public finance laws; public debt management laws and various laws on minerals, petroleum and gas). The legislations also oblige countries to report and publish debt statistics, which is often not done with respect to RBLs. The public finance legislative framework further requires information on natural resource exploitation to be reported to the Minister of Finance in each jurisdiction. In almost all the countries, all agreements relating to exploitation of natural resources are subject to approval by Parliament as per legislation. However, Parliament is often by-passed with respect to RBLs. Some national legislations also require that mineral agreements and their status be available on the Ministry of Mines website including information on mineral exploitation. This level of transparency is often ignored. Moreover, the bidding process for acquisition of mining rights is also legislated for in some countries (Mozambique, Nigeria, Uganda and Zambia). However, mining rights involving RBLs often get excluded from compliance.

Whether debt management and governance frameworks are strong enough for RBLs

The public debt management legal framework across the nine countries exhibits various levels of strength which if enforced could handle most of the negative issues associated with RBLs. For example:

- They set borrowing limits for governments and pubic bodies.
- There should always be a specified purpose of borrowing.
- They set up institutional mechanisms for public debt management.
- The legislation requires for periodic production of detailed statements of debt including sustainability analyses and risk assessments.
- Standalone public debt management laws and institutions exist, which do not exclude RBLs from their purview.
- Generally, the laws require all the loans to be secured on the consolidated revenue fund.
- The laws require some bidding processes to be conducted for mineral rights.
- The legislation has provisions for strong Parliamentary oversight.

The only drawback is that there is no explicit mention of RBLs in the legislations across all the nine countries. This could be a loophole exploited which might warrant legislative revisions.

Do the legislations across the countries allow for well-structured RBLs to emerge?

The fact that there are no explicit provisions for RBLs that can be found in the laws leaves most countries requiring further guidance on how to optimise natural resources for infrastructure development outside the traditional Consolidated Fund. RBLs are a new form of finance which was not adequately anticipated by existing mining and revenue management regimes. However, the existing legal frameworks might in general deal with some of the negatives associated with RBLs. Transparency issues on terms, tenure and contractual process are already part of the legislations but often not enforced when it comes to RBLs. There is no guidance on how RBLs can be structured on valuation of natural resources, as well as on how to respond to price and output fluctuations.

Legality of the use of RBLs in the various regions and countries
There are no strong provisions in the legislations which make RBLs in the legislations illegal. It is largely the practice that has been associated with RBLs that in most cases is illegal. This includes:

- Non-involvement of and no accountability to Parliament.
- Channels used to transmit natural resource revenue to settle RBLs.
- Non-compliance with the general mining and petroleum rights acquisitions.
- Non-disclosure of public debt information.
- Non-compliance with the procurement laws (governments shortchanged).

In Ghana, Tanzania and Uganda, the use of revenues from petroleum and gas that is due to government as collateral for loans is prohibited by legislation. This prohibition, however, is for revenues (royalties, taxes etc) that have already been paid into the special fund created for collection of all revenues due to government. This leaves room for mortgaging the actual petroleum output rather than revenue, hence does not make RBLs illegal.

Lessons from case study review

The study also reviews three case studies involving RBLs. The three case studies include the following:

- Trinity Energy and Afreximbank's $400 million RBL of South Sudan. This involved Trinity importing diesel and petroleum from KenolKobil (Kenyan registered company) for sell in South Sudan.

- Société des Hydrocarbures du Tchad (SHT) and Glencore's $1.5 billion RBL of Chad. This financed SHT's acquisition of Chevron's 25% share of the Doba consortium and a combined 21% share in Chad Oil Transportation Company (TOTCO) and Cameroon Oil Transportation Company (COTCO), the two oil-pipeline companies that own and operate the Chad-Cameroun pipeline.

- China Development Bank and Government of Ghana's US$3 billion RBL. Under this deal, Ghana guaranteed that it would pay 13,000 barrels of oil per day from Jubilee Field to China International United Petroleum & Chemicals Co., Ltd. (UNIPEC Asia) over a period of 15.5 years

There are a number of issues that went wrong with these deals, including the following:

- Poorly negotiated terms favouring financiers/contractors.
- Total disregard of procurement regulations.
- Disregard of the public finance management laws (transparency, debt ceilings, revenue from minerals).
- The loans being very expensive (7-8%).
- Requiring that the financing goes beyond the shipped oil revenue.
- The short-time frame of the loan.
- Use of inexperienced negotiators.
- Lack of legal framework to guide debt procurement in general.
- Unrealistic loan projections and unanticipated price risk.
- Limited Parliamentary oversight and public scrutiny in negotiations.

Proposed recommendations

The policy recommendations to African Governments on how the various regions and countries can deal with the challenges of using RBL to leverage on natural resources riches to boost domestic resource mobilisation include the following:

- Public finance management frameworks on debt should be amended to incorporate provisions that give guidelines on how RBLs should be negotiated and implemented to complement the existing frameworks.

- Deals must not be hastily signed. Government must give enough time to the negotiating team to do due diligence including thorough assessment of economic viability of projects. Skipping this process often result in increased debt burden as countries fail to generate the requisite revenue to repay the loans.

- Governments should exercise caution and subject the RBL deals to more scrutiny by all critical stakeholders to ensure that issues that need to be taken into account in safeguarding the interest of the countries are factored into the negotiations.

- Governments should ensure that they bring in expertise that match the financiers to the negotiating table. Where such capacity in terms of engineering, financial and legal expertise is lacking, government should hire such expertise to ensure that some of the provisions that are solely intended to benefit the financiers at the expense of the countries are eliminated.

- Public finance management laws, including the guidance on debt ceilings, should be complied with when RBLs are being negotiated.

- Deliberate efforts should be made in ensuring that RBLs are also subjected to the same tendering processes, starting from the selection of the financier to the stage of selecting contractors involved in constructing the financed infrastructure.

- African governments must make all efforts in reducing interest rates as well as increasing the tenure of the loan at negotiating RBLs. This also includes prioritising only concessionary loans rather than commercial loans in RBL transactions.

1. INTRODUCTION

1.1 BACKGROUND

With a wide range of natural endowments (fisheries, minerals, fossil fuels and timber), Africa has an opportunity to leverage on them as key sources of economic activity and domestic revenues. The African governments' responsibility of ensuring that there is effective delivery of essential public services is a difficult one due to inadequate financial resources, especially as they face fiscal constraints linked to global economic conditions. Specifically, critical infrastructure services such as power, transport, telecommunications, water and sanitation need to be in place at the right quality and quantity to facilitate development and enhance livelihoods. The inadequacy of infrastructure has seen its financing becoming a topical issue as governments seek to enhance economic, industrial, technological and social development (Kalu, 2015). Developing countries often face difficulties in accessing large-scale financing to meet their development needs. Major constraints are the lack of sufficiently deep domestic markets and limited or costly access to international capital markets.

While challenges with infrastructure financing persist, there has been a rising demand for minerals arising from new technology-inspired manufacturing processes, which has seen a surge in their prices. Countries that are rich in mineral resources have been trying to leverage on their resource endowments, taking advantage of the high mineral prices to raise financial resources. The extraction of the resources, however, requires huge capital outlays which do not only take long time to mobilise but might also be beyond the scope of governments to raise.

To bridge this mismatch, government explore mechanisms through which they can leverage on their resource endowments to unlock finance for immediate needs while allowing the mineral investment and exploitation cycle to take its course. RBLs and collateralisation of mineral resources fall under these possible financing mechanisms. They are intended to ensure that governments unlock resources at the present time while the financing is settled later when the resource extraction cycle has been completed.

However, despite being a result of the desire to bridge two common needs between the parties to the deals (government requiring financing and the financier requiring repayment through access to mineral revenues), RBLs have contributed to crippling debt levels in Africa. Ideally, the co-existence of natural resource endowment and huge infrastructure gaps in developing countries can be a justification for the use of RBLs to sustainably close off the infrastructure gaps. The failure of RBLs to serve as a viable financial option can mainly be attributed to the manner in which they are designed, which is mainly tilted in the favour of the investors compared to the governments. Having the necessary guidelines on how to manage RBLs can be an important milestone to safeguard the interest of African governments from exploitation by lending institutions.

This paper explores whether African countries' public finance regimes adequately take into account measures that deal with RBLs, using a select of countries in Eastern, Western and Southern Africa. In addition, the paper also looks at country cases of national public finance management law and the implication on domestic resource mobilisation and sustainable debt management in Africa.

Specifically, the paper focuses on the Central, Eastern, Western and Southern Africa, with the following being the country case studies:

1. Chad
2. Ghana
3. Kenya
4. Mozambique
5. Nigeria
6. Senegal
7. Tanzania
8. Uganda
9. Zambia.

1.2 RESOURCE BACKED LOANS: WHAT ARE THEY?

Mihalyi, Hwang, Rivetti, & Cust (2022) define RBLs as loans that are secured by leveraging on a country's natural resources to serve as either a direct source of repayment or as an underlying guarantee of repayment in respect of the loans. According to Mihalyi, Adam, & Hwang (2020), RBLs take place when natural resources serve as either payment in kind, the source of an income revenue stream used to make repayments, or as an asset collateral. Halland, Beardsworth, Land, & Schmidt (2014) further provide that their main distinguishing feature is that they are a financing model where a government pledges its future revenues from a resource development project to repay a loan used to fund the construction of an unrelated infrastructure project. Xu, Ru, & Song (2020) also add a dimension that RBLs involve the linking up of two supply chains that would have been otherwise separate: the infrastructure building supply chain and the resource extraction supply chain, hence they tend to be more complex.

Thus, based on the definitions, properly structured RBLs involve three distinct stages:

- The government agrees on a resource development and production license with a resource developer and with a firm development timeline and a fiscal regime that provides clear revenue flows when the resource is under production.

- The government agrees with a potential lender to pledge part or all of the government revenue flows it will receive from the resource production project in exchange for a credit facility to be paid back (both principal and accrued interest) solely from the pledged revenue stream.

- The government or the lender or both use the credit facility to obtain infrastructure by contracting with entities that specialise in the development and construction of the specific types of infrastructure to be built. Funds from the revenue flows would be used to finance the construction and, potentially, the operations and maintenance of the infrastructure for a specified duration.

RBLs are often labelled as or seen as a subcategory of collateralised loans. Mihalyi, Hwang, Rivetti, & Cust (2022) as well as Mihalyi, Adam, & Hwang (2020) describe collaterisation as having taken place when the creditor has rights over an asset or revenue stream that would allow it, if the borrower defaults on its payment obligations, to rely on the asset or revenue stream to secure repayment of the debt.

This means that the mineral resources have only been used as a collateral but if government were to be able to raise resources from other revenue sources, the collateralised mineral resource would not be tapped into by the lender. Thus, a borrower would be granting liens over specific existing assets or over future receivables to a lender as security against repayment of the loan (Mihalyi, Hwang, Rivetti, & Cust, 2022).

Collateralisation as a way of mitigating the risk of payment difficulties can see the lender requiring for placement of a resource revenue flow, for example a given percentage of mineral revenue, in an escrow account or assign rights to future production volumes. This is described by Mihalyi, Adam, & Hwang (2020) as collateralised future commodity receipts arrangement. The collateralised revenue then becomes the basis for unlocking credit and the lender gets access to the collateralised revenue in the event of default.

Thus, RBLs and collateralisation of mineral resources do not necessarily mean the same, although in most cases the impact is the same as governments in developing countries, especially Africa, are rarely able to raise resources to redeem the collateralised mineral rights.

1.3 OBJECTIVES OF THE STUDY

a) Review country and regional convergence protocols at a time when RBL is gaining prominence amid tightened fiscal conditions cause by multiple crisis facing African countries.

b) Analyse the extent to which regional and country level public finance regimes adequately take into account measures to deal with instances of RBLs.

[1]Member States of the EAC include Burundi, Democratic Republic of Congo, Kenya, Rwanda, South Sudan, Tanzania and Uganda

c) Determine the legality of the use of Resource Backed Loans in the various regions and countries – what makes them legal or illegal in the regions and countries under study?

d) Provide analysis and reflections based on well known cases where RBL has succeeded or failed to enable countries leverage on their resource riches to finance development.

e) Provide policy recommendations on how the various regions and countries can deal with the challenges of using RBL to leverage on natural resources riches to boost domestic resource mobilisation.

2. REGIONAL CONVERGENCE PROTOCOLS RELATED TO PUBLIC FINANCE MANAGEMENT AND RBLS

RBLs are taking place in countries that belong to different Regional Economic Communities (RECs). RECs have convergence protocols that try to harmonise the manner in which regional integration is achieved, and this also includes guidelines on how the members are to manage their public finance issues. If these criteria were to be followed, it would be expected that when RBLs are negotiated with the financiers in Africa, the manner in which one country would approach the negotiations would be similar to the manner in which another country from the same REC would also approach the issue. This is because of guidance by the respective convergence protocols that the RECs have put in place.

However, there are different challenges that have arisen from the manner in which public finances are being managed across the African region. The landscape in public finance management has continued to evolve as innovative and new methods of finance have emerged, calling for more attention on how they are regulated. Given that the same investors normally target different African countries, they are likely to take advantage of less regulated extractive sectors and exploit any regulatory loopholes.

It is on this basis that at the REC level, Africa has also tried to remain abreast of the evolving landscape by coming up with different convergence protocols. These are regional guidelines intended to ensure that all countries belonging to the same REC adopt similar strategies that are aimed at maximising value accruing to the member countries. This section discusses the various convergence protocols with the view to contextualise RBLs within the convergence protocols.

2.1 EAST AFRICAN COMMUNITY (EAC)

With the joining in of the Democratic Republic of Congo (DRC) in July 2022, the East African Community (EAC) is now a REC bloc consisting of seven Partner States . It is also one of the most advanced regional cooperation frameworks in Africa, as reflected by the progress that the regional bloc is making towards meeting its regional integration targets. The Treaty for the Establishment of the East African Community (The Treaty) was signed on 30th of November 1999 and entered into force on 7th July 2000.

In addition to advancing regional integration objectives, the EAC Treaty also focuses on enhancing convergence in the way the Partner States manage their public finances. Under Article 83 of The Treaty which focuses on Monetary and Fiscal Policy Harmonisation, the Partner States need to adopt policy measures in accordance with an agreed macro-economic policy framework. This includes adjusting their fiscal policies and net domestic credit to the government in a manner that ensures monetary stability and the achievement of sustained economic growth. The Partner States should also harmonise their tax policies so that they are free from tax distortions thereby bringing about a more efficient allocation of resources within the EAC region. In addition, Partner States are required, under Article 84 of The Treaty, to evolve policies designed to improve their resource and production base.

In pursuit of the objectives of The Treaty, the Partner States signed off the Protocol on the Establishment of the EAC Monetary Union in November 2013. The Protocol gives further details on the convergence criteria which the Partner States committed to meet to achieve macroeconomic stability. Key indicators include the following:

- A ceiling on headline inflation of 8%
- A ceiling on fiscal deficit, including grants, of 3% of GDP
- A ceiling on gross public debt of 50% of GDP in Net Present Value terms
- A tax to GDP ratio of 25%.

With respect to public debt management under which RBLs would fall, the Protocol provides that Partner States should adjust their net financing to ensure that the ceiling on public debt does not exceed 50%, while also disclosing to the EAC Council of Ministers the status of their domestic and external debt, including their publicly guaranteed debt, on a quarterly basis. In addition, all the Partner States must adopt a common public debt management framework.

2.2 ECONOMIC COMMUNITY OF WEST AFRICAN STATES LEVEL

The treaty governing the way regional integration could take place in Economic Community of West African States the (ECOWAS) was initially signed by the Heads of States and Governments in 1975 in Lagos, Nigeria. However, following new developments and emerging issues on regional and continental integration, a revised treaty was signed in Cotonou, Benin Republic in July, 1993 by the heads of states and government. Thus, regional integration in the region is now governed by the Revised Treaty of 1993.

The Revised Treaty serves as the sole economic community treaty in the West Africa region for the purpose of economic integration and the realisation of the objectives of the African Economic Community. It provides for the harmonisation and co-ordination of national policies and the promotion of integration programmes, projects and activities, in areas which include, among others, finance, taxation and economic reform policies.

Within the context of RBLs, Article 31, which focuses on natural resources, provides that Member States are obliged to harmonise and co-ordinate their policies and programmes in the field of natural resources. This includes methods of pricing and marketing of raw materials through a concerted policy as well as co-ordinating their positions in all international negotiations on raw materials, including minerals.

During their 62nd Ordinary Session, the ECOWAS Council of Ministers established the Directive on the Harmonisation of Guiding Principles and Policies in the Mining Sector in 2009. As stated under Article 2 of the Directive, the objectives include:

- Providing for harmonisation of guiding principles and policies in the mining sector for Member States with high standards of accountability for mining companies and governments.

- Improving transparency in mineral policy formulation and implementation processes in the mining sector within the region.

- Ensuring that a mining environment is responsive to macroeconomic sustainable development needs while balancing the need to create incentives for investors with the protection of the revenue base and resources for Member States.

As outlined under Article 5 of the Directive, the granting of mineral rights must follow all the procedures laid out by each Member States with transparency being at each and every stage of the decision-making process. Under Article 12, a holder of a mining right should maintain records and documents relating to all its mining activities. As emphasised under Article 13, all the information and records should be classified as public and shared with the general public.

The ECOWAS convergence criteria can be traced to July 1987 when ECOWAS adopted the ECOWAS Monetary Cooperation Programme (EMCP). The EMCP had a set of macroeconomic convergence criteria, which the member countries were expected to observe. The convergence criteria were intended to ensure that there was synchronisation of economic policies and fundamentals among prospective Member States. Although the convergence criteria were done under the old treaty, there have been no revisions following the signing of the new treaty in 1993. Thus, the convergence criteria can still be regarded as the guiding principle in public finance management.

The agreed convergence criteria include the following (Onye & Umoh, 2021):

- Overall fiscal deficit (including grants) to GDP ratio of not more than 3%.
- Outstanding domestic and external debt to GDP ratio of less than 70%.
- Non-accumulation of domestic and external arrears together with settlement of all outstanding arrears.
- Tax revenue to GDP ratio of at least 20%.
- Wage bill to tax revenue of not more than 35%.
- Internally funded public investment to tax revenue of at least 20%.

- Real GDP growth rate of at least 7%.

2.3 SOUTHERN AFRICAN DEVELOPMENT COMMUNITY LEVEL

Under Article 21 of the Consolidated Southern African Development Community (SADC) Treaty, Member States are obliged to coordinate, rationalise and harmonise their overall macro-economic policies and strategies. This includes the areas of finance, investment and mining. It is on this bases that the SADC Protocol on Finance and Investment of 2006 outlines the SADC Macroeconomic Convergence criteria. It follows from the SADC Memorandum of Understanding on Macroeconomic Convergence that was agreed by Member States in August 2002. The Protocol seeks to foster harmonisation of the financial and investment policies of the State Parties to make them consistent with objectives of SADC.

As specified under the Protocol, State Parties are expected to promote and establish predictability, confidence, trust and integrity by adhering to and enforcing open and transparent policies, practices, regulations and procedures as they relate to investment. In addition, there should be macroeconomic convergence of several indicators, including the ratio of the budget deficit to GDP in a State Party as well as the ratio of public and publicly guaranteed debt to GDP, taking account of the sustainability of such debt.

Specifically, the Protocol on Finance and Investment advocates for Member States to maintain a public debt-to-GDP ratio of not greater than 60%. In addition, Member States were to achieve ratios of budget deficit to Gross Domestic Product (GDP) of less than 5% by 2008, decreasing to less than 3% by 2012 and maintaining that ratio through 2018. This generally defines the key convergence criteria within the context of RBL and public finance management.

Although not binding upon Member States, the SADC Parliamentary Forum has also adopted the SADC Model Law on Public Financial Management to serve as a benchmark and guiding legal instrument for national Parliaments to reinforce their domestic legal framework on public financial management. These also have some guidelines on debt management which would also have a bearing on the way RBLs are implemented if followed. For example, the Minister is required to make public debt statements, which do not only include an assessment of the amount of outstanding public debt at the date of the statement but should also include information about any resources allocated as, or available for allocation as, collateral in respect of each element of public debt. This is intended to ensure that RBLs are also disclosed to the public.

3. DO REGIONAL AND COUNTRY LEVEL REGIMES DEAL WITH RBLS ADEQUATELY?

3.1 ASSESSMENT FRAMEWORK

Generally, debt and tax accumulation guidelines in countries should be designed to safeguard the national interest in all investment arrangements as well as within the general way public finances are managed. For the regional and country level regimes to adequately take into account RBLs, they should be designed to:

a) maximise benefit to the mineral rich economies in terms of infrastructure and developmental financing; and
b) effectively deal with the negative side of RBLs.

In a comprehensive paper, AFRODAD (2022) identifies a number of design attributes which can be used to ensure that RBLs can effectively bring benefits to the mineral rich countries. These include:

- The loan negotiation and implementation process being done transparently and effectively, with the loan's terms being favourable while also the projects being financed through RBLs being well selected and well executed.

- Strong debt management and governance framework to ensure that all creditors are accorded the same treatment while all loans are accounted for.

- No diversion of the loans from the originally intended uses towards other projects, resulting in high debt levels without any corresponding completed infrastructure.

- Allocating funding directly to construction companies rather than to borrowing governments to eliminate resource diversion risk.

- Giving assurances that once RBLs have been negotiated, the extraction of the mineral resources is going to be complimented by the construction of befitting infrastructure of the financed project.

- RBLs being structured to eliminate corruption and diversion risk by minimising government control in the execution, with the lender remaining separate from the infrastructure contractor as well as the mineral resource extractor and instead having a special purpose vehicle (SPV) created to be the link.

This generally forms the context under which the country and regional frameworks can be assessed with respect to whether they are adequately designed to deal with RBLs or not.

3.2 REGIONAL LEVEL ASSESSMENT

a) Implication on the EAC convergence protocols on RBLs. Given that RBLs are already being used in the region, there are some expectations with respect to the way they should have been or should be contracted in the region. There is nothing within the EAC protocols or the EAC Treaty which makes RBLs illegal or prevent Partner States from negotiating them. However, once signed:

- Their contribution to total debt level should not remain a secret as it needs to be reported to the EAC Council as part of the regular quarterly public debt status update. However, literature shows that they are still shrouded in secrecy.

- The Partner States should be able to account and report for that debt in the total debt levels to ensure that the debt level remains within the ceiling of 50% of GDP.

The decision to pursue RBLs is also part of fiscal policy as these are loans that are used to finance public expenditure. That finance mechanism should also be in line with what other Partner States are using, as having only one country using them might create inconsistencies with the finance systems used in other countries. Thus, RBLs as a financing mechanism might need to be discussed and agreed with other Partner States rather than bilaterally with the financier.

b) Implication of the ECOWAS convergence protocols on RBLs.I f all the countries in the ECOWAS region were to follow the dictates of the protocols as well as the dictates of the convergence criteria, some of the challenges associated with RBLs would not have been taking place. This is because:

- The exploitation of resources under RBLs is being done at a time when the methods of pricing and marketing are not clear. In addition, RBLs were only negotiated in a few countries of the region at a time when the Treaty provided for minerals to be exploited through a concerted policy with co-ordinated positions in the international negotiations. This shows that the spirit of the treaty has not being carefully followed.

- The treaty provides for high standards of accountability for mining companies and governments as well as transparency in mineral policy formulation and implementation processes in the mining sector within the region. Such transparency is often missing in RBLs that were negotiated in some of the ECOWAS Member States.

- ECOWAS also foresaw the need for the public to be fully aware of the manner in which natural resources would be exploited. If holders of mineral rights that are subject to exploitation under RBLs were as transparent as required by ensuring that records and documents relating to all its mining activities are shared with the public, there probably would be more buy-in with respect to RBLs.

- The ECOWAS convergence criteria requires that all outstanding domestic and external debt to GDP ratio should always be less than 70%. This means that all debt would need to be declared in terms of amounts disbursed, amounts outstanding and payments being made to check whether the convergence criteria is still being met. If this was being enforced, the debt associated with RBLs would also have been included instead of being shrouded in mystery.

c) Implication of the SADC convergence protocols on RBLs

The implications from the review of the protocols on convergence governing the SADC region reveals that:

- If the Member States were indeed coordinating, rationalising and harmonising their overall macro-economic policies and strategies in finance, investment and mining, then by now there would be a common strategy towards dealing with RBLs, which is currently missing despite that they have been concluded in some SADC countries.

- If the spirit of promoting and establishing predictability and confidence through enforcing open and transparent policies, practices, regulations and procedures relating to investment as per the Treaty's aspirations had been embraced, RBLs would have been done more transparently.

- The SADC Model Law on Public Financial Management specifically provides for information about any resources allocated as collateral in respect of public debt to be disclosed. If this law was to be domesticated, RBLs would be regulated in a transparent manner.

3.3 COUNTRY LEVEL ASSESSMENT

The national level assessment can be done as follows:

3.3.1 TANZANIA

Public finance management in Tanzania within the context of RBLs is a result of the interface of about four pieces of legislation, in addition to the Constitution itself.

The Public Finance Act [CAP.348 R.E. 2020] serves as the main legislation through which the control, management, and regulation of the collection and use of the public finances for Tanzania is regulated. It also sets the tone for the manner through which parliamentary control and supervision of public funds and resources should be conducted.

The Government Loans, Guarantees and Grants Act, 1974 (as amended) does not only provide for how loans raised and guarantees given by the Government are to be handled, but it also provides mechanisms through which grants made to the Government and any other matters connected to loans, guarantees and grants are to be regulated.

The Mining Act [CAP. 123 R.E. 2019] regulates the manner in which prospecting for minerals, mining, processing and dealing in minerals is to take place in Tanzania. It also gives the procedure related to granting, renewal and termination of mineral rights, payment of royalties, fees and other charges. This means that RBLs that are hinged on the mining sector would also be expected to follow the guiding principles as specified under this Act.

While the Petroleum Act, 2015 regulates the regulation of upstream, midstream and downstream petroleum activities, the Oil and Gas Revenues Management Act, Chapter 328 provides for the manner in which the revenues from oil and gas are to be managed. In addition to providing for the establishment of the Oil and Gas Fund under which such funds would be resident, it also provides for the framework for fiscal rules and management of oil and gas revenues, which would have a bearing on RBLs that have oil and gas revenue as their anchor.

This legislative environment generally serves as the context for the Tanzania assessment.

Whether legislation allows for transparency in loan and resource exploitation

Transparency is provided for under section 5 of the Public Finance Act. Under this section, the Minister responsible for Finance must develop and implement a macroeconomic and fiscal policy control, management and framework. This must be done under full and transparent accounts which are from time to time (not less than annually) made to the National Assembly. The control of the National Assembly over such resources and public moneys must be maintained while transparent systems are established which provide a full account to the National Assembly for the use of resources and public finance. This means that if any RBLs have been negotiated, it is mandatory that they be disclosed for parliament to have an oversight over them.

The highest level of transparency in debt and debt management is ensured under section 25 of the Government Loans, Guarantees and Grants Act, 1974 (as amended).

The Minister is obliged to ensure that within three months prior to the commencement of the fiscal year, the following are prepared for approval by the Government:

- An annual Debt Strategy and borrowing plan;
- A debt strategy implementation report on a quarterly basis; and
- A debt and budget execution reports.

Once these are approved by the Cabinet, the Minister must present these bi-annually before the National Assembly for approval. This means that in Tanzania, if the legislative framework is fully implemented, it is not possible for RBLs to be negotiated without the knowledge of Parliament and the public.

Transparency over mineral resources is also ensured under the Mining Act. Under section 123, the Mining Commission (established under section 21 of the Act) must maintain a central register of all mineral rights. This record should include all applications, grants, variations and dealings, assignments, transfers, suspension, and cancellation of the rights. The records are to be maintained in every regional mine office detailing all mineral rights, with a register being open for public inspection on payment of the prescribed fee. This means that if there are any mining activities, including those involving RBLs, they would also be known by the public if the provision are followed.

Similarly, section 5 of the Petroleum Act empowers the Minister to supervise the petroleum industry by ensuring that there is sustained transparency in the petroleum sub-sector. More critically, under section 48, petroleum agreements cannot be entered unless a transparent and competitive public tendering process is completed. The Minister must ensure that the invitation to tender is published in a newspaper of wide circulation. The regulator, the Public Utilities Regulatory Authority (PURA) is also mandated under section 13 to exercise and perform its functions and powers in a manner that ensure transparency in relation to activities of the petroleum sector. Under section 91, PURA must make available to the public (upon payment of the prescribed fee):

- Details of all agreements, licences, permits and any amendments to the licences, permits or agreements whether valid or terminated.
- Details of exemptions, variations, or suspensions of conditions of licence and permit.
- Approved development plan; and
- All assignments and other approved arrangements in respect of a licence and permits.

This means that if there are any existing petroleum mining agreements that are now being renegotiated to accommodate RBLs, this should also be open to the public as this is part of the requirement disclosures.

In addition, as specified under section 251, transparency and accountability should be ensured on collection, allocation, expenditure and management of petroleum and natural gas revenues as well.

Transparency in revenue and expenditure from oil and gas is also ensured under section 18 of the Oil and Gas Revenues Management Act. For purposes of transparency and accountability, the records of oil and gas revenues and all expenditures must be published by the Minister in the Gazette, as well as online on the website of the Government and Ministry of Finance. In addition, the record of oil and gas revenue and expenditure shall be the subject of Parliamentary oversight.

Under section 16 of the Oil and Gas Revenues Management Act, expenditure from the Fund shall be done in conformity with fiscal rules. The fiscal rules, established under the Act, are intended to help financing of the Government budget and to ensure fiscal stabilisation, among other objectives. As a result, they are based on some principles, including:

- Safeguard of the economy against inherent volatility of the oil and gas revenue;
- Adherence to fiscal convergence criterion for the East Africa Monetary Union;
- Avoidance of borrowing where Government holds financial savings.

Fiscal revenues are considered binding and any change to the fiscal rules require support of not less than two thirds of the total number of Members of Parliament.

Tanzania Extractive Industries (Transparency and Accountability) Act, 2015 was also introduced to ensure transparency and accountability in extractive industries. Under Section 4 of the Act, the Tanzania Extractive Industries (Transparency and Accountability) Committee is established, whose role is, among others, to promote and enhance transparency and accountability in the extractive industry. The Committee develops a framework for transparency and accountability in the reporting and disclosure by all extractive industry company on revenues due to or paid to the Government. Under section 16 of the Act, the Committee must cause the Minister to publish contracts and licenses relating to extractive industry companies as well as the names of individual shareholders who own interests in the extractive industry companies. These details need to be published on the website or through a media which is widely accessible across the country.

It is also expected that if some control over mineral resources is transferred to the financiers, this needs to be communicated to the general public in fulfillment of this Act.

Whether debt management and governance frameworks are strong enough for RBLs

RBLs are not explicitly mentioned in the Tanzania legislation. However, this is not to imply that there is no legal basis for regulating them. A review of the existing pieces of legislation shows that there are indeed some areas where RBLs can still be regulated to ensure that their negative effects are moderated in the country within the general debt management framework.

In line with Section 135 of the Constitution, all revenue derived from various sources for the use of the Government of the country shall be paid into one special fund; the Consolidated Fund. As specified in section 136, the use of funds from the Consolidated Fund can only be after authorisation either by the Appropriation Act enacted by Parliament for that purpose or a law enacted by Parliament for that purpose. This means that debt repayment must be done in a predictable manner, even if negotiated under RBL.

Section 141 of the Constitution also provides that public debt must be secured on the Consolidated Fund, including the principal loan itself and also the interest charged on it as well as the costs, charges and expenses incidental to the management of that debt. This seems to be inconsistent with RBL arrangements that would see debt being paid outside the Consolidated Fund but through minerals. It also means that if there are any mineral resources to be mortgaged for loans, the proceeds from the mineral concerned still need to be deposited into the Consolidated Fund first before the financier is paid. This appears to bring a complication to RBLs under the Tanzania legislative framework.

The Government Loans, Guarantees and Grants Act, 1974 (as amended) also sets borrowing rules, which apply to all debt, which would also include RBLs. This is intended to limit debt distress. Under section 3 of the Act, the Minister is empowered to borrow externally. However, the borrowing condition is that in no financial year should the aggregate of the service cost becoming due and payable in respect of all outstanding foreign loans during that financial year and the four succeeding financial years exceed 15% of the average annual foreign exchange earnings of the preceding three financial years. In addition, the aggregate of the service cost becoming due and payable in respect of all outstanding loans (both foreign loans and local) during that financial year and the four succeeding financial years should not exceed 30% of the average annual recurrent revenue of the three preceding financial years. This means that even if RBLs were to be considered, the amounts involved would be limited to ensure that the total debt service falls within these thresholds if these provisions were religiously followed.

Under section 19 of the Government Loans, Guarantees and Grants Act, 1974 (as amended), the Minister is obliged to specify the amount required to meet the service cost on all outstanding loans during the financial year in the annual estimates of public revenue and expenditure submitted to the National Assembly. This also means that if RBLs are negotiated, they would also be expected to be subjected to the same process.

Section 16 of the Government Loans, Guarantees and Grants Act, 1974 (as amended) also establishes a National Debt Management Committee. Its functions, as specified in section 17, include monitoring the implementation of the Annual Debt Strategy and Borrowing Plan. These have to be approved by the Government for the ensuing quarter. The Committee should also prepare quarterly debt and budget execution reports, while also monitoring, co-ordinating and directing the activities of all government departments and institutions involved in the management of debt, grants and guarantees. If RBLs were to be negotiated, they also have to pass through this process, which should be an opportunity for any shortcomings to be identified.

To assist the National Debt Management Committee, a Technical Debt Management Committee of the National Committee is established under section 19 of the Government Loans, Guarantees and Grants Act, 1974 (as amended). Its duty is to be the technical arm of the National

Debt Management Committee. Members of the Technical Committee are the heads of all the units involved in debt management. With such a high-level institutional landscape, it is difficult for RBLs to be negotiated and executed without their shortcomings having been identified.

The legislative requirements on how revenues from oil and gas are managed in Tanzania also rule out RBLs once the revenue has been deposited into the Oil and Gas Fund. Under section 8 of the Oil and Gas Revenues Management Act, an Oil and Gas Fund is established which all government revenues from the mining of oil and gas have to be deposited. As specified under section 9, the Fund will be funded from the exploitation of oil and gas in Tanzania including (a) royalties; (b) Government profit share; (c) dividends on Government participation in oil and gas operations; (d) corporate income tax on exploration, production and development of oil and gas resources; and (e) return on investment of the Fund. Although the Fund is established to ensure that fiscal and macroeconomic stability is maintained and social and economic development is enhanced, section 11 provides that the amount of money deposited in the Fund shall not be used as collateral or guarantees, commitments or other liabilities of any other entity.
This could imply that oil and gas revenues due to government cannot be mortgaged to financiers once deposited into the Fund. Thus, RBLs involving oil and gas would probably require some legislative amendment to work out in Tanzania.

In sum, the legislative framework in Tanzania can be regarded as adequate to deal with some of the negative issues associated with RBLs. However, since they are not explicitly mentioned in the legislation, some tightening would also help.

Does the legislation allow for well-structured RBLs to emerge?

With no mention of RBLs, there is currently no guidance as to how they could be structured to ensure a win-win situation between the financier and the resource rich Tanzania. This means that if Tanzania were to negotiate RBLs, there would still be need for further guidance outside the current legislative framework on how to optimise natural resources to get access to critical infrastructure outside the Consolidated Fund.

Does legislation try to equate resource extraction to the value of the infrastructure/project financed?

With all loans being disbursed through the Consolidated Fund, there currently exists no framework to link any resource extraction to the value of any infrastructure project. This does not, however, imply that the country cannot be able to use its natural resources to pay for loans that have helped finance infrastructure.

Does the legislation ensure that RBLs are structured to eliminate corruption risk?

The legislation has generally safeguarded loan resources to ensure that they are used to enhance public finance management. The involvement of parliament as well as the involvement of several debt management institutions helps with ensuring that debt management is done under standardised conditions that can help eliminate corruption.

3.3.2 NIGERIA

There are a number of pieces of legislation that have a bearing on public finance management in general and public debt management in particular in Nigeria. The Constitution of the Republic itself is the foundation of debt management, as it gives some guidelines as to the manner in which debt should be managed in Nigeria. The Finance

(Control and Management) Act can be considered as the overall guide with respect to the control and management of the public finances of the Federation. However, the Fiscal Responsibility Act, 2007 also has a role to play in public finance management in Nigeria. It was introduced for a number of reasons, which include:

- Ensuring prudent management of the nation's resources.
- Ensuring long-term macro-economic stability of the national economy.
- Securing greater accountability and transparency in fiscal operations within a medium-term fiscal policy framework.
- Establishing the Fiscal Responsibility Commission, to ensure the promotion and enforcement of the nation's economic objectives.

The National Revenue Mobilisation Allocation and Fiscal Commission Act Cap. R7 LFN 2004 (originally Decree No. 98 of 1993) also provides an additional institutional framework with respect to public finance management.

It establishes the Revenue Mobilisation, Allocation and Fiscal Commission whose functions include monitoring the accruals to and disbursement of revenue from the Federal Account and reviewing the revenue allocation formulae to ensure conformity with changing economic realities. This also has a bearing on public finance management, including debt. It is however, the Debt Management Office (Establishment) Act, 2003 which can be regarded as the explicit legislation focusing on the way debt is managed in Nigeria. In addition to providing for the establishment of the Debt Management Office, it also empowers the institution with the enforcement of some guidelines to control the manner in which debt is acquired and managed in Nigeria.

Given that mineral resources are central to RBLs, the laws governing the manner in which natural resource are to be extracted are also expected to have a bearing on debt related to minerals. The Minerals and Mining Act, regulates all aspects related to the way the exploration and exploitation of solid minerals is conducted in Nigeria. The Petroleum Industry Act, 2021 is a very modern legislation which is expected to take into account issues associated with RBLs since it was just recently introduced. The legislation provides the legal, governance, regulatory and fiscal framework for the Nigerian petroleum industry in general. RBLs that relate to petroleum would be expected to at least have some segments that are regulated under this legislation.

This generally forms the legislative context under which the regulation of the public finance management environment, taking particular interest in RBLs in Nigeria, is being assessed.

Does Nigeria legislation allow for transparency in loan and resource exploitation?

Under section 44 of the Constitution, the control of all minerals, mineral oils and natural gas is managed in a manner as prescribed by the National Assembly. This also makes it difficult for any other scheme of arrangement involving the exploitation of minerals outside the existing legal frameworks to be arranged without passing through Parliament.

As provided for under section 3 of the Finance (Control and Management) Act, the Minister shall supervise the expenditure and finances of the Federation to ensure that a full account is made to the Legislature and its financial control is maintained. In that respect, the Legislature has the management of the Consolidated Revenue Fund and the supervision, control and direction of all matters relating to the financial affairs of the

Federation. This makes it difficult to exclude Parliament from scrutinising agreements involving mineral revenues , even if the revenues have been used to settle RBLs.

Under section 11 of the Fiscal Responsibility Act, 2007, the Federal Government is required to lay a Medium-Term Expenditure Framework for the next three financial years before the National Assembly, not later than four months before the commencement of the next financial year. The Medium-Term Expenditure Framework must contain a Fiscal Strategy Paper setting out the policies of the Federal Government for the medium term relating to taxation, recurrent (non-debt) expenditure, debt expenditure, capital expenditure, borrowings and other liabilities, lending and investment. In addition, there should be a Consolidated Debt Statement setting out and describing the fiscal significance of the debt liability of the Federal Government and measures to reduce any such liability. This generally implies that all debt liabilities need to be disclosed, including the RBLs. The provision does not make any exceptions to some types of debt for RBLs to escape through.

Under section 48 of the Fiscal Responsibility Act, 2007, public finance management must be done in a transparent manner. The Federal Government shall ensure that its fiscal and financial affairs are conducted in a transparent manner and accordingly ensure full and timely disclosure and wide publication of all transactions and decisions involving public revenues and expenditures and their implications for its finances. This also makes it difficult for the RBLs to be excluded from the disclosure process, together with their implications on public finance in general.

Under section 9 of the Minerals and Mining Act, the Minister must determine areas where a mining lease has to be granted and this can only be done based on competitive bidding requirements. The Mining Cadastre Office also must be involved in considering the competing bids and through an open and transparent method, select the bid which will promote the expeditious and beneficial development of the mineral resources of the area. The provisions do not appear to have given any room for RBLs that allow exploitation of minerals in return for a loan without following the general process required to start mining operations.

Under section 73 of the Petroleum Industry Act, a petroleum mining lease can only be granted based on fair, transparent and competitive bidding process. This seems to close off any opportunity for the granting of mining leases for the exploitation of petroleum resources under conditions where the terms are not clear as has been the case under most of the existing RBLs.

Transparency in contracting and exploitation of petroleum products is also provided for under the Act. Under section 83 of the Act, any licensee or a petroleum mining lease is required to provide a yearly summary of royalties, fees, taxes, profit and other payments to government within six months after the beginning of each year to the Commission and Minister of Finance. The Commission in turn shall summarise this and ensure that the summary is published on its website. In addition, if the mining is in partnership with Nigerian National Petroleum Company Limited (NNPC) (a government owned national petroleum company established under section 53 of the Act), the text of any such existing contract with NNPC as well as the license itself shall not be confidential and should be published on the website of the Commission. Any new contract that is signed is also considered not confidential and the text of the contract must be published by the Commission.

Section 224 of the Petroleum Industry Act, provides for public access to information with respect to the mining of petroleum in the country. The Commission must designate some specific days for the public to access the information if they so wish. The information that can be accessed includes a register of all leases, licences, permits and authorisations which have been issued as well as any extension, transfer or any other matter affecting changes in the status in licences and permits. This also implies that if there are any RBLs being contracted, the information would be freely accessible to the public.

Whether debt management and governance frameworks are strong enough for RBLs

The debt management process is also spelt out in the Nigerian legal framework, which make it strong enough to address some negatives associated with RBLs. Under Section 41 of the Fiscal Responsibility Act, 2007, are rules that govern the country's debt management framework. Government shall only borrow for capital expenditure and human development and such borrowing shall be on concessional terms with low interest rate and a reasonably long amortisation period which is subject to the approval of the appropriate legislative body.

This appears to rule out some of the commercial loans which are being negotiated under RBLs with high interest rates. Government shall ensure that the level of public debt as a proportion of national income is held at a sustainable level as prescribed by the National Assembly from time to time on the advice of the Minister. Non-compliance with these requirements is an offence. Given that RBLs are also part of debt and no exceptions have been made with respect to any particular type of debt, it is expected that they should also be subject to these rules.

In addition, under section 44 of the Fiscal Responsibility Act, 2007, if the Federal or State government or their agencies want to borrow, they should specify the purpose for which the borrowing is intended and present a cost-benefit analysis, detailing the economic and social benefits of the purpose to which the intended borrowing is to be applied. In addition, the borrowing must be preceded by prior authorisation in the Appropriation or other Act or Law for the purpose for which the borrowing is to be utilised, while the proceeds of such borrowing shall solely be applied towards long-term capital expenditures. This also does not leave much room for RBLs that are secretly negotiated without full participation of the national assembly.

In addition to the Fiscal Responsibility Commission, the institutional framework for the management of public finance in Nigeria also includes the National Revenue Mobilisation Allocation and Fiscal Commission (RMAFC). The RMAFC is empowered, under section 6 of the RMAFC Act Cap. R7 LFN 2004 not only to monitor the accruals to, and disbursement of, revenue from the Federation Account but to also review the revenue allocation formulae and advise the Federal, State and Local Governments on fiscal efficiency and methods by which their revenue is to be increased. The inclusion of so many oversight entities in public finance management makes it difficult for secretly negotiating RBLs in Nigeria.

The promulgation of the Debt Management Office (Establishment) Act, 2003 (DMO Act) can be seen as the most effective way through which the Nigerian government has ensured that debt is effectively managed. Under section 6 of the DMO Act, the responsibility of the DMO includes maintaining a reliable database of all loans taken or guaranteed by the

Federal or State Governments or any of their agencies. In addition, the DMO must prepare and submit to Federal Government a forecast of loan service obligations for each financial year. It is further required to prepare and implement a plan for the efficient management of Nigerian's external and domestic debt obligations at sustainable levels, while also participating in negotiations aimed at realising those objectives. This also adds in another institutional layer in debt management. The DMO also must set guidelines for managing Federal Government financial risks and currency exposure with respect to all loans. This generally implies that the DMO must be involved in all debt matters, including instances where RBLs are negotiated.

Under section 19 of the DMO Act, the DMO must ensure that each year they advise the Federal Government on the financing gap for the succeeding financial year and the amounts to be borrowed for bridging the gap both internally and externally. Given that it is empowered to advise on debt sustainability, it is further expected to be better positioned to advise whether or not government should opt for RBLs as a financing strategy. However, as specified under section 21 of the Act, no external loan shall be approved or obtained by the Minister unless its terms and conditions shall have been laid before the National Assembly and approved by its resolution. Thus, in Nigeria, it is not expected that RBLs can be negotiated without the involvement of Parliament.

Does the legislation allow for well-structured RBLs to emerge?

Although there is no specific piece of legislation that recognises how minerals can be used to back loans, this might not necessarily be the case with respect to petroleum. The Petroleum Act has provided room for the mortgaging of petroleum resources towards the payment of loans. Under section 74 of the Act, where a bilateral or multilateral arrangement has been negotiated between Nigeria and another country with substantive benefits to the nation, the Nigerian Upstream Petroleum Regulatory Commission (The Commission) is empowered to negotiate and award a petroleum mining lease to a qualified investor identified under the agreement. This is largely how RBLs are negotiated and financed. Thus, while the Act has given room for RBLs, it has also provided for further guidelines which, if followed, would not result in opaque deals emerging.

There are also two model contracts that can be signed to allow for the exploitation of petroleum products and these provid room for RBLs. Under section 85 of the Petroleum Industry Act, a production sharing contract to produce petroleum can be signed on terms which the financial risk bearing party can recover costs from a share of the product as specified in the contract. In addition, a risk-service contract can also be signed, where the financial risk-bearing party can recover costs from a share of the production, as per the terms that are specified in the contract. This means that there are some legal guidelines on how RBLs based on petroleum can be structured.

Does legislation try to equate resource extraction to the value of the infrastructure/project financed?

The legislative framework that can be considered as having provided for using natural resources to serve as an anchor for loans is the Petroleum Industry Act, 2021, especially under section 74 and 85. While the Commission is empowered to enter into a bilateral or multilateral arrangement with another country if it has substantive benefits to the nation, the guidelines as to the valuations to be used in the negotiation are not given. This might not prevent the petroleum resources to be undervalued in the agreement. However, the fact that there is a requirement for all such deals to have Parliamentary approval is encouraging.

Section 85 provides for the financial risk bearing party to recover costs from a share of the petroleum resources as specified in the contract under product sharing and risk-service contracts. However, there is also no further guidance on issues to do with valuation of how the resources would be equated to the value of the loan, including how the risk is also to be rewarded.

Does the legislation ensure that RBLs are structured to eliminate corruption risk?

The fact that there is a strong debt management framework with high level of transparency with parliamentary oversight, could imply that if RBLs are to be negotiated in Nigeria, there would be adequate checks and balances to guide the enforcement. Room for corruption exists from lack of transparency in identifying lenders as well as in designing the terms through which the loan would be recovered. This would also arise more in cases where the drawdown of the loans is taking place outside the general centralised government revenue system (Consolidated Fund) which has strong oversight. Thus, although there are no specific pieces of legislation that deal exclusively with issues associated with the structuring of RBLs, there are some encouraging features in the legislative framework that closes off some corruption loopholes.

3.3.3 KENYA

The legislative framework governing public finance management in general as well as debt is basically underpinned by the Constitution and the Public Finance Management Act, 2012. The Public Finance Management Act provides for the management of public finances by the national and county governments, while also providing for the oversight responsibility of Parliament and county assemblies over public finances. Given that RBLs involve natural resources, the Mining Act, 2016 is also relevant, as it consolidates all the laws relating to mining. The Petroleum (Exploration and Production) Act also regulates the negotiation and conclusion of petroleum agreements by government relating to the production of petroleum. It is also expected that RBLs might also need to have some basis in either the Mining Act or Petroleum Act.

Does Kenya legislation allow for transparency in loan and resource exploitation?

Under Article 201 of the Constitution, there should be openness and accountability, including public participation, in financial matters. In addition, financial management must be responsible while fiscal reporting has to be clear. If these principles are upheld, they have potential to reduce opacity that is associated with RBLs whilst exposing the public finance data to public scrutiny.

Under Article 220, the Constitution requires the Minister to include in the Budgets of the national and county governments borrowing proposals and other public liability that have an impact of increasing public debt during the following year. This means that if there are any RBLs that are to be negotiated, they would have been included in the borrowing proposal that is laid before Parliament, hence would be in the public domain.

The Constitution further provides for transparency in mineral resource sector, with Article 71 stipulating that those agreements relating to exploitation of natural resources in Kenya (whether it is a right or a concession) are subject to approval by Parliament. If enforced, this will ensure that all agreement including those involving RBLs are struck in the best interest of the country.

Section 15 of the Public Finance Management Act, 2012 provides for public debt and obligations to be maintained at a sustainable level as approved by Parliament for the national government and the county assembly for county government. This ensures that Parliament cannot be avoided when it comes to issues relating to debt, for which RBLs would fall, and Parliamentary oversight and debates are in the public. The National Treasury is further required to prepare an annual Budget Policy Statement as set out in Section 25 of the Act and submit it to Parliament, by the 15th of February in each year. The Budget Policy Statement should specify the financial outlook with respect to Government revenues, expenditures and borrowing for the next financial year and over the medium term. This generally shows that the opaqueness of RBLs that are in some African countries would not have any legal basis in Kenya.

Every four months, the Cabinet Secretary is required, under Section 31 of the Public Finance Management Act, 2012, to report to Parliament on all loans made to the national government, national government entities and county governments. The report is required to contain information about loan parties, its size, interest charges payable; repayment terms as well as the purpose for which the loan was used and the perceived benefits of the loan.

Production of such detailed reports equips the Parliament in tracking the utilisation of the loans and reduces opacity that is normally associated with RBLs. Further, Section 33 requires the Cabinet Secretary to submit to Parliament, Commission on Revenue Allocation and the Intergovernmental Budget and Economic Council a statement setting out the national government medium term debt management strategy on an annual basis as well as to publish and publicise it. Similar reporting is also required at county level as provided for in Section 122 of the Act. This demonstrates that the law ensures that debt information is made available to every relevant stakeholder to inform decision making. No exceptions have been made in the law which could be the basis for RBLs to escape such scrutiny.

Section 58 also gives the Cabinet Secretary authority to guarantee loans either of a county government or any other borrower on behalf of the national government taking into account recommendations from the Intergovernmental Budget and Economic Council but with approval of Parliament. The Cabinet Secretary must submit a statement on loan guarantee to Parliament detailing the guarantee; name of borrower; duration and nature of guarantee; a risk assessment in respect of the guarantee; and any other information in line with Section 59 of the Act. This means that even if it is a publicly guaranteed, debt that is to be financed through RBLs and its details would need to be disclosed to Parliament.

The Mining Act of 2016, which replaced the outdated 1940 Act, also has some provisions designed to ensure transparency. For example, Section 119 requires all agreements entered relating to mining and mineral resource exploitation be made accessible to the public. Further, it compels the Cabinet Secretary to ensure access to information, including ensuring that mineral agreements and the status thereof is available on the official website of the Ministry responsible for mining. Further to these provisions, it requires the Cabinet Secretary to make regulations that provide for accountable and transparent mechanisms of reporting mining and mineral related activities, including revenues paid to the government by mineral right holders and production volumes under each licence or permit. This ensures all issues around minerals' statistics is fully disclosed, especially since the Cabinet Secretary is required to publish this information on the ministry website.

Whether debt management and governance frameworks are strong enough for RBLs

Kenya's legal framework for debt management is very detailed and has covered all the key elements that constitute a sound legal framework and therefore can be viewed as adequate to handle some debt implication aspects of RBLs. Article 211 of the Constitution gives Parliament powers to prescribe the terms on which the national government may borrow and it imposes reporting requirements. The Constitution further clearly lays out borrowing conditions for the counties given that Kenya is a devolved state. These provisions are meant to ensure that debt levels are always in check. It also requires the Minister to furnish Parliament with all the information regarding the size of the loan (both principal and interest); purpose of the loan; provisions made for servicing or repayment of the loan as well as the progress made in the repayment of the loan.

To give effect to this Constitutional provision, Section 12, the Public Finance Management Act, 2012 gives the National Treasury the mandate to manage the level and composition of national public debt, national guarantees and other financial obligations of national government; develop a framework for sustainable debt control; and mobilise domestic and external resources for financing national and county government budgetary requirements.

The Public Finance Management Act, 2012 also lays out provisions seeking to control the cost of borrowing, borrowing limits, risks involved and impact on debt sustainability of the country. Section 52(6) provides for an agreement to obtain a loan by the national government, or a national government entity may be amended from time to time and where the amendment results in further indebtedness or prejudice to the entity that borrowed, the amendment shall be approved by Parliament. This provision is critical particularly for RBLs because of their size and risks, many countries have had to either cancel or restructure the loans. If Kenya is to decide to do so, it will have backing of the law.

Kenya's legal framework for debt management further provides for institutional arrangements for public debt management including their roles and responsibilities. For example, Article 229 of the Constitution and Section 66 of the Public Finance Management Act, 2012, provide for the oversight role of Parliament, Judiciary, Auditor General, constitutional commissions and independent offices as critical watchdogs on public resource management by the executive.

Sections 62 to 64 of the Act provide for the establishment of the Public Debt Management Office (PDMO), which is a dedicated institution whose role is largely to do with debt and debt management. Its roles, as specified under section 63 of the Public Finance management Act, include being responsible for the day-to-day operations of public debt management, which include sourcing required funds, negotiating and processing loan contracts, and disbursements and settlement of debt service obligations accurately and timely. Further, the PDMO has responsibility to maintain the public debt register, undertake periodic debt sustainability analysis, prepare statistical and analytical debt reports, and promote dissemination of information on public debt and borrowing. More so, the PDMO's roles and responsibilities, processes and procedures in the conduct of public debt management operations must be guided by the relevant laws and best practices. In addition, the borrowing in Kenya follows a policy; the Debt and Borrowing Policy of 2020, that provides further guidance on debt management. Thus, the existing framework is generally strong enough to regulate RBLs if followed.

Cognisant of the fact that Kenya is a devolved state, the legal framework promotes the national structures of debt management to give oversight and technical assistance to the county government. This can be viewed as a strength in the framework as it ensures coordination and monitoring of debt contracted at the lower levels for it to be kept within the set limits. For example, Parliament in Section 50 of the Public Finance Management Act, 2012, sets borrowing limits and thresholds for the borrowing entitlements of the national government and county governments and their entities. Further, Section 187(2) provides for the establishment of an Intergovernmental Budget and Economic Council, which also provides a forum for consultation and cooperation between the national government and county governments on matters relating to borrowing and the framework for national government loan guarantees, criteria for guarantees and eligibility for guarantees. Section 65 requires the Public Debt Management Office to assist the county government in its debt management and borrowing.

Does the legislation allow for well-structured RBLs to emerge?

The current legal framework in Kenya does not explicitly identify RBLs as one of the possible financing mechanisms. As a result, there are no provisions in the law that have been designed to regulate how to structure RBLs.

In addition, the Debt and Borrowing Policy of 2020 has also not provided guidelines through which RBLs could be designed to ensure that their undesirable attributes are curtailed.

Does legislation try to equate resource extraction to the value of the infrastructure/project financed?

Given that the legislative framework has not anticipated cases where infrastructure financing can be done through RBLs rather than through the usual payments from the Consolidated Revenue Fund, there is no legislative framework that can be the basis of equating the mineral values with the funded infrastructure.

Does the legislation ensure that RBLs are structured to eliminate corruption risk?

There is huge potential for Kenya's debt management legislation to reduce corruption risk when handling loans given the transparency and oversight provisions in the Acts. The challenge, however, may lie in the fact that RBLs have not been officially recognised by the legal framework and some corruption issues which might arise due to the unique nature under which RBLs are negotiated, could still remain unregulated (for example, choice of the financier and choice of the contractor to construct the infrastructure funded under RBLs).

3.3.4 ZAMBIA

The legislative framework on public finance as well as debt management in Zambia is largely situated within about three pieces of legislations in addition to the Constitution. The Public Finance Management Act, 2018, provide for the framework for accountability, oversight, management and control of public funds, together with the associated institutional and regulatory framework. This would be expected to provide overall guidance on how loans should also be handled.

The Public Debt Management Act, 2022, is a very recent legislation which provides for the legal basis upon which loans and grants can be raised and how guarantees can be given in Zambia. It also provides for the loan approval process, as well as the institutional framework for regulating the way loans can be negotiated in the country. It is thus expected that provisions relating to RBLs would also be contained in this legislation.

The Mines and Minerals Development Act, 2015 governs the way mining is to be conducted in Zambia, including the exploration, mining and processing of minerals. It is also expected that if there are any provisions regulating mineral exploitation in general, they would also appear handy in dealing with issues associated with RBLs involving minerals.

Does Zambia legislation allow for transparency in loan and resource exploitation?

One of the guiding principles of public finance enunciated in Article 198 of the Constitution calls for transparency and accountability in the development or formulation of macro-economic frameworks, socio-economic plans and the budget. It is expected that debt management in Zambia will be guided by this principle. In further promoting transparency, Article 211 of the Constitution requires the Minister of Finance to prepare a financial report within three months after each year and submit it to the Auditor-General for audit. This report shall include information on debt repayments. This would also include debt associated with RBLs.

Under Article 63 of the Constitution, the National Assembly shall oversee the performance of executive functions by approving public debt before it is contracted. This implies that any debt, including RBLs, that is not approved through the National Assembly would be violating the constitution.

Section 7 of the Public Finance Management Act, 2018, upholds the values of transparency by providing the preparation of the annual consolidated statement of assets and liabilities, including a statement of the public debt of the Republic with a requirement to incorporate this in the financial report to be laid before the National Assembly.

Transparency with respect to debt is also ensured under section 42 of the Public Debt Management Act, 2022. The Minister is required to prepare an annual public debt, guarantees and grants execution report for submission to the National Assembly. Among others, this report must include:

- Information on the debt management strategy and its rationale.
- The effect of the implementation of the debt management strategy in achieving the debt management objectives.
- Any deviation from the approved debt management strategy and the justification for the deviation.
- Outstanding loan guarantees, the amount guaranteed and the beneficiaries;
- An assessment of the credit risk of outstanding loan guarantees.
- Outstanding borrowing operations of the Government debt and debt service paid during the financial year.

Under Section 42, the Minister is also required to publish the annual public debt, guarantees and grants execution report, within thirty days of submission of the report to the National Assembly. This ensures transparency with developments relating to public debt in general, which would also apply to any RBLs that are negotiated.

With respect to transparency and accountability in the mining sector, the acquisition of mining rights in Zambia passes through a transparent process, including through bidding as provided for under section 19 of the Mines and Minerals Development Act, 2015. The bidding process must be preceded by a notice in a daily newspaper of general circulation in Zambia, issuing invitations for bids for mining rights over identified areas or mineral resources. This means that RBLs that are to be based on new mines must follow the same process. In addition, section 8 of the Mines and Minerals Development Act requires a Mining Cadastre Office to be instituted and it should maintain a public cadastral maps and cadastre registers detailing the various mining areas and players. This also ensures that all players in the mining sector are known.

Whether debt management and governance frameworks are strong enough for RBLs

The debt management framework for Zambia can be regarded as being fairly strong, especially since there is a stand-alone debt legislation. Section 8 of the Public Debt Management Act, 2022, requires the DMO to prepare and submit to the Minister an annual borrowing plan including the Medium-Term Debt Strategy.

Enshrining the annual borrowing plan and the medium-term debt strategy in the law enables the country to keep its debt within sustainable levels and managing risks associated with the size of the debt whilst being able to meet its financing needs. RBLs would also not escape scrutiny as there are no exceptions provided for.

Section 40 of the Act also requires the Minister to publish a debt sustainability analysis report by the end of the first quarter of the following year. The Minister is also required to ensure that at least once every quarter, there should be prepared a debt statistical bulletin that provides:

- The debt stocks and debt charges of the debt portfolio of the Government.
- The guarantees issued by the Government.
- The loans contracted by the Government.
- The amounts undisbursed on public and publicly guaranteed commitments.
- The projected debt service on outstanding external and domestic debt.

This debt statistical bulletin should be published on the Ministry of Finance official website, which also ensures transparency. Thus, if enforced, it is expected that any RBLs that would take place after the Act is in force would be adequately tracked.

The Public Finance Act also has some provisions that can be the basis upon which RBLs could be regulated. The Act defines "aided projects" as those projects which are partially financed through a loan, grant, donation or technical assistance and partially financed from public funds. Under section 40 of the Act, all finances received for aided projects by way of loans, grants and donations shall constitute public monies and shall be paid into the Consolidated Fund. The Secretary to the Treasury also must make provision in the budget estimates for loans, grants and donations receivable in cash in respect of aided projects. In addition, the Secretary to the Treasury must keep separate and proper books and records in respect of loan aided projects including appropriate audited financial statements. This means that not only will the details of RBLs be known with respect to amounts and financiers but the extent to which the debt is being serviced would also be kept track of. In addition, by requiring that the loan be part of the Consolidated Revenue Fund also implies that it is easily accounted for through Parliament.

Does the legislation allow for well-structured RBLs to emerge?

Given that RBLs are not specifically provided for under the law, the guidelines that would be designed to ensure that they are well structured is missing from the Zambia legislative framework.

Does legislation try to equate resource extraction to the value of the infrastructure/project financed?

Given that RBLs have not been specifically legislated for, the guidelines on how the benefits from the loan in terms of financed infrastructure can be related to the value of the minerals that have been used as the basis for the loan is missing from the legislation.

Does the legislation ensure that RBLs are structured to eliminate corruption risk?

With no specific provisions dealing with RBLs, there could still be some inherent challenges related to corruption in their management if they are implemented under the current legislation environment.

However, currently there are some legislative provisions that aim to fight corruption related to dealing with public loans to which RBLs are a part of. For example, the Public Finance Management Act, 2018, provides for internal and external audit requirement for borrowed funds in addition to the need for National Assembly approval. This strong oversight, if effectively implemented, would be expected to stamp corruption in RBLs. In addition, Zambia enacted an anti-Corruption Act, 2012, although there are still some challenges related to its effectiveness.

3.3.5 UGANDA

There are a number of legislations in Uganda that shape up the manner in which public finance management is handled, and these have an implication on debt management, including RBLs. Most of these were established to fulfil the requirements of Uganda's Constitution.

The Public Finance Management Act, 2015. provides for fiscal and macroeconomic management for Uganda. It also sets the terms for management of expenditure commitments, raising of loans by the Minister as well as management of the Government debt. This makes it very relevant for RBLs and their assessment. Under section 4 of the Public Finance Management Act is the requirement to produce The Charter for Fiscal Responsibility. The second Charter is for the period 2021-2026 and is also expected to have provisions on how public finance is to be managed over this period. The Charter provides Government's fiscal policy objectives over a five-year period and sets out Government's commitment to managing fiscal policy in accordance with clear and measurable objectives, including revenue mobilisation and maintenance of prudent and sustainable levels of public debt. The Charter is thus expected to provide the framework through which public debt is to be managed.

The Petroleum (Exploration, Development and Production) Act, 2013 was established to regulate petroleum exploration, development and production. It also regulates the licensing and participation of commercial entities in petroleum activities, hence if there are any RBLs to be negotiated in the petroleum sub=sector, it is expected to provide guidance on how this should be done.

The Mining and Minerals Act, 2022, is a very recent mining legislation that strengthens the administrative structures for the effective management of the mineral sub-sector in Uganda. It also regulates the licensing and participation of commercial entities in mining operations, which is also expected to be the basis upon which any agreement involving mining, even under conditions of RBLs, is to be handled.

The extent to which the Uganda legislative framework adequately covers RBLs is assessed under this context.

Does Uganda's legislation allow for transparency in loan and resource exploitation?

Article 159 of the Constitution provides that information concerning any loans has to be presented to Parliament for approval. The information to be presented should show:

- The extent of the total indebtedness by way of principal and accumulated interest.
- The provision made for servicing or repayment of the loan.
- The utilisation and performance of the loan.

Transparency with respect to loans is also underlined under the Public Finance Management Act. Under section 36 of the Act, except for a loan raised for the purpose of monetary policy or a loan raised through issuance of securities, the terms and conditions of a loan raised by the Minister has to be laid before Parliament and the loan shall not be enforceable except where it is approved by Parliament, by a resolution.

This makes it illegal for RBLs to be raised outside the involvement of Parliament.

In addition, under section 42 of the Act, the Minister must ensure that by the 1st of April of each year, he prepares and submits to Parliament a detailed report of the preceding financial year with respect to the management of the public debt, guarantees and the other financial liabilities of Government. In addition to the management of debt, the report must indicate the medium-term debt management strategy as well, which needs to be published for public consumption. This detailed level of reporting is important as it gives strong oversight by Parliament on not only the principal loans and interests but also contingent liabilities in the form of guarantees.

The Charter for Fiscal Responsibility of Uganda (2021-2026) also has further provisions for enhancing transparency in debt and loans in general. The Charter requires the Minister to prepare a Fiscal Risks Statement that must be included in the annual Budget Framework Paper. This statement must include, among other issues, risks in public debt management, including the results of the annual debt sustainability analysis. Entrenching debt sustainability analysis into law is in line with international best practice as it will assist Ugandan authorities to prudently manage risk associated with debt.

For RBLs involving the extraction of petroleum, there are some provisions in the Petroleum (Exploration, Development and Production) Act, 2013 which if enforced would also help enhance transparency. Under section 70 of the Act, the priority in obtaining a petroleum production licence rests with the holder of a petroleum exploration licence, who would have discovered the petroleum deposits. However, where the holder of a petroleum exploration licence does not apply for a production licence, the Minister must make bidding for a petroleum production licence open. This must be done by publishing the information in the Gazette and in newspapers of national and international circulation and in other electronic print media. This implies that it is difficult to negotiate RBLs with a new financier secretly if that will result in the financier getting the licence to produce petroleum.

RBLs are normally negotiated through production sharing agreements. Under section 6 of the Petroleum Act, while the Government may enter into such agreements resulting in the exploitation of petroleum, there should be a model Production Sharing Agreement or any other model agreement to guide such agreements which must be submitted to Cabinet for approval before being laid before Parliament by the Minister for approval. The Production Sharing Agreement or any other model agreement that passes through this process then becomes the guide for negotiations of any future agreements. Uganda has already produced the model Production Sharing Agreement which also guides production and exploration. However, while it has provided for the recovery of costs and any loans that the license holder might have incurred, it does not provide for loans to government that can be recovered through petroleum proceeds. Thus, if Uganda is to negotiate a RBL involving petroleum, the terms and conditions for such an agreement would need to be provided through Parliament and a new model has to emerge.

The Petroleum Act, however, provides for non-disclosure of information furnished under it. Specifically, Section 153(1) states that information furnished, or information in a report submitted under this Act by a licensee shall not be disclosed to any person who is not a Minister or an officer in the public service except with the consent of the licensee. Whilst it protects licensees' privacy, it starves the general public the opportunity to scrutinise data on petroleum and gas sector, especially if any of the proceeds are used to finance debt.

For mineral resources outside petroleum, section 28 of the Mining and Minerals Act, 2022 allows the Minister to enter into mineral agreements with any person with respect to the issuance of a large-scale mining licence in respect of highly capitalised and complex projects. A mineral agreement shall include terms and conditions relating to:

- The minimum expenditure in respect of the mining operations.
- The financial obligations for the parties to the agreement.
- Production sharing arrangements where minerals have been ascertained and quantified.
- The manner in which mining operations would be carried out.
- The basis on which the market value of any mineral or group of minerals in question may from time to time be determined.

These can be the legal provisions which can be leveraged upon for RBLs to be negotiated. However, the Act provides that the Minister must lay the mineral agreement signed and adopted by government before Parliament within sixty days from the date of signing of the agreement. While this ensures transparency on what has been signed, it prevents Parliament from dictating the terms as this has only to be laid before Parliament after the agreement has already been signed. However, it helps enhance transparency in all mining agreements, which will apply to RBLs as well.

Whether debt management and governance frameworks are strong enough for RBLs

Although Uganda does not have clear legislative provision providing guidance on how RBLs should be handled, a strong debt management framework can still ensure that the negativities associated with RBLs are minimised. The Constitution of Uganda, under Article 159, prohibits Government from borrowing, giving guarantees, or raising a loan except as authorised by or under an Act of Parliament. In addition, Article 160 of the Constitution, which is also given effect in section 41 of the Public Finance Management Act, 2015, provides that Public Debt of Uganda can only be charged on the Consolidated Fund and other public funds of Uganda, including the interest on that debt, sinking fund payments in respect of that debt and the costs incidental to the management of that debt. This means that RBLs where payment would be tied to some specific resources have to be paid for through either the Consolidated Fund or another specific fund created for the purpose.

Under the Public Finance Management Act, 2015, all revenues due from petroleum have to be paid into the Petroleum Fund, established under section 56 of the Public Finance Act. Section 74 of the Act provides that the financial assets of the Petroleum Fund should not be earmarked, pledged, committed or loaned out. Specifically, using the resources from petroleum that are already part of the Petroleum Fund to provide credit to Government as collateral for debt, guarantees, commitments or other liabilities is not allowed.

A contract, agreement or arrangement which encumbers a financial asset of the Petroleum Fund, whether by way of guarantee, security, mortgage or any other form of encumbrance is contrary to the Act and is considered null and void. This means that RBLs based on petroleum must find other mechanisms of being structured rather than relying on paying the financier from the Petroleum Fund as this is outlawed.

In addition, the requirement that all loan proceeds must be through the Consolidated Fund while production sharing agreements could specify the terms under which the production can be shared removes some of the discretion that is abused in creating opaque RBLs. The legal framework for debt management further sets debt ceilings which allow for prudent debt management. For example, the current Charter for Fiscal Responsibility restricts public debt in nominal terms to below 50% of GDP while nominal publicly guaranteed debt to GDP should be below 5%.

Does the legislation allow for well-structured RBLs to emerge?

Despite some provisions that enhance transparency and gives general guidelines on how public debt is managed, the legislative framework does not specifically identify RBLs as one of the potential mechanisms through which government can borrow. This makes it difficult for the laws to safeguard the structural issues related to RBLs.

Does legislation try to equate resource extraction to the value of the infrastructure/project financed?

The legislation does not have guidelines on linking any infrastructure financing to RBLs.

Does the legislation ensure that RBLs are structured to eliminate corruption risk?

Allowing for the Minister of Mines to present to Parliament already signed mining agreements as alluded to above can be cited as a weakness in the legal framework that can give room to corruption if oversight is not effectively done. Further, a lack of a dedicated debt management office compromises Ugandan authorities to stamp corruption that is associated with RBLs as a fragmented approach to handling RBLs can easily emerge.

3.3.6 CHAD

Debt management in Chad has historically been characterised by a number of challenges. First, there were several entities involved in the signing of external debt agreements. This undermines the ability of the Government to have a clear overview of its debt portfolio. There is also a lack of a comprehensive database of debt contracts, resulting in technical delays in servicing the debt and accurately and consistently calculating the stock of debt (World Bank, 2018). Debt management itself was split between two ministries (in charge of Planning and Finances), with limited coordination, both in terms of new contracts and disbursements (World Bank, 2018).

However, some of the measures have been improved over the past five years, especially following the widely publicised RBL shortcomings. In June 2014, there was a noticeable reinforcement of the regulatory framework for debt management, following the promulgation of a decree strengthening the organisation and roles of the inter-ministerial committee for debt analysis.

A debt directorate began to be consulted on all new borrowings, with an annual borrowing plan also regularly produced and revised per the financing needs of the government in good coordination between the relevant units (World Bank, 2018).

With the reforms having been instituted, this makes it an ideal time to assess the legislative status in Chad, especially with respect to the extent to which they facilitate the ability to mitigate the negative effects associated with RBLs. In addition to the Constitution, there are three other legislative frameworks that can be considered relevant to mining taxation as well as public finance management in general, especially within the context of the RBLs. The Mining Code (Loi N°011/PR/1995 du 20 juin 1995) was established in June 1995 to govern the manner in which prospecting, research, exploitation, possession, circulation, transformation and trade in mineral or fossil substances in the Republic of Chad would take place. However, the mining of petroleum is separately regulated.

The Law relating to Hydrocarbons (Law No. 07-006 of May 2, 2007) was introduced to define the legal and fiscal regime for Prospecting, Exploration, Exploitation, Transport by pipeline, processing of Hydrocarbons, marketing, storage of Hydrocarbons, refining, distribution of petroleum products, as well as works and installations allowing the exercise of all these activities on the territory of the Republic of Chad. The law is expected to have a huge bearing on how the exploitation of resources such as fuel and gas, is governed.

To further provide guidance on how revenue from petroleum is to be managed, the Law On Petroleum Revenue Management (LAW No.002/PR/2014) was instituted to establish the terms and conditions for the management and control of oil revenues from the exploitation of all oil fields in Chad. Thus, if petroleum resources are to be used to settle debt, then it would be expected that the manner in which such revenues would be managed would be as guided by this law.

The General Tax Code 2016 (Code général des impôts 2016) also governs the manner in which taxation in general is conducted in the Republic of Chad. Although this can be regarded as the public finance management tool, it does not have any provisions on how borrowing by the State or debt incurrence such as the RBLs could be handled . However, all mining sector operations are subject to the taxation principles as outlined in the Tax Code, and there are no exclusions that were anticipated with respect to any special treatment of mining activities that would have been mortgaged to loans.

Does Chad legislation allow for transparency in loan and resource exploitation?

Under Article 223 of the Chad Constitution, the treaties relating to the exploitation of the natural resources or those which engage the finances of the State may only be approved or ratified after the authorisation of the National Assembly. Any such agreement which does not pass through the approval and ratification of the National Assembly will not take effect. If followed, this provision would ensure that RBLs are not implementable in Chad if Parliament has not provided oversight.

The 2007 Law relating to hydrocarbons also has provisions that are designed to ensure transparency in the exploitation of petroleum.

Under Article 9 of the law, although the Petroleum concession or production sharing contract is signed on behalf of the State by the Minister in charge of hydrocarbons, these are awarded following an International Call for Tenders procedure, through terms set by Ministerial Order. This would also have gone a long way in safeguarding the way RBLs that pertain to petroleum are handled. The same Article however, gives the Minister the power to ‘decide otherwise’. This negates the whole purpose behind the inclusion of this requirement for enhancing transparency in the manner in which contractors for all exploitation of petroleum, including those under RBLs, are selected.

However, Article 9 provides that after its signature, the Petroleum Concession or Production Sharing Contract is subject to legislative approval, including its annexes and riders. Any agreement that does not pass through this process is deemed null and void. This provision allows parliament to have oversight of any agreement involving the exploitation of petroleum resources in Chad, which can be regarded as transparency enhancing.

Transparency is also provided for under the Mining Code. Under Article 12, all the holders of mining titles and beneficiaries of authorisations under the Mining Code must keep the Director of Mines informed of their activities by sending him reports and documents whose contents and frequency would be specified in the regulations. However, there is no requirement in the Mining Code for such information to be in the public domain. This means that there is no basis for the public to keep track of the quantum of minerals and the possible value of the current mining activities take place. Article 87 of the Mining Code only requires the register of mining titles and authorisations granted under the Mining Code to be open to the public. While this also helps the public in knowing who has been awarded a mining title where, the secrecy that shrouds RBLs can still be maintained since a particular petroleum mine can be mortgaged to some debt.

The Republic of Chad is devolved into Autonomous Collectivities, which are geographic provinces and communes. Under Article 211 of the Constitutions, the resources of the Autonomous Collectivities are constituted of the percentage of the revenues of the resources exploited on their territory. This means that if some resources are to be mortgaged to debt repayment as in RBLs, there is still need to ensure that the fixed percentages going to the local areas are not disturbed. This could also be instrumental in ensuring transparency if followed.

In sum, if the legislative provisions governing the minerals sector in Chad were being religiously enforced, transparency in the manner in which resources are being exploited would be present.

Whether debt management and governance frameworks are strong enough for RBLs

Although there have been some reforms, debt management continues to be weak in Chad. This is largely due to low debt management capacity, low resources allocated to debt management, and poor coordination among entities intervening in the debt contracting, management, and monitoring (IMF, 2023). Thus, while there are provisions for transparency, there are no guidelines on general debt management framework, including the maximum tolerable level of debt, that has been imbedded in the public finance management framework. This makes the country vulnerable, especially in negotiating RBLs as the capacity to relate the loans to the value of minerals being used to finance is always lacking.

The World Bank is currently implementing the Sustainable Development Finance Policy (SDFP) project in Chad intended to improve the authorities' efforts to improve debt management and enhance debt transparency. The project has very wide focus areas, demonstrating the depth of the weaknesses in the framework. The aim is to ensure that there is commitment by government:

- To improve the accuracy of debt transactions and payments recording and reporting.
- To improve debt database construction and management.

- To ensure that annual debt reports are published no later than 6 months after the end of the year.
- To comply with a zero non-concessional borrowing policy.
- To further enhance debt management capacity and public debt transparency.
- To strengthen fiscal policies including improving control of state owned enterprises' liabilities and enhancing domestic revenue mobilisation and expenditure efficiency to build resilience against adverse shocks to revenues (IMF, 2023).

Does the legislation allow for well-structured RBLs to emerge?

The legislation on debt management in Chad is still developing as there are still capacity challenges to be addressed. The medium-term debt strategy developed with IMF assistance will generally serve as the main anchor, in the absence of other debt management tools in the country. Thus, the legislation currently does not help in ensuring that well-structured RBLs could emerge.

Does legislation try to equate resource extraction to the value of the infrastructure/project financed?

With a poor legislative framework to govern debt in Chad, it also means that currently if there are any investment projects that would be financed through RBLs, there is no legislative fall back to use in ensuring that the resources being extracted can be linked to the value of the infrastructure/project financed.

Does the legislation ensure that RBLs are structured to eliminate corruption risk?

The legislative loopholes on debt management also imply that there are still avenues for corruption to emerge. While the transparency in extraction and revenue management would help, it still requires some mechanism to ensure that the management of debt, especially through RBLs, is adequately managed to deal with possible resource leakages that could also be hidden within the negotiated agreements. This is still missing in Chad.

3.3.7 SENEGAL

In addition to the Constitution, there are about three critical legislative frameworks in Senegal that can be argued to have a bearing on the manner in which public finance management in general and the management of natural resources are governed. The Organic Law relating to Finance Laws (Law No.2011-15 relating to finance laws) can be regarded as the main public finance management law, giving the general principles under which public finances should be handled in the country.

It focuses on giving guidance on:

- The preparation of national budget and economic programming documents.
- Classification of drawings and repayments of medium and long-term loans.
- Strengthening of information for Parliament and its control of the execution of finance laws.
- The consistency of the balances of the finance law with the criteria retained in the Convergence criteria with the West African Economic and Monetary Union (UEMOA).

It is, thus, the primary law which is expected to set up terms and conditions under which RBLs can be negotiated and handled.

Law No. 2016-32 of November 8, 2016 (the Mining Code) governs the way mining is conducted in Senegal. It is a revision of Law No. 2003-36 of November 24, 2003, seeking to harmonise the provisions relating to mining with those of other national legislations, considering guidelines from the Western Economic and Monetary Union (UEMOA) and the Economic Community of West African States (ECOWAS). The law also takes into account the continental guidelines as provided for under the African Mining Vision (AMV). Decree No. 2017-459 setting the terms of application of the Mining Code was also promulgated to explain further on the implementation modalities of the Mining Code.

Law No. 2004-06 of February 6, 2004 on the Investment Code also establishes the overall consistency between the reforms of the common law system and the restructuring of the incentive framework. It also covers the manner in which investment, including in mining, needs to be conducted in Senegal.

Although there are other laws that have a bearing on public finance, such as the law No 2012-31 of December 31, 2012 (The General Tax Code) and the various finance laws that are introduced to give legal effect to the national budgets, they do not have much bearing on public debt or borrowing, which is how RBLs generally arise.

It is against this legislative environment that the extent to which Senegal's regime is strong enough to handle RBLs is now being assessed.

Whether legislation allows for transparency in loan and resource exploitation

Under Article 25 of the Senegalese Constitution, all natural resources generally belong to the people and should be used for the amelioration of the conditions of life. As a result, the exploitation and the management of the natural resources is made with transparency and in a fashion to generate economic growth, to promote the well being of the population in general and to be ecologically sustainable. This generally gives the impression that all agreements, including those under RBLs, need to have benefits to the people through some level of transparency.

Under section 14 of the Investment Code, all investors into Senegal should comply with the legislation of Senegal, in particular with regard to the texts and regulations governing the creation and operation of companies, observe the rules and standards already required on the products they are producing and provide any information deemed necessary to monitor their obligations under the Investment Code.

Given that financiers would have invested huge sums that entitle them to natural resources exploitation under RBLs, they also qualify as investors and should thus also comply with the transparency obligations under the Code.

Under Section 3 of the Organic Law Relating to Finance Laws, the nature, amount and allocation of State resources and expenses as well as the resulting budgetary and financial balance have to be determined through the finance laws. This has to be done taking into account the State's macro-economic situation and objectives, as well as obligations of the Convergence, Stability, Growth and Solidarity Pact of WAEMU Member States. This means that all provisions relating to the base, the rate and the methods of recovery of finances and financing of any kind, whether collected by the State or allocated to other public bodies, are the domain of the finance law and nothing should be done which is not provided for under them. This provision also rules out any secret arrangement and negotiations on loans which would be done outside Parliament, as it is Parliament that approves the finance laws through which the annual national budgets are implemented.

This is explicitly stated under Section 4 of the Organic Law Relating to Finance Laws which provides that no revenue may be liquidated or collected and no public expenditure may be incurred or paid if it has not been previously authorised by a finance law. The only grounds through which revenue not provided for in an initial finance law may be liquidated or collected is authorisation by a decree taken in the Council of Ministers, which has to be regularised in the subsequent finance law.

The Mining Code also provides for transparency in the way mining resources are exploited. Under Article 95 of the Mining Code, any holder of a mining title has the obligation to respect the principles and requirements of the Extractive Industries Transparency Initiative (EITI), which include making declarations based on the data which are subject to audit by the authorities that are competent in the matter, as well as declaring to the national EITI bodies all information relating to its payments to the State, including economic and social achievements. By mainstreaming the EITI principles, the Mining Code goes a long way in enhancing transparency in the extraction of resources, which would need to be reflected even if such resources are being extracted under RBLs.

Given that RBLs can also involve the transfer or sharing of contract under existing mining activities, the Mining Code can also be regarded as allowing for transparency even under such conditions. Under section 34, a production sharing contract needs to be produced, which establishes the relationship between the State and the contractor throughout the duration of the mining operations. It covers the exploration and exploitation periods and requires that terms and conditions for establishing the production sharing contract be set by decree. This means that government should not partner a financier in secret including transactions negotiated under RBLs.

Whether debt management and governance frameworks are strong enough for RBLs

Under section 42 of the Organic Law Relating to Finance Laws, the conditions for granting guarantees must comply with the provisions of the regulations on the reference framework for public debt policy and public debt management in WAEMU member states. These regulations provide for convergence criteria, where total public debt to nominal GDP ratio should not exceed 70% (David, Nguyen-Duong, & Selim, 2022).

In addition, under Article 45 of the Organic Law Relating to Finance Laws, the finance law for the year should be accompanied by explanatory appendices containing a detailed statement of the outstanding balance and maturities of State debt service and the public debt strategy provided for in the provisions of the Regulation relating to the reference framework for public debt policy and debt management public debt in WAEMU member states.

By linking debt policy and debt management to the convergence criteria, the debt management and governance frameworks in Senegal can be considered strong enough for controlling some of the negative effects of RBLs if enforced.

The Organic Law Relating to Finance Laws also attempts to ensure that public debt arising from public bodies is managed. Under Article 54,

[3]The details of this loan are provided later in Box 3

the operations of public bodies, which include local authorities, public establishments of an administrative nature, executive agencies and social protection bodies, must be balanced without recourse to borrowing. The State must adopt rules framing and limiting the borrowing possibilities of public bodies, which can only be allocated to the financing of their investments. This also limits the extent to which borrowing for public entities conducted through RBLs could also end up creating debt distress if adequately enforced.

Does the legislation allow for well-structured RBLs to emerge?

The legislative framework guiding natural resource extraction and accounting of revenues therefrom provides for a way to ensure that all agreements reached for their extraction do not prejudice the nation. In addition, if the finance laws are followed to their letter and spirit, all new debt would be accounted for, including those arising from RBLs. This means that if debt accumulation and new borrowing under RBLs follow the procedures outlined in the Organic Law Relating to Finance Laws, while the extraction of resources follows the procedure laid out under the Mining Code in terms of valuation of resources, it is possible for well-structured RBLs to emerge. However, it would also require expertise in negotiations to ensure that the structure of the RBLs does not prejudice the country.

Does legislation try to equate resource extraction to the value of the infrastructure/project financed?

The legislative framework does not have a specific focus on safeguarding the use of revenues from the exploitation of minerals beyond having them transferred to treasury. It is still possible for the amount negotiated under RBLs to be lower than the value of the resources that ended up being extracted to finance the loan. This mainly arises from the fact that the pieces of legislation did not adequately anticipate that such a financing arrangement (RBL) could arise in future, hence do not provide adequate safety nets to prevent financiers from benefiting more from natural resources beyond the value of the loans that they would have given out.

Does the legislation ensure that RBLs are structured to eliminate corruption risk?

The elimination of corruption that could arise from RBLs is not separate from the general legislative environment that is designed to fight corruption. This means that there have not been separate arrangements to safeguard corruption associated with RBLs.

3.3.8 MOZAMBIQUE

Public finance management in Mozambique, which is the avenue through which debt in general and RBLs in particular would be handled, is mainly through the Constitution and the Council of Minister Decree no. 26/2021 (the Regulation of the State Financial Administration System). Decree no. 26/2021 establishes the rules and procedures for the operation of the State Financial Administration System (SISTAFE). The principles and norms for the organisation of SISTAFE are contained in Law 14/2020, hence it is also another legislative framework governing the way public finances are managed in Mozambique.

Given that minerals and petroleum form part of natural resources, two other relevant legislation from the point of view of negotiations of RBLs include the Mining Law No. 20/2014 and the Petroleum Law No. 21/2014. The Mining Law seeks to govern the way minerals are extracted with a view to ensuring competitiveness and transparency, while also specifying rights and obligations of the mining holders. The Petroleum

Law gives the legal framework for petroleum activities to align them to the present economic order of the country. It is also expected that these two will serve as guides as far as the legal framework for mineral resources is concerned in Mozambique.

The way this legal framework is adequate to deal with RBLs is assessed within this context.

Does Mozambique legislation allow for transparency in loan and resource exploitation?

Under Article 179 of the Constitution, it is the exclusive competence of the National Assembly to authorise the government as well as to define the general conditions on contracting loans, and performing other credit operations, including establishing the limit most of the guarantees granted by the State. This means that even RBLs would be contracted with the authorisation of Parliament.

The requirement to be transparent and open with respect to debt information is provided for under the legislative framework. Article 64 of the Council of Minister Decree no. 26/2021 requires that the Medium-Term Strategy for Public Debt be published on the website of the Ministry of Economy and Finance. In addition, under Article 88, the Public Treasury Subsystem Supervision Unit should prepare quarterly and annual reports, covering information on all forms of public debt, including guarantees granted and retrocession agreements. The report should contain information on the profile of the debt portfolio by creditor, type of debt (internal or external), interest rate and maturity. In addition, an analysis of the debt portfolio including cost and risk indicators, as well as the stock and debt service and evolution of the State's indebtedness should also be reported. The report should also present information on public debt management, its stage of implementation, and its deviations from the Medium-Term Strategy for Public Debt Management. The annual and quarterly reports should be published on the website of the Ministry of Economy and Finance, about 30 days after the end of the period reported. It is expected that RBLs would also be captured in this reporting.

Article 89 of Decree no. 26/2021 also requires government to furnish the National Assembly with public debt statistics including conditions of the loan through the budget statements biannually.

It further requires that this information be published, attached to the General State Account, with an indication of the respective responsibilities, determined in relation to December 31 of each year. This also implies that there is no legal basis for not subjecting RBLs to Parliamentary oversight.

Article 72 of Decree no. 26/2021 also provides for the registration of public debt by the Supervision Unit of the Public Treasury Subsystem where all the information of the agreement, interest, amount, maturity, financing entity, disbursement schedule and repayment terms are captured through the electronic platform (e-SISTAFE). Thus, this information is kept online thereby enhancing the compilation and reporting of public debt to the general public.

Law 14/2020, which establishes the principles and norms for the organisation and operation of SISTAFE also provides for disclosure of debt management information. Article 5 provides that SISTAFE shall be governed on the principle of transparency, which consists of making available and disclosing, to the general public, information on planning, budgeting, execution, control, monitoring and evaluation of results in treasury management. Article 21 further requires the proposal for the Economic and Social Plan and the State Budget to contain updated information on public debt indicators.

There are also some transparency requirements in the mining law which at least compel the beneficiaries of RBLs to be made public. Under Article 10 of the Mining Law No. 20/2014, the Government may organise a public tender procedure for the mining operations, especially in geologically studied areas or areas that have been subject to previous mining activity. Since RBLs are likely to be financed by known mineral deposits rather than greenfield projects, the expectation is that the licensing should be subjected to tender. In addition, Article 8 of the Mining Law provides for all mining contracts to be published in the Bulletin of the Republic, preceded by the Administrative Court's prior approval, within 30 days. In addition to publication in newspapers and the national bulletin, the mining contracts, once approved, as well as its amendments, are mandatorily supposed to be sent, for cognisance, to the National Assembly. This does not make RBLs any exception.

The transparency provisions are, however, not very clear with respect to petroleum resources. While under Article 21 of the Petroleum Law No. 21/2014, the Government shall launch a public tender for the activities of exploration, production and exploration of oil and gas, Article 17 also allows for petroleum operations to be carried out via a concession contract signed through direct negotiation in addition to a public tender. This is a loophole through which RBLs can escape the competitive traits associated with tenders.

Whether debt management and governance frameworks are strong enough for RBLs

The Council of Minister Decree no. 26/2021 generally serves as the main debt regulation framework in Mozambique. Article 47 calls for the Public Treasury Subsystem Supervision Unit to prepare Public Debt Management and Fiscal Risk Management Manuals and keep them up to date. Further, the Unit must establish procedures and guidelines, based on good practices, for the identification, analysis, quantification, mitigation, monitoring and disclosure of fiscal and financial risks, including, public debt, guarantees and retrocession agreements. If these provisions are implemented, it is expected that RBLs and their impact would also be reflected in the reports, to allow for mitigation measures to be formulated.

The requirement for the preparation of the Medium-Term Strategy for Public Debt Management by the Minister of Finance also helps with ensuring that mechanisms to prevent the distorting effect of public debt are mainstreamed. It is updated annually and must contain information such as evolution and composition of the debt portfolio, financing needs and debt recovery mechanisms; debt strategy and limit; measures to ensure sustainability; and challenges among others.

The institutional framework, policies, principles and procedures necessary for prudent debt management are also articulated in the law and if they are adequately implemented, this might also help in building capacity to deal with RBLs. Article 47 of Decree no. 26/2021 requires the Public Treasury Subsystem Supervision Unit to formulate proposals for financing policies and strategies for indebtedness and public debt management and manage internal and external debt. The responsible institutions are also required under Article 69 of Decree no. 26/2021 to undertake risk analysis for all loans borrowed by the state on behalf of other entities and sets conditions for their approval. Given that RBLs are also to a great extent negotiated through state owned entities, this provision has provided for their regulation.

The legislation also outlines the processes of the public debt management macro-process across various institutions. Article 127 of

Decree no. 26/2021 describes the public debt management process as issuing, negotiation, contracting, registration, payment, monitoring and debt control. The activities of the public debt management macro-process as described must be carried out in the Planning and Budgeting subsystem and the Public Treasury, with accounting handled by the Public Accounting subsystem, while monitoring is by the Monitoring and Evaluation subsystem and evaluation is by the Internal Audit subsystem. With involvement of so many institutions in public debt, it is expected that if this practiced, even the negative effects of RBLs could be under control.

Capacity building for debt management is also provided for under the law. Article 204 of the Decree no. 26/2021 also requires that public debt management be one of the modules of the SISTAFE computer system to support the management of public debt and State guarantees and the macro-process of public debt management. This consolidated approach to public finance management is viewed as promoting policy coordination and achievement of intended goals if enforced.

Article 59 of Law 14/2020 outlines the principles and specific rules governing public debt in Mozambique. It states that public debt is governed, among others, by the following principles and rules:

- Management guided by rigor and efficiency, ensuring the availability of the necessary funding for each budget year.

- Matching the use of public debt with the financing needs of the State's priority programs and actions, included in the planning and budgeting instruments.

- Debt and guarantee issuance limits must take into account the medium-term debt strategy and the public debt sustainability analysis.

These principles can be viewed to be solid enough to provide clear guidance to authorities responsible for debt management in Mozambique.

Article 67 of the Decree no. 26/2021 also requires that when contracting public debt, the terms and conditions of the financing agreements must be analysed. This includes the amount, interest rate, maturity of the financing, degree of concessionality, payment modalities, among other information relevant to the agreements. In addition, the participation of interested parties must be ensured, namely the Ministry of Economy and Finance, the Bank of Mozambique, the sector responsible for the object of negotiation and contracting and the Creditor. Such an approach that promotes the sharing of technical expertise and teamwork can go a long way in ensuring a well structured RBL emerges. This requirement is a strength in the country's legal framework as it ensures that due diligence is exercised before any RBL is contracted.

Does the legislation allow for well-structured RBLs to emerge?

Although the current legislative framework can deal with some of the negative issues associated with RBLs, it may be inadequate in ensuring that properly structured RBLs emerge. This is because RBLs have not been officially recognised as a financing instrument in the legislations. This means that issues associated with the structuring of RBLs, especially with respect to valuation of minerals and dealing with output and price fluctuations, may not be adequately handled. Unlike traditional debt methods, RBLs are complex because they link two supply chains that would have been otherwise separate: the infrastructure building supply chain; and the resource extraction supply chain. This requires further guidance to ensure that well-structured RBLs that adequately mainstream the associated challenges emerge.

Does legislation try to equate resource extraction to the value of the infrastructure/project financed?

With no specific legislation dealing with RBLs, the legislative framework is not able to give guidance on how best to ensure that the terms are designed in such a way that proceeds from minerals do not end up exceeding the value of the infrastructure being financed.

Does the legislation ensure that RBLs are structured to eliminate corruption risk?

Corruption risks associated with RBLs mainly emanate from lack of transparency, lack of competition in selecting contractors and failure to subject RBLs to the general public debt management framework. Thus, while the general legislative framework on transparency and debt management is clear, the absence of legislative provisions that officially provide for RBLs also mean that they can be negotiated outside the normal debt processes and be subjected to corruption.

3.3.9 GHANA

There are several legislation pieces in Ghana that govern the way public finance is handled. It is expected that through these pieces, the issues relating to RBLs negotiation and implementation are covered. Some of the legislation pieces discussed in this section include The Constitution of the Republic of Ghana (Amendment) Act, 1996; the Public Finance Management Act, 2016; and the Minerals and Mining Act, 2006 (Act 703).

This forms the context under which key relevant legislative provisions for addressing the concerns associated with, and issues that need strengthening with respect to RBLs are discussed.

The Public Finance Management Act, 2016 is the main guiding tool for public finance and debt management in Ghana. It contains provisions for institutional arrangements on loan contraction; management; reporting; and oversight of Parliament on government loans and these have a bearing on RBLs in Ghana. In addition to specifying the duties of the Minister of Finance; Auditor General; and Parliament, the Public Finance Management Act provides for the creation of the Public Debt Management Office that is responsible for debt management.

The Minerals and Mining Act, 2006 (Act 703) governs the manner in which mining is to be conducted in Ghana. The framework for the collection, allocation and management of petroleum revenue in a responsible, transparent, accountable and sustainable manner for the benefit of the citizens of Ghana is regulated under the Petroleum Revenue Management Act, 2011 (Act 815).

These provisions imply that RBLs that involve the exploitation of mineral resources as collateral would be handled through these rules governing the operation of minerals.

Does Ghana legislation allow for transparency in loan and resource exploitation?

Conducting RBLs without transparency in Ghana would be in violation of several statutes, including the Constitution of Ghana, the supreme law of the land. The Constitution of Ghana requires any transaction or agreement regarding natural resources to be ratified by Parliament.

For example, Article 268 provides that any transaction, contract or undertaking involving the grant of a right or concession to any other person for the exploitation of any mineral or other natural resource of Ghana should be subject to ratification by Parliament.

Section 181 of the Constitution also requires that loans raised by the Government on behalf on itself or on behalf of a public entity must be raised under the authority of an Act of Parliament. The terms and conditions of the loan also need to be laid before Parliament and do not come into force unless approved by the Parliament.

Disclosure of public debt management is also provided for in the Public Finance Management Act, which would promote transparency and accountability if adhered to. For example, Section 72 of the Act requires the Public Debt Management Office to produce an annual report on debt which then must be submitted by the Minister to Parliament. Further, Section 60 of the Act also provides for an annual borrowing and recover plan which is to be prepared by the Public Debt Management Office. This is meant to guide the nature in which borrowing requirements of the Government for each financial year would be met. This implies that if the RBLs are to be used as part of the financing mechanism, then they would need to be captured in the borrowing plan.

Section 56 of the Public Financial Management Act also provides that the terms and condition of all government borrowing must be laid before Parliament and shall not come into force unless approved by a resolution of Parliament in line with the Constitution.

To promote transparency and accountability of petroleum sales, Section 8 of the Petroleum Revenue Management Act, 2011 requires all income streams that fund the Petroleum Holding Fund (royalties from oil and gas, sale or export of petroleum) to be disclosed by the Minister through a published record in a gazette. In addition, the Act also provides for the establishment of Public Interest and Accountability Committee, an independent body to monitor and evaluate government and other relevant institutions compliance with this Act in the management and use of petroleum revenue and investments.

Whether debt management and governance frameworks are strong enough for RBLs

Generally, the legal framework of Ghana has some capacity to meet the minimum requirements for debt management through RBLs. This is because critical laws such as the Constitution and the Public Finance Management Act, 2016 provide for the requisite institutional and legislative requirements for debt management in line with international best practice.

The Constitution and the Public Finance Management Act, 2016, contain provisions for institutional arrangements on the contraction; management; reporting; and oversight. For example, in addition to specifying the duties of the Minister of Finance, Auditor General, and Parliament, the Public Finance Management Act, 2016, provides for the creation of the Public Debt Management Office that is responsible for debt management under the supervision of the Chief Director in the Ministry of Finance. It also outlines its responsibilities some of which include the assessment of the feasibility of borrowing requirements and the formulation of a Medium-Term Debt Management Strategy (Section 54). The Strategy is a strategic plan designed to make operational the high-level objectives for debt management, taking into account the cost and risk associated with the public debt portfolio, which specifies the borrowing requirements of government and how the borrowing requirement of government is financed over a number of years.

Whilst these legislation pieces do not explicitly state resource backed loan deals, the general understanding and interpretation shows that they are indeed covered. Just to support their legality, in 2014 the Ministerial Cabinet of Ghana gave Government a directive to scale down the US$3 billion loan facility that was between China Development Bank and Government at US$1.5 billion. The loan was to be financed through oil revenues . The Minister of Finance therefore sought the legal implications of this move from the Attorney General, who then scrutinised the Master Facility Agreement and confirmed the legality of the RBL.

RBLs can also involve government mortgaging its share of revenues from ongoing mining activities in return for a loan. Section 2 of the Petroleum Revenue Management Act, 2011 provides that all revenue due to Ghana from petroleum mining shall be deposited into the Petroleum Holding Fund. However, section 5 of the Petroleum Revenue Management Act, prohibits the use of Petroleum Holding Fund as collateral for debt, guarantees, commitments or other liabilities of any other entity. This makes RBLs involving repayment being tied to petroleum revenue that has already been collected from petroleum miners illegal in Ghana. Only RBLs involving a player not paying revenues altogether into the Fund are the only possible avenue for petroleum based RBLs.

Does the legislation allow for well-structured RBLs to emerge?

RBLs in Ghana, as elsewhere in sub-Saharan Africa, have been largely characterised by unrealistic projections of loan amounts and potential projects; this has resulted in disbursement challenges and project funding bottlenecks (Gyeyir, 2022). Although the general provisions governing debt in Ghana can help with ensuring that RBLs are regulated, the fact that the legislation does not explicitly make RBLs distinct in approach makes it difficult for the legislation to regulate the structure of RBLs. Thus, it is not expected that the Ghana legislative framework would be able to deal with structural issues such as failure to consider commodity price movements and output fluctuations in negotiations.

Does legislation try to equate resource extraction to the value of the infrastructure/project financed?

The legislative framework has not yet been able to provide further guidelines on how RBLs can be managed, especially with regard to equating mineral resources being extracted to the value of the infrastructure being financed.

Does the legislation ensure that RBLs are structured to eliminate corruption risk?

The spirit of the legal provisions for government borrowing and debt management is meant to create a sound legal and institutional framework that promotes debt sustainability and transparency in public resource management. The oversight role of Parliament has been highly pitched and the laws have provided for reporting and publishing of government debt in an effort to expose all government loan dealings to public scrutiny and in a way fight corruption tendencies. Despite these efforts, non-disclosure provisions and general secrecy in RBLs are a great set back and seem to expose Ghana to corruption tendencies when it comes to RBLs.

Literature confirms that Ghana has faced several risks in its experience with RBLs. These include ineffective oversight; absence of international tender process that gives value for money cited above; and hidden debt (Gyeyir, 2022). Ineffective oversight creates opportunities for public resource leakages through corruption as the executive is not held to account due to Parliament incapacitation.

4. THE LEGALITY OF THE USE OF RESOURCE BACKED LOANS IN THE VARIOUS REGIONS AND COUNTRIES

The legality of RBLs can be assessed from a number of perspectives. Regional level frameworks generally serve as guidelines and are not necessarily binding on the member States. Thus, non-observance of these guidelines might not necessarily be termed illegal. However, at the national level, non-compliance with the set rules and procedures in the legislation can be deemed illegal. The various compliance assessment issues in determining illegality of RBLs include the following:

Whether resource backed loans are explicitly provided for in the legislation

Having RBLs explicitly provided for or mentioned in the legislation is the best guidance to their legality. If there is no explicit mention of RBLs in the statutes, RBLs could still be legal as they would be regulated under the general debt management guidelines.

Whether there are some provisions in the legislative framework that make resources backed illegal

The illegality of RBLs can also be easily determined if there are any provisions in the public finance management or mineral resource exploitation pieces of legislation that outlaw the mortgaging or collateralisation of minerals as repayment of debt. In addition, RBLs can also be illegal if there are some provisions which make public debt exclusively chargeable to the Consolidated Fund rather than minerals or other resources.

Whether the RBLs could be illegal due to non-involvement of, and accountability to, Parliament.

The legislation can also make it clear that no debt can be incurred if it does not pass through Parliament. This could happen if the legislation says that every public debt has to get parliamentary approval with no exceptions.

Whether illegal due to the repayment processes

RBLs can also be argued to be illegal if the debt management processes provide for all debt repayments to be charged to the Consolidated Revenue Fund with no exceptions. This would imply that debt repayment through minerals or proceeds from minerals which are not part of revenues has not been regularised.

Whether illegal due to non-subjection to general mining and petroleum laws

The RBLs could also be deemed illegal based on the way the financier accessed mineral rights. Some countries provide for mineral rights to be given to holders of exploration licences who would have discovered minerals otherwise, they can only be transferred though a competitive bidding process. RBLs where the financier is just given mineral rights without following this process could be in violation of the legislative framework.

Whether illegal due to non-reporting of updates on debt information

The debt management regulations may require regular updates on debt, including outstanding amounts, interests, and repayments without any exception. If this is not followed with respect to RBLs, this can be deemed as an aspect that is illegal and needs to be regularised for compliance.

Based on the country reviews as already discussed, the illegality of RBLs across the nine countries can be summarised as follows:

Attribute for determination	Comment based on country frameworks
Resource backed loans explicitly provided for in the legislation	Across all the nine countries, there is no direct specific mention of RBLs as a source of finance in the legislation. In addition, the provisions relating to debt have not included the possibility of using mineral resources as an avenue to negotiate loans. This makes it difficult for the existing legislative provisions to adequately regulate RBLs due to the missing legal provisions as guide. However, in Tanzania, the Government Loans, Guarantees and Grants Act, 1974 (as amended) provides for foreign loans that have been raised for development projects to be deposited outside the Consolidated Revenue Fund into a special fund. The guidance on the use of the funds would in this case be the basis under which RBLs would be handled. In Nigeria, The Petroleum Act provides for bilateral or multilateral arrangement which can be negotiated between Nigeria and another country for an award of a petroleum mining lease to a qualified investor. In addition, a production sharing contract for the production of petroleum can be done on terms which the financial risk bearing party can recover costs from a share of the product as specified in the contract.
Resources backed loans made illegal by the laws	The absence of provisions on RBLs also means that across all the nine countries, RBLs have not explicitly been made illegal. This means that they have to be regulated under the general debt management laws. In Ghana, Tanzania and Uganda, the use of revenues from petroleum and gas that is due to government as collateral for loans is prohibited. This prohibition, however, is for revenues (royalties, taxes etc) that have already been paid into the special fund created for collection of all revenues due to government. This might still leave room for mortgaging the actual petroleum output rather than revenue.
Whether illegal due to non-involvement of, and accountability to Parliament	Across eight of the nine countries (with the exception of Chad with no public finance management law), incurring debt outside Parliament is generally not allowed. This also includes a requirement that mining and petroleum contracts also have to be approved by Parliament. In addition, Parliament should be appraised of the debt developments, including new debt, amortisation of debt and outstanding balances. This means that RBLs that are negotiated and signed for with Parliament remaining in the dark about them would be illegal. In addition, not giving updates about RBLs to Parliament would also be illegal.
Whether illegal due to the repayment processes	In countries such as Tanzania, public debt has to be secured on the Consolidated Fund. This requirement had not anticipated securing public debt on mineral resources and could make RBLs not so legal in Tanzania. In Uganda, a loan raised by Government has to be paid into the Consolidated Fund and shall form part of the Consolidated Fund. RBLs generally involve loans but financiers construct infrastructure without the proceeds getting into the Consolidated Revenue Fund. This means that contrary to these provisions, there are some loans that are not paid through the Consolidated Revenue Fund as per the legislation, which could also imply that they become illegal unless legislation is refined to make them an exception.
Whether illegal due to non-subjection to general mining laws	The ceding of mineral rights to the financiers under RBLs generally appear to have not followed the general process of acquiring mineral rights. The transfer of mineral rights from existing miners to financiers following an agreement must be transparent as per law requirement. Countries such as Mozambique, Nigeria, Zambia provide for a bidding process to be followed in acquiring mineral rights, which is not followed once a financier has been identified.

Whether illegal due to the non-subjection to general petroleum laws	Some countries, such as Chad, Nigeria, Senegal, Tanzania, Uganda have specific requirements on how one ends up having a petroleum contract, including open bidding. However, under RBLs, this process is not followed, which also makes them illegal.
Whether illegal due to non-reporting of updates on debt information	In all the nine countries, there are tight reporting requirements about all debt, including details about the identity of the lenders as well as the total amounts and how this has evolved over time. However, the current reality with RBLs is that they are opaque and therefore end up not being subjected to such reporting requirements. This practice is illegal with respect to RBLs as the legislative requirements do not make any exceptions.

5. A REVIEW OF WELL-KNOWN RBL CASES: WERE THEY SUCCESSFUL?

A comprehensive database of RBLs by Mihalyi, Hwang, Rivetti, & Cust (2022 has a total of about 30 RBLs from Sub-Saharan Africa. While these span across several countries, specific details about most of them remain largely unavailable. In this section, a case study of three well known RBLs in Chad, Ghana and South Sudan are reviewed to give some indications about some of the challenges that are associated with these kinds of loans.

In South Sudan, the use of RBLs did not help enhance the capacity of government to respond to social needs, with the government remaining constrained in paying civil servant salaries. But how did this situation happen when the government had resources which were being exploited? Box 1 gives more details about how this particular RBL in South Sudan happened and some of the issues that can be identified as being the main limitations in the deal.

CASE STUDY 1: SOUTH SUDAN STILL REELING FROM THE EFFECTS OF THE 2018 RESOURCE BACKED LOAN

How was the deal structured?

In April 2018, a loan agreement was reached between African Export-Import Bank (Afreximbank), a regional financial institution and Trinity Energy, a company that was registered in South Sudan. Under the deal, which is believed to be worth US$400 million , the Afreximbank agreed to issue a revolving trade finance facility, which was to be paid in three months installments worth about US$30 million to Trinity Energy. Using the letters of credit under that loan facility, Trinity was tasked with importing diesel and petroleum from Kenol Kobil, a Kenyan registered company, which it would then sell in South Sudan. The reason for the deal was the challenges relating to fuel availability in the economy, at a time when fiscal space constraints were significant.

The other side of the arrangement was that Trinity would be awarded contracts for cargoes of South Sudanese crude oil by South Sudan's Ministry of Petroleum. This underlined South Sudan's lack of petroleum refining capacity; although the country had crude oil, which constituted 81% of revenues and almost 99% of exports, the country still faced fuel challenges. Thus, Trinity had to negotiate with an 'offtaker' of the crude oil, identified as Glencore Singapore, a 100% subsidiary of the Switzerland-based global oil trader, Glencore PLC. What this meant was that Trinity would get the finance from Afreximbank, use it to import fuel from Kenol Kobil, and then sell the fuel in the South Sudan market to get a return from its efforts. Meanwhile, Afreximbank would get its payments from the sale of crude oil to Glencore, hence the South Sudanese government would have to do without the mortgaged crude oil in its budgeting processes.

Trinity Energy traded at least 4.2 million barrels of crude oil in the June 2018 to May 2019 financial year, which was more than a third of all the crude tendered by the government. Over the period June 2018 to May 2019, the government awarded seven crude cargoes to Trinity Energy which were all purchased by Glencore. In 2018, this translated into about 6.4 million barrels of South Sudanese crude at an average price of $66.76 per barrel and 6.3 million barrels in 2019 at an average price of $59.72 per barrel, making Glencore's shipments worth a combined $801 million over the two years.

This is about two times the value of the original loan.

Can this arrangement be considered a success?

South Sudan generally considered this arrangement as something that had not benefited the country a lot. On June 28, 2019, the government cited the damaging impact of agreeing to sell future crude production and decided to suspend all such contracts, after deeming them as not healthy but actually destroying the economy. In addition, when the government signed this deal in April 2018, payments to civil servants were in arrears by four months, which was still the same situation when the 2019/20 budget was presented to Parliament in June 2019. This shows that the government's fiscal space was not in any way enhanced by this arrangement.

The deal however, provided some temporary fix for a dire economic situation resulting from years of conflict and economic mismanagement, while also helping with ensuring that fuel availability in the economy was assured. This shows that, probably, there could have been ways of structuring the deal better.

What went wrong with the Trinity/Afreximbank oil backed loan?

There are a number of challenges that were associated with this deal which can probably serve as lessons for any future arrangement involving this kind of financing arrangement. These include the following:

Poorly negotiated deal with terms favouring Trinity

Import license fees for petroleum products was generally set at 3 SSP ($0.02) per litre. However, Trinity Energy was paying only 1.5 SSP per litre in import license fees, which is actually half the official price. It is not clear why Trinity was found liable to such favourable conditions when the company was adequately compensated for its endeavours. It is estimated that the import license fee would have been about US$1.2 million payable to the government by Trinity, but the firm ended up paying only half of this, meaning US$600,000 that could have helped enhance the government's fiscal space was lost.

In addition, government was also happy to have this deal signed off because it took a substantial portion of government spending off the books, especially financing fuel for the army. However, Trinity went into an arrangement worth more than US$1 million per month to supply fuel to the army at an inflated price, through an arrangement that was carefully kept away from public scrutiny. Based on the volumes supplied to the Ministry of Defence of close to 3 million litres of diesel and gasoline at a total cost of $4.2 million, with Trinity charging the Ministry of Defence $1.40 per litre for the fuel that was about 26% more than the average price. Trinity also charged its nine other clients during the same period, and this resulted to about US$300,000 a month in additional profits for the company, which was also a loss for the government budget where payment was charged. In addition, for reasons not clear, Trinity enjoyed very broad exemptions from taxes, which also disadvantaged the government.

Total disregard of procurement regulations in the deal

South Sudan has public procurement regulations and when the deal was signed, the Interim Public Procurement and Disposal Regulation of 2006 were in force.

They provide that public procurement should be conducted in a transparent and efficient manner so as to achieve value for money by ensuring that contracts are awarded in a structured and collective manner. Specifically, they provide for transparency and equal opportunity to tenders with all contracts awarded based on competition, and the regulations identifying the preferred procurement method as the open competitive tendering. The selection of Trinity however, was not subjected to any competitive process, neither was the company subjected to any competition when the deal to supply the army with fuel was negotiated.

In addition, there was a disregard of provisions that had been in place to government in the manner in which petroleum resources could be exploited. The Petroleum Act of 2012 provided for petroleum agreements to be entered into following an open, transparent, non-discriminatory and competitive tender process. This was just disregarded in the arrangements made between Trinity Energy, Afreximbank, the government of South Sudan, and Glencore, despite the fact that the South Sudanese government was already tendering crude oil in monthly bid rounds at which oil traders compete for the contracts to buy cargoes of crude.

Disregard of the public finance management laws

The deal also disregarded the general transparency legislative provisions on debt. First, debt is to be approved through the budget process, hence this deal enabled the government to bypass the budget process. This means that laws on budget ceilings and cash limits designed to control government spending, the laws on debt management which stipulate that the government cannot increase borrowing without parliamentary approval, and laws governing the manner in which revenues that would typically accrue to government accounts from crude oil sales, were all no longer applicable. In addition, the South Sudanese law requires that the budget must be made publicly available, along with an annual report detailing past, current, and projected fiscal activity, major fiscal risks and Government's debt. This allows the legislature to approve or reject unfavourable terms associated with debt arrangements. This could not be done under this arrangement as the allocation of crude oil cargoes to pay for fuel was not included in government budgets for the 2018/19 or 2019/20 financial years.

The loan was very expensive

The law that governed South Sudan's public finance management at the time, the Public Financial Management and Accountability Act of 2011 provides for government to only borrow and/or guarantee foreign loans that are being provided on strictly concessional terms. However, this loan was not on concessional terms as Afreximbank only provides commercial loans. Thus, besides being a disregard of the law, the transaction was actually very expensive which also contributed to low effectiveness. Under the transaction, the margin on the first $30 million letter of credit was 5%, but further charges on the facility included:

- Establishment fees of $525,000.
- Letter of credit charges of $300,000.
- Legal fees of $80,000.
- Letter of credit confirmation charges of $75,000; and
- collecting bank's fees at $25,000 per year.

This effectively makes the interest more than 8% of the value of each installment, at a time when the 2018 average for three-month loans at the London Interbank Offered Rate had a benchmark interest rate of 2.3%.

The deal was designed to finance recurrent expenditure

The deal also perpetuated a damaging reliance on future oil production to finance current spending as it was not in any way being used to create any future production capacity or infrastructure. If the deal had been used to finance infrastructure which is useful to help enhance production, this might have also helped in alleviating poverty and enhancing social well-being. By being a deal to supply fuel, which is a recurrent expenditure item, the deal just exacerbated the country's indebtedness rather than resolving it.

Source: The Sentry. (2023). Crude Dealings: How Oil-Backed Loans Raise Red Flags for Illegal Activity in South Sudan. Washington DC: The Sentry.

In Chad, the country ended up remaining with only 17% of revenues to meet social obligations, after the terms of the RBL which meant that some of the revenues were used to repay the RBL. Chad however, stands out as an example of a country that managed to successfully renegotiate the RBL, resulting in terms that were more favourable but the damage had already been done. Box 2 gives more details about the loan, including identifying potential issues that caused problems with the loan.

BOX 2: SOME CHALLENGES ASSOCIATED WITH RESOURCE BACKED LOANS WERE OVERCOME THROUGH RENEGOTIATION IN CHAD

The manner in which the deal was structured

In mid-2014, the Chadian Government borrowed US$1.45 billion from Glencore . Out of this amount, US$1.3 billion was to enable the country's state-oil owned company, the Société des Hydrocarbures du Tchad (SHT), to purchase Chevron's assets in Chad, including several oilfields which were operated by ExxonMobil. Glencore was already present in Chad, as it had bought Caracal Energy, a Chad-focused oil company and had also invested heavily in the oil sector after having invested in several oilfields. The loan financed SHT's acquisition of Chevron's 25% share of the Doba consortium and a combined 21% share in Chad Oil Transportation Company (TOTCO) and Cameroon Oil Transportation Company (COTCO), the two oil-pipeline companies that own and operate the Chad-Cameroun pipeline. The loan was very significant as it equaled roughly 10% of the Chad's annual gross domestic product at that time.

The loan was to be repaid over the period 2014-18 through direct deductions from oil shipments sold by Glencore. However, under the terms of the loan, if the value of deductions from oil shipments turned out to be insufficient to service the debt, then the revenues from oil royalties due to the Government would also be used. In December 2015, the loans were consolidated, and their repayment schedule was extended to 2021.

An unanticipated sharp drop in oil prices in 2016 however, resulted in the servicing of the commercial loan almost fully depleting Chad's annual oil revenue.

The interest on the debt was also very high at a time when the maturity period was very low. For example, in 2016, interest payments on the debt with Glencore amounted to 1.9% percent of non-oil GDP, while the debt amortisation was 0.9%. As per the terms of the contract, payment was directly serviced from government oil revenue, which was also supposed to cater for operating costs, including pipeline transportation costs, and marketing fees. It was only the remaining revenue after catering for these costs and debt service that would be transferred to the Treasury. What treasury was receiving however, was lower than what was being paid as debt service costs. For example, in 2016, debt service to Glencore amounted to US$231 million when to total oil sales revenue was about US$271 after accounting for operating and transportation costs. This meant that only US$40 million or about 17% of total oil sales revenue was left for treasury to meet other obligations, including paying civil servant salaries.

It was only in 2018 that some milestones began to be registered in the quest to cushion Chad from the generally unsustainable Glencore debt. In February 2018, Chad and Glencore agreed to restructure the oil-collateralised loan. In this instance, Chad hired international financial and legal advisors to help with expertise in the negotiations. Under the restructured debt, a 12-year maturity period and a reduction in interest rate from 6.75% to 2% above LIBOR until 2021 and 3% above LIBOR thereafter were agreed. An additional cash sweep mechanism was agreed where immediate (additional) amortisation and additional interest payments would be a function of available oil revenues. This meant that when oil prices would be low, the debt service burden would reduce, and vice versa. The final agreement on these terms was reached in June 2018.

Can this deal be considered successful?

By simply considering the objective of the loan, the exit of Chevron helped with ensuring that government had some control of the Doba consortium, TOTCO and COTCO, and hence influence over the Chad-Cameroun pipeline. the transaction however, created fiscal space challenges for Chad, as 83% of oil revenues in 2016 went to servicing the debt. Thus, this ability to control the pipeline and oilfields was at a very huge costs, creating further challenges on the ability of the Chad government to respond to service delivery. In addition, the deal failed to be self-financing, resulting in further claims on government revenue in addition to what could be covered from the direct export of oil. Thus, it can generally be regarded as a failure on the part of the government.

What really went wrong with the Chad/Glencore deal

The way the deal was structured can actually reflect a number of problems, which also explains why it ended up creating repayment challenges for Chad. Some of the undesirable attributes in the arrangement included the following:

Requiring that the financing goes beyond the shipped oil revenue

The first challenge with the terms of the arrangement was requiring that if the value of deductions from oil shipments turned out to be insufficient to service the debt, recourse would be made to government revenues due from oil royalties. This shows that the financier had anticipated a possible decline in the oil prices. The decline in oil prices in the international market resulted in great vulnerability of government revenues, as they had to tap into their own revenues to repay the debt, when it was largely expected that it would be financed from the earmarked oil produce.

If the terms of the deal had been solely based on the need to equate the amount of oil being extracted and shipped by Glencore to the repayment of the loan, the deal could at least have protected some of the royalties due to government, instead of taking about 83% of government revenue. The renegotiated cash sweep mechanism where debt servicing would be related to oil prices, to ensure that when oil prices are low, the debt service burden reduces, should have been ideal from the beginning.

The short-time frame of the loan

The biggest blunder in the terms of the loan was to commit to repayment of a loan of about 10% of the country's annual GDP over a five year period. This was suicidal and could be the major reason why the debt ended up choking the whole ability of government to perform with respect to service delivery. This could be explained by the restructuring of the deal after renegotiation, which resulted in a longer repayment period and helped enhance debt sustainability.

High interest rates on the debt

The Chad government also opted for a commercial debt with high interest rates, which is very dangerous for such a highly priced loan. An interest rate of 6.75% is generally very high, and the ability to renegotiate it to a range of 2%-3% above LIBOR after the damage was already done shows that it could still have been done earlier. This would have given some breathing space to government in terms of satisfying its fiscal obligations.

Use of inexperienced negotiators

The lesson from the successful round of negotiations in 2018, which resulted in reduced interest rates, a longer repayment period and the protection of Chad from falling oil prices demonstrates the importance of having expertise in the negotiating team. Chad hired international

.../economic/CDB_Loan_Summary_050112.pdf financial and legal advisors to help with expertise in the renegotiation. Financiers always have an experienced team of engineers, financiers, lawyers in negotiating RBLs, and this was missing in the Chadian team of negotiators at the start of the negotiations.

Lack of legal framework to guide debt incurrence in general

As reflected in the country reviews, Chad lacks a sound legal framework for dealing with debt as well as giving guidelines on the nature of arrangements that can be tolerated. This made it difficult for the negotiators to have any legal basis for ensuring that the country was protected from the resultant deal. The diversion of government revenue to repayment of debt would have received some protection if there were clear public finance management guidelines on how debt payments need to be done.

Sources: World Bank (2018) and Financial Times archive article 'Glencore arranges $1bn oil loan for Chad' at website https://www.ft.com/content/1061fc0a-f539-11e3-91a8-00144feabdc0

Just like Chad, Ghana was also forced to renegotiate the debt just a few years into the loan term. However, unlike Chad, the Ghanaian case involved cancelling 50% of the original loan amount, and the country had to incur significant costs in reducing the originally negotiated debt value. The decision to cancel followed some disagreements with the Chinese Development Bank on valuation of the oil revenue that backed the financing following the oil price slump. Box 3 gives the details.

BOX 3: GHANA HAD TO CANCEL PART OF THE DEAL AND INCURRED SIGNIFICANT CANCELLATION FEES

Background and structure of the deal

In 2011, the Government of Ghana signed a US$3 billion commercial loan agreement with the China Development Bank (CDB) that was to be disbursed in two equal tranches. The first tranche of US$1.5 billion had a 15-year repayment period and a five-year grace period. The second tranche of US$1.5 billion had a 10-year repayment period and a three-year grace period. The loan was meant for 12 eligible projects in transport; fisheries; gas and oil development; special economic zones infrastructure; and ICT. As part of the agreement, Ghana guaranteed that it would pay 13,000 barrels of oil per day from Jubilee Field to China International United Petroleum & Chemicals Co., Ltd. (UNIPEC Asia) over a period of 15.5 years. An Offtaker Agreement was signed between Ghana National Petroleum Company (GNPC) and UNIPEC for the supply of the 13,000 barrels of oil a day as per the Agreement. The loan agreement was signed just about a year after Ghana began commercial oil production, and at that time it was the largest single loan ever contracted in the history of Ghana.

The agreement stated that UNIPEC Asia will purchase the oil as soon as it is produced with revenues paid directly into Ghana's Petroleum Holding Fund for at least 15 years and six months. If the oil proceeds were insufficient to cover the $3 billion plus interest during that period, then the agreement would extend in duration until the loan had been paid in full.

The Agreement also included a clause specifying that at least 60%

of the companies performing construction work organised through the subsidiary agreements were to be Chinese owned and operated. The remaining 40% of each tranche could be applied towards local contractors.

An emergency Cabinet meeting was held on a Sunday of 30th March 2014, which was intended to get an update brief on the loan facility. The meeting recommended that the Ministry of Finance cap the loan at US$1.5 billion and engage with the Chinese Government at a higher level. After seeking the legal opinion from the Attorney General, the negotiations to restrict the debt to only half of its original value commenced. Under the terms of agreement, the Government had to pay a cancellation fee of 1% of the amount cancelled as well as to pay the accrued commitment fees. This meant that Ghana became liable to pay US$30million, being 1% cancelation fee of US$15million on US$1.5billion cancelled, plus 1% per annum accrued commitment fee on the amount cancelled of US$ 1.5billion.

The emergency cabinet meeting could have been necessitated by some pricing disagreements between CDB and the Government of Ghana in executing the Offtaker Agreement. A meeting between CDB and the Government in Beijing, China in March 2014 saw CDB claiming that according to their financial model, which assumed a crude oil price of US$85 per barrel, the supply of 13,000 bpd was only sufficient to support a total loan of US$840 million. A request by the Government of Ghana for the model so that they could review it was turned down.

The Government of Ghana felt that using US$85.00 as the benchmark crude oil price was inconsistent with the reality, given that since the inception of the Offtaker Agreement, GNPC sold crude oil to UNIPEC at a price over US$100.00; with the average price being about US$110.00.

Another source of disagreement was that the initial Agreement provided that in the event that the government would need to make up for any anticipated debt servicing shortfall (for example due to lower prices than expected), the use for other sources of revenue was permitted. Thus, the Government suggested liquefied petroleum gas (LPG) as an option for meeting the anticipated debt servicing shortfall when principal repayments were to begin in 2015. CDB was, however, sceptical about LPG and as far as they were concerned, the transaction was an oil-backed transaction and the government of Ghana had to live up to that.

The cancellation and renegotiations led to a cessation of disbursements after an initial payment of $1.5 billion. In the end, the only project that was under the loan facility was the Western Corridor Gas Infrastructure Project, which was completed in 2015.

What was done wrong?

Several reasons have been cited in literature as to why the loan was cancelled and why one of the implemented projects faced delays hence the classification for the RBL a failure.

There was an expertise mismatch in the negotiations

China Development Bank had two advantages in the US$3 billion deal. First, it was involved in the negotiations with a fairly new Chinese desk within the Ministry of Finance in Ghana, with limited negotiation and due diligence capabilities thereby limiting opportunities for negotiating favourable terms. Second, the Ministry of Finance was given an unrealistic deadline to strike the deal thereby imposing pressure and limiting the time horizon to closely scrutinise the terms before the deal could be struck.

Unrealistic loan projections and unanticipated price risk

The terms of the contract overlooked providing adequate covers for price risks. Issues related to valuations, resulting in a dispute over the cover which 13,000 barrels per day of crude oil would cover in a good indicator. By insisting that the output could only guarantee US$850 million at a price of $85 per barrel, CBD was effectively demanding more barrels per day beyond what was stipulated in the initial agreement. The inability to properly take into account these issues saw the country paying an unnecessary US$30 million in cancelling the agreement.

Limited Parliamentary oversight and public scrutiny

Whilst the agreement was laid before Parliament in line with legislative provisions, there was no consensus about the loan terms and conditions between members of Parliament from different parties. Those that had majority representation took advantage of their numbers and approved the loan. Further, there was no transparency in full public exposure of the terms of the contract despite the strong legislative requirement for this to be done. The deal was also submitted to Parliament under a certificate of urgency.

This starved the loan agreement the due diligence and scrutiny from all critical stakeholders outside the government.

Inconsistency of the agreement with the law

The loan agreement was inconsistent with the existing laws particularly the

Petroleum Revenue Management Act and the Local Content regulations. Some of its provisions that violated laws included the 15 years take off agreement with UNIPEC Asia that collateralised Ghana's oil revenue for debt. Section 18 (7) of the Petroleum Revenue Management Act, 2011 provides that the Annual Budget Amount may be used as collateral for debt and other liabilities of Government for a period of not more than ten years. In addition, the law was also manipulated to cover the deal. Originally, the law provided that there should be no collateralisation of petroleum 'resources'. This was later changed to indicate that there should be no collateralisation of petroleum 'revenues', which would be those that have already been made part of the consolidated revenue fund.

Absence of tendering processes for competitive pricing

The execution of the project in terms of engineering, procurement and construction was done by a Chinese institution affiliated to China Development Bank denying the projects from international competitive bidding, thus reducing the incentive to deliver infrastructure projects that provide value for money. In addition, requiring 60% of the companies performing construction work to be Chinese owned and operated effectively eliminated competition with the local players and prevented them from the benefits of the construction activities to flow fully into the economy.

Sources: Gyeyir (2022); Beard (2015); Asafu-Adjaye (2019); and Ghana Parliamentary Memorandum Update on Cabinet Directive to Cap the Facility At US$1.5 Billion

6. POLICY RECOMMENDATIONS ON DEALING WITH THE CHALLENGES ASSOCIATED WITH RBLS

The review of the legislation and the country case studies on RBLs generally reveal that there are a number of outstanding issues which prevent African countries from fully benefiting from leveraging on their mineral endowments to spearhead developmental outcomes through borrowing. The policy recommendations to African Governments on how the various regions and countries can deal with the challenges of using RBL to leverage on natural resources riches to boost domestic resource mobilisation include the following:

a) The need to reform the legal framework so that it specifically deals with RBLs

Although the current legislative frameworks might have been able to deal with some of the negative issues associated with RBLs if they had been followed, there are still a lot of legislative gaps as far as dealing with some specific issues associated with RBLs is concerned. For example, accounting for revenues that would have been deposited into the Consolidated Revenue Fund or escrow accounts but is instead directly going towards the servicing of the loan is not provided for in some country legislation. In addition, while there are debt guidelines and ceilings, they do not apply in instances where RBLs are used, as this requires mineral resources to offset the debt without imposing additional burden on treasury.

More importantly, the legislative framework should also aim at forcing assurances that once RBLs have been negotiated, the extraction of the mineral resources is going to be complimented by the construction of infrastructure of the financed project, and push diversion of resources to other uses.

Thus, it is recommended that public finance management frameworks on debt should be amended to incorporate provisions that give guidelines on how RBLs should be negotiated and implemented to complement the existing frameworks.

b) Strengthening negotiation skills in RBL deals

A review of country case studies reveals some desperation on the part of the resource rich countries, resulting in terms favouring the financiers. Examples include the factoring in of provisions protecting the financiers against a drop in commodity prices but without also taking into account the effect of a rise in commodity prices. It is recommended that:

- Deals must not be hastily signed. Government must give enough time to the negotiating team to do due diligence including thorough assessment of economic viability of projects. Skipping this process often results in increased debt burden as countries fail to generate the requisite revenue to repay the loans.

- Governments should exercise caution and subject the RBL deals to more scrutiny by all critical stakeholders to ensure that issues that need to be taken into account in safeguarding the interest of the countries are factored into the negotiations.

- Governments should ensure that they bring in expertise that match the financiers to the negotiating table. Where such capacity in terms of engineering, financial and legal expertise is lacking, government should hire such expertise to ensure that some of the provisions that are solely intended to benefit the financiers at the expense of the countries are eliminated.

c) Compliance with the public finance management laws

Although the current public finance management laws have loopholes with respect to the effectiveness of dealing with the undesirable attributes of RBLs, they help with safeguarding debt distress of the countries. Debt ceilings were introduced in the national and regional legislation pieces mainly to prevent debt distress. However, in RBLs, the procedure that is outlined for debt is generally disregarded, resulting in financial difficulties for the governments, especially when the RBLs are poorly designed and negotiated. Thus, while the law is in place, it is also important to ensure that institutions that have been put in place to enforce the laws are adequately capacitated to enforce them.

It is recommended that the public finance management laws, including the guidance on debt ceilings, be complied with when RBLs are being negotiated.

d) Full respect of the procurement regulations in RBL enforcement

African governments generally have instituted strong public procurement policies to ensure that the public sector is not disadvantaged through high prices by suppliers. As a result, they have embedded competitive tendering processes to be followed in every government procurement that reaches a prescribed threshold. For some reason, such processes are totally disregarded when the implementation of RBL deals is taking place. This might also have saved the government from excessive pricing associated with the contractors who are mainly from the financier's country of origin.

It is recommended that deliberate efforts should be made to ensure that RBLs are also subjected to the same tendering processes, starting from the selection of the financier to the stage of selecting contractors involved in constructing the financed infrastructure.

e) Targeting concessionary rather than commercial financiers in RBLs

Despite being leveraged on known mineral deposits, RBLs also tend to have very high interest rates, especially since they are commercial loans. Examples from Chad and Ghana, where the renegotiation phase managed to reduce interest rates show that the negotiating power in lowering interest rates for African government is generally weak as they are often desperate for the loan. In addition, RBLs with commercial financiers also tend to have a very short maturity period and a high interest rate.

It is recommended that African government make all efforts to negotiate for lower interest rates and longer loan tenure when as far as RBLsare concerned. This also includes prioritising only concessionary loans rather than commercial loans in RBL transactions.

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