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International Sovereign Bonds Issuance in Sub-Saharan Africa

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The increasing dynamism of the Sub-Saharan African economy coupled with the continent's large financing needs have led Sub-Saharan African countries to consider alternative sources of external funding to finance their local development. Traditionally, Sub-Saharan African countries have recourse to classical forms of external financing such as multilateral and bilateral financing, commercial bank loans and/or other private sources of investment due in part to their quite limited access to global financial markets.[1] Since the last decade, however, there has been a surge for Sub-Saharan African countries in global financial markets with Eurobond issuances by countries such as Congo, Gabon, Ghana and Nigeria in 2007 and followed by a number of other countries after the pause imposed by the recent global financial crisis.

This trend has been driven by changes in both African sovereigns and investors factors. Indeed, prospects for growth in emerging economies coupled with the slow economic growth of advanced countries since the 2007 financial crisis has impacted international investors' investment strategy, who are looking for higher yielding investments and are willing to diversify their portfolio. Yet, the increasing interest of international investors for bonds issued by African sovereigns are limited to issuance made on international markets due to the lack of political stability and regulatory framework of domestic capital markets. There is indeed a preference for bonds issued on traditional trusted locations which offer established regulatory and legal frameworks as well as lower risk for investors.

International financial markets are indeed a good alternative source of financing for sovereigns when domestic resources are inadequate or insufficient and have been used by Sub-Saharan African countries for various reasons, ranging from debt restructuring to financing of local infrastructure projects. Though the prospects for inaugural bond issuances on international markets are quite high,[2] international bond issuances by Sub-Saharan African countries are still at an early stage and we thought it would be useful to analyse this new form of financing for Sub-Saharan African countries which, we anticipate, would certainly raise a number of challenges and issues that local governments would have to face. At this stage, the biggest challenge for existing and prospective issuing States is to ensure that such alternative form of financing is a real opportunity for the continent and to adopt internal measures to manage efficiently the proceeds of bonds issuance to ensure that it actually serves local development and internal growth.

Financial market participants and analysts gladly welcome this evolution as they consider that it is recognition of the progressive advanced financial integration of Sub-Saharan African countries which can be used to underpin growth and economic transformation and lessen the dependence on traditional aid providers' assistance if used appropriately and wisely. Lessons can be learned from the experience of Western countries in such domain by mastering both the benefits offered by such form of financing and by shaping the most appropriate legal framework for each issuance to secure the rights of both the investors and the issuing State, keeping in mind that the success of a bond issuance would clearly depend on the investors' appetite for the proposed issuance which will carefully assess the specific risks inherent to transactions with Sub-Saharan sovereign issuers.

International sovereign bonds are debt security "*which are issued or guaranteed by the state or central bank*" on international financial markets and "*governed by a law other than the law of the issuer and gives a foreign court jurisdiction over any claims that may arise under the bond*".[3] Though the applicable legal regime would vary from one issuance to another as it is mainly determined by the law governing the issuance (relations between the bondholders and the issuing State) and the financial market regulations where the bonds are to be listed (rules governing the formalities that need to be carried for the bond issuance), we have identified below a number of common legal features and issues that need to be addressed and analysed when considering international sovereign bonds.

Rather than revisit all the themes that have already been discussed in relation to Sub-Saharan African sovereign bond issuances, we have chosen to discuss the common financial and legal features (1) and the challenges for Sub-Saharan African countries (2).

1. Preparation and Management of an International Sovereign Bond Issuance

An international sovereign bond issuance shall be carefully planned and prepared well ahead of time by the issuing State as it requires assessing whether it is the most tailored source of funding for the project to be financed and considering a number of legal and financial considerations that are crucial for the success of the issuance.

1.1 Economic and Financial Considerations

When considering an international bond issuance, sovereigns shall carefully balance the benefits and disadvantages of such form of financing and determine the structure of the issuance with the assistance, when needed, of experienced financial advisers.

1.1.1 Economic Rationales: Cost-Advantage Analysis for the Issuer

International capital markets may not always be the best financial option for a project development; tailored financial options would be less expensive and/or less risky for the sovereign. For that reason, alternative sources of funds shall be carefully considered by a sovereign to fund a particular public project. When considering

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available sources of funding, whether private or public, sovereigns shall take into account their particular financial situation as well as the specificities of the project to be financed with the proceeds of the debt.

International sovereign bond issuance offers a number of benefits to the issuing State both in terms of its capacity to raise an import amount of money under more attractive financial conditions and in terms of its indirect impact on the country's financial sector development;[4] including, but not limited to: sovereign's access to international financial markets;[5] good alternative to inadequate or insufficient domestic resources; lower direct borrowing costs and/or lower interest rates than domestic debts; improved liquidity of the local corporate market; and access to long-term funding.

Yet, all these advantages can be outweighed by a number of potential risks that shall be carefully addressed and monitored by the issuing State in light of the country-specific context and needs. Indeed, the cost-advantage of the issuance may be outweighed by the currency risk if the local currency weakens compared to the borrowing currency,[6] or by the risk associated to interest rate variation if the bonds have to be repaid at higher interest rates as it implies higher cost for the issuer or by the potential poor return for the State when it failed to implement appropriate fiscal institutions and efficient public investment expenditure policy.

International Sovereign bonds have been recently used by Sub-Saharan African countries for a number of reasons. Financing infrastructure projects was the key reason for recent Sub-Saharan African bond issuance as domestic resources are quite limited to financing such long-term projects but other incentives have also played an important role in the surge for such source of funding, such as financing projects that traditional international donors have been unlikely to finance or providing a benchmark for local entities to gain access to international markets.[7]

1.1.2 Shaping the Financial Features of Bond Issuance

For a bond issuance to be successful, a number of technical and operational considerations shall be carefully assessed by the issuing State; the purpose of which is to build the best favourable terms and to avoid excessive issuance costs. When carefully prepared, the financial characteristics of the bonds could contribute to mitigating the financial and economic risks inherent to the issuance.

The first issue to address is the size of the bond, particularly the manner in which it would impact the sovereign's debt profile by carefully analysing the costs and benefits of the issuance for the issuing State.

In addition, international bonds are usually denominated in a foreign currency which creates a foreign exchange risk for the issuing State as it may lead to an increase of the interest payments and/or principal repayments in the local currency equivalent that would render the debt more costly, and in some cases, unpayable. The issuing State shall, as a result, carefully determine the currency of the issuance taking into account, for example, its fiscal revenues in the chosen currency or available financial hedging instruments to cover such risk.

Another key feature of the issuance is the maturity of the bond – a longer maturity bond further increases any risk associated to the bond, particularly the currency risk referred to above. The issuing State shall consider whether a short or a long maturity is preferable.

1.1.3 Selection of Financial Support

The success of a bond issuance clearly depends on the needs of the issuer and the investors' appetite. As a result, it is important for the issuing State to properly determine the financial structure of the proposed issuance, taking into account both its needs and those of the targeted investors. Though this can be achieved by the issuing State, issuance of international sovereign bonds usually involves a number of participants that would assist the issuing State in preparing the issuance, support, monitoring and service of the bonds.

Issuers usually appoint various investment banks which would be in charge of arranging and placing the bonds. Generally, the issuer appoints a lead manager which would arrange and place the issuance for the benefit of the issuing State. When the size of the issuance so requires, several lead managers may be appointed by the issuer (so-called joint lead managers), who will jointly arrange and place the issuance of the bonds. In addition to the supervision of the issuance, lead managers and joint lead managers: work closely with the issuer to determine the placement/issuance structure as well as the main features of the bonds to be issued; prepare, with the assistance of their legal advisers, any documentation required for the issuance; carry the due diligence of the issuer; and monitor relations with the competent financial regulatory authorities when the bonds are listed on a regulated market.

When selecting such investment banks, the issuing State shall consider their experience and knowledge of the financial markets where the bonds are to be issued as well as the currency of the issuance of the bonds. In practice, different banks would be appointed for the same issuance as the cost issuance cannot usually be supported by a single bank,[8] and such plurality of banks would, in addition, provide the issuing State with access to a larger base of potential investors.

The appointed investment banks, as well as any other investment service provider appointed by the issuer, usually form an underwriting syndicate (*syndicat de prise ferme*) which is in charge of the placement or the underwriting of the bonds to potential investors. To that end, they can organise road shows and/or one-to-one meetings to market the bonds to the targeted investors. The scope of their liability[9] would vary according to the type of investment services provided[10] to the issuing State, the markets practices[11] and the type of securities issued.

Banks are appointed by a mandate letter entered into with the issuing State, and generally cover issues such as information disclosure by the issuing State and confidentiality of the information so provided, damages payable by the issuing State to banks for any loss suffered and/or any cost paid by said banks, banks' fees payable by the issuing State, lock-up periods, conflicts of interests and designation of joint lead managers for the issuance.

In addition to such investment banks, issuers would usually appoint one or several financial institutions to monitor the investment services provided to investors after the issuance of the bonds, namely: transmission of any notifications to the holders of the bonds; payments and repayments of the interests and the principal to the holders of the bonds (the so-called paying agent); keeping of the security register (the fiscal agent); and, when applicable, calculations required for the modalities of payments of the bonds (the calculation agent). Additional support may be obtained from legal advisers, taking into account their knowledge and experience of the financial markets where the bonds are to be issued, other investment service providers or auditors.

1.2 Practical Legal Considerations Applicable to a Sovereign Bond Issuance

Though the applicable legal regime would vary from one bond issue to another,[12] a number of common legal features and considerations shall be addressed in advance by the issuing State to prepare and complete the contemplated bond issuance.

1.2.1 Shaping the Legal Structure of the Bond Issuance

With the assistance of its legal and financial advisers, the issuing State shall also consider a number of practical considerations that

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shall be addressed in anticipation of the bond issuance to ensure it meets the investors' requirements and the issuing State's needs such as: currency; maturity; public offering *vs* private placement; governing law; place of listing; interest rates; and repayment profile. Indeed, it is important for the issuer to determine at an early stage the form of the offering, the law governing the issuance, the issuance timetable as well as the terms and conditions that will govern the issuance.

First and foremost, the issuing State shall choose between a public offering[13] and a private placement of the bonds[14] to be issued. In the context of an international bond issuance, market participants tend to have a preference for private placements as they provide for less cumbersome procedures than the procedures applicable to public offerings.[15]

The issuing State shall also consider whether or not it is relevant to list the bonds on a regulated financial market or a multilateral negotiation system. International sovereign bonds have been historically listed on the Luxembourg and the London Stock Exchange. Such historical preference may be explained in part both by the rather low costs of listings in Luxembourg and London as well as the flexibility of the existing procedures. There is a trend, however, towards recognition of other financial centres such as Paris because of the impact/influence of the harmonisation of the procedures and costs at the European level.

Another key point to address is the law governing transactions. International sovereign bonds are usually governed by either English law or New York law. The issuing State shall be very careful in choosing the law that would govern the transaction, as it would determine the form of the bonds that may be issued as well as the rules and the procedures to comply with for the bond issuance to be valid. For example, securities issued in France and governed by French law are generally registered in the dematerialised form,[16] and as such are eligible for 144A placement as opposed to global (bearer) bonds issued under English law.

The issuance timetable is also a crucial point for the issuer to determine and would clearly depend on the timing requirements of each country where targeted investors are located, for example, during the Ramadan period in certain regions and after the end of June, no road shows/issuance can be organised. The issuance timetable shall include periods during which roadshows would be carried out by the issuing State. Roadshows are indeed a key element of bond issuance and shall be carefully planned in order to ensure that the issuer's representatives would be able to visit a maximum number of countries where targeted investors are located. Careful planning of roadshows would also allow the issuer to accommodate two contradictory requirements: the necessity to give very detailed information on the bond issuance to the potential investors (additional meetings may be required); and compliance with applicable selling restrictions and the principle of equal information of investors.

Last but not least, the issuing State shall also carefully consider, with the assistance of its legal advisers, the terms and conditions that will govern its relations with the bondholders upon realisation of the bond issuance. Such terms and conditions embody the rights and obligations of the issuing State and the bondholders and usually cover issues such as the form of the bonds, priority among creditors, *pari passu* and negative pledge commitments, structure of repayment of the debt, events of default and other covenants that shall take into consideration "*the specificities of the transaction, the issuer's credit rating and the needs of the parties*"[17] to the transaction.

1.2.2 Credit Rating Issues and Requirements

Though there is no legal requirement for credit rating, a key condition of the issuance is to ensure that the process of obtaining a sovereign rating is completed prior to the realisation of the issuance. Indeed, when issuing on an international market, the issuer shall first obtain a grade from one of the major credit rating agencies[18] (the "**CRAs**") to assess the credit risk of the issuer. Such credit risk assessment is all the more important when the issuance is made by a sovereign. Credit rating agencies may provide either a general assessment of the issuer's credit risk profile or focus their analysis on the proposed issuance only.

The credit risk profile of the issuer will determine the debt profile of the issuance. If an investment grade note is granted, the issuer would have access to a large number of investors and, as a result, would obtain lower financing costs. On the contrary, if a non-investment grade note is granted to the issuer, it would have access to a restricted number of investors and would obtain, as a result, more restrictive conditions (high yield, additional covenants, higher interest rates, etc.).

The European Securities and Markets Authority (ESMA) has identified[19] a number of deficiencies in the processes for producing and issuing sovereign ratings at the CRAs.

ESMA identified deficiencies and issues for improvement in the following areas:

- independence and avoidance of conflicts of interests;
- confidentiality of sovereign rating information;
- timing of publication of rating actions; and
- resources allocated to sovereign ratings.

The bond issuance shall be preceded by a detailed analysis of the issuer's financial and legal situation by the investment banks and their legal advisers. Such diligence would be more or less detailed depending on the issuer's risk debt profile and is crucial to assure the investors' confidence and reliance on the information provided in the marketing documentation. The issuer's advisers shall be very careful in performing such due diligence as it would be the basis of any action against them or can be raised by the investment banks as a defence in the event the issuer's financial situation adversely changes during the life of the bonds and results in damage suffered by the bondholders.

2. Challenges Raised by International Sovereign Bonds for Sub-Saharan African Countries

2.1 Mitigating Investors' Legal Risks

Every financial investment involves a certain level of risk for the investors, and international sovereign bonds are no exception. A key factor of the success of a bond issuance is the assurance for the investors that the potential high returns of his/her investment would not be outweighed by the risks which can be anticipated and mitigated by appropriate contractual mechanisms.

2.1.1 Jurisdictional and State Immunity Issues

International investors' lack of confidence in Sub-Saharan African national legislations and legal systems is a major issue to address when considering a sovereign bond issuance. Sub-Saharan African country bond issuance usually contains jurisdiction clauses which grant jurisdiction to foreign courts for any dispute arising out of or in connection with the bond issue. Jurisdiction is usually granted to the courts of leading financial locations such as New York or English courts, and in very rare circumstances, they contain arbitration clauses granting jurisdiction over any dispute relating to the issuance to the arbitral tribunal of a leading arbitration location such as the arbitration court of the French ICC.

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Another risk for the investors, relates to the immunity of the State. Under the State's immunity doctrine, a State cannot be sued in the courts of another State. This doctrine allows a State to claim that a foreign "court or tribunal does not have jurisdiction over it, or to prevent enforcement of an award or judgment against any of its assets".[20] Yet, as we have mentioned above, international bond issuances usually contain jurisdiction clauses in favour of foreign courts. Basically, if the issuing State claims its immunity against suit or enforcement, the bondholders would not be in a position to enforce its contractual right against the issuing State.

As a result, particular attention shall be paid to the sovereign's capacity to waive its immunity and, if an arbitration clause is provided instead, ensure that the place of arbitration is in a country which is party to the 1958 NY Convention[21] on the recognition of foreign arbitral awards as well as a waiver clause. Though it is an international customary law doctrine, issues relating to State immunities are ruled in accordance with the *lex fori* (the law of the forum), i.e. the court dealing with the immunity issue will look into its own national law, or the law of the seat of the arbitration if applicable, to decide whether immunity shall be granted or denied. Consequently, particular attention should be paid to the law of the place of resolutions of conflicts and the law of any places where enforcement of the court decision may be sought by the defendant bondholders, i.e. the location of the assets.

2.1.2 Debt Restructuring Prior to or Upon Realisation of an Event of Default

Debt restructuring is as important as the debt profile and structure of repayment of the debt under the bond. It raises a number of issues that are important for both investors and the issuing State to prevent and manage any potential or existing event of default of the issuer.

The market practice[22] is to provide for collective action clauses in sovereigns' bonds in order to anticipate any debt restructuring that may be contemplated by the issuer and/or the bondholders. Such clause allows a majority of bondholders to agree to a debt restructuring that is legally binding on all bondholders, including those who voted against the debt restructuring. Put simply, majority restructuring provisions such as collective action clauses "enable a qualified majority of bondholders to modify key financial terms, and to make that decision binding on all holders of a given bond issue".[23]

The purpose of these clauses is to address issues relating to the "majority" requirement when a renegotiation of the debt is contemplated by the parties. Absence of such clause in the contractual bond documentation allowed minority bondholders to hold out majority bondholders and to force the issuer to liquidate even in cases where debt reorganisation is a better route.

They have, however, raised some issues that have led market participants to reconsider their legal regime and to make a number of proposals, including in particular the IMF.[24]

The IMF is consistent with a number of the features of the clauses that were recently adopted by the International Capital Market Association (ICMA).

They introduce:

- a new voting procedure that allows decisions to be taken by a majority of creditors across all bond issuances, without the need for an issuance-by-issuance vote. This will severely limit the ability of holdout creditors to avoid a restructuring by obtaining a large share of the bonds in any one issuance; and
- a proviso into the *pari passu* clause that clarifies that this clause does not require ratable payment to all creditors, but, rather, only equal legal ranking. In other words, it would only prohibit actions that result in legal subordination of certain unsecured creditors over others.

2.2 Appropriate Management and Use of International Sovereign Bonds by African Sovereigns

2.2.1 Ensuring that International Bond Issuances work for Local Development

The issuing State will have to ensure that the bond issues meet the capacity building needs (macroeconomic frameworks; improved prudential frameworks to monitor all relevant risks, implementing a medium debt strategy; strengthening debt management; and monitoring capacity).

International institutions such as IMF/World Bank may provide for technical assistance, in such respect.

The issuing State shall equally verify the appropriate use of the proceeds of the issuances (clear plan to use the proceeds and appropriate institutions).

2.2.2 Increasing the Attractiveness of the Continent for International Investors

As a conclusion, it is worth noting that Sub-Saharan African countries should work on the following factors to develop the level of sovereign bond issuance in the continent:

- improve economic growth potentials;
- eradicate corruption and implement stronger institutions;
- reduce deficit;
- foster financial market development (local); and
- promote best practices (information disclosure and outreach to potential investors).

Endnotes

1. In the '90s, only the Kingdom of Morocco and Tunisia had regular access to international capital markets in Africa (International Sovereign Issuance in Africa 2013-14: A Rating Agency Perspective, Moody's Investors Service, Oct. 8, 2013).
2. Countries such as Cameroon, Angola, Kenya, Tanzania, Uganda and Mozambique are expected to issue inaugural bonds on international markets within the next few years (International Sovereign Issuance in Africa 2013-14: A Rating Agency Perspective, Moody's Investors Service, Oct. 8, 2013).
3. Collective Action Clauses in International Sovereign Bonds, Yan Liu, August 30, 2012, extract from the paper on "The Design and Effectiveness of Collective Action Clauses".
4. For example, in some cases, access to international capital markets may strengthen macroeconomic discipline and favour transparency and structural reforms as a result of the increased scrutiny by international market participants.
5. Access to international markets implies, for the issuing State, access to a larger database of investors.
6. International sovereign bonds are usually denominated in a foreign currency such as US dollars or Euros (please refer to our discussion below).
7. For example, the 2001 international bond issuance by Nigeria aimed to ensure Nigeria's presence in international markets, to attract foreign direct investment and to provide a benchmark for Sovereign and national corporate bond issuances.
8. Banks shall comply with the regulated capital costs requirements as determined by the McDonough Ratio (which replaced the Cooke Ratio in 2006) set forth by the Basel Accord and which calculates the amount of capital a bank should have as a percentage of its total risk-adjusted assets. It aims to determine a minimum capital adequacy standard that banks should maintain in case of unexpected losses.

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9. They can be jointly liable, jointly and severally liable or severally liable to the issuing State.
10. Relevant investment services comprise underwriting, guaranteed placement and non- guaranteed placement.
11. European markets usually work on the basis of the joint responsibility of joint lead managers as opposed to US ones which operate on a several basis.
12. Such legal regime is, indeed, determined both by the law governing the transaction and the regulations of the financial markets where the bonds are to be issued.
13. In a public offering, the issuer publicises the upcoming bond issue, provides the timeframe and platform for which bids will be accepted, and provides any additional guidelines or details related to the bond issue.
14. Private placement provides funding through direct negotiation with one or a select number of private financial institutions.
15. In France, for example, public offerings are subject to a number of formalities which include for the issuers to prepare a prospectus which shall be approved prior to the offering by the French Financial Market Authority and to obtain prior approval from the same Authority of any marketing documentation (*documentation à caractère promotionnel*).
16. French Monetary and Financial Code, art. L. 211-3.
17. M. Sébire, R. Ferrère et V. Tessler, Documentation de l'emprunt obligataire, Revue de Droit Bancaire et Financier n° 1, Janvier 2014, dossier 4.
18. Standard & Poor's (S&P), Moody's, and Fitch Group.
19. Press release ESMA/2013/1790.
20. Orrick Guides, State Immunity: An Overview.
21. 1958 New York Convention on the Enforcement and Recognition of Foreign Arbitral Awards which has a restrictive approach to State immunity, please see Ashurst Quick Guides, State Immunity: An Overview.
22. The IMF recommends the use of collective action clauses in international sovereign bonds, IMF, Collective Action Clauses in Sovereign Bond Contracts – Encouraging greater use; Policy Development and Review, International Capital Markets and Legal Department, approved by T. Geithner, F. Ganviti and G. Häusler, June 6, 2002.
23. IMF, Collective Action Clauses in Sovereign Bond Contracts – Encouraging greater use; Policy Development and Review, International Capital Markets and Legal Department, approved by T. Geithner, F. Ganviti and G. Häusler, June 6, 2002.
24. IMF Supports Reforms for More Orderly Sovereign Debt Restructurings, IMF Survey, October 6, 2014.

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