

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

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Why recourse to RBLs?

- African countries face huge infrastructure gap despite rich mineral resources
 - Recourse through RBLs and collateralisation of mineral resources emerged
- RBLs are loans secured by leveraging on a country's natural resources
 - serve as either a direct source of repayment or as an underlying guarantee of repayment
- Through RBLs government pledges its future revenues from a resource development project to repay a loan used to fund the construction of an unrelated infrastructure project
- RBLs are often labelled as or seen as a subcategory of collateralized loans
 - Collateralisation takes 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

Study had five main objectives

- a) Review country and regional convergence protocols at a time when RBL is gaining prominence amid tightened fiscal conditions caused by multiple crises facing African countries.
- b) Analyze the extent to which regional and country level public finance regimes adequately take into account measures to deal with instances of RBLs.
- 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

General methodological approach

- Paper explores whether African countries' public finance legal regimes adequately provide for RBLs, using a select of countries in EAC, SADC and ECOWAS.
 - Chad; Ghana; Kenya; Mozambique; Nigeria; Senegal; Tanzania; Uganda and Zambia.
- Paper also explores whether the three regional economic communities have adopted convergence protocols that can help manage RBLs
 - EAC, ECOWAS and SADC
 - If protocols have been adopted and are effectively implemented, it is expected that member states will adopt RBLs in a harmonized manner.

Assessment framework at country level to assess whether regimes adequately deal with RBLs

- Whether legislative regimes provide for loan negotiation and implementation process to be transparent and effective
 - Loan terms to be favourable
 - Selection and execution of funded projects to be effective
- Whether there are strong debt management and governance frameworks
 - Guarantees same treatment for all creditors
 - Accountability of loans
- Whether legislation has safeguards for non diversion of loans from original intended use
- Legislative backup for assurance 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
- Whether regimes ensure that RBLs are structured to eliminate corruption

EAC Treaty and its guidance on RBLs

- Protocol on the establishment of the EAC Monetary Union in November 2013
- Related to RBLs, the protocol provides that
 - member states should have a ceiling on public debt does not exceed 50%.
 - Treaty requires member states to disclose debt levels, on a quarterly basis.
 - Member states must adopt a common public debt management framework.
- No provision within the EAC protocols or Treaty makes RBLs illegal or prevents 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.

ECOWAS Treaty and its guidance on RBLs

- If enforced, some issues associated with RBLs could have been addressed
- The Treaty provides for minerals to be exploited through a concerted policy with coordinated positions in the international negotiations.
 - The exploitation of resources under RBLs is being done in a few countries without any regional coordination
- Provides for high standards of accountability for mining companies and governments as well as transparency in mineral policy formulation and implementation processes
 - Such transparency is often missing in RBLs negotiated in ECOWAS Member States.
- Provides the need for the public to be fully aware of the manner in which natural resources would be exploited.
 - However, no transparency in activities relating to mining activities to the public
- The ECOWAS convergence criteria requires that all outstanding domestic and external debt to GDP ratio should always be less than 70%.
 - Amounts disbursed, amounts outstanding and payments being made on RBLs often left out

SADC Treaty and its guidance on RBLs

- SADC Treaty obliges its member states to coordinate, rationalise and harmonise their macro-economic policies and strategies in finance, investment and mining.
 - However, different approaches to RBLs in countries show this is missing
- The SADC Treaty provides for promoting and establishing predictability and confidence through enforcing open and transparent policies, practices, regulations and procedures relating to investment
 - RBLs still characterised by lack of transparency in member states
- 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 were to be domesticated, RBLs would be regulated in a transparent manner.

Despite secrecy on RBLs, countries legislations 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.
- Legislations also oblige countries to report and publish debt statistics
- The public finance legislative framework further requires information on natural resource exploitation to be reported to the Minister of Mines in each jurisdiction.
- In almost all the countries, all agreements relating to exploitation of natural resources are subject to approval by Parliament
- Some national legislations also require that mineral agreements and their status be available on the Ministry of Mines website including information on mineral exploitation.
- Bidding process for acquisition of mining rights is also legislated for in some countries (Mozambique, Nigeria, Uganda and Zambia)

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 RBLs.
 - Set borrowing limits for governments and public bodies;
 - specified purpose of borrowing;
 - set up institutional mechanisms for public debt management;
 - require periodic production of detailed statements of debt including sustainability analyses and risk assessments.
 - Standalone public debt management laws and institutions which do not exclude RBLs
 - Generally, the laws require all the loans to be secured on the consolidated revenue fund.
 - Requiring bidding processes for mineral rights
 - Provisions for strong Parliamentary oversight could eliminate corruption risks
- However, there is no explicit mention of RBLs across all the nine countries
 - RBLs involving minerals, oil and gas without proceeds going to CRF require legislative amendment to work the selected countries

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

- Inexplicit provision for RBLs in the laws
 - leave most countries requiring further guidance on how to optimize natural resources for infrastructure development outside the traditional Consolidated Fund.
- Legal frameworks might in general deal with some of the negatives associated with RBLs
 - Transparency issues on terms, tenure and contractual process
- However, the failure to explicitly mention RBLs
 - inadequacies to ensure that RBLs are properly structured.
 - Absence of guidance on valuation of natural resources, how to respond to price and output fluctuation

Are RBLs currently illegal across the countries reviewed?

- No explicit provision of RBLs in the legislations so are not illegal
- Only become illegal in terms of practice
 - non-involvement of and 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)

Three case studies explored in the study

- Trinity Energy- Afreximbank \$400 million RBL of South Sudan
 - Trinity importing diesel and petroleum from KenolKobil (Kenyan registered company) for sell in South Sudan
- Société des Hydrocarbures du Tchad (SHT)-Glencore \$1.5 billion RBL of Chad
 - 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- Government of Ghana US\$3 billion RBL
 - 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

What went wrong with the case studies?

- Poorly negotiated terms favouring financiers/contractors (Trinity, Glencore)
- Total disregard of procurement regulations (South Sudan, Ghana)
- Disregard of the public finance management laws (transparency, debt ceilings, revenue from minerals) (South Sudan, Ghana)
- The loan was very expensive (7-8% South Sudan, Chad)
- The deal was designed to finance recurrent expenditure (South Sudan)
- Requiring that the financing goes beyond the shipped oil revenue (Chad)
- The short-time frame of the loan (5 years for a loan of 10% GDP) (Chad)
- Use of inexperienced negotiators (Chad, Ghana)
- Lack of legal framework to guide debt incurrence in general (Chad)
- Unrealistic loan projections and unanticipated price risk (Ghana)
- Limited Parliamentary oversight and public scrutiny in negotiations

Proposed recommendations

- Reform the legal framework so that it specifically provide for RBLs management in their debt management regimes
- Strengthen negotiation skills in RBL deals
- Ensure full compliance with the existing public finance management laws
- Ensure full compliance with procurement regulations in RBL execution
- Target concessionary rather than commercial financiers in RBLs



Thank You!!!

