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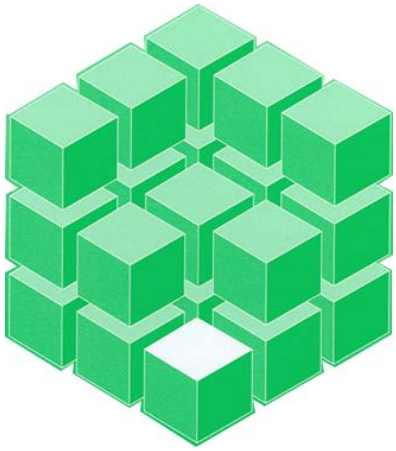
UNITAR TRAINING PROGRAMMES IN THE LEGAL ASPECTS
OF DEBT AND FINANCIAL MANAGEMENT

A NEW APPROACH TO DEBT MANAGEMENT



Document No. 21

A NEW APPROACH TO DEBT MANAGEMENT

Papers written following a UNITAR Seminar on
"The Legal Aspects of Debt and Financial Management"
for Officials from the Nigerian Debt Management Office
(Geneva—Switzerland, 6 to 10 December 2004)

GENEVA, January 2005

Other documents in this series:

Document No. 1: Debt Re-structuring (February 1992).
Document No. 2: Recommendations of Participants (March 1992).
Document No. 3: Good Debt Management Pays (January 1993).
Document No. 4: Negotiations in Debt and Financial Management (December 1994).
Document No. 5: The Role of the Lawyer in External Debt Management (October 1995).
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PREFACE

This publication has been written following a UNITAR seminar which was organized for the Nigerian Debt Management Office (Geneva – Switzerland, 6-10 December 2004) on the 'Legal Aspects of Debt and Financial Management'. This seminar included 16 officials from the Nigerian Debt Management Office as well as a panel of distinguished speakers to moderate the discussions on various themes pertaining to debt management and structuring international financial transactions.

Having worked in the legal aspects of debt and financial management for some years now, the Crown Agents commissioned UNITAR to conduct a national seminar to discuss and look at specific issues of relevance to Nigerian debt managers. As part of this seminar, ten separate themes were chosen for discussion (see Seminar Information Note, Annex I). The broad aim of this seminar was to expose Nigerian debt managers to the importance of *legal aspects* in the borrowing process in general and in debt management in particular. The aim was also to prepare Nigerian debt managers to work proactively in multidisciplinary teams for structuring financial transactions, involving lawyers and their expertise at the right time. More importantly, this seminar provided an opportunity for the Nigerian participants to reappraise the legal basis of their financial arrangements which have contributed in no small measure to the debt burden of the country.

This document contains four separate papers, written by the seminar speakers. Some papers are more generic and treat the problematic of economic development as well as structuring and negotiating international financial transactions in a broader perspective. Other papers deal specifically with the Nigerian case pertaining to legal aspects and public finance. Despite this variance, it is hoped that this document will benefit not only Nigerian debt and finance managers but also officials handing debt portfolios of other developing and emerging economies. Needless to say, this document is also aimed at policy makers and negotiators.

Last but not least, I wish to thank Prof. Christian Comeliau, Mr. Alexander Troller, Prof. Bolaji Owasanoye and Dr. Aboubacar Fall for having contributed papers in this edition of our document series.

I hope that this document is useful as well as challenging to the readers.

Marcel A. Boisard
Assistant Secretary-General of the United Nations
Executive Director of UNITAR

PAPER 1

RETHINKING DEBT AND FINANCIAL MANAGEMENT IN THE CONTEXT OF THE DEVELOPMENT PROCESS

By Professor Christian Comeliau

Introduction

This paper touches upon three distinct yet interrelated areas, namely: (1) External borrowing and the development process; (2) Current developments in international finance and implications for Nigeria; and (3) Multilateral sources of funding and the role of the major International Financial Organisations: the example of the World Bank. Each of these areas will be treated one by one below.

1 – External borrowing and the development process

The process of indebtedness is supposed to be undertaken primarily in favour of development of the borrowing country. So what exactly is development? I shall not try to compare various theoretical definition and at the same time emphasize two major aspects of the development process.

The first aspect is that, at least in a seminar of this sort, "development" must be understood in its most general meaning: that of the *"progress of the society"* (as a modern translation of the Enlightenment idea that "the society of tomorrow may be better than the society of today"). In this context, development is a *multidimensional* phenomenon: it is not only economic and financial, but it is also social, cultural, environmental and political. It also has to be regarded as a *process of choice*, by the community concerned, regarding the components of the desired progress: development is not — and should not — be perceived as a uniform and homogeneous process of change in one unique direction. Regarding the economic aspects of this progress, especially, collective choices must be pronounced about the rhythm, the structure, the content and the time horizon of growth; about income and power distribution among social groups; about the comparative role of the State, the market and the civil society; about the modes and the degree of opening-up of the economy; and so on. These choices must be organised by each of the communities concerned, at various levels (not only national, but also local, regional and global).

The second aspect is that today, the development process is taking place in the general context of "globalisation": this context is defined, mainly, by the accelerated relations of exchange at the global level, the emergence of new actors, and the establishment of new modes of regulation. The emerging "world system" is predominantly economic : it tends to spread a more or less uniform *model of development* across the planet, which would reproduce in all countries the main features of the historical experience of the industrialised countries (these

features being in particular : accelerated technology, productivity, expansionism, and predominance of market mechanisms).

The confrontation of the two basic aspects above raises a fundamental issue about the meaning of "development": is it primarily a social progress with components chosen by each community, or is it simply synonymous with the expansion of the world system and of its associated development model through all countries? And if it is both, are these meanings compatible or not? Clearly, in today's world, there is no uniform answer to these questions; and that is why development *and development choices must be conceived and organised primarily as a political rather than a technological process*. The process of indebtedness, the role of debt in development and the issues of debt and financial management are a part of these political phenomena: who decides about indebtedness? What are the objectives? Who are the beneficiaries and who is supposed to pay for the reimbursement of capital and interest?

In this framework, it is important to recall that financial capital is only one development factor among a set of others (including natural resources, equipment, infrastructure, human resources, technology, etc.), and that domestic saving usually provides a major part of these financial resources, to which external resources should be regarded only as additional resources. External borrowing is only one source of foreign capital among others that includes mainly foreign direct investment (FDI) and official development assistance (ODA). Authorities in charge of development policies are supposed to make a systematic "social cost/benefit analysis" of the use of these external financial resources, taking into consideration the specific objectives of the national (or regional) development policies.

The above considerations may seem self-evident: however, it becomes more and more obvious that they are almost completely neglected in the predominant technocratic philosophy on debt issues.

Coming to these debt issues, if one accepts their *political* nature, it also becomes evident that their solutions must be perceived in *economic* terms, in order to maximise the implementation of development objectives at the lowest social cost. The economic rule in this perspective stipulates that external borrowing (as an addition to domestic resources) may be entirely rational and desirable, provided that the development objectives and priorities be clearly defined and that the borrowed resources be primarily allocated so as to generate sufficient resources in the future for the reimbursement of capital and interest that is due. The basic question raised in the field of debt management therefore becomes: *how does one simultaneously and consistently master the development process and the debt and financial management issues?*

The history of debt in the world and in developing countries during the recent decades may appear somewhat far away from those basic principles. Let's just think about the origins of the debt crisis in the seventies: accelerated and simultaneous growth of demand and supply of financial resources as a result of oil shocks and other changes in the international economy. Let's also think about the outcome of this uncontrolled growth of indebtedness: proliferating structural adjustment programs in the eighties and the nineties, social and economic dislocations, decelerating development, increased poverty and dependence for a majority of countries. The resulting costs of the adjustment process (in economic, social, environmental and political terms) are considerable, and it becomes at the same time extremely urgent and extremely difficult for

those countries to restore the necessary predominance of development over adjustment in the future. That is the main challenge of the present "development/debt question".

2 - Current developments in international finance and implications for Nigeria

A serious study of this broad set of issues would require an examination of a large list of data, and a comparison of this data with detailed information about the present development problems of the Nigerian economy. Such a study was obviously not possible in the short time available for the Seminar in question. I shall limit myself to referring very briefly to some major changes in the field of international finance, and more specifically to raising some basic *questions* (rather than implications) to the Nigerian development policy makers about those changes.

(1) There has been a major announcement regarding the so-called "international development policy" when the United Nations proposed the list of the *"Millennium Development Goals"*: This list includes quantitative objectives in the fields of poverty alleviation, primary education, gender equality, infant mortality, maternal health, AIDS and other major epidemics, sustainable environment, as well as proposals for global partnerships in finance, trade, technology, health, debt management and reduction, etc. The major question addressed to Nigerian policy makers in the new context resulting from this declaration is therefore: what is your own assessment of these Millennium Development Goals, and *what is your translation of these international goals in terms of national development objectives in Nigeria for the following decade?*

(2) *Poverty alleviation* has become a major slogan of international policies, in terms of development goals, as well as for new instruments in international finance. Examples are: recent discussions among donor countries about ODA; the proposed International Financial Facility; the IMF Facility for the Reduction of Poverty and for Growth; and more generally, the recent discussions and proposals for the replacement of Structural Adjustment Programs through various strategies and procedures of poverty reduction. There is even a preliminary discussion in international forums in view of promoting various forms of international taxation, with poverty alleviation among the key priorities. One of the major criticisms about these poverty reduction strategies, however, is that such strategies are targeted towards the effects or the results of poverty, rather than towards the *causes* – and especially the "systemic" causes – of poverty. The question for Nigerian development policy makers regarding these perspectives is: *what is your own view on these proposals and, more specifically, on the very notions of poverty and poverty alleviation in an African and Nigerian context?*

(3) Regarding the recent changes in the *structure of international financial flows*, it appears that FDI (foreign direct investment) flows remain heavily concentrated among industrialised countries, and that the flows towards the developing world are extremely selective in favour of less than a dozen countries. The impacts of those flows must be carefully debated in terms of development : there may be a positive impact, at least in terms of economic growth and export revenues (usually less in terms of employment), but the impact is less clear on the balance of payments and may be negative in terms of overall dependence of the country. On the other hand, ODA global flows (Official

Development assistance) have been constantly decreasing up until recently, and the changes in their structure have certainly not been favourable for Sub-Saharan Africa. Three basic questions to Nigerian development policy makers are therefore: (1*) Is it possible for Nigeria to reverse these negative trends of selectivity of the external financial flows, and if so, by what means?* (2) *What is Nigeria's own preference in the use of external financial resources* (taking into account the country's cost/benefit analysis of the three categories of these flows) as compared to the specific objectives of the country's development policy for the future? and (3) Do you consider that in the present context, the policy priority, for Nigeria and for developing countries, has become to act collectively in order *to change the commercial and financial rules of the global economy,* rather than to ask permanently for an increase in the flows of financial resources towards developing countries?

(4) Finally, there have been many international discussions in the recent years on *possible strategies for debt reduction or even debt cancellation*. Still, the present modalities of debt negotiations (around the Paris Club or the London Club, in particular) confront clubs of creditor countries to each of the debtor countries taken separately: there have not been any examples of associations or even alliances of debtor countries in debt negotiations. The result must be considered, of course, in terms of comparative strength and weaknesses of the various parties in the negotiations. The question is: why is this so? And the particular question to the Nigerian authorities in debt and financial management is: given the importance of the Nigerian economy in the African context, *is it feasible and desirable to develop a Nigerian initiative to organise an alliance among African countries for debt negotiations?*

3 – Multilateral Sources of Funding and the Role of the Major International Financial Institutions: the Example of the World Bank

This topic is very broad, and requires the discussion of very extensive literature. My objective is more modest: it is only to illustrate how the international financial institutions function — especially the Bretton Woods institutions (i.e. the International Monetary Fund and the World Bank Group, with their voting power distributed among countries, in proportion to their level of income) — with the World Trade Organisation being among the dominant public actors and rulers of the world system described above. I shall try to suggest how the example of the World Bank emphasizes some of the basic challenges for national and international development prospects that are raised by the emerging world system.

Before discussing the case of the World Bank, I would like to summarize the present "development philosophy" of the world system through a short assessment of what has been called the "Washington consensus". I am conscious of the fact that many commentators consider that the time of this consensus is now behind us and that we should try to identify the main features of a "post-Washington consensus". However, I do not personally believe in this change, and I think that the lines of this international development philosophy, as described under this wording ten years ago remain basically valid. What are these lines?

The "Washington Consensus" does not result in a formal international agreement: the formula was used at the beginning of the nineties by an American economist, John Williamson[1], to describe and summarize the rules of macro-economic and macro-financial management established by the Bretton Woods institutions (in accordance with the American Treasury, hence the reference to Washington D.C). Those rules are imposed on the majority of developing countries, but they are also "internalised", it could be argued, by the majority of countries, including industrialised nations. The ten principles of management proposed as a summary by John Williamson are related to the balance of payments management (financial liberalisation, single exchange rate, encouragement of FDI, and trade liberalisation), to the fiscal system (fiscal discipline, priorities in state expenditures, and tax reform), and more broadly to the necessary predominance of market mechanisms (privatisation, deregulation, and property rights). I will not present these ten rules in detail as in Williamson's presentation; instead I prefer to insist more on the development perspective involved in this so-called consensus, and I will personally summarize this perspective through the following five principles[2]:

- long term development is basically assimilated to limitless GDP growth;
- "social" development will automatically follow from GDP growth through the so-called "trickle-down effect";
- countries should maximise their engagement in international trade and relations;
- market principles should be systematically preferred to State regulation mechanisms, and the State should be considered as "subordinate" to market rules; and
- there is only one development model that is rational and desirable, in the line of the experience of developed countries.

Given these principles, one can understand why international institutions are so important in the present practices of the world system. In actuality, the role of the "financial" multilateral institutions like the World Bank in the development process is not primarily financial. While providing information, technical aid and finance, these institutions consider themselves primarily as the authorised sources of a sort of official "development doctrine" that should be generalised to all countries.

The World Bank is a fascinating example of such a concept. The speeches of the successive presidents of the World Bank, about their strategies, are full of slogans regarding priorities such as "basic need satisfaction" (Mr. McNamara in the seventies) and "poverty alleviation" (Mr. Wolfensohn).

In fact, the World Bank's official definition of the word "development" is precisely defined in Article 1 of the I.B.R.D.[3] statutes, which mention the World Bank's basic objectives as the following:

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[1] See : John WILLIAMSON (ed.) : *The Political Economy of Policy Reform*, Institute for International Economics, Washington D.C., 1994.

[2] See a special issue of the *International Sciences Journal (*UNESCO), December 2000, n° 166, on « The development Debate : beyond the Washington Consensus », and especially my own paper in this issue on « The limitless growth assumption », pages 457-465.

[3] International Bank for Reconstruction and Development, which is today the main component of the « World Bank Group ». These statutes have been written and voted in Bretton Woods in 1944, and the article 1 has not been modified since then.

- "to assist in the reconstruction and development" (with the word "development" meaning essentially "the development of productive facilities";
- "to promote private foreign investment"; and
- "to promote the long-range balanced growth of international trade".[4]

However, one will notice that poverty is not mentioned anywhere in these founding texts. Of course I am not accusing the World Bank of omitting this information. I am only trying to identify the official *priorities* of the World Bank, as defined and imposed by the founders to the members states — and consequently to the staff of the World Bank. I also believe that the texts are very clear. This does not imply, of course, that the role of the World Bank should be considered as basically negative. It only means that, if the development process is to be regarded as a process of *choices, the autonomy of national authorities is seriously limited* by these institutions and the rules of the present world economic system.

[4] I propose a broader analysis in : Christian COMELIAU, *The Impasse of Modernity. Debating the Future of the Global Market Economy,* Zed Books, London and New-York, 2002.

PAPER 2

PREPARING FOR THE NEGOTIATION OF INTERNATIONAL FINANCIAL TRANSACTIONS FROM THE PERSPECTIVE OF STATE BORROWERS FROM DEVELOPING COUNTRIES[5]

By Mr. Alexander Troller

Independent States, their agencies and instrumentalities, State-owned corporations and other State-controlled companies are regular players in the international financial markets. All year round, new loans are negotiated and existing borrowings restructured, sometimes following weeks, if not months, of negotiation. When asked for their understanding and definition of the *negotiation phase* for a new contract or for a debt restructuring agreement, lenders and borrowers, be they from G8 member States or from developing countries, frequently point to the agreement signing ceremony at the Ministry's or company's official cocktail room or to the phase starting with the welcoming of the lender's delegation at the airport and ending when the ink is dry on the contract execution copies.

There are as many definitions of negotiation as there are negotiators on the globe. *Negotiation* has been defined as *"the process of submission and consideration of offers until an acceptable offer is made and accepted"*[6] or *"the deliberation, discussion, or conference upon the terms of a proposed agreement; the act of settling or arranging the terms and conditions of a bargain, sale, or other business transaction"*.[7]

To negotiate has further been described as *"to transact business; to bargain with another respecting a transaction; to conduct communications or conferences with a view to reaching a settlement or an agreement. It is that which passes between parties or their agents in the course of or incident in the making of a contract and is also conversation in arranging terms of contract"*.[8] More generally, to negotiate is also understood as *"to communicate or confer with another so as to arrive at settlement of some matter; to meet with another so as to arrive through discussion at some kind of agreement or compromise about something"*.[9]

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[5] Paper written for UNITAR by Alexander Troller, attorney-at-law, Lalive & Partners (www.lalive.ch) and UNITAR Senior Special Fellow, further to his participation as speaker in a UNITAR workshop held in Geneva from 6 to 10 December 2004 for Officials from the Nigerian Debt Management Office on "The Legal Aspects of Debt and Financial Management". The author expresses his thanks and gratitude to Domitille Baizeau, Solicitor (England & Wales), Lalive & Partners, for her patient revision and corrections.

[6] Gainey v. Brotherhood of Ry. And S.S. Clerks, Freight Handlers, Exp. & Station Emp., D.C.Pa., 275 F.Supp. 292,300, in *Black's Law Dictionary*, 6th ed., 1990, p. 1036.

[7] *Black's Law Dictionary*, 6th ed., 1990, p. 1036

[8] *Black's Law Dictionary*, 6th ed., 1990, p. 1036

[9] Al Herd, Inc. vs Isaac, 271 Cal.App.2d 749, 76 Cal.Rptr. 697,699 in *Black's Law Dictionary*, 6th ed., 1990, p. 1036

The common denominator of these definitions is the direct communication between the parties, i.e. (in the case of international loan agreements) when lenders and borrowers meet face to face, talk over the telephone, exchange e-mails, faxes or mail in relation to the contemplated transaction. Yet, the negotiation cycle should cover a broader time range and start well before any communication is established between borrowers and potential lenders.

From a borrower's perspective, the negotiation phase should begin with an **analysis** of the actual **needs** relating to a specific project and of the ways to satisfy those needs. What is required to finance this project? Is cash the only alternative to implement it? Can different funding sources be considered? In day-to-day life, a thorough analysis of one's financial needs is probably the best way to save money and what is true for individuals is also true for States.

The prerequisite for the analysis of a borrower's requirements is to be able to paint a clear picture of its assets, revenues and liabilities. On the income side, in order to avoid over-borrowing, a debt management office should have full access to complete and accurate data pertaining to the country's sources of income. This means not only a close coordination between the relevant ministries and State agencies (Ministry of Finance, Central Bank, etc.), but also a full transparency of State-owned or State-controlled corporations ranking as the country's primary earners of foreign income (e.g. exporters of commodities).

With respect to the State's indebtedness, adequate debt recording systems and procedures are necessary to maintain accurate and complete loan records. As for the country's income, a good flow of information among the debt agencies is a precondition for a coherent debt management. The best possible policy will remain useless if different agencies apply different criteria to similar situations, simply because they are unaware of the agenda and problems faced by their neighbouring offices. As a result, while certain countries will insist on maintaining several debt management offices or agencies to handle a country's debt portfolio, it is necessary for them, at the very least, to share their information, experience and knowledge, so that a comprehensive inventory of the country's loans remains available at all times to the public debt managers. Failing to centralise and share the relevant information may result in valuable experience and debt management skills being lost, to the country's detriment. Indeed, where precise information on a country's debt portfolio is available at all times, this will assist policy makers in their forecasts for the nation's debt servicing. This will, in turn, reflect positively on the risk profile of future loans and the restructuring of existing borrowings.

The next crucial stage for borrowers will be **to determine their goals** for the upcoming negotiation. How much funding do they want to obtain? In what form? At what cost? What rate can they reasonably claim for a new borrowing? How much can they afford not to obtain, i.e. what are their minimal requirements? What is the maximum interest rate they can afford to pay on the loan? What is the minimum rate that they can claim at the inception of bilateral talks with the lender whilst still being considered realistic and credible negotiators? Can they reasonably expect a fixed interest rate for all or part of the financing? If not, should they consider derivatives to hedge their risk? Can specific caps be bought at a reasonable price to protect themselves against a rise in market rates? Can floors be purchased at a fair price in case of sudden drop in the market price of the commodity serving as principal repayment source and/or underlying collateral for the loan? The purpose of establishing such precise goals is to set clarity in the negotiator's

mind and provide useful guidance in the verbal exchange during the more hectic phase of the negotiation.

While each situation and negotiation calls for a specific preparation, general borrowing guidelines and policies at State level can prove helpful, in particular when debt management is spread over several agencies. The following are examples of useful policies that should be put in place.

First, having a central approval authority can help avoid over-borrowing by monitoring the external debt requirements of all State agencies and instrumentalities. Secondly, setting maximum debt service ratios will prevent the bulk of the income generated by a particular sector from being earmarked to the repayment of existing borrowings – and may prevent the taking of unnecessary new loans. Thirdly, the requirement for a feasibility study will distinguish sustainable projects from hazardous ventures. Borrowings for commercially viable activities should be for the private sector to undertake. Even where such projects cannot be funded from the domestic market, foreign borrowings by the private sector should not be supported by State guarantees, notwithstanding the standard requirements from certain commercial lenders. In that respect, a positive track record of a country's commercial borrowers should suffice to convince these lenders that a State guarantee will not improve the risk profile of a loan, in particular when the country's national debt rating is several level beneath the borrower's own standing. This is important because, even when they remain uncalled, State guarantees increase the country's contingent liability and therefore indebtedness ratio. As a result, the issuance of public guarantees for private sector projects should be restricted to exceptional circumstances.

The most important phase, concomitant with the whole negotiation process, is the **gathering** of **information**. Information is a negotiator's primary tool and weapon. What are the counterparts' strengths? What are their weaknesses? What are their interests? Is the lender particularly desirous to reach an agreement for commercial and/or political reasons? What information is readily available? What information can be accessed with a reasonable research effort? What information must be gathered before commencing any talk? Who will be the negotiating partners? Who are their dominant members? What should be known and understood about their cultural environment and customs, or even their personal background? What about their and the borrower's political context, if relevant?

Obtaining answers to these questions prior to facing a negotiating counterpart will give any negotiator a significant edge during the bi or multilateral talks to be held. On the contrary, it will most likely create a very unsavoury impression on the lender if the borrower is obviously unaware of the lender's options, basic criteria and constraints, all the more if these are posted on the lender's website, as is the case for certain institutional lenders. Yet, every year, numerous delegations of borrowers, and not only from developing countries, either visit or host lenders' representatives and reveal their lack of preparation by requesting loans which do not fit the lender's corporate chart or purposes. These situations are most embarrassing for the borrower, who will have wasted the lender's time and jeopardized the level of attention that may be received when submitting a new request. Information on the other side's culture is equally important and best known in advance. Smiles and nods can be construed as signs of approval and progress in the Western hemisphere. A seasoned negotiator will know that the same is not necessarily true in Asia. Learning of these differences is essential for the interpretation of a

counterpart's indirect communication expressed through the representatives' body language, the environment or protocol chosen by the counterpart, or simply by reference to matters that are not transaction specific. Missing a hidden message in what only appeared to be an innocuous remark can have costly consequences when negotiating multi-million transactions.

Having gathered sufficient ammunition, a negotiator will start preparing for the battle and define a field strategy. This **planning** phase is important as it will enable the borrower to verify that all issues at stake are being covered. A calm and contact-friendly setting should be preferred as a venue for the talks. When a team comprises several members from different hierarchical levels and/or with distinct technical skills, it may be useful to define or distribute different characters among the members of the group in the event that role playing becomes advisable during a more difficult phase of the negotiation. Even if no specific plan of action can be predetermined, it is of utmost importance to avoid any cross-interference amongst the group members in order to offer a coordinated front to the counterpart. Flawless communication and coordination among the members of the same team are thus necessary prior to the strict negotiation phase.

The **negotiation** as such, or more correctly, the exchange and communication stage between the parties, will as a rule be the shortest phase in the whole negotiation process. A number of guiding principles can be applied (although the list below is by no means exhaustive).

First, silence is gold, and for good reasons. Listening skills are among the most important tools in any negotiation, whether commercial, diplomatic ... or private! They allow the collection of crucial information on one's counterpart. Since knowledge is power, it is not always the best tactic to speak first: the surprise effect – and perceived advantage - of opening fire first will soon vanish. Furthermore, listening should be understood in the broad sense, i.e. being attentive to all forms of expression: a counterpart's direct language but also the body language, the environment and the cultural setting.

Secondly, the quality of the communication is hugely important for the success of a negotiation. Good communication implies that each party actually understands and, above all, indicates to the other side that it understands, what the counterpart is saying. Accordingly, where the lender has just made a proposal, he may physically hear a response but will not actually be listening if the borrower answers immediately by making a counterproposal (this may be different if the borrower indicates an unconditional approval). The lender's mind will still be concentrating on the point that he has just tried to make. As a result, one should wait before making a counterproposal and first acknowledge what has been said. To show one's attention, one may move the head forward, a common negotiation and communication strategy – at least in Western cultures – unless one is about to disagree or attack. In addition, one should usually focus on one issue at a time, in a structured way towards reaching the overall agreement; this will be more efficient that purporting to move directly to a global formulation of a final solution.

Thirdly, when near to reaching a final agreement, it is not advisable to conspicuously slip into the basket last-minute additions; should your opponent notice, this may ruin the confidence built over the long negotiation process. The parties should also retreat before signing the final agreement in order to enable them to cool down and review the final draft before signature

against their initial aims, the sight of which may have been lost in the heat of the verbal exchange with the other party.

Last but not least, the negotiation phase does not end with the signature of the contract. A carefully managed and well attended debt portfolio is an asset for a country's growth and development. It is during the **performance** of an agreement that borrowers pave the way for future transactions. The fulfilment of the primary repayment obligations is at the centre of the borrower's responsibility. Accordingly, if and when it appears that meeting the full repayment obligations in a timely fashion may become impossible, the lender should immediately be informed of the upcoming default, rather than be caught by surprise.

In conclusion, whilst preparation is key, it is clearly by complying with the covenants, representations and warranties contained in the loan agreement that a borrower will polish its image in the financial community, build a favourable track record, and thus acquire a primary asset for … the next negotiation! It is hence vital for borrowers not to exceed the pre-agreed indebtedness ceilings, to provide the lender with the quarterly or annual reports requested under the loan agreement, and otherwise respect all ancillary obligations under each contract. Lenders do talk to each other. Having a good reputation as a reliable borrower and business counterpart will inevitably be the most powerful magnet for new lenders and thus set the scene for a much easier negotiation when it comes to the next financial transaction.

PAPER 3

THE NIGERIAN DEBT MANAGEMENT OFFICE: ACT NO. 18 OF 2003

By Professor Bolaji Owasanoye

Introduction

Establishment of debt management offices is regarded in contemporary times as a best practice in view of the importance of external debt management to development. The practice cuts across developed and developing nations who desire to remain on the cutting edge of sound fiscal and external debt management practices.

The World Bank reports that several countries are undertaking reforms in external debt management as a measure of management of the economy.[10] Reformers in the late 80s and early 90s are said to include developed countries like Belgium, Norway, New Zealand, Ireland and Sweden. At the same time, reforms are underway in Argentina, Brazil, China, Columbia, Korea, Mexico, Poland and Thailand.[11]

This article intends to review the enabling statute of the Debt Management Office (DMO) of Nigeria in the light of the debt crisis which led to the establishment of the DMO. It will consider its structure, functions and the mechanism used by the law to address the existing gaps in external debt management within Nigeria's federal structure.

Prior to the establishment of the DMO, debt management functions were shared between the Central Bank of Nigeria and the Federal Ministry of Finance. The period was characterised by lack of co-ordination, poor data and information management, poor record keeping,[12] gross lack of capacity on the part of desk officers, etc. Furthermore, the contracting of new loans was mired in controversy, mystery and cultic attitude by the various tiers of the federation in particular the agencies of the federal government and the states. New loans were concluded and copies of the agreements may never be - deposited with the office of the Federal Attorney-General and Minister for Justice. Indeed, negotiating teams were ad hoc and could be selected in a spur of the moment.

These and many more negative practices fuelled corruption and compounded the management of the external debt of the nation. Needless to say, the debt crisis worsened by political instability which marked the period 1990 – 1998. Until the return of the country to civilian rule in 1999 it was not certain that the country could imbibe best practices in external debt management in view of the preoccupation of the governments of the period with political matters.

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[10] See www.worldbank.org/fps/
[11] Ibid.
[12] Until the establishment of DMO the country could not produce all the loan agreements it had signed and for which Federal Government guaranty had been issued.

In tandem with the best practices noted above, the Nigeria Debt Management Office (DMO) was established in 2000 two years in advance of its enabling statute. The move was to address immediately in a refreshingly different but sustainable way Nigeria's lingering debt crisis which the government of President Olusegun Obasanjo inherited in 1999.

The DMO Act is divided into eight parts, which cover preliminary matters, establishment provisions, functions, staff, financial provisions, external borrowing, government guarantee and miscellaneous matters.

The statute of the DMO indicates that debt management (external and internal) is a portfolio of the office of the Vice President (VP) because he is the chair of the Supervisory Board of the DMO, although several key functions remain the responsibility of the Minister of Finance. This arrangement is in line with the existing policy of government and some statutes which have put certain key aspects of the economy under the office of the Vice President. For example, the VP chairs the National Council on Privatization, which supervises the work of the Bureau for Public Enterprises on Nigeria's privatization programme[13]. Therefore, placing debt management under the VP allows for synergy building in the management of certain key areas of the nation's economy, especially since privatization is a key factor in the strategy to get out of the debt bind.

The Supervisory Board

The Supervisory Board of the DMO comprises ex-officio members, key to the subject of debt management. These are the Minister of Finance who also serves as Vice Chairman; the Attorney-General of the Federation; the Chief Economic Adviser to the President; the Governor of the Central Bank; the Accountant-General of the Federation; and the Director-General of the DMO, who serves as secretary to the Board. The Board is fairly balanced except for the lack of representation from the capital market and the civil society cum non-governmental organizations to serve the public interest. Considering the significant functions of the DMO with regard to internal borrowing, the Director-General of the Securities and Exchange Commission, which oversees the operations of the capital market, ought to be a member.

The functions of the Board as prescribed by section 8 of the Act include approving policies, strategies and procedures for the Office for the achievement of its objectives and to review, from time to time, the economic and political impact of domestic and external debt management strategies. It is important that the Board and the DMO bear in mind not only the economic but also the political impact of strategies adopted in the management of the debt problem. This is a reality which must be balanced against the legal and economic issues arising from the debt crisis. Since the return of civil rule to Nigeria, there has been no year in which the National Assembly did not vehemently oppose Executive proposals in the budget for satisfaction of external debt. Regrettably, such allocations annually deny the country of much needed resources for development, yet the country cannot simply ignore its international obligations. In a nutshell, paying up and failure to pay up both have serious political consequences of "a catch 22 situation"[14]. Diplomatic balancing and careful debt management strategies that are well thought-out in advance are the only solutions.

[13] See Guidelines on Privatisation issued pursuant to Privatisation and Commercialisation Decree No.28 of 1999.
[14] For the fiscal year 2005 a whopping $30 billion is the estimated allocation for external debt service.

The Board is empowered by section 33 to make regulations for the operation of the Act. Specifically, it is to make guidelines, with the approval of the Minister, for obtaining external loans, guarantees, lending to public bodies, and on any other matter that it may deem fit in each circumstance. The incongruity here is that the Minister is a member of the Board, yet the Board, chaired by the Vice President, has to seek the Minister's approval. Furthermore, the section conflicts with sections 6(h), which gives the DMO the duty to advise the Minister on terms and conditions for borrowing, and section 27, which gives the National Assembly the power to approve from time to time the terms and conditions for negotiating and accepting external loans.

Of more importance, however, is that the guidelines are expected to deal with crucial matters left out of the Act, such as the borrowing limit or ceiling on external borrowing in any fiscal year or any economic cycle; purposes for which external loans may be obtained; the source(s) from which the country may borrow; and the timing. Besides, it is expected that something will be said of the purposes for which foreign economic aid and grants may be obtained, bearing in mind the distortions caused to the economy by foreign aid in the past.

Functions of the Debt Management Office

The functions of the DMO are quite extensive and therefore, specific commentary is necessary. The wide functions are understandable in the light of Nigeria's harrowing experience with domestic and external debt, generally. The functions of the Office as provided in **section 6** are to:

> *(a) maintain a reliable database of all loans taken or guaranteed by the Federal or State Governments or any of their agencies;*

Comment: why not 'accurate' as opposed to 'reliable'? This is because until recently, Nigeria's debt profile was the subject of controversy. Information about exactly what was owed and to whom the amount was owed was not known. On the expression "taken or guaranteed," it is not clear if this responsibility extends to domestic loans taken or guaranteed by states and their agencies. The capacity of the DMO to handle domestic loans of all federating units in Nigeria is doubtful and this is a question of fact. Going by the paucity of funding and staffing, it is not likely that the organization will be able to discharge this function adequately.

> (b) *prepare and submit to the Federal Government a forecast of loan service obligations for each financial year;*

Comment: The question that arises is, why prepare a forecast if all the existing obligations are ascertainable and the amounts due on them according to the agreements are known? Should we still depend on a forecast or an accurate figure of what is due each year? One reason why a forecast is preferred is due to the existence of agreements with variable interest rates. The exact amounts due on such agreements may not be determinable in advance. Another reason is the existence of agreements that use the increase in the price of oil beyond certain levels in any year

as a basis for the obligation of the county to pay interest and principal on some agreements[15]. The volatility of the pricing of oil in the international market compels the country's debt managers to only make forecasts, rather than to give accurate figures of amounts payable in any fiscal year.

> (c) *prepare and implement a plan for the efficient management of Nigerian's external and domestic debt obligations at sustainable levels compatible with desired economic activities for growth and development; and participate in [<u>all</u>][16] negotiations aimed at realizing those objectives;*

<u>Comment</u>: The word "all" is missing in paragraph (c) of section 6. Should the Office not be a part of all negotiations? The question, however, is whether this is practicable in the absence of political will, to fund and staff the DMO appropriately.

> (d) *<u>verify</u> and service external debts guaranteed or directly taken by the Federal Government;*

<u>Comment</u>: The use of the word "verify" implies the possibilities of "ghost loans and guarantees". Again, this word reflects the immediate past experience of the country where obligations were alleged by external creditors, but the country did not have copies of the agreements. By implication, if such agreements are doctored by the external creditor, Nigeria cannot challenge the authenticity except if it can provide its own copy.

> (e) *<u>on agency basis</u>, service external debts taken by State Governments and any of their agencies <u>where such debts are guaranteed</u> by the Federal Government;*

<u>Comment</u>: Acting as agent here has implications. The first implication relates to all the parameters of agency law as we know it in its relationship with its principal. This carries liabilities for which the States could sue if the DMO defaults in its duties of, for example, remitting due payments to external creditors on time, which later affects the project of the Principal (the State). The second implication of the expression is that it appears that the DMO would like to charge fees from the states for this service. Would this fee be included in the borrowing cost to the states since the same statute places responsibility for negotiating external loans on the DMO? Another observation here relates to the words "<u>where such debts are guaranteed</u>**".** This implies first that where a debt is not guaranteed, the DMO cannot act as agent. Does this imply that State governments may execute external loan agreements that are not guaranteed by the federal government? Section 21(2) of the Act specifically says that "the Federal, State Government or any of their agencies shall not obtain any external loan except with a guarantee issued by the Minister". The Minister is prohibited by section 22(3) from guaranteeing any loan except if the terms and conditions have been approved by a resolution of the National Assembly. In the face of a federal constitutional arrangement where states continue to insist on their autonomy in matters relating to borrowing including external borrowing, the DMO Act has rightly prohibited external borrowing at any other level except the federal. The

[15] There is divergent opinion as to the propriety or otherwise of such agreements. Their only justification lies in the fact that the creditor concedes that its debts will be paid with proceeds of oil therefore, if the price of the commodity rises above a particular level in any year the borrower ought to be bale to pay.
[16] Emphasis mine

ambivalent expression in section 6(e) above must therefore not be read to support such borrowing. On a final note, one must point out that the expression may have been included because of existing agreements contracted by state governments in the heady days of reckless borrowing without federal government guarantee. If this is the case, we think such agreements should have been separately dealt with because the DMO and the federal government cannot realistically ignore the threats such agreements pose to national development, peace and security in the states affected.

> (f) *set guidelines for managing Federal Government financial risks and currency exposure with respect to all loans ;*
>
> (g) *advise the Federal Government on the re-structuring and re-financing of all debt obligations;*

Comment: Is the government bound by any advice given by the DMO? By a literal reading of section 19(2) of the Act, the government cannot ignore the advice of the DMO with regard to borrowing, and especially external borrowing. But paragraph 6(g) relates to re-financing and restructuring of [existing] debt obligations. In such situations, new borrowing may not be involved. Of more importance is the fact that it may not be politically expedient for the government to accept the advice of the professionals in the DMO. Section 8(b) on the functions of the Board would seem to align with this argument that government can, for political reasons, ignore the DMO's advice on debt management.

> (h) *advise the Minister on the terms and conditions on which monies, whether in the currency of Nigeria or in any other currency, are to be borrowed;*

Comment: We must observe here that this paragraph must be read in line with sections 21(1) and 27(1). These sections provide:

> 21.-(1) *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.*
>
> 27.-(1) *The National Assembly may, by a resolution, approve, from time to time, standard terms and conditions for the negotiation and acceptance of external loans and issuance of guarantees.*

We can assume that the advice of the DMO to the Minster will be the same to be laid before the National Assembly as its resolution on standard terms and conditions. Although the National Assembly has power to vary the proposals, differences may be settled by public hearings and political manoeuvrings in the economic interest of the nation.

> *(i) submit to the Federal government, for consideration in the annual budget, a forecast of borrowing capacity in local and foreign currencies;*

Comment: In the light of the awesome powers of the DMO over domestic and external borrowing, especially as contained in section 24, which mandates all banks and financial

institutions requiring to lend money to federal, state and local governments to seek the approval of the DMO with regard to domestic borrowing, paragraph (i) above demands that the DMO equitably and effectively discharge its duties. The Office must consult the State governments for their input before it makes a blanket forecast. This is important in order that the DMO does not become a willing tool in the hands of politicians, whereby states that do not belong in the same party are branded as "errant states" and denied the opportunity to borrow for their own development programmes. Besides, if the DMO denies approval, does this mean that a bank or financial institution that determines that it can protect its interest in other ways cannot go ahead with the transaction? We think not. It implies that such a bank or financial institution will not enjoy government guarantee for the domestic loan. This is to be contrasted with section 21(2) that specifically prohibits external loans without guarantee. Any other interpretation may frustrate the workings of the states and local governments and turn the DMO into a huge bureaucracy. Facilities such as overdrafts to meet staff salaries and other recurrent expenditures must be exempted from the operations of this section.

> (j) *prepare a schedule of any other Federal Government obligations such as trade debts and other contingent liabilities, both explicit and implicit, and provide advice on policies and procedures for their management;*
>
> (k) *establish and maintain relationships with international and local financial institutions, creditors and institutional investors in Government debts;*

Comment: This particular paragraph is curious in that it discloses no special obligation beyond what the DMO must do in the fulfilment of statutory or national contractual obligations.

> (l) *collect, collate, disseminate information, data and forecasts on debt management with the approval of the Board;*
>
> (m) *carry out such other function, which may be delegated to it by the Minister or by an Act of the National Assembly; and*
>
> (n) *perform such other functions which, in the opinion of the Office, are required for the effective implementation of its functions under this Act.*

Comment: This omnibus provision leaves a window for a proactive approach to its functions and the objectives of its establishment. It is a common feature of statutes creating authorities.

In order to carry out these functions, the DMO is conferred with general powers of the nature, granted statutory authorities of its type. The only comment relates to the inelegant presentation of section 7(a), which provides that the Office "issue and manage Federal Government loans publicly issued in Nigeria upon such terms and conditions as may be agreed between the Federal Government and the Office."

The word "issue" would appear to be out of place, as loans are not issued. It seems the section contemplates money raised by the government through the capital market. Such money is raised by issue of government securities. Section 23(1)(a)(i) supports this argument.

Staff and Administration of the Debt Management Office

Section 9 requires that the Director-General of the DMO shall not be below the rank of a Permanent Secretary in the civil service. This is good. But the section omits to request that the person must have cognate experience in debt and financial management matters. This is a fundamental omission, as previous experience in the country shows that for political expediency, a square peg is sometimes forced into a round hole. As a strategy for sustainable debt management, qualified personnel in the right disciplines must always be at the helm of affairs. It will be counterproductive to appoint just any civil servant as Director-General simply because the person is qualified to be a Permanent Secretary.

Section 10 empowers the Board to employ other employees for the purpose of carrying out the functions of the Office. Considering the vital role of the DMO to Nigeria's economic development, the staff of the Office must be high quality staff with up-to-date information on the subject matter and able to hold their own with peers from other parts of the world. It is noteworthy that the staff audit being conducted by the present Minister of Finance has revealed that over 80 percent of staff in the Ministry have qualifications at variance with the primary concern of the Ministry. This lot must not befall the Office.

In order to attract and keep high quality staff, the law ought to have specified that the remuneration, tenure and conditions of service of the Director-General and staff of the DMO shall be no less than is applicable for chief executive officers and staff in the financial services sector in Nigeria, generally, and shall be determined in accordance with guidelines prescribed by the Board. This is without prejudice to consultation with the National Salaries and Wages Commission. Approved terms and conditions will of necessity include pensions and gratuities[17]. Rigid affiliation of the conditions of service of staff to the inefficient civil service standard may deny the Office of much needed high quality staff.

Section 13 introduces an interesting mechanism for the efficient management of the Office. It provides that there shall be a Management Team comprising heads of departments of the office, which shall implement the policies of the Board. The Act however does not create any department, thereby leaving the matter to be dealt with administratively. Since the Act establishes a Management Team, it is appropriate to create some statutory departments such as those identified in the Strategy Document released by the Office at a Stakeholders Forum in 2001[18]. At the moment, the DMO operates the front, middle and back offices model in its administrative structure. This model is used by several countries.[19] The law ought to have established some key departments which may then fit into its existing administrative model. Naturally, there will be a window left open for the creation of such other departments that it may require from time to time.

Section 14 anticipates that the Office will be funded from government subvention, internally generated funds and loans. The Office, as a federal government agency, is also caught

[17] At the moment, section 12 ties the pension rights of staff to those applicable in the civil service. It remains to be seen if the new pension regime introduced by the government through the Pension Reform Act No.2 of 2004 will work better than the former i.e. under Pensions Act Cap 346 LFN 1990.
[18] See Debt Management Office Strategic Plan 2002-2006
[19] See Best Practices in Government Debt Management www.worldbank.org/fps

by section 24 of the Act, which requires that banks and financial institutions obtain the approval of the Minister before granting any loan.

Like any other statutory agency, the Office is not precluded from obtaining gifts or grants, provided the terms and conditions attached to such gifts are not at variance with and will not fetter the performance of its statutory functions.

Adequate funding is at the heart of performance. If the DMO is not well funded, it cannot achieve its objectives; therefore, adequate funding will be the first indicator of the government's commitment to see Nigeria's debt being well managed. Going by the experience of other key agencies which have been established by the present administration but starved of adequate funds, there is not much hope that the DMO's experience will be different. Indeed, the DMO's major takeoff support for staff training, infrastructure development and debt reconciliation have all been externally supported. This is a contradiction which the government must resolve as the first sign of its irrevocable commitment to managing the nation's debts efficiently. As the saying goes, the government must "put its money where its mouth is".

Borrowing and Government Guarantee

For the first time in Nigeria's legislative history, specific provisions have been made to regulate borrowing and government guarantee. Pre- and immediately post- independence, the principle that all external borrowing must be backed by a separate law was followed, as the external borrowings of that period were backed by laws made and publicized. For example, the Railway Loans (International Bank Act),[20] External Loans Act[21] and External Loans Rehabilitation, Reconstitution and Development Act[22], are specific statutes made to legalize external borrowing at the time. It is noteworthy that each of these statutes tied external borrowing to a specific periodic economic development programme of the government. This shows that external borrowing was not whimsically done but was well thought-out and planned for.

Sections 19 to 27 of the DMO Act deal with different aspects of borrowing by the federal, state or local governments and their agencies. Furthermore, some administrative matters relating to external borrowing such as negotiations, execution of agreements and approvals have been made statutory.

The importance of the DMO is underscored by section 19 which provides that:

(1) *The Office shall annually 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;*

[20] Cap 387 Laws of the Federation of Nigeria 1990 (Revised).
[21] Cap 122
[22] Cap 123

(2) *Any advice issued by the Office under subsection (1) of this section shall, among other things, form the basis of the national borrowing programme for the succeeding financial year as may be approved by the National Assembly;*

(3) *The Office shall participate in the negotiation and acquisition of such loans and credit referred to in subsection (1) of this Section.*

The first observation is that the marginal note of section 19 talks of external borrowing but subsection (1) talks of amounts to be borrowed for bridging the gap internally and externally. Though section 3(2) of the Interpretation Act[23] says that marginal notes do not form part of the statute but merely serve as a guide, the courts have found it irresistible to rely on them in the interpretation of some statutes; therefore, the real intent of the section needs to be clarified by an amendment.[24]

The second observation relates to the scope of the advice of the DMO. Will it cover the states and local governments? In other words, will they be precluded from borrowing both internally and externally except with the DMO's approval? The preferred interpretation is that the DMO's advice is crucial to external borrowing, therefore no state or local government can borrow externally without the DMO's input. This is supported by other sections of the Act. Indeed, the use of the words "national borrowing programme" in subsection (2) of section 19 underscores the argument that it is federal government borrowing that is contemplated. This argument is in conformity with the principles of federalism and the independence of federating units.

From subsection (1), another issue that arises is the mechanism through which the Office will annually advise the Federal Government. One of the ways by which this may be achieved is through the DMO Director-General's membership of the present Economic Team of the present administration. Whether or not this will be sustained by succeeding governments remains to be seen. But it is a commendable measure. Another strategy is for the DMO to annually publish a report of its professional opinion of the state of the nation's economy and the absorptive capacity in terms of borrowing. This can be used as a barometer to gauge government policy and external borrowing.

The implication of subsection (2) of section 19 is that the Executive cannot ignore the advice of the Office with regard to the financing gap. This makes the Office a very powerful agency indeed. It follows that if the DMO's advice is not to be ignored, it must always give the right advice. Again this underscores the need for highly competent and well motivated staff. Furthermore, subsection (3) implies that any loan agreement of which the Office was not a part is illegal, invalid and statutorily unenforceable against the country, a state, or local government. However, it is debatable whether or not the Office must take the initiative for the negotiation of the loan because subsection (3) uses the word "participate". Also, it is not clear if the Office has to "participate" in the negotiation of all domestic loan agreements by federal, state and local government agencies. At the moment, the Office has no capacity to do this.

[23] Cap 192 LFN 1990

[24] See for example Schroeder & Co vs Major [1989] 2NWLR (Pt 101)1, where Justice Nnamani of the Supreme Court confessed that the marginal note had assisted him in interpreting a provision.

The key section on restriction of external borrowing is found in section 21, which provides that:

> 21.-(1) *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.*
>
> (2) *The Federal, State Government or any of their agencies shall not obtain any external loan except with a guarantee issued by the Minister.*

Supporting provision is found in section 22(3) which provides that the Minister shall not guarantee an external loan unless the terms and conditions of the loan shall have been laid before the National Assembly and approved by its resolution.

Section 21 unambiguously covers borrowing but it cannot be read to include debt restructuring where no new money is involved and the agreements are founded on agreements predating the statute. A major lacuna is however found in the fact that no mention is made of private sector debts. This is important in view of the privatization exercise going on and the role the outcome is expected to play in Nigeria's economic reform agenda.

The key import of section 21 and the supporting provisions is that they bring transparency into the borrowing process for the first time since the early 70s. More importantly, the section precludes the nation from concluding external loan agreements without the legislature having an input. In practice, the legislature lays down general guidelines on borrowing, which must be followed rather than requesting that each agreement be presented before it is signed. Section 27(1) would seem to support this position, as it provides that "the National Assembly may, by a resolution, approve from time to time, standard terms and conditions for the negotiation and acceptance of external loans and issuance of guarantees".

Subsection (2) of section 27 reinforces this argument as it specifically says that:

> "*Where the National Assembly has approved the terms and conditions under subsection (1) of this section, any agreement entered into by the Federal Government shall come into operation without further reference to the National Assembly: where the terms and conditions are in conformity with the approval*".

The point to note is that the terms and conditions must be in conformity with the terms and conditions set by the National Assembly. This is a very important mechanism for introducing some standard into the nation's external borrowing agenda. Standard borrowing terms and conditions are expected to aid the DMO in the performance of its functions. They also ought to strengthen it to negotiate better terms for the country and to help loan negotiators avoid odious terms prevalent in the current set of agreements.

It is the expectation of the public and Nigeria's international partners and creditors that the National Assembly will prepare standard terms and conditions upon which external borrowing may be carried out. This demands a thorough analysis of the subject and must be a key part of the debt management strategy of the country. As anticipated by section 6(h), the DMO

must make input through the Minister of Finance on what the terms and conditions should be. In making proposals, the DMO must consult widely and secure the services of experts and other technical persons on what terms Nigeria should henceforth borrow. Needless to say, the terms and conditions must be reviewable from time to time.

Subsection (3) of section 27 leaves a window of review and oversight open to the National Assembly to scrutinize particular agreements whenever it so desires. The subsection says, "Notwithstanding the provisions of Subsection (2) of this Section the National Assembly may by a resolution request that a particular agreement shall be brought before it for further approval". Further approval implies that it may impose additional conditions before the loan is finalized, while subsection (4) of section 27 reinforces the point that where such further approval is needed and is not obtained, the loan agreement cannot become operational. The same way as saying it is not enforceable. The question however is, at what point can further approval be requested? Will it be at the beginning, middle or end of an agreement? This needs to be carefully considered, as the country will be regarded as ill-prepared if an agreement is almost concluded before further approval is requested.

Finally on this point is that section 27(5) provides a limit of 30 days to the National Assembly, within which it must act where it demands to give further approval to a loan agreement before it becomes operational. The Minister of Finance is entitled to assume that he or she has approval if the National Assembly does not respond within 30 days. It must be emphasized that the approval mechanism anticipated by section 27 (3-5) of the Act relate only to agreements for which the National Assembly demands it. Where terms and conditions have been published and are followed, a loan agreement need not go to the National Assembly for approval.

Section 21(2) raises one of the most contentious issues about federalism as it limits the powers of autonomous units in a federal arrangement. It prohibits states and their agencies from borrowing without Ministerial guarantee. This is not an aberration because the constitution reserves the power to regulate external borrowing to the federal legislature. Secondly, for a nation that depends largely on one commodity for the bulk of its foreign earnings, such a provision is necessary. The situation might be different if many states within the federation have the capacity to generate foreign exchange without depending on other states or the dole from the central purse. Bearing in mind that the present debt crisis is caused by the unbridled borrowing of states in the past, a rein on this practice is welcome and desirable.

The loan guarantee mechanism of the Act contains similar principles as those governing external borrowing. Section 22 provides that the Federal Government may, through the Minister of Finance, guarantee an external loan, provided its terms and conditions have been approved by the National Assembly. Again, we think that once the prescription of the legislature for external borrowing and guarantee of agreements have been followed in the first place, there is no need to seek a formal approval for the guarantee.

The Minister is now the only designated public official with power to execute loan agreements and government guarantees on behalf of the nation. Hitherto, loan agreements had been signed by other public officers without recourse to the Minister of Finance. Section 20 empowers the Minister or his or her designated nominee to execute all loan agreements. Section 22(2) gives similar powers over guarantee agreements.

Section 22(4) must provide some comfort to Nigeria's creditors, as it charges debt service obligations from loans and guarantees on the Consolidated Revenue Fund of the Federation or the State, as the case may be. By implication, barring any legal basis for refusing to pay, the nation has to satisfy due debt obligations. This section empowers the DMO to request that all such due obligations be included in the budget for each fiscal year. The operation of the clause remains to be seen in the light of the constitutional powers of the National Assembly over appropriation. Ideally, the National Assembly should accept whatever proposals are placed before it by the DMO as the cost of meeting due obligations; however, the political concerns about the huge cost of such a move will always be a restraining factor. Therefore, it is not likely that the National Assembly will automatically approve debt service proposals without intense lobbying by the DMO and the Executive.

In a similar vein, section 26(1) and (2) says that all loan receipts are to form part of the Consolidated Revenue Fund or any other designated fund of the Federation or the State, as the case may be. Such receipts are to be applied solely for the purpose for which they were obtained. This is an important provision, as funds diversion has been a major contributory factor to the emergence of the debt crisis. By implication, payments cannot be made out of these funds except by appropriation through a law. This will introduce more transparency into the use of loan funds and ought to also reduce the corruption which has pervaded external borrowing in the past. The law however, ought to have specifically covered aid and grants, which have also been the source of much corruption from the giver and recipient.

From the perspective of federating units, however, the section has other profound implications in view of the decision of the Supreme Court of Nigeria in what is now popularly regarded as the Resource Control Case.[25] The Court held that external debt obligations should be serviced from the accounts of those federating units that incurred the debts rather than from the Federation Account. In other words, if loan receipts form part of the Consolidated Revenue Fund of the federal or state governments, as the case may be, then debt service should rightly be charged to the same account.

This section and the decision of the Supreme Court should hopefully induce some fiscal discipline in state governments, especially as debt service had hitherto been charged to the Federation account and regarded as the problem of the federal government, thereby covering up the iniquities of states that had over-borrowed or borrowed with nothing to show for it. Governors of such states sell their citizens the ruse that insufficient allocation was made by the federal government rather than owning up to their indebtedness.

Lending by the Federal Government

Section 25 of the Act deals with a matter which has hitherto been taken for granted but in which the Federal Government had indulged without constitutional or any other statutory backing. The section deals with lending to foreign states and bodies. Despite being heavily

[25] Attorney-General of the Federation vs Attorney- General of Abia State and 35 others Suit No. SC 28/2001 Judgment delivered 5th April, 2002.

indebted, Nigeria's economic potential has put her in the position to lend occasionally to foreign states and bodies. For example, she has a facility with the African Development Bank called the Nigeria Trust Fund. Similarly, she has given grants to her less endowed neighbours like Niger Republic and Chad, much to the consternation of the public because of lack of transparency. Section 25 provides that:

> (1) *Approvals for grants or loans to a foreign state or any international body or any of its agencies may be granted in accordance with the procedure specified in this Section;*
>
> (2) *Applications for grants or loans to a foreign state may be submitted by the President to the National Assembly and may be approved subject to such terms and conditions as may be prescribed by a resolution of the National Assembly;*
>
> (3) *An application specified in Subsection (2) of this Section shall indicate the:*
> *(a) foreign policy objectives underlining the request or proposal;*
> *(b) terms and conditions of the grant or loan;*
> *(c) benefits which Nigeria stands to derive from the grant or loan; and*
> *(d) state of the relations existing between the foreign state or international body and Nigeria at the time of the request or proposal;*
>
> (4) *The National Assembly shall, by resolution, decide whether or not the grant or loan should be made.*

A loan to a foreign state or grant to an international body or organization must be a charge on the Consolidated Revenue Fund of the Federation, as provided for in section 80 of the 1999 Constitution; therefore, this section violates the constitution. The Executive cannot spend money by a mere resolution of the National Assembly. If the Assembly is convinced of the merit of the request, it ought to pass a supplementary appropriation act if the request is made in the middle of a fiscal year. In terms of debt management and planning, however, there is no reason why such a request cannot be well considered in advance and included in the expenditure forecast of the government, i.e. the budget. Certainly, the situations in which government needs to grant credit in any fiscal year will be few and far between, while grants to international organizations never become due by surprise. The section leaves a window for fiscal indiscipline by the Executive and it should be amended. If an emergency arises, the National Assembly may be informed in accordance with the provisions of section 25. Thereafter, the Executive should present an Appropriation Bill before the National Assembly and where the exigency of the moment demands it, the Assembly may suspend its rules in order to fast track the request and pass a supplementary Appropriation Act. This will enthrone the rule of law which is much needed in the country.

In the fiscal year 2004, the Presidency announced a loan of about $600 million to Ghana for an undisclosed emergency. It was not included in the Appropriation Act for the year. The National Assembly was merely informed by letter after the matter had been announced in the

media. This is in spite of the fact that the DMO Act that deals with this action had become operative since 19th June 2003[26].

Miscellaneous Matters

Sections 28 to 34 of the Act deal with sundry matters, such as limitation of suits against the office, the requirement of notice of intended suits, service of documents and restriction on execution of judgment against the property of the Office. Section 31 transfers existing powers of other Ministries and extra-ministerial departments to the Office. Consequently, she inherited existing rights interest, obligations and liabilities of such departments in respect of debt management by virtue of section 31(2).

Section 32 is a reminder of the fact that the DMO commenced without statutory backing; therefore, the section statutorily validates all staff appointments made before the commencement of the Act. This is without prejudice to the fact that the Act was eventually made retroactive in commencement.

Conclusion

The establishment of the DMO is a welcome development which has been canvassed over the years by several interest groups[27] as a major requirement towards resolving the debt problem of Nigeria. The enabling statute, in spite of its flaws, is a major step towards the realization of this objective. Making the law, however, is one thing while granting both financial and operational autonomy to the DMO is another issue entirely. If the DMO is starved of funds and quality staff, it is not likely to be able to achieve its objectives, while the high expectations of the national and international community would again have been frustrated.

[26] Note that the DMO Act came into force on the 19th of June in accordance with section 2 of the Interpretation Act Cap 192 which provides that an Act comes into force the day it is passed or signed as the case may be.

[27] As Resource Persons at several regional debt management training programmes for public officers in sub-Saharan African countries organised by UNITAR and similar organisations, I am aware of that the resolution of participants over the years has included the need for a separate agency to manage the nation's external debts.

PAPER 4

AN OVERVIEW OF THE CONVERSION OF PARIS CLUB DEBT[28]

By Dr. Aboubacar Fall

INTRODUCTION

According to UNITAR's Debt Management Glossary[29] "*debt conversions are debt relief techniques, which alter the original valuation and nature of loan instruments. They afford the debtor with a method to reduce its obligation and provide the creditor with a debt, which is more likely to meet.*"

The most extensively used debt conversion techniques include: debt equity, capitalization, securitization, debt-for-asset swaps, debt-for-bonds swaps, debt-for debt swaps, round tripping, debt relief, swaps etc.

The objective of this paper is to provide the reader with an overview of the conversion of Paris Club debt.

Indeed, many Paris Club agreed minutes include a debt conversion option, which allows a portion of the rescheduled hard currency debts of the country concerned to be converted into local currency for investment in local projects approved by the government of the country. This wide range of projects includes education and agricultural rehabilitation programmes, commercial investment and health and medical projects funded by charitable organisations [30].

The overall advantages of debt conversion for the debtor country can be summarized as follows:

- The early settlement of the rescheduled hard currency debts in local currency at a discount in the price charged by the creditor to the purchaser, leaving the foreign currency reserves unaffected.

- The local currency released from a debt conversion is reinvested locally in projects approved by the government.

- The debt conversion scheme allows the debtor country to attract investment, which might not otherwise take place.

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[28] For an in-depth analysis of this subject, see "The conversion ¨Paris Club Debt: Procedures and Potential"; prepared by UNCTAD Development Finance Branch and published by the United Nations – 2001.

[29] See UNITAR website at: http://www.unitar.org/dfm/Resource-Center/Training Package/TP10/Glossary D.htm

[30] These are examples of projects recently financed by the United Kingdom's ECGD Debt Conversion Scheme see "Guide for Governments of countries that have rescheduled debts to ECGD's Debt Conversion Scheme" at http://www.ecgd.gov.

I. THE PARIS CLUB CONVERSION CLAUSE

It is important to underline that debt reduction methods are technically easier to implement for bilateral debt than for commercial debt, as they mainly depend on political decisions of creditor governments and do not, hence, require sophisticated legal negotiation and arrangements that would be needed to achieve commercial debt reduction.

In this regard, a new opportunity is opened up for severely indebted low-income countries (SILIC) and lower middle-income countries (SILMIC) to reduce their bilateral official debts by conversion. This option is relevant for these countries including many sub-Saharan African nations because of the high portion of official bilateral debt in their total debt stock.

Indeed, for these categories of indebted countries, the Paris Club has agreed to grant a debt conversion clause stating that "creditor countries can, on a voluntary basis, swap, debt-for – nature swaps and debt-for-development swaps for up to 10% of the bilateral official and officially guaranteed non-concessional loans"

This Paris Club clause, which was introduced in 1990 for lower-middle-income countries and extended in 1991 to severely indebted low-income countries, provides the basic framework for conversion of Paris Club debt. Debt conversion is a voluntary option for both debtor and creditor provided for in the multilateral Paris Club agreement.

It is important to underline that, apart from the case of Egypt, the volume of Paris Club debt converted so far is not significant.

It should be pointed out that each creditor country has its own methods and procedures for the conversion of Paris Club debt.

Furthermore, one should emphasize that the purpose of debt conversion is to finance the local cost component only of the beneficiary projects.

Conditions for Paris Club Debt Conversions
(Debt covered: pre-cut-off date debt)

The conditions agreed by the Paris Club in 1991 were as follows:

- Official development assistance (ODA):
  No limits on the amount that can be converted.
- Officially guaranteed commercial debt:
  Conversion within the limit of 10 per cent of total exposure or up to US$ 10 or 20 million, whichever was higher, the minimum amount of US$ 10 or 20 million being determined on a country-by-country basis. In 1996 the limits for conversion of officially guaranteed commercial debt were increased to 20 per cent of total exposure and SDR (special drawing nights) 15 or 30 million.

Generally Paris Club debt conversion for SILICs involves officially guaranteed commercial debt for which each creditor country has its own approach and procedures vary considerably from one country to another.

For certain creditor countries such as the United Kingdom and Belgium once the bilateral agreement has been signed, it is possible to sell claims for conversion. While other countries, such as France, require that a further specific agreement ("Accord cadre" or Frame Agreement) be signed with the debtor country setting out the conditions on which claims will be sold for conversion [31].

II. WHAT ARE THE DIFFERENT TYPES OF DEBT CONVERSION?

When exploring the possibilities they can get from the Paris Club debt conversion, the debtor country must consider two main types of debt conversion.

a) Traditional debt conversions

These tripartite transactions involve the following:

i) The sale of a foreign currency claim on the debtor country by a creditor to an investor, at a discount, often via a financial intermediary, and

ii) The cancellation of the foreign currency claim by the investor in exchange for a local currency (or "in kind") disbursement by the debtor country at a lower discount.

The purchase of the claim is negotiated for a specific debt conversion transaction for which approval has been given by the debtor country.

It must be recalled that traditional debt conversions were developed during the 1980's initially using claim held by commercial creditors of sovereign debtors which were traded in the secondary market for sovereign debt.[32]

For traditional conversions, the debtor government role consists of the following:

i) Negotiation of the conditions of the debt conversion with the potential purchaser or beneficiary. This includes:
   - Authorization of the beneficiary projects
   - Indications about the use of funds resulting from the conversion

[31] The Conversion of Paris Club Debt: Procedures and Potential, UNCTAD 2001.

[32] Supra (4) – ibid – idem.

- Restrictions on the use of funds resulting from the conversion
- Level of local currency (or in kind) disbursement
- Type of debt accepted for conversion
- Procedure for cancellation of the converted debt and making available the local currency (or in kind) disbursement
- Reporting or supervisory procedures

These different elements are included in the agreement to be signed between the debtor government and the beneficiary of the conversion.

ii) Acceptance of the specific claims proposed by the beneficiary for conversion. In this respect, the creditor with whom the purchase has been negotiated is vested with the provision of the details of the claims proposed.

iii) Signature with the beneficiary of documentation cancelling the foreign currency debt obligation in exchange for disbursement of the local currency counterpart.

It must be noted that the debtor country has to put in place a control procedure (see below the case of Nigeria) to ensure that the local currency is used as intended and avoid round tripping.[33]

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b) <u>Conditional cancellation conversions</u>

These are bilateral transactions negotiated between a debtor and a creditor country, involving the cancellation by an official creditor of a foreign currency debt obligation in exchange for a local currency counterpart fund to be invested in specific projects mutually agreed between the debtor and the creditor.

For the conditional cancellation conversion, bilateral negotiations will take place between the debtor and creditor concerning the conditions on which the debt is to be converted.

These conditional cancellation conversions normally take the form of local currency counterpart funds capitalized by the debtor country, the amount made available being a percentage of the debt converted as agreed with the creditor.

These counterpart funds are managed jointly by representatives of the debtor and creditor countries. An independent legal entity with its own management and supervisory structure will be created where larger amounts are involved. Otherwise, the management of the funds will be

[33] Round tripping is a situation in which local currency funds resulting from a conversion are not used by the beneficiary as intended to cover its local currency costs in the debtor country but are used instead to purchase foreign currency which is re-transferred out of the debtor country with a profit.

For United Kingdom bilateral debt see ECGD Debt Conversion Scheme – Guide for Debtor government doc. AC11/09/2003.

delegated to an executing agent .Such funds are frequently used to fund development programmes in the debtor countries, often in cooperation with local or international NGOs.[34]

III. DEBTOR COUNTRIES' DEBT CONVENTION PROGRAMMES: THE CASE OF NIGERIA

When deciding to approve a Paris Club debt, a debtor government should evaluate the macroeconomic impact of the transaction. The main issue that has to be addressed is how the local currency counterpart is to be funded by the debtor government and the budgetary and monetary impact of debt conversion.

It must be recalled that one of the main objectives of debt conversion for the debtor country is to achieve debt relief or attract a particular category of investment (private investment, additional funding for social development or environmental protection, etc.). That is the reason why some debtor countries have adopted debt conversion programmes. But the majority of debtor countries address the debt conversion issues on a case-by-case basis.

In an effort to reduce the burden of its public debt service, the Federal Government of Nigeria established, in 1988, the Debt Conversion Programme (DCP) and set up a Debt Conversion Committee (DCC) to implement this Programme.

The Guidelines on the Nigerian Debt Conversion Programme set out (i) the objectives of the Programme (ii) the application procedure seeking for approval in principle (iii) the conversion procedure and (iv) the monitoring of projects funded by the debt conversion proceeds.

a. Objectives of the Nigerian Debt Conversion Programme

The objectives of the Nigerian Debt Conversion Programme, among others, included:

- To reduce the stock of outstanding foreign currency denominated debt in order to alleviate the debt service burden.
- To create an attractive avenue for the importation of foreign capital.
- To serve as an additional incentive for the repatriation of capital.
- To stimulate investments that will generate employment opportunities.

The DCC is headed by the Governor of the Central Bank. The functions of the Committee include the following:

- To design, review and implement an efficient Debt Conversion Programme in Nigeria.
- To establish clear and concise approval criteria and procedures.
- To approve applications and transactions within reasonably specified time.
- To continually monitor and review the progress of the Programme and projects approved under it.

[34] See for example, The Swiss Debt Reduction Facility: A State of the Art. Bern, Swiss Coalition of Development Agencies, 1995.

Eligible debts to this Programme include: (i) Central Bank of Nigeria (CBN) dollar denominated promissory notes issued under the CBN circular of 18th April 1984, (ii) the Nigerian Par Bonds and (iii) some portions of the Paris Club debts.

Part I (7) of the Guidelines indicates the type of transactions on which the conversion proceeds can apply. These include conversion for: (i) the purpose of making a grant to Nigerian non-profit organisations, (ii) for the acquisition of Naira denominated government debt instruments, (iii) the acquisition, expansion or re-capitalization of existing companies or businesses, and (iv) the acquisition of government privatised enterprises.

b. Application Procedure: Seeking Approval-in-Principle

Part II of the guidelines points out that all prospective participants must first obtain the prior consent or Approval-in-Principle from the Debt Conversion Committee in order to qualify for participation in the Programme. Applications should be supported by relevant documents duly certified by either a Court or a Notary Public.

In order to carry out their inspection, the officers of the Debt Conversion Committee Secretariat may evaluate the projects into which the conversion proceeds will be injected.

After the decision of the Secretariat to interview the applicant or visit the project, the Committee will approve or reject in part or whole of the application. That decision will be final and the Committee will not be under any obligation to give reasons for approval or rejection.

Where approval-in-principle is granted it is deemed to expire after a one-year period. After the one year period has expired, then revalidation will be necessary based on the same procedures as described earlier.

c. The Conversion Procedure

Auction is the method by which the conversion is conducted. However, under certain circumstances, the DCC can, at its discretion, approve an application for conversion on its own merit, outside the auction system. Eligible bidders are all applicants who have received Approvals-in-Principle to participate in the auction sessions organized by the DCC secretariat. Bid forms will be provided by the DCC Secretariat and an applicant can submit more than one bid at any particular session. The Guidelines include provisions dealing with the exchange rate (art 29), reserve price (art 30). In case of a successful bid, the award will be made at the bidder's bid price. Payment of a non-refundable transaction commission is foreseen by the Guidelines which also provide for the fate of unutilized winnings auctions / out side auctions (art 33).

After the auction, the DCC Secretariat will advise the relevant cancellation agent to accept, verify for genuineness and cancel the debt instruments of successful bidder within fifteen (15) working days of winning at the auction. Where the amount of debt to be converted is less than the face value of the debt instruments submitted for cancellation, the cancellation agent concerned shall issue a fresh debt instrument in the amount of the unredeemed balance to the

redemptor (art 34.3). Upon confirmation of receipt and cancellation of the debt instruments, the Central Bank of Nigeria will provide the Naira proceeds in a non-interest yielding account for draw by the beneficiary organization.

Inspections will be carried out to ensure that the conversion proceeds are used exclusively for the approved purpose. Diversion of Naira proceeds of conversion into unauthorized projects would lead to immediate blacklisting of the beneficiary organization or company as the case may be.

As foreseen by article 43, the Guidelines may be reviewed or amended from time to time by the Central Bank of Nigeria and may set or modify execution procedures for the purpose of controlling or supervising operation pursuant to the Debt Conversion Programme.

CONCLUSION

The purpose of this paper was to provide the reader with an overview of the debt conversion mechanism with an emphasis on the specific Paris Club debt conversion clause.

This paper also aimed at outlining the practical steps that the potential beneficiary of the debt conversion proceeds would need to follow. The Nigerian Debt Conversion Programme was used as a case study, in that respect.

PROFILE OF THE AUTHORS

Prof. Christian Comeliau

Professor of Economics and Development (Geneva and Paris)

Prof. Christian Comeliau has been working as a development economist for more than forty years. He has a Ph.D in Economics from the University of Louvain in Belgium.

He was successively :

- researcher and professor at the University of Kinshasa (Congo) for twelve years , where he worked mainly on development planning and public policy issues ;
- country economist at the World Bank in Washington DC, especially for Morocco ;
- economist at the OECD in Paris, where he studied long term prospects in developing countries within the world economy ;
- member of the French Planning Agency in Paris for ten years ;
- professor at IUED (Graduate Institute of Development Studies) in Geneva.

He has published numerous books and articles on development, development planning, development cooperation, role of the State, and on the analysis of the system of « modernity ».

Mr. Alexander Troller

Attorney-at-Law / Partner
Lalive & Partners (Geneva, Switzerland)

Mr. Alexander Troller, a member of the Geneva Bar since 1991, has practiced as legal counsel with the industrial group Firmenich (Geneva 1993; Princeton NJ, USA 1994), occupied the post of 'Structuring Officer' with the International Trade Engineering and Commodities & Trade Finance Departments of Banque Paribas (Paris, 1992 [as trainee] and 1994-1997) before joining the law firm of Lalive & Partners (Geneva) in 1997, where he became a Partner in 2003. Mr. Troller is a member of a number of professional associations including the Geneva Bar Association, the Swiss Society of Jurists, the Geneva Association for Business Law, the Geneva Society of Law and Legislation and the Swiss Chapter of the International Association for the Protection of Intellectual Property.

Mr. Troller's areas of specialization cover a wide canvass including international commercial transactions, banking and finance law, national and international litigation and international judicia1 assistance in criminal matters.

Mr Troller's working languages include English, French and German.

Prof. Bolaji Owasanoye
Professor and Director of Research
Nigerian Institute of Advanced Legal Studies (NIALS)
University of Lagos Campus (Lagos, Nigeria)

Education:

LL.M. (Master of Laws) University of Lagos 1987; Qualifying Certificate, Nigerian Law School 1985 LL.B (Hons) Upper Division University of Ife (1984); Certificates - Legal Aspects of Debt and Financial Management (United Nations Institute for Training and Research UNITAR, 1991; Legislative Drafting (Royal Institute of Public Administration U.K. and Nigerian Institute of Advanced Legal Studies) July 1992; Negotiation of International Trade Agreements (International Law Institute, Washington), 1993; Managing Development Projects and Programmes (IMA Associates, UK) 2000.

Research/Teaching Experience (16 years)

Coordinator, NIALS Project on Annotation of Federal Laws, 1992 to date; Faculty Member, Continuing Legal Education programmes on Legal and Legislative Drafting, Negotiation of International Contracts, Legal Aspects of Debt and Financial Management, Children Rights; Coordinator, National Conference on External Debt and Financial Management in Nigeria, 1996; Asst. Coordinator, NIALS/Ford Foundation Rights of the Child Project 1992-1996; Co-ordinator, National Conference on the Family Law Centre Project, 1991; Coordinator, NIALS/USIS National Workshop for Judges on Individual Rights under the 1989 Constitution, 1992; Supervisor, NIALS/Ford Foundation Family Law (Legal Aid Clinic) Project 1984 - 1991; Supervisor, UNICEF/WORDOC Human Rights Project on Situation Analysis of Woman and the Girl Child in Nigeria; Lecturer/Adjunct Professor, Lagos State University, 1986-1996; Member, Legal Sub-Committee on the Reform of Anti-Trust Laws in Nigeria 2001; Member Law Revision Committee on the Review of the Laws of Nigeria 2001; Senior Special Fellow, United Nations Institute for Training and Research, 2001; Participant, Stakeholders Forum of the Debt Management Office, Nigeria.

Consultant:

UNITAR on Legal Aspects of External Debt and Financial Management; UNICEF on the Implementation of the UN Convention on the Rights of the child in Nigeria; ILO on the International Programme on the Elimination of Worst Forms of Child Labour in Nigeria; West African Institute for Finance and Economic Management (WAIFEM) International Law Institute (ILI) African Legal Center for Excellence. Ag. Executive Director and Trustee, Human Development Initiatives (non-governmental organisation).

Member, Nigerian Society of International Law, Association of British Council Fellows, Nigerian Bar Association, International Bar Association, National Geographic Society.

Editorial Experience:

Executive Editor, Current Law Review; Journal of the Nigerian Institute of Advanced Legal Studies, 1997-1998; Director of Publications Nigerian Society of International Law, 1998-2001; Editor, REPRO-MAT, Reproductive Rights Newsletter of Human

Development Initiatives, 1998-date; Editorial Consultant, Weekly Reports of Nigeria, Law Report of Legal Text Publishing Co. Ltd., 1999 - to date.

Dr. Aboubacar Fall

Principal Legal Counsel, Legal Services Department
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Dr. Aboubacar FALL is currently the Principal Legal Counsel at the Legal Department of the African Development Bank Group (AFDB). In that capacity he is in charge of negotiating and drafting loan agreements both with public and private sector, as well as implementing the AFDB's policy on Good Governance. The latter encompasses components such as legal and judicial reforms, public resources management and public participation.

Prior to assuming this position, he worked as Business Law Expert at the World Bank funded Legal Reform Committee in Senegal dedicated to building the capacity of the Private Sector, mainly with respect to the new harmonized business law in Africa (OHADA).

Dr FALL holds a Doctorate in International Business Law from University of Rouen, a Master degree in International Trade, a Master degree in International Transportation from University of Paris I - Sorbonne and an LLM from University of Washington (Seattle).

He is a former Hubert Humphrey Fellow and a Member of the Senegal and Paris Bar Associations. He has an extensive international teaching and consulting experience and has published several scientific articles.

He is the Executive Secretary of the African Law Institute (ALI) Steering Committee.

ANNEX I:

UNITAR

UNITAR Seminar on

« The Legal Aspects of Debt and Financial Management For Officials from The Nigerian Debt Management Office »

Geneva (Switzerland), 6-10 December 2004

INFORMATION NOTE

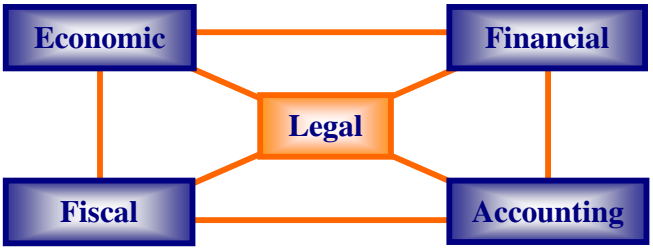
Introduction

This five-day seminar – designed by UNITAR specifically for the Nigerian Debt Management Office (DMO) – will draw on UNITAR's past experience of sensitization and skills building of government officials in *the legal aspects* of debt and financial management.

Debt management is a multifaceted activity involving economists, financial analysts, policy planners, accountants and lawyers. To be effective, debt management must combine all aspects including the legal aspects of debt management with a view to mastering the legal basis of debt arrangements through proper risk allocation between debtor and creditor.

This seminar – tailored specifically for Nigeria -- will be a first step in allowing debt managers to better comprehend the legal aspects in the borrowing process. It is assumed that the outcomes of this seminar will lead to a series of skills building workshops in legal aspects of debt management for Nigerian DMO officials and debt managers in 2005.

UNITAR's Multi-disciplinary approach to Debt Management and the Centrality of the Legal Aspects therein



Broad Objectives

The broad aim of this seminar is to expose Nigerian debt managers to the importance of *legal aspects* in the borrowing process in general and in debt management in particular. The aim is also to prepare Nigerian debt managers to work proactively in multidisciplinary teams for structuring financial transactions, involving lawyers and their expertise at the right time. More importantly, this seminar will be an opportunity for the Nigerian participants to reappraise the legal basis of their financial arrangements which have contributed in no small measure to the debt burden of the country.

Specific Objectives

This seminar – tailored to the Nigerian situation – is designed to achieve the following specific objectives:

- Enhance participants' understanding of the legal procedures and legal aspects (regulatory framework) of debt management in the specific context of Nigeria;
- Initiate a process for reviewing and assessing existing regulatory frameworks in Nigeria;
- Enhance participants' understanding of the legal issues in debt transactions particularly those involving external sources of funds;
- Enhance participants' understanding of the role of the lawyer in debt management and debt transactions; and
- Highlight the centrality and importance of the legal aspects in the borrowing process.

Intended Audience

This seminar is designed for senior and middle-level officials from the Nigerian Debt Management Office, including lawyers and non-lawyers.

Training Methodology and Materials

This five-day seminar will expose participants to ten distinct half-day modules (see overleaf) relating to the legal aspects of debt management. Each module will involve a detailed exposé of the subject matter as well as a round table discussion. Certain modules may be followed by group work. A pack of training and reading materials will be provided for each module. The last module will consist of recommendations by participants and a wrap-up by the Seminar Director. The seminar will be conducted in the English language.

Resource Persons and Experts

The Seminar – designed by UNITAR – will be led by a Seminar Director who will moderate all sessions. A number of other senior and specialized resource persons / experts (including the Seminar Director) will present all seminar modules. Experts will be chosen based on their experience of the Nigerian situation. Participants will also be expected to present topics pertaining to the Nigerian experience.

Venue

The Seminar will be held in Geneva, Switzerland at the International Environment House Building No. 1 / Conference Room No. 3 on the Ground Floor (Street Address: 11-13 chemin des Anémones, CH-1219 Châtelaine, Geneva). The seminar venue is accessible on bus route no. 6 direction Vernier (get off at bus stop: 'Châtelaine Ecole').

Themes to be Covered

Module 1: Introduction / Overview of the Legal Aspects of Debt and Financial Management / Multidisciplinarity of Debt Management and the importance of the Legal Aspects in the Borrowing Process / External Borrowing and Development Process

Module 2: Current Developments in International Finance and their Implications for Nigeria / Nigerian Borrowing Strategy, Framework and Challenges

Module 3: Overview of Legal / Regulatory Frameworks for Debt Management / National Loan and Guarantee Approval Procedures

Module 4: Discussion on Nigeria's Legal Framework for Borrowing / The Importance of an External Borrowing Legislation / The Challenges facing a Federal State

Module 5: Multilateral Sources of Funding including the World Bank Group and the African Development Bank / Overview of Documentation and Drafting of Loan Agreements / Negotiation Best Practices

Module 6: The Paris Club / Understanding the Practices of the Paris Club / Paris Club Agreements and specific Clauses within these Agreements / The Nigerian experience so far and how to prepare for the future

Module 7: Introduction to Arbitration and Dispute Resolution and/or Debt Conversion and how to revitalize the Debt Conversion Programme of Nigeria

Module 8: Participant Roundtable on Legal Aspects of Debt Management

Module 9: Negotiation Skills and Techniques / Experience of Nigerian Debt Managers and Negotiators / Ways of optimizing the Negotiation Potential of Nigeria (with Multilaterals and within the context of the Paris Club) / Mock Negotiation (time permitting)

Module 10: Participant Recommendations / The Way Forward / Wrap-up by Seminar Director

ANNEX II:

UNITAR

UNITAR Seminar on

« The Legal Aspects of Debt and Financial Management for Officials from The Nigerian Debt Management Office »

Geneva (Switzerland), 6-10 December 2004

SEMINAR AGENDA

Day One – Monday, 6 December 2004

Seminar Director: Prof. Daniel D. Bradlow

Morning Session:

08:30-09:00 Participant Registration (International Environment House Building, Geneva)[35]

09:00-09:20 Seminar Opening and Welcome Remarks *by Marcel Boisard and Jaime Delgadillo Cortez*

09:20-09:45 Introduction of Participants and Panellists

09:45-10:30 Module 1: Introduction / Overview of the Legal Aspects of Debt and Financial Management / Multidisciplinarity of Debt Management and the importance of the Legal Aspects in the Borrowing Process / External Borrowing and Development Process *(Primary Speakers: Daniel Bradlow, Christian Comeliau; Commentators: Bolaji Owasanoye, Aboubacar Fall)*

10:30-11:00 *Coffee/Tea Break*

11:00-12:30 Module 1 *(continued)*: Introduction / Overview of the Legal Aspects of Debt and Financial Management / Multidisciplinarity of Debt Management and the importance of the Legal Aspects in the Borrowing Process / External Borrowing and Development Process

12:30-14:00 Lunch Break

Afternoon Session:

14:00-15:30 Module 2: Current Developments in International Finance and their Implications for Nigeria / Nigerian Borrowing Strategy, Framework and Challenges *(Primary*

[35] Seminar Venue : International Environment House Building No. 1 (Conference Room No. 3 / Ground Floor), Street Address: 11-13 chemin des Anémones, CH-1219 Châtelaine, Geneva, Switzerland.

Speakers: Christian Comeliau, Bolaji Owasanoye; Commentators: Daniel Bradlow, Aboubacar Fall)

15:30-16:00 *Coffee/Tea Break*

16:00-17:30 Module 2 *(continued)*: Current Developments in International Finance and their Implications for Nigeria / Nigerian Borrowing Strategy, Framework and Challenges

Day Two – Tuesday, 7 December 2004

Seminar Director: Prof. Daniel D. Bradlow

Morning Session:

9:00-10:30 Module 3: Overview of Legal and Regulatory Frameworks for Debt Management / National Loan and Guarantee Approval Procedures *(Primary Speaker: Daniel Bradlow; Commentator: Aboubacar Fall)*

10:30-11:00 *Coffee/Tea Break*

11:00-12:30 Module 3 *(continued)*: Overview of Legal / Regulatory Frameworks for Debt Management / National Loan and Guarantee Approval Procedures

12:30-14:00 Lunch Break

Afternoon Session:

14:00-15:30 Module 4: Discussion on Nigeria's Legal Framework for Borrowing / The Importance of an External Borrowing Legislation / The Challenges facing a Federal State *(Primary Speakers: Mrs. Janet O. Jiya[36] ; Bolaji Owasanoye; Commentators: Daniel Bradlow, Aboubacar Fall)*

15:30-16:00 *Coffee/Tea Break*

16:00-17:30 Module 4 *(continued)*: Discussion on Nigeria's Legal Framework for Borrowing / The Importance of an External Borrowing Legislation / The Challenges facing a Federal State

Day Three – Wednesday, 8 December 2004

Seminar Director: Prof. Bolaji Owasanoye

Morning Session:

9:00-10:30 Module 5: Multilateral Sources of Funding including the World Bank Group and the African Development Bank / Overview of Documentation and Drafting of Loan Agreements / Negotiation Best Practices *(Primary Speakers: Alexander Troller, Christian Comeliau, Aboubacar Fall; Commentator: Bolaji Owasanoye)*

10:30-11:00 *Coffee/Tea Break*

11:00-12:30 Module 5 *(continued)*: Multilateral Sources of Funding including the World Bank Group and the African Development Bank / Overview of Documentation and Drafting of Loan Agreements / Negotiation Best Practices

12:30-14:00 Lunch Break

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[36] Country Presentation: '**Legal Aspects of Debt and Financial Management – The Nigerian DMO Experience**' by *Mrs. Janet O. Jiya*, Chief Legal Officer, Nigerian DMO.

Afternoon Session:

14:00-15:30 Module 6: The Paris Club / Understanding the Practices of the Paris Club / Paris Club Agreements and specific Clauses within these Agreements / The Nigerian experience so far and how to prepare for the future *(Primary Speakers: Bolaji Owasanoye Mr. Abubakar Zakari; Commentator: Christian Comeliau)*

15:30-16:00 *Coffee/Tea Break*

16:00-17:30 Module 6 *(continued)*: The Paris Club / Understanding the Practices of the Paris Club / Paris Club Agreements and specific Clauses within these Agreements / The Nigerian experience so far and how to prepare for the future[37]

Day Four – Thursday, 9 December 2004

Seminar Director: Prof. Bolaji Owasanoye

Morning Session:

9:00-10:30 Module 7: Negotiation Skills and Techniques / Experience of Nigerian Debt Managers and Negotiators / Ways of optimizing the Negotiation Potential of Nigeria (with Multilaterals and within the context of the Paris Club) / Mock Negotiation (time permitting) *(Principal Speakers: Alexander Troller, Bolaji Owasanoye)*

10:30-11:00 *Coffee/Tea Break*

11:00-12:30 Module 7 *(continued)*: Negotiation Skills and Techniques / Experience of Nigerian Debt Managers and Negotiators / Ways of optimizing the Negotiation Potential of Nigeria (with Multilaterals and within the context of the Paris Club)

12:30-14:00 Lunch Break

Afternoon Session:

14:00-15:30 Module 8: Mock Negotiation Session *(Moderator: Alexander Troller)*

15:30-16:00 *Coffee/Tea Break*

16:00-17:30 Module 8 *(continued)*: Mock Negotiation Session

Day Five – Friday, 10 December 2004

Seminar Director: Prof. Bolaji Owasanoye

Morning Session:

9:00-10:30 Module 9: Introduction to Arbitration and Dispute Resolution and/or Debt Conversion and how to revitalize the Debt Conversion Programme of Nigeria *(Principal Speaker: Alexander Troller; Commentator: Bolaji Owasanoye)*

10:30-11:00 *Coffee/Tea Break*

11:00-12:30 Module 9 *(continued)*: Introduction to Arbitration and Dispute Resolution and/or Debt Conversion and how to revitalize the Debt Conversion Programme of Nigeria

[37] Country Presentation: '**Origin and Structure of Nigeria's Paris Club Debt**' by *Mr. Abubakar Zakari*, Assistant Chief Operations Officer, Debt Registration and Settlement Department, Nigerian DMO.

12:30-14:00 Lunch Break

Afternoon Session:

14:00-15:30 Module 10: Participant Round Table and Recommendations / The Way Forward / Wrap-up by Seminar Director *(Moderator: Bolaji Owasanoye and Isiaka Abdulrazaq)*

15:30-16:00 *Coffee/Tea Break*

16:00-16:30 Seminar Evaluation and Closing *by Marcel Boisard*

UNITAR

UNITAR is an autonomous body within the United Nations which was established in 1965 to enhance the effectiveness of the UN through appropriate training and research. UNITAR's programmes in the legal aspects of debt and financial management are among a wide range of training activities in the field of social and economic development and international affairs carried out, generally, at the request of governments, multilateral organizations, and development cooperation agencies. UNITAR also carries out results-oriented research, in particular research on and for training, and develops pedagogical materials including distance learning training packages.

UNITAR's Training and Capacity Building Programmes in the Legal Aspects of Debt and Financial Management are conducted for the benefit of over 35 partner countries mainly from sub-Saharan Africa, Central Asia, Azerbaijan and South-East Asia. These programmes aim at meeting the priority training needs of senior and middle-level government officials through a wide range of seminars, workshops, training of trainers' workshops as well as e-Learning/online training. In parallel to training activities, the programme also assists in strengthening local capacities of governmental and academic institutions through distance learning training packages, up-to-date publications as well as networking activities.

During 2005, the programme will focus on:

- Training government officials through short-duration regional seminars and workshops on various aspects of debt, financial management and negotiation;
- Conducting online training courses (in parallel with its traditional regional training) specifically for debt and finance managers from developing countries and economies in transition;
- Strengthening existing ties with regional training centres and offering joint courses with partners in the field;
- Creating awareness among senior government officials of the importance of the legal aspects in the borrowing process and of putting together a multidisciplinary team for loan management and public administration;
- Providing in-depth training and skills development for accountants, economists, financial experts and lawyers coming from government ministries and departments involved in negotiation, financial management and public administration; and
- Developing and disseminating training packages and 'best practice' materials directly related to the practicalities of legal aspects of debt and financial management, with a view to strengthening existing human resources and institutional capacities at the national level.

A description of UNITAR's latest activities and training programmes in the area of debt and financial management is available on its website at: www.unitar.org/dfm.

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