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LEGAL APPROACH TO BREAKING THE CYCLE OF IRRESPONSIBLE BORROWING IN IVORY COAST

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DECLARATION

"I declare that this Mini-Dissertation which is hereby submitted for the award of Legum Magister (LL.M) in International Trade and Investment Law in Africa at International Development Law Unit, Centre for Human Rights, Faculty of Law, University of Pretoria, is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution".

WISEL ALBAN GOUET

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DEDICATION

I dedicate this thesis to African countries in particular francophone countries from central and western Africa which are still suffering from cyclical poor management of public debt.

LIST OF ACRONYMS

GDP : Gross Domestic Product

HRIA : Human Rights Impact Assessment

IMF : International Monetary Fund

PDM : Public Debt Management

UNCAC: United Nations Convention against Corruption

UNCTAD: United Nations Conference on Trade and Development

UNODC: United Nations Office on Drugs and Crime

WAEMU: West African Economic and Monetary Union

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CHAPTER 1

INTRODUCTION

1.1 Background

Ivory Coast has achieved an outstanding economic performance since 2013. The economic growth figures from 2013 to 2016 were respectively 8, 7%, 7, 9%,and 8, 8%'.[1] The Ivorian economic performance from the last four years has been so amazing that the World Bank has qualified it as impressive'.[2] Actually, Ivory Coast is highly praised by International financial institutions for the growing trend of its economy after 9 years of civil war.

The country benefited from the Highly Indebted and Poor Country debt relief initiative in 2012 which entailed the writing off of USD 4,4 billion of its external debt'.[3] Since then, the indicators of the economic performance have been positive and highly promising.

However, behind those apparent promising economic indicators, along with its economic growth, there is also a growth of the Ivorian State sovereign debt since 2013. In fact, even if the current ratio of the debt to the GDP is currently qualified as moderate risk by the International Monetary Fund[4] (IMF), it is its rapid growth in the aftermath of the cancellation of a substantial part of its debt thanks that is worrisome. Actually in 2015, the ratio of the debt to GDP was 49, 01% and in 2016 50, 9 %'.[5] It is getting closer to its level in 2011 (69, 5 %)[6] before the achievement of the completion point under the enhanced HIPC initiative.

[1] Cote d'Ivoire Economic Outlook https://www.afdb.org/en/countries/west-africa/cote-d%E2%80%99ivoire/cote-divoire-economic-outlook/ (accessed on 10 July 2017)

[2] The World Bank in Côte d'Ivoire http://www.worldbank.org/en/country/cotedivoire/overview (accessed on 10 July 2017).

[3] IMF Country Report No 12/170 Côte d'Ivoire: Enhanced Heavily Indebted Poor Countries Initiative Completion point Document and Multilateral Debt Relief Initiative; Press Release, July 2012 page 20.

[4] IMF Cote d'Ivoire debt sustainability analysis November 2014 and June 2017, page 01.

[5] Central Intelligence Agency, the World Factbook , Africa: Cote d'Ivoire. https://www.cia.gov/library/publications/the-world-factbook/geos/iv.html (accessed on 09 July 2017)

[6] Ivory Coast national debt goes up http://countryeconomy.com/national-debt/ivory-coast (accessed 27 July 2017)

Those concerns are all the more justified insofar as since its first budgetary crisis in the 1980, Ivory Coast has been mired in a cycle of over-indebtedness crises which has hijacked its development dreams. During the reign of the second President in 1997, the debt had attained the level of 116¨% to GDP ratio. At the beginning of the term of the fourth President in 2000, the public debt to GDP ratio was 103%'.[7]

Over-indebtedness has characterized budgetary practices of the Ivorian government since the reign of her first President. The fact is that like in the current economic atmosphere of Ivory Coast, it gives an appearance of a healthy country still trying to heal from nine years of civil war. It should not be forgotten that the root cause of the last Ivorian conflict was linked to resource-scarcity catalysed by the first financial crisis experienced by the country in the 1980.Thus, beyond the macroeconomic objectives of the country, preventing the occurrence of another sovereign insolvency is essential for its social peace.

1.2 Problem statement

Over-indebtedness and development are incompatible. Ivory Coast has the ambitious dream of becoming an emerging economy by 2020.[8] This ambitious project will turn into a pipe dream if another sovereign debt crisis were to occur. It is therefore imperative to find preventive and curative antidote to the threat of overindebtness. Finding the aforesaid antidote, like for any social or economic problem, requires understanding the causes of the problem. Then, the first question is what could be the cause of debt crises in Ivory Coast? How Ivory Coast has become insolvent in the past?

Like for its African peers, there is a whole host of reasons which led to the Ivorian debt crisis. They can be summarized in two points: External and internal factors. External factors are divided between historical and economic reasons. From a historical perspective, African states overindebtness cycle has been described as a legacy of colonization. In fact, certain African states inherited a huge debt at their independence. Starting with liabilities would have led African countries to cyclical balance of payments problems which in turn would have

[7] Ivory Coast national debt goes up (n.6 above)

[8] The World Bank in Côte d'Ivoire http://www.worldbank.org/en/country/cotedivoire/overview (accessed on 10 July 2017)

catalysed overindebtness. One of the very examples in that regard is Zimbabwe which have inherited a record debt of $ 700 million at its independence'.[9]

This situation does not apply to Ivory Coast insofar as there is no empirical data which prove the existence of a sovereign debt inherited from the French colonist and paid by the Ivorian state. After all, after independence, the health of the Ivorian economy was excellent until the falling of the price of its main exportation commodities that are cocoa and coffee in the 1980.[10] That was the starting point of the Ivorian overindebtness.

From an economic perspective, some authors link overindebtness to the easy access to loans on the international market. Irresponsible over lending would have led to irresponsible borrowing from African states.[11] This argument contains some truth. However, it is undermined by the fact that the availability of loans on the international market has helped some other countries like China, Japan, and Singapore to boost their economic development. Thus the availability of loans on the International market is an opportunity not a disadvantage especially since taking out those loans is not compulsory.

It results from the above that one should look at probably look at internal factors for explaining the very reasons of the Ivorian state insolvency in the past.

Internal factors of states insolvency in Africa are linked to factors like political instability, as well as wasted and misappropriated sovereign loans. Ivory Coast previous insolvency is certainly linked to the two last factors. As a matter of facts, the building of a huge catholic church thanks to a record loan $ 175 million in the middle of the financial crisis in the 1990, is an example of wasted sovereign loan in the Ivorian Coast'.[12] The amazing wealth of the two first presidents of the country amassed in the middle of the financial crisis of the 1990 cast suspicion about misappropriation of sovereign loans'.[13]

[9] Qekisi, M "Origins of the African Debt crisis", 2016 page 03, subtitle external factors.
http://www.academia.edu/5104533/ORIGINS_OF_THE_AFRICAN_DEBT_CRISIS

[10] AFDB/OECD Report African economic outlook 2004 Cote d'ivoire page 108.

[11] Qekisi, M "Origins of the African Debt crisis", 2016 page 03, subtitle external factors

[12] The New York Times " Ivory Coast Church to Tower Over St. Peter's", December 19 1988.
http://www.nytimes.com/1988/12/19/world/ivory-coast-church-to-tower-over-st-peter-s.html

[13] Comité Catholique contre la Faim et pour le Développement et Terre Solidaire *« Bien mal acquis profitent trop souvent-la fortune des dictateurs et les complaisances occidentales » (ill-gotten gains benefit very often –the fortune of dictators and western complacencies)*

In light of the analysis presented above, it may be deduced that the Ivorian debt crisis is mainly linked not to external factors but rather to internal factors especially the mismanagement of sovereign loans. That entails also that the framework for preventing wasting and misappropriation of sovereign loans is either not working or at worst not existing. The solution to the equation of the problem of the prevention of another sovereign debt crisis in Ivory Coast lies therefore in either addressing the anomalies of the current legal framework on sovereign borrowing or creating an efficient legal framework and implement mechanisms aimed at realizing responsible borrowing .

1.3 Research question(s)

The broad research question which this study will seek to answer is: how can responsible borrowing as a legal obligation be enforced in Ivory Coast?

In answering the broad research question, the following sub-questions will also be answered-

How have the international standards on responsible borrowing emerged?

Is there an extant legal framework for external borrowing in Ivory Coast?

Are there international best practices in enforcement of responsible borrowing that Ivory Coast can draw lessons from?

1.4 Thesis statement

Ivory Coast's current legal framework on sovereign debt is inconsistent with international standards on responsible borrowing hence the continuous renewal of the cycle of over-indebtedness from one government to another. Therefore, this study will argue that enforcing responsible borrowing requires a deep reform of the current legal framework on sovereign debt which will catalyse a tectonic shift in the Ivorian state borrowing policy.

1.5 Significance of the study

As stated in the background to this study, irresponsible borrowing is not specific to Ivory Coast. It is an economic pandemic very present in Africa and in numerous developing and least developed countries. It is against this backdrop that this study will seek to interrogate a legal approach to the problem of over-indebtedness which is relevant not only for Ivory Coast but for many other African countries and developing countries in general which are trying to escape the grips of over-indebtedness and its corollary underdevelopment.

The legal reforms which this study will propose to enforce responsible borrowing are peculiarly relevant for francophone African countries especially those of the Franc zone in the sense that most of these countries have a legal framework similar to the one of Ivory Coast and are confronted by the same challenges with respect to sovereign debt.

1.6 Literature review

Preventing sovereign debt default is not a new issue. Numerous authors have explored the issue and proposed solutions against the economic pathology.

Among the most recent and relevant studies, the book of the economic Professors Carmen Reinhart and Kenneth S Rogoff respectively from Maryland and Harvard University entitled *"This time is different : eight centuries of financial folly"* is considered as authoritative in this area'. [14] This book provides a comprehensive history of main financial crises from 1800 to 2010. It analyses both banking crises and sovereign debt default. One of the key findings of this book based on the scrutiny of financial crises during the period mentioned above is that over the years the same causes have produced the same effects regarding the catalysts of sovereign debt defaults.

According to this book, financial crises due to banking crises or sovereign debt default occurred as a result of the failure of balancing the risks and opportunities of a debt. States tended through history to ignore the alarms signals deriving from the overall ratios of public debt to their GDP'.[15]

[14] Best seller Lists and awards http://www.reinhartandrogoff.com/ (accessed 27 July 2017)
[15] Reinhart C & K S Rogoff *This time is different Eight Centuries of Financial Folly* 2010 Princeton University Press , page 22.

In this regard, the authors emphasized with respect to middle-income countries, a debt ratio to the GDP under 60% is a positive sign of the sustainability of their sovereign debt. But, conversely a debt ratio to the GDP above 60% is an economic harbinger of the unsustainability of the debt and therefore for forthcoming sovereign debt default'.[16]

Moreover, for mitigating the occurrence of sovereign debt default, the authors advice states to base their debt sustainability exercise on plausible scenarios of economic performance'.[17]

On the whole, among other key findings, this book provides the benchmark for sovereign debt ceiling limits for low income countries like Ivory Coast. A legal framework for enforcing responsible borrowing shall translate into law this public debt sustainability threshold measurement.

Another major work on the realization of responsible borrowing and essential in the analysis of countries legal framework consistency with international standards is the book co-edited by Carlos Esposito, Yuefen Li and Juan Pablo Bohoslavsky entitled *Sovereign Financing and International Law the UNCTAD principles on Responsible Sovereign Lending and Borrowing*.

This book discusses the practical implementation of the 13 principles developed by UNCTAD for assessing responsible lending and borrowing. Regarding the realization of responsible borrowing the authors analyse in line with United Nations Convention against Corruption (UNCAC), legal measures which have to be taken by states for preventing corruption in sovereign borrowing. By the same token, it also looks at legal measures to be implemented for giving effect to responsible sovereign debt management. Eventually, it discusses UNCTAD principles on responsible borrowing and sovereign insolvency law.

In substance this book describes how to translate into laws and policies the UNCTAD principles on Responsible sovereign lending and borrowing hence its relevance in the assessment of the Ivorian legal framework on responsible borrowing as well as the proposal of reforms of the said legal framework.

Finally the book of John Mukum Mbakum entitled *Corruption in Africa*: *Causes, consequences and clean-ups* proposes solutions avenues to counter sovereign overindebtness through its description of best practices regarding budget discipline in Africa. In the light of

[16] Reinhart C & K S Rogoff (n.9 above)
[17] Reinhart C & K S Rogoff (n.9 above), page 289.

efficient mechanisms developed by countries like Namibia and Senegal, the author shows how to give effect to budgetary discipline in Africa.

1.7 Research methodology

This study intends to address irresponsible borrowing to prevent sovereign debt unsustainability in Ivory Coast through an efficient legal framework on sovereign debt.

To that effect, as a result of the absence of the author from the country that legal framework is at the core of this study, the search for solutions to that "equation" will be grounded on a desktop research method quintessentially based on library and internet sources.

Actually, this research will be built from secondary data obtained from the researches of the intergovernmental organisation Collaborative African Budget Reform Initiative on budgetary discipline in Africa. It will also rely on the works of prominent authors and experts sovereign debt like Professor Roza Mastra , Carmen Reinhart Kenneth Rogoff and Lee C Buchheit.

Through a descriptive and analytical approach the author will analyse the consistency of the Ivorian framework on sovereign debt with international standards on responsible borrowing for the purpose of diagnosing its deficiencies. Then from this diagnosis, it will explore solutions avenues from International standards and experts' works about best practices pertaining to ensuring debt sustainability and enforcing responsible borrowing.

1.8 Limitations of the study

Sovereign defaults are the consequence of the inability of a government to meet payments deadlines on its external and domestic debts obligations. Thus most of the studies on responsible borrowing focus on the avenues for enforcing budgetary discipline and debt sustainability concerning both external and internal debt. This study will be limited to the enforcement of responsible borrowing with respect to external debt. The analysis of the legal framework and statistics provided in this study will be focused on the Ivorian external debt. Besides, based on the principle that "for each government agent who overborrows, there is

another agent public or private who overlends,"[18] most studies on the enforcement of responsible borrowing address lenders and borrowers responsibilities concomitantly. As far as this study is concerned, it will be limited to the study of the portion of responsibility of the Ivorian state for giving effect to responsible borrowing in Côte d'Ivoire.

Moreover, this study will afford to minimize the analysis of the technical and purely economic aspects of the foreign debt like debt sustainability analysis principles. It will be mainly focused on legal aspects of responsible borrowing especially the budgetary law.

1.9 Layout of chapters

The rest of this study will be divided as follows:

- The second chapter will consist of a comprehensive description of international standards on responsible borrowing especially the consolidated version of those standards derived from UNCTAD's principles on Responsible Sovereign Lending and Borrowing (2012), United Nations guiding principles on Foreign debt and human rights and United Nations Convention against corruption (2003)

- The third chapter will describe in first place the Ivorian legal and institutional framework on sovereign borrowing and then assess the compliance of this legal framework with International standards on responsible borrowing in order to diagnose the shortcomings of the Ivorian sovereign debt legal regime with respect to the enforcement of responsible borrowing

- The fourth chapter will describe international best practices that Ivory Coast may draw lessons from, for addressing the shortcomings of its legal framework on sovereign borrowing

- The last chapter will summarize the main findings of the study and provide key recommendations for a tectonic shift in the Ivorian government borrowing practices.

[18] S Panitchpakdi, Secretary General of UNCTAD Preface of *Sovereign Financing and International Law The UNCTAD Principles on Responsible Sovereign Lending and Borrowing* (2013).

CHAPTER 2

OVERVIEW OF INTERNATIONAL STANDARDS ON RESPONSIBLE BORROWING

2.1- Introduction

This chapter will describe the sources as well as the content of international standards on responsible borrowing which will constitute the benchmark of assessment of the Ivorian legal framework on responsible borrowing.

Until quite recently, sovereign debt was considered as a matter regulated by domestic law regarding the issuance of debts and informal processes generally derived from ad hoc agreements between the parties as well as fragmented rules of international law with respect to debt adjustment or restructuring. Sovereign debt was a chapter of international finance with no globally agreed customs or rules to the point that it was considered as a law free zone'.[19]

This legal void on international law of sovereign debt is undoubtedly the very origin of different severe debt crises experienced especially by developing and least developed countries as well as poisonous debt restructuring plans like the sadly notorious structural adjustment programmes of the 1980.

One of the most recent consequences of the normative gap in international law on sovereign financing was the Eurozone debt crisis of 2009 which has alerted the international community about the imperious necessity of defining international principles on sovereign lending and borrowing'.[20]

It is in that context that UNCTAD in the aftermath of the global financial crisis of 2009 UNCTAD decided to launch a project on the identification of principles of responsible borrowing and lending based on best practices in this domain. This research resulted in the enshrining in 2012 of 15 principles aimed at preventing irresponsible sovereign financing. So

[19] A Gelpern "Hard, soft and embedded: Implementing the UNCTAD Principles" in C Esposito, Y Li & JP Bohoslavsky *Sovereign Financing and International Law The UNCTAD Principles on Responsible Sovereign Lending and Borrowing* (2013), page 353 & 354.

[20] S Panitchpakdi, Secretary General of UNCTAD Preface of *Sovereign Financing and International Law The UNCTAD Principles on Responsible Sovereign Lending and Borrowing* (2013).

the UNCTAD principles on Responsible Sovereign Lending and Borrowing (hereinafter the UNCTAD principles) are at the core of international standards on responsible borrowing. Notwithstanding, they are not the sole benchmark source of harmonized rules of International Law on sovereign financing. Actually, UNCTAD principles refer clearly to United Nations Convention against Corruption (UNCAC) of 2003 and United Nations Guiding principles on foreign debt and human rights of 2011 as source of complementary norms on responsible borrowing and lending'.[21]

De facto, international standards on responsible borrowing encompass on one hand, soft law principles enshrined in UNCTAD principles and UN guiding principles on foreign debt and human rights and one the other hard law norms derived from UNCAC. As a matter of fact, the UN Guiding principles complement the provisions of UNCTAD principles on responsible borrowing whereas UNCAC is the "Trojan horse" of UNCTAD especially regarding the implications of the fiduciary duties of the authorities intervening in the elaboration and the management of the public debt.

2.2-UNCTAD principles and UN guiding principles on foreign debt and human rights complementary standards on responsible borrowing

The complementarity between both soft law instruments stems from the strong similarity of their content. UNCTAD's principles and UN guiding principles contains the same core points of the responsibility of the sovereign borrower. But, they are nuances in their definition of the positive actions expected from debtor states under each core point of the enforcement of responsible borrowing. One instrument may be more comprehensive than the other from one core point to another but the quintessence of the responsibilities of the sovereign borrower remains the same.

In fact, starting with UNCTAD's principles as its full title indicates, it covers simultaneously the responsibility of the lender and the one of the sovereign borrower. Those responsibilities are described in 15 principles. Principle 1 to 7 addresses the lender's responsibilities whereas principle 8 to 15 deals exclusively with those of the sovereign borrower.

[21] UNCTAD, guidelines on Responsible Sovereign Lending and Borrowing (2014) paragraph 57.

Principle 8 starts by emphasizing the fiduciary duty of state agents as well as the conditions for validity of the borrowing agreement. Principle 09 and principle 15 enunciate respectively the binding character of the borrowing agreement and the sovereign borrower options in case where a restructuring of the debt becomes necessary.

Principles 10 , 11 and 13 stipulate the duties of the borrowing state with respect to the implementation of a legal framework for giving effect to the transparency of the borrowing process, access to information on borrowing agreement, and the adequate management and monitoring of the debt.

In the same spirit of the responsibility of adequate management and monitoring of the debt stipulated by principle 13, the principle 14 postulates the obligation of avoiding incidences of over-borrowing. Principle 12 addresses the responsibility of the sovereign borrower with respect to specific measures to be put in place for mitigating adverse effects on human rights of development projects. As mentioned in in the introductory chapter especially in the section on the limitations of the study, this domain of international standards on responsible borrowing is not covered by this study.

So there are six principles specifically dedicated to the borrower's responsibility which will be covered by this study. To those six principles dealing specifically with the responsibilities of the borrowing state, is added the "hybrid "international standard of due authorization which entails positive actions to be taken both by lenders and borrowers.

UN guiding principles on foreign debt on human rights legal or its part comprises 86 paragraphs in total and among which 63 address the responsibilities of both lenders and borrowers. Those 63 paragraphs highlight the responsibilities of the sovereign borrower in line with the protection of public interest in contracting loans and in the use of loan funds, "transparency, participation and accountability in the indebtedness process and in debt management, the core principles of the general legal framework of foreign debt, debt servicing, project financing and debt restructuring'.[22]

[22] Report of the Independent Expert on the effects of foreign debt and other related other International Financial Obligations of states on the full enjoyment of all human rights particularly economic social and cultural rights, Cephas Lumina. Guiding principles on foreign debt and human rights, (2011), paragraph 23 to 86.

It is observed that the same central points of the enforcement of responsible borrowing mentioned in UNCTAD's principles are repeated in UN Guiding principles on foreign debt and human rights.

Actually, both instruments provide rules regarding the fiduciary duty of states agents, the adequate management of the debt and the transparency of borrowing procedures as well as sovereign debt management and finally debt servicing and restructuring

2.2.1-Responsible borrowing and fiduciary duty of states agents in UNCTAD principles and UN guiding principles on foreign debt and human rights

The fiduciary duty refers to the highest standard of care expected from the agent with respect to matters entrusted to him in the context of an agency relationship. An agency relationship is a relationship wherever a person (the agent) is obliged by law or by contract to act in the best interest of another person (the principal) on specific matters within the scope of the relationship'.[23] This legal scheme imported from corporate law on trusteeship describes the relation between the governments' agents and citizen with respect to sovereign debt management.

Principles 1 and 8 of UNCTAD legal regime on public debt establish a fiduciary relationship between the government and their citizen inasmuch as they emphasize "the responsibility of state agents to protect their citizens' interests when they contract debt obligations".[24]

By the same token, UN Guiding principles on foreign debt and human rights also stipulate debtor' states obligation to borrow and to use loans funds for the purpose of serving the public interest'.[25]

[23] JR Oyola & M Sudreau "Fiduciary Relationships Legal framework and Implications for Responsible Sovereign Debt management" in C Esposito, Y Li & JP Bohoslavsky *Sovereign Financing and International Law The UNCTAD Principles on Responsible Sovereign Lending and Borrowing* (2013), page 213

[24] JR Oyola & M Sudreau "Fiduciary Relationships Legal framework and Implications for Responsible Sovereign Debt management" in C Esposito, Y Li & JP Bohoslavsky *Sovereign Financing and International Law The UNCTAD Principles on Responsible Sovereign Lending and Borrowing* (2013), page 213 & 215

[25] United Nations Guiding Principles on foreign debt and human Rights (2011), paragraph 23.

For giving effect to states' agents obligation to fulfil their end of their fiduciary responsibility toward their citizen that is to say acting in the public interest in sovereign debt management, borrowing states have to take specific measures. Those measures concern on one hand the enactment of measures related to the validity of loan contracts including the definition of borrowing purposes, the responsibilities and limits of the borrowing authority and on the other code of conduct for states agents and the penalties applicable to the infringement of this code of conduct.

Public interest protection and the validity of the loan agreement in UNCTAD principles and UN Guiding principles on foreign debt and human rights

UN guiding principles and UNCTAD Principles touch on three aspects of the conditions for the validity of loan agreements in respect of which borrowing states have to enact measures for conciliating protection of the public interest and conditions for the validity of loan agreements.

The first aspect of the conditions for the validity of loan agreement is about the satisfaction of the criterion of the legality of the loan agreement vis-à-vis the laws and regulations of the borrowing state. In fact, the loan must have been previously approved and be contracted by a person or entity which is empowered under the laws of the borrowing state for representing him in loan agreements. Proper approval implies that the loan shall have been previously approved by the parliament or by some other democratically constituted national legislative entity endowed with such role. In practice it means that the sovereign loan concerned shall have been listed in the national budget for the financing of specific government expenditure'.[26] Legislation should also clarify which entity in the state has authority to borrow on behalf of the sovereign.

Thus, debtor's states should define borrowing purposes as well as clear borrowing procedures defining responsibilities and limitations of the borrowing authority in their legislation. To

[26] Guidelines on Responsible sovereign Lending and Borrowing, responsibilities of sovereign borrowers (2014), paragraph 39, page 12.

that effect, they may also include restrictions of sovereign borrowing to certain purposes that are in public interest'. [27]

So, due authorisation is the first cornerstone of the conditions for validity of loan agreements under UNCTAD's and UN guiding principles legal framework on sovereign debt that sovereign borrowers have to give effect to in their legislation on public debt.

The two other aspects concern the protection of the integrity of the contract against corruption and the recognition of the legal doctrine of the odious debt in the legal framework for sovereign debt contracts.

On the point of the protection of the integrity of the sovereign loan contract against corruption, UNCTAD's legal framework for responsible sovereign borrowing postulates clearly the incompatibility between corruption and public interest protection in debt contract as well as debt management'.[28] This implies that it adheres de facto to a principle already acknowledged in the jurisprudence of certain international tribunals'[29] as well as certain treaties on corruption'[30]: The unenforceability or voidness of a contract or claims deriving from an agreement based on corruption'. [31]

Consequently for guaranteeing the integrity of public debt transactions vis-à-vis corruption and de facto protecting public interest, debtor states have to adopt laws aims at deterring lenders as well as states agents from participating in corrupted transactions. Those measures may include inter alia the criminalization of the fact of giving a bribe for himself or for another person to a public official. In the same vein, debtor's states should also specify in their legislation on sovereign debt contracts the consequences of the creditor's complicity in the corruption of government officials regarding the obligation to service the loan'. [32]

[27] Guidelines on Responsible sovereign Lending and Borrowing, responsibilities of sovereign borrowers, page 49 & 50.

[28] UNCTAD's principles on Responsible Sovereign Lending and Borrowing, Implications of principle 08.

[29] *World Duty free v Kenya* (2006) ICSID, Case No ARB/00/7, paragraph 155.

[30] Civil law Convention on Corruption (1999), article 08.

[31] JB Justo "UNCTAD's principles on public debt and the United Nations Convention against Corruption Links and Common strategies" in C Esposito, Y Li & JP Bohoslavsky *Sovereign Financing and International Law The UNCTAD Principles on Responsible Sovereign Lending and Borrowing* (2013), page 207; referring to M Goldmann *"Responsible sovereign Lending and Borrowing the view from Domestic jurisdictions, a comparative survey"* (2012), page 43.

[32] UNCTAD, guidelines on Responsible Sovereign Lending and Borrowing (2014), page 50.

Regarding the last cornerstone of the conditions for validity of sovereign debt agreements, it implies the responsibility of sovereign borrowers to give effect to the legal doctrine of odious debt in their legislation on sovereign debt agreements.

This legal doctrine postulates that a sovereign loan contracted by a regime without the consent of its people and for objectives that "do not serve the best interests of a nation should not be enforceable".[33] Sovereign borrowers have to define in their legislation the criteria for qualifying a debt as odious. In this regard, UN guiding on foreign debt and human rights has enumerated the elements that have to be taken into account by sovereign borrowers in the definition of the criteria of odious debt. Those are':[34]

- The absence of consent by the debtor's state population
- The absence of benefit to the debtor's state population
- The creditor's awareness of the above facts

So, in short under UNCTAD and UN guiding principles legal framework on sovereign debt, a legal framework on sovereign debt contract compliant with the duty of protection of public interest should address adequately in its provisions the issues of due authorisation of the loan, the protection of the integrity of the loan contracts against corruption and the definition of criteria for qualification of a debt as odious.

Public interest protection and the regulation of the conduct of public officials intervening in the indebtedness process

The direct consequence of the state's agents obligation to act in the interest of their citizen when they contract debt obligations is the application of their responsibility in the possibility to hold them accountable in case of violation of their obligation of protection of their citizen interest. The corollary of this possibility to hold state agents accountable is debtor's states duty to define a legal regime for giving effect to the accountability of public servants resulting from their obligation of protection of the public interest.

[33] A N, Sack *"The effects of states transformation on their public debt and other financial obligations"* (1927), page 157-158.

[34] United Nations Guiding Principles on foreign debt and human Rights (2011), paragraph 86 (d).

In this regard, UN guiding principles on foreign debt and human rights specifies that "accountability requires remedial measures that ensure that decision- makers are answerable if warranted for their actions regarding external debt agreements or arrangement as well as external debt policies and strategies".[35]

So for giving effect to the accountability of state's agents based on their obligation of protection of public interest whey are contracting debt obligations, debtor's states should develop a legal framework for monitoring their conduct.

This legal framework should include a "code of conduct as well as conflict-of-interest guidelines" destined to public officials and civil servants. This code of conduct should be supported to sanctions applied by a disciplinary tribunal designated for this purpose'.[36]

In the same vein, debtor states should also enact provisions aimed at punishing, the fact of borrowing on behalf of the state in contravention of the relevant provisions of the law. The complicity of such actions should also be punished. In this regard a state entity should be established for the purpose of investigations alleged public officials actions which contravene public interest notably claims on corruption'. [37]

Overall, the protection of public interest is the first "pillar" laid down both by UN guiding principles on foreign debt and human rights and UNCTAD's principles for ensuring responsible borrowing. Debtor's states should take concrete measures to support this "pillar" of responsible borrowing legal framework especially through the punishment of the involvement of public officials and lenders in corrupted transactions as well as the declaration of the illegality of debt contracts based on corruption.

So, in parallel to the obligation of accountability of leaders in democracy, the fiduciary duty of state's agents involved in the management of public debt entails their accountability toward their citizen. The logical extension of the fiduciary duty of state's agent in reason of its component of highest standard of care entails adequate management and monitoring of the debt.

[35] United Nations Guiding Principles on foreign debt and human Rights (2011),paragraph 31.
[36] UNCTAD, guidelines on Responsible Sovereign Lending and Borrowing (2014), page 49.
[37] UNCTAD, guidelines on Responsible Sovereign Lending and Borrowing (2014), page 49.

In addition, like other areas of public management in democracy, the process must be transparent. Finally, symmetrically to the right of access to information in democracy, access to information on public debt must be guaranteed.

2.2.2-Adequate management and monitoring of the debt, transparency of the indebtedness process and disclosure of information on the debt

There are "family ties" between the principles of transparency and disclosure of information inasmuch as transparency entails access to information. Thus, it is appropriate to describe them together and to separate them from the description on the adequate management and monitoring of the debt.

Adequate management and monitoring of the debt and responsible borrowing in UNCTAD's principles and UN Guiding principles on foreign debt and human rights

Adequate management and monitoring relates to the responsibility of borrowing states to monitor the state of their debt, in particular its sustainability.

On that point, UN guiding principles on foreign debt and human rights and the UNCTAD principles define two types of actions that debtor's states should undertake for giving effect to their responsibility of managing and monitoring adequately their debt. Those are on one side the enactment of normative measures and the establishment of debt monitoring institutions.

Regarding the enactment of normative measures, UN guiding principles on foreign debt and human rights stipulate that states should fix ceilings on international loans through budgetary law. The UN Principles on foreign debt also specifies that any modification in those ceilings should require prior approval of the parliament or some other democratically constituted legislative body before coming into force'.[38]

With respect to the establishment of debt monitoring institutions, principle 13 of UNCTAD's legal regime emphasize debtor's states responsibility to implement effective debt monitoring systems. In the spirit of this provision, those debt monitoring systems encompass an audit institution and a debt management unit.

[38] UN guiding principles on foreign debt and human rights (2011), paragraph 34.

The function of the former is to "conduct, independent, professional, timely and periodic audits of government debt portfolios". Those audit functions include also compliance and performance audits of the sovereign debt and other debt management activities as well as a qualitative and quantitative assessment of recent loans'.[39]

As for the latter, its role concerns mainly the analysis of the sustainability of the debt including risk assessments of sovereign guarantees. It also has the function of developing a debt management strategy and of keeping the records of state's debts and guarantees'.[40]

The debt sustainability analysis conducted by the debt management unit has to be submitted to the parliament or its equivalent in the context of the presentation of the annual budget bill'.[41]

Transparency, disclosure and publication of information on the state of the debt

The duty of transparency refers to the responsibility of the debtor's state to ensure the readability of the debt process and its management in order to permit public scrutiny. Readability presupposes access to information. That is why the transparency of the indebtedness process is consubstantial to the disclosure and publication of information on the debt.

Under UNCTAD's legal framework on sovereign debt, the principle of transparency entails dual duty: the duty of data transparency and the duty of process transparency.

The former refers to the duty to publish regularly information on "the stock and composition of the country's debt including its currency, maturity and interest rate structure" as well as the guarantees issued by the state. The latter refers to the clarity of borrowing procedures notably regarding the parliament role with respect to the approval of every part of the debt, to the establishment of debt ceilings and debt management objectives. Process transparency also

[39] UNCTAD, guidelines on Responsible Sovereign Lending and Borrowing (2014), options of the sovereign borrower (principle 13) page 52.

[40] UNCTAD, guidelines on Responsible Sovereign Lending and Borrowing (2014), options of the sovereign borrower (principle 13) page 51 & 52.

[41] UNCTAD, guidelines on Responsible Sovereign Lending and Borrowing (2014), options of the sovereign borrower (principle 13) page 51 & 52.

includes also the duty to report to the parliament all sovereign loans and debt management activities'.[42]

In parallel to this dualism of duties derived from the transparency principle, UNCTAD and UN guiding principles on sovereign debt provide for positive actions expected from states which reflect the said dualism.

In fact for the purpose of giving effect to data transparency both agreements provide for the duty of sovereign borrowers to disclose information pertaining to "loan agreements, debt repayments, debt management, audits reports and other related matters". On this point, it should be emphasized the disclosure of relevant information pertaining to loan agreements refers to the publication of the financial terms of each loan as well as their main legal terms like "the *pari passu* clause, the negative pledge, the default and the waiver of immunity clause".[43]

As for the duty of enforcing process transparency, UNCTAD principles provide that sovereign borrowers should clearly establish in their legal framework on public debt laws that establish clearly the process for approval and oversight of sovereign borrowing as well as the issuance of guarantees by the state. Those laws should also clearly establish responsibilities and accountabilities for public loans'.[44]

Finally the principle of transparency entails the duty of the borrowing state to clearly define in its legislation on public debt the roles of the different institutions intervening in the decision-making and the management of public debt (Debt management office, Ministry of finance, central bank) as well as borrowing purposes'.[45]

[42] UNCTAD, guidelines on Responsible Sovereign Lending and Borrowing (2014), Paragraph 65 & 66, Interpretation of principle 10, page 16.

[43] United Nations guiding principles on foreign debt and human rights (2011), paragraph 29.

[44] UNCTAD, guidelines on Responsible Sovereign Lending and Borrowing (2014), options of the sovereign borrower (principle 10) page 50 & 51.

[45] UNCTAD Guidelines (n.45 above) , paragraph 67.

2.2.3-Responsible borrowing and debt restructuring and related matters' legal regime in UNCTAD and UN guiding principles on sovereign debt legal regime

UNCTAD's principles and UN guiding principles postulate the responsibility of borrowing states to execute the sovereign debt contract in good faith, in particular with respect to their obligation to repay the debt'.[46] On this point, one of the key rule with respect to responsible borrowing is that in the fulfilment of their obligation to service their debt, debtor's states have the responsibility to ensure that debt servicing is not so disproportionate vis-à-vis their financial capacity to the point that it jeopardizes the provision of social services to their population'.[47]

Besides, like in any other agreement in spite of the sovereign borrower's good faith, external factors or circumstances may affect the execution of the debt repayment. It is incumbent upon debtor's states to make specific enactments for guaranteeing its right to temporarily suspend the service of its debt under exceptional circumstances. In those specific enactments, debtor's states have to define those exceptional circumstances which may lead to the provisional suspension of the service of the debt. On this point, UNCTAD principles and UN guiding principles on foreign debt and human rights provide that financial distress and natural disasters may justify a temporary suspension of the service of the debt. According to responsible borrowing and lending international standards, the moratorium obtained on the basis of those exceptional circumstances should apply to "the principal, interest, commission, penalties and debt restructuring'. [48]

Furthermore, it is the responsibility of debtor's states to prepare a contingency plan about the strategy to be followed in situations where economic or financial distress requires a restructuring of the debt'.[49]

The last point on debt restructuring and related matters legislated by international standards on responsible borrowing concern sales of debts on secondary markets. UN guiding principles

[46] UNCTAD's principles on Responsible Sovereign Lending and Borrowing (2012), principle 09 and United Nations guiding principles on foreign debt and human rights (2011) paragraph 52.

[47] United Nations guiding principles on foreign debt and human rights (2011) paragraph 48.

[48] UNCTAD's principles on Responsible Sovereign Lending and Borrowing (2012), principle 09 and United Nations guiding principles on foreign debt and human rights (2011) paragraph 52 & 58.

[49] UNCTAD, guidelines on Responsible Sovereign Lending and Borrowing (2014), options of the sovereign borrower (principle 15) page 52.

on foreign debt and human rights provide for some specific rules for protecting debtor's states against debt sales which might modify or affect negatively their obligations under the initial debt agreement like the unorthodox practices of vulture funds.

The first point of the safeguards provided by UN guiding principles on foreign debt with respect to sale of debts concerns the information of the borrower state before the sale or assignment of debts. It stipulates that loan agreements should restrain unequivocally the sale or assignment of debts to third parties without prior and informed consent of the sovereign debtor concerned'.[50]

The second point concerns sales of debt in situations where settlement negotiations between the debtor and the creditor have failed and the creditor has decided to sell or assign the debt to a third party. For this scenario, UN principles on foreign debt provide that a change of creditor should not lead to any change in the relevant provisions of the original agreement between the parties. Pertinent provisions of the original loan agreement like those pertaining to interest rates and change of circumstances should apply between the sovereign debtor and the new creditor'.[51]

In a nutshell, the sovereign debtor has to fulfil its part of the debt contract especially its obligation to pay in good faith. However this obligation to service its debt should not compromise the fulfilment by the debtor's state of its minimum core obligations with respect to socio-economic and cultural rights towards its population'. [52] Besides, it is the responsibility of sovereign borrowers to integrate in its legal regime on public debt financial distress and natural distress as circumstances under which the sovereign debtor has the right to suspend the service of its debt temporarily. Finally the sovereign debtor has to made arrangements to ensure on one hand that sales of debt on the secondary market do not happen without its prior and informed consent and on the other that in cases where the debt has been transferred to a new creditor, all relevant provisions of the initial loan agreement continue to apply.

Here is the description of the soft law components of international standards on responsible borrowing. UNCTAD principles and UN guiding principles on foreign debt and human rights deal with the same topics concerning the responsibilities of the sovereign borrower. Those

[50] United Nations guiding principles on foreign debt and human rights (2011) paragraph 59.
[51] United Nations guiding principles on foreign debt and human rights (2011) paragraph 60.
[52] United Nations guiding principles on foreign debt and human rights (2011) paragraph 50.

are: the fiduciary duty of public official, transparency and disclosure of information on debt, adequate management and monitoring, binding agreements, renegotiation and restructuring of the debt and finally project financing".[53]

One notices that the protection of the integrity of public credit operations is at the core of both instruments especially with respect to the implications of the fiduciary duty of states agents and the transparency of public debt operations. As integrity of public credit operations is consubstantial to its protection against corruption, it follows that the provision of the leading instrument against corruption becomes inevitably relevant for the enforcement of responsible borrowing.

2.3-United Nations Convention against Corruption provisions and responsible borrowing

UNCAC's legal regime on responsible comprises on one hand some of the cardinal principles highlighted in UNCTAD's legal framework and UN guiding principles framework on sovereign debt, and on the other some specific rules derived from UNCAC's provisions on states obligations to prevent corruption.

The cardinal principles concerned are the principles of transparency and the fiduciary duty of public officials. As for states obligation to prevent corruption, it is about the obligation to establish independent control bodies to prevent corruption in public credit operations.

2.3.1-Transparency in public credit operations in UNCAC

The content of the obligation of transparency in public credit operation under UNCAC is described in its article 09. This provision provides for transparency rules from two angles: Transparency with respect to public procurement in the context of public credit operations and transparency in the management of public finances.

As for the first angle, the first paragraph provides for states parties obligation as part of measures to be taken for preventing corruption, to implement appropriate systems of procurement built on "transparency, competition and objective criteria in decision-making'.[54]

[53] See UNCTAD's principles on Responsible Sovereign Lending and Borrowing (2012), principle 01 to 08 and United Nations guiding principles on foreign debt and human rights (2011), paragraph 23 to 86.

The procurement systems in question shall tackle at least the four following issues:

- The public distribution of information on contracts and procurement procedures for the promotion of concurrence between tenders
- Establishment of predetermined criteria for participation, selection and award of tenders
- Establishment in advance of objective criteria for public procurement decisions for the purposes of subsequent verification of the compliance with rules and procedures
- An effective system of domestic review which encompasses an efficient system of appeal in order to provide for legal recourse and remedies in cases where rules or procedures are not complied with.

Article 09 (1) stipulates also that in the implementation of their public procurement system, states parties "may take into account appropriate thresholds values" for instance regarding comparatively small amounts'.[55]

Besides it is worthwhile to mention that the obligation of disclosure of information on public procurement is not absolute. In fact, states parties may restrict disclosure of information on the ground of the protection of "their essential interests in relation to national security".[56]

This legal regime on public procurement procedures also applies to public credits contracts. That means that under UNCAC provisions, sovereign credit contracts have to comply with the criteria of "transparency, competition, and objective criteria in decision making". As a result public credit contracts that do not comply with those rules should be sanctioned with invalidity". It is therefore incumbent upon states parties to provide for a legal framework for the award of public credit compliant with the criteria of transparency, competition, and objective criteria in decision-making. This legal framework should also include the causes of secret operations and the reasons for limitation of access to information on those transactions or agreements'.[57]

[54] United Nations Convention against corruption (2003), article 09 (1).
[55] UNODC , "Legislative Guide for the implementation of United Nations Convention against corruption", paragraph 79.
[56] UNODC, Travaux préparatoires of the negotiations for the elaboration of UNCAC (2010), interpretative note on article 09, page 116.
[57] JB Justo "UNCTAD's principles on public debt and the United Nations Convention against Corruption Links and Common strategies" in C Esposito, Y Li & JP Bohoslavsky *Sovereign Financing and International Law The UNCTAD Principles on Responsible Sovereign Lending and Borrowing* (2013), page 203.

Regarding the second angle of the obligation of transparency, the article 09 (2) of UNCAC provides for the obligation of states parties to take measures for enforcing transparency and accountability in the management of public finances. Those measures shall include inter alia:

- Procedures for the adoption of the state's budget
- Timely reporting on revenue and expenditure
- A system of accounting and auditing standards and other means of oversight
- Effective and efficient systems of internal control and risk management
- Provisions for corrective actions in case of non-compliance with the measures mentioned above.

There is an obvious symmetry between the measures to be taken by states described above and the responsibilities of states parties with respect to transparency under principle 10 of UNCTAD's legal framework for public debt. As a matter of facts, like in principle 10 of UNCTAD, transparency under article 09(02) of UNCAC refers not only to the clarity of the procedures for obtaining financing but also to clear provisions for the oversight of public finances management.

2.3.2-Implications of fiduciary duty of states agents participating in the indebtedness process under UNCAC

The obligation to give effect to the fiduciary duty of states under UNCAC covers three aspects: firstly, the promotion of integrity, honesty and responsibility among its public officials, secondly the obligation to criminalize corruption offences which involve public officials, and lastly the definition of the consequences of those acts of corruption.

Given the fact that the promotion of integrity and honesty among states entails the definition of corruption offenses involving public officials, these two aspects will be discussed together before elaborating on the issue of compensation for acts of corruptions related to credit operations.

In order to give effect to the promotion of honesty, integrity and responsibility among their agents under UNCAC, states should adopt codes or standards of conduct designed for public officials. For the adoption of those codes of conduct, UNCAC provides that states parties may draw inspiration from international instruments addressing the issue like "the International

code of conduct for public officials adopted by UN General Assembly on 12 December 1996".[58] Moreover, those codes of conducts should be underpinned by disciplinary or other measures against public officials who infringe them.[59]

There is a close relationship between the obligation to promote integrity and states responsibility in relation to giving effect to the fiduciary duty of states' agents intervening in the indebtedness process. As aforementioned, the adoption of codes of conduct accompanied by sanctions is one of the key positive actions expected from states in line with their responsibility to give effect to the fiduciary duty of their agents under soft law standards on responsible borrowing.

However, under UNCAC the obligation of states parties deriving from the promotion of integrity among public officials does not end there. In fact, states parties also have to criminalize acts of corruption which involve public officials. Those acts of corruption are "bribery of national public officials (national public officials, foreign public officials and officials of public international organization), embezzlement, misappropriation or other diversion of property by a national public official, trading in influence, abuse of functions and illicit enrichment".[60]

Bribery may be either active or passive. In its active sense, it is defined as the intentional act of promising or giving an undue advantage directly or indirectly to a public official for this official himself or herself or for another person or entity for the purpose of causing this person to act or abstain from acting in the exercise of his or her official duties. This definition includes national public officials. When it involves foreign public officials or officials of public international organisations, the primary action of giving or promising at the basis of this offence is identical to the one referred to in bribery of public officials. What changes is the purpose of the act which in this case aims at obtaining or retaining business or other undue advantage related to the conduct of international business. [61]

As for passive bribery the definition is the same for national or foreign public official or for official of public international organisation. It refers to the intentional solicitation or acceptance directly or indirectly by a public official of an undue advantage for himself or for

[58] UNCAC (2003), article 8 paragraphs 02 & 03.
[59] UNCAC (2003), article 8 paragraph 6.
[60] UNCAC (2003), article 15, 16, 17, 18, 19, & 20.
[61] UNCAC (2003), article 15 and 16, paragraph 01.

another person or entity for the purpose of acting or abstains from acting in the exercise of his or her official duties.[62]

As such, the meaning of bribery under UNCAC encompasses the participation of national public officials and foreign public officials as well as officials of public international organisations. It also covers the realm of international business transactions, including foreign debt transactions.

Eventually, one notices a clear parallelism between the obligation to criminalize bribery under UNCAC and the duty of states under principle 01 and 08 of UNCTAD legal framework on public debt. In fact, like the obligation to criminalize bribery of national and foreign public officials under UNCAC, states responsibility to give effect to the fiduciary duty of their agents under principles 01 and 08 of UNCTAD's legal framework on public debt entails the obligation to adopt laws for deterring lenders and states agents to enter into corrupt transactions. In short, criminalizing bribery is part of measures which may be taken by states under principle 01 and 08 for giving effect to their duties under principles 01 and 08 of UNCTAD's legal framework on public debt'.[63]

As for trading in influence, like bribery, its definition under UNCAC covers its active and passive forms. In its active form, it refers to the intentional act of promising, offering or giving directly or indirectly to a public official for making him "abuse is or her supposed influence in order to obtain to obtain from an administration or public authority of the state an undue advantage for the original instigator of the act or for another person".[64]

In its passive form, it refers to the direct or indirect solicitation or acceptance of an undue advantage by a public official or by another person for the personal benefit of the person concerned or another person or entity with the goal that the public official or this person abuses its supposed or real influence for obtaining an undue advantage from an administration or public authority of the state.[65]

Regarding abuse of functions, UNCAC describes this act of corruption as "a violation of laws by a public official resulting from the performance or non-performance of his functions. Here,

[62] UNCAC (2003), article 15 and 16, paragraph 02.
[63] UNCTAD, guidelines on Responsible Sovereign Lending and Borrowing (2014),options of the sovereign borrower (principle 08), page 50.
[64] UNCAC (2003), article 18 (a).
[65] UNCAC (2003), article 18 (b)

again, the incentive is an undue advantage for the public official or for another person or entity".[66]

As for embezzlement it is defined under UNCAC as "the diversion or misappropriation of anything of value including property, public or private funds or securities entrusted to a public official by virtue of his or her position". [67]

Finally, the corruption act of illicit enrichment is described under UNCAC as a "considerable increase in the assets of a public official that he or she cannot reasonably relate to his or her lawful income".[68]

So, UNCAC legal framework on the fiduciary duty of government's agents, in addition to defining a code of conduct for public officials which may entail disciplinary measures, also provides unequivocally for criminal offences applicable to the realm of public officials actions in debt elaboration and management process. The criminalization of those corruption acts becomes even more relevant for enforcing accountability in sovereign debt transactions management inasmuch as the definition of public officials under UNCAC covers simultaneously the highest states authorities including the elected ones and those to the lowest level of the hierarchy'.[69]

That implies in the context of responsible borrowing that measures that states parties have to implement for giving effect to the criminalisation of those acts of corruption should cover every category of states agents involved in the indebtedness process and its management. However states parties' obligation with respect to the corruption offences defined above is not limited to the criminal sanction of the involvement of public officials and lenders in corrupted transactions. Under UNCAC, states also have to define the consequences of the involvement of public officials or lenders in those crimes.

[66] Unpublished : WA, Gouet " The United Nations Convention against Corruption and stolen assets recovery : An African perspective" (2016), page 24; Making reference to article 19 of UNCAC.

[67] UNCAC (2003), article 17.
[68] UNCAC (2003), article 20.
[69] UNCAC (2003), article 2 (a).

Consequences of the involvement of lenders or public officials in corrupted debt transactions

The legal regime of UNCAC on the consequences of the involvement of public officials and lenders in corrupted practices concerns the plight of the debt contract related to this corrupted transaction and the issue of a compensation of individuals or entities from those acts of corruption.

Regarding the debt contract, article 34 of UNCAC enlighten on his plight when its legitimacy is questioned by acts of corruption. The article 34 stipulates the obligation of states parties to adopt measures for addressing the consequences of corruption. To that effect, it emphasizes that states parties have the option of considering those acts of corruption as a ground for annulment of a contract or withdrawal of a concession. In other words the obligation of states parties is to clarify the consequences of corrupted transactions upon contracts that arise out of them. States are allowed but not obliged to annul or rescind them.[70]

As for compensation, article 35 postulates the obligation of states parties to "ensure that entities or individuals who suffered damage as a result of acts of corruption, are entitled to initiate legal proceedings against those responsible for that damage for the purpose of obtaining compensation. It is worthwhile to mention that the expression 'entities' included states and legal persons.[71] That implies that states parties have the obligation to give effect to the *locus standi* of governments, individuals or legal persons to initiate legal proceedings against a public official or a lender in case where they have committed acts of corruption that those persons or entities have suffered from.

In a nutshell here is the content of UNCAC's version of the legal framework on the obligations of transparency and to give effect to the fiduciary duty of states' agents.

[70] JB Justo "UNCTAD's principles on public debt and the United Nations Convention against Corruption Links and Common strategies" in C Esposito, Y Li & JP Bohoslavsky *Sovereign Financing and International Law The UNCTAD Principles on Responsible Sovereign Lending and Borrowing* (2013), page 206.

[71] UNODC, Travaux préparatoires of the negotiations for the elaboration of UNCAC (2010), interpretative note on article 35, page 299.

2.3.3-The obligation of establishing an independent body in charge of preventing corruption

The article 06 of UNCAC imposes upon states parties to UNCAC the establishment or maintenance of body or bodies that main function is to prevent corruption. Those independent body or bodies will achieve their mission through the following means':[72]

- The implementation of coordinated and effective policies which aims at promoting the participation of society and embody the principles of "the rule of law, transparency, integrity, accountability and proper management of public affairs
- The creation and dissemination of knowledge pertaining to the prevention of corruption

Furthermore, article 06 emphasizes the obligation of granting to this body the necessary independence for preventing any undue influence in the fulfilment of its mission.

It results from the above that the body to be implemented do not concern any particular sector. Its main attribution is to prevent corruption. Thus, it follows that nothing prevents this or those bodies to extend their operations to the realm of sovereign debt transactions. So, the compliance of states parties to UNCAC with this provision entails that, this or those bodies must be able to play their preventive role in public debt transactions'.[73]

In practice, it means that its control function shall be exerted before the entry into force of any debt agreement. Moreover in reason of the fact in public credit operations, "the development and implementation of a contract requires prior and integrated control" by the competent organ which in this case is the prevention organ described by article 06 of UNCAC, the prior

[72] UNCAC (2003), article 06. See also JB Justo "UNCTAD's principles on public debt and the United Nations Convention against Corruption Links and Common strategies" in C Esposito, Y Li & JP Bohoslavsky *Sovereign Financing and International Law The UNCTAD Principles on Responsible Sovereign Lending and Borrowing* (2013), page 201.

[73] JB Justo "UNCTAD's principles on public debt and the United Nations Convention against Corruption Links and Common strategies" in C Esposito, Y Li & JP Bohoslavsky *Sovereign Financing and International Law The UNCTAD Principles on Responsible Sovereign Lending and Borrowing* (2013), page 201.

checking of the debt transaction by this organ shall be part of the requirements for the validity of a sovereign debt contract'. [74]

Besides as result of the obligation to give effect to the independence of this or those bodies of control and prevention of corruption, the assignment of auditing functions to hierarchically dependant organs is incompatible with the provisions of article 06'.[75]

Here is a description of the salient points of UNCAC's provisions that constitutes a source of international law on responsible borrowing. Those salient points repeat the key points of UNCTAD and UN guiding principles legal regime on sovereign debt especially the fiduciary duty of states agents, the principles of transparency and disclosure of information and the one of adequate management and monitoring of the debt. This similarity of content entails a symbiosis between soft law standards on responsible borrowing and UNCAC in the enforcement of responsible borrowing. In fact when states will be bringing into conformity their legal framework on corruption vis-à-vis UNCAC's provisions described above, they will concomitantly be implementing best standards on responsible borrowing hence the qualification of UNCAC as a "trojan horse of soft law rules on responsible borrowing".[76]

Conclusion

UNCTAD principles on responsible sovereign lending and borrowing (2012) constitute the main source of international standards on responsible borrowing. They are complemented by UN guiding principles on sovereign debt and human rights (2011) and United Nations Convention against corruption (2003). Those three international instruments provide for borrowing states obligations to give effect in their legislation to the fiduciary duty of state agents, to the adequate management and transparency in the management of public finances, to access to information on public debt, to the avoidance of incidence of over-borrowing and finally to a debt servicing and restructuring legal framework which protect public interest.

The next chapter will analyse the issue of an extant legal framework for responsible borrowing in Ivory Coast.

[74] JB Justo (n. 78 above), page 202.

[75] JB Justo (n.78 above), page 202.

[76] JB Justo (n.78 above), page 195.

CHAPTER 3:

THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR RESPONSIBLE BORROWING IN IVORY COAST

3.1-Introduction

Like in most of sub-Saharan francophone countries, in line with the "practice of copy and paste" automatically the legal system of their former colonial masters, the Ivorian legal framework on external debt is largely the faithful replica of the French legal framework on public debt at least in the written texts.

In fact, following the example of France, the Ivorian legal framework on external borrowing reflects the legal implementation of the French doctrine of public finances'.[77]

In the legal scheme provided by this doctrine, there is no special act per se dealing exclusively with external debt. External debt like the other modes of financing of public expenditure is part of the national budget. Accordingly, the same rules that apply to the authorisation and the control of the state budget also apply to external borrowing.

Following the example of France, in Ivory Coast, the authorisation or more specifically the vote of the national budget as well as the control of its management are governed by constitutional provisions as well as other various act.

Besides, coincidentally or through another imitation of the former colonial power, like the French state, Ivory Coast also belongs to an economic and monetary union: The West African Economic and Monetary Union (hereinafter WAEMU). Like in the European Union the multilateral surveillance of macroeconomic policies of its members' states is part of the legislative field of WAEMU. In that regard, the sub-regional economic and monetary organisation regrouping the former French colonies of West Africa as part of its surveillance of economic policies has enacted a specific community law pertaining to the issue of public debt in its members' states.

[77] M ,Mountap *Financial Doctrine in Africa* online article http://www.theses.fr/s123617 (accessed on 24 July 2017).

Overall, the Ivorian framework on external borrowing contains on one hand supranational rules coming from WAEMU (1) and on the other national rules deriving from its constitution as well as other legislative provisions (2).

3.2-WAEMU'S regulation on public indebtedness

WAEMU's regulations enacted by its council of ministers have the same legal impact as the regulations enacted by the Council of Ministers in the European Union. Using exactly the same wording as the Treaty establishing the European Union,[78] WAEMU's founding treaty define regulations as measures of general scope which are immediately enforceable in the members states'.[79] That means that in principle, the regulation of WAEMU's on public indebtedness (Regulation 09/2007/CM/WAEMU of 04 July 2007) is immediately enforceable in Ivory Coast.

The 20 provisions of this regulation define community rules pertaining on one side to the elaboration and follow up of public indebtedness policy and the control of such policy.

3.2.1-WAEMU's regulation on public debt and the elaboration and conduct of the public debt policy

For the purpose of providing clarity in this descriptive analysis, it is necessary to describe separately the issue of the elaboration of the public debt policy and the one of the conduct of the said policy.

Regulation 09/07/CM/2007 legal framework on the elaboration of the public debt policy

WAEMU's legal framework on the elaboration of the public debt policy established substantive conditions pertaining to the description of the national debt in the financial law, a general obligation of public information on the state of the national debt as well as a general obligation of definition and respect of competences of organs in charge of the implementation and follow-up of the national debt policy.

[78] Consolidated Versions of the Treaty on European Union and of the Treaty establishing the European Community (2002), article 249.

[79] Treaty Establishing the West African Economic and Monetary Union, (1996), article 43.

Those substantive conditions are the obligation to mention in an annex to the financial law':[80]

- The justification of the debt
- The debt ceilings and guarantees
- The portfolio structure of the new borrowings of the state
- The indicative terms of the new borrowings
- The profile of viability of the debt for the next fifteen years

The justification of the debt means that the recourse to foreign debt as the mode of financing of government's expenditures rests upon a budgetary rationale. In fact, the recourse to debt means that there is an unbalance between the available financial resources of the state and its expenditures. This unbalance is due to the fact that the available financial resources (tax, export revenues) are insufficient to finance the government expenditure. Thus, a debt serves to the financing of a specific state expenditure. WAEMU's regulation provides that this correspondence between a specific state expenditure and a foreign debt must be translated in the annex to the financial law. The justification of the debt in the financial law is a mean to control the correct use of the debt for the state expenditure it was provided for.

As for debt ceilings it refers to the maximum threshold that WAEMU's members' states public debt shall not exceed. This maximum threshold is expressed in terms of debt ratio to the GDP. Such "injunction" to comply with a specified maximum threshold in terms of a country debt ratio to the GDP per se is not defined neither in the community regulation on public debt nor in other regulations or treaties pertaining to budget policy in WAEMU.

By contrast, the "Convergence, Stability, Growth and Solidarity" of WAEMU, one of the most relevant WAEMU's community treaties on the issues of budget and debt policy, urged WAEMU countries to endeavour to reach a debt ratio to the GDP which does not exceed 70% by 2019'.[81] It is in that spirit that the debt ceiling obligation must be complied with.

[80] Regulation 09/2007/CM/WAEMU of 04 July 2007, article 04.

[81] WAEMU Commission "Convergence dynamic in WAEMU Zone: from 1999 Pact to the new criteria of convergence" (2014), page 20. See also additional act n. 01 of 2015 which establishes new convergence criteria (Acte additionnel N° 01/2015/CCEG/UEMOA instituant de nouveaux critères de convergence)

In this regard, the Community regulation imposes upon WAEMU members' states to mention the debt ratio to the GDP as well its guaranties in an annex to the financial law dedicated to the national debt.

By the same token, the regulation obliges them to mention the portfolio structure of the new borrowings that is to say their composition'.[82] There is no standard description of the composition of the debt. Generally, it is about the distribution of the debt burden between external and internal debt as well as their respective composition (multilateral debt, bilateral debt, private debt, international bonds, and treasury bills, treasury bonds). This description of the public debt portfolio structure entails also their currency distribution and their distribution of the debt according to the type of interest rate'.[83]

The obligation to mention the indicative terms of the debt follows logically the course of the description of the composition of the debt insofar as it refers to the description of the conditions of the new borrowings (interest rate, maturity date, interest period, guaranties…).

Finally the obligation to describe the profile of the viability of the debt for fifteen years corresponds to the obligation to provide a sustainability analysis of the debt that is to say an assessment of the country ability to service its debt for the next fifteen years based on macroeconomic projections and stress tests aimed at evaluating a country vulnerability to a payment crisis'.[84]

Regulation 09/07/CM/2007/WAEMU legal framework on the conduct of the public debt policy

WAEMU's regulation on public debt legal regime is limited to two aspects of the practical implementation of the public debt policy: The jurisdiction for the negotiation of public borrowings and the guaranty by WAEMU countries of loans.

[82] D, Sangaré, " Analyse comparée des stratégies de désendettement public pour la zone UEMOA (Compared Analysis of public debt deleveraging strategies for WAEMU area) ", LLM Dissertation, Université Jean Moulin Lyon 3, 2007. See Chapter II : Structure et spécificité de la dette des pays en developpement (Structure and specificity of developing countries debt) http://www.memoireonline.com/12/08/1768/m_Analyse-comparee-des-strategies-de-desendettement-public-pour-la-Zone-UEMOA3.html (accessed on 29 August 2017).

[83] Ministry of Finances and budget of Madagascar (2016), medium term debt strategy 2017-2019, page 22.

[84] International Monetary Fund "Debt sustainability analysis" , 29 July 2017 https://www.imf.org/external/pubs/ft/dsa/ (accessed on 29 August 2017).

Regarding the first aspect, the regulation excludes the practice of several states authorities having the power to negotiate and sign loan agreements. In unequivocal terms, the regulation stipulates that without prejudice to the constitutional powers of the President of the Republic in this domain, a single state authority must be designated by members' states for the negotiation and the signature of loan agreements as well as any other agreement related to the national debt. The regulation emphasizes also that this authority is the sole competent authority for signing security agreements granted by the state to his components or to third parties'.[85]

It is the sole rule laid down by the regulation regarding the designation of an authority in charge of the negotiation of loan agreement. WAEMU's other directives and regulations on budgetary law do not provide for any other rules on this issue. That implies that important issues linked to the selection of such state authority like the conditions for his designation are left at the discretion of states members.

On the second aspect, the regulation set out a general condition for WAEMU's member states to act as a guarantor of a loan. The regulation postulates that except exceptional circumstances, states belonging to WAEMU cannot guarantee a loan that conditions are more onerous than those of its own loans'.[86]

In cases where a WAEMU's member state considers that exceptional circumstances require his participation in a loan contract as a guarantor in violation of the general principle previously mentioned, the state concerned must consult with the national structure in charge of the coordination of the public debt policy with the budgetary and military policy. It must also inform the Central Bank of West African countries and the WAEMU Commission about the exceptional circumstances or difficulties which enter in this agreement as a guarantor as well as the measures taken to stabilize the situation'.[87]

Here again, neither the criteria for determination of loans more onerous than the state own loans nor the exceptional circumstances which may lead a state to deviate from the community general rule on the guaranty of loans by states are provided by the regulation or

[85] Regulation 09/2007/CM/WAEMU of 04 July 2007, establishing a reference framework on indebtedness policy and the management of the public debt in WAEMU article 11.
[86] Regulation 09/2007/CM/WAEMU of 04 July 2007, establishing a reference framework on indebtedness policy and the management of the public debt in WAEMU, article 11.
[87] Regulation 09/2007/CM/WAEMU of 04 July 2007, establishing a reference framework on indebtedness policy and the management of the public debt in WAEMU, article 11 and 08.

by any other WAEMU legal framework. That means again that the members' states have the discretion to determine which exceptional circumstances may lead them to participate as a guarantee in a loan agreement as a guarantee as well as what categories of loans they consider more onerous than their own loans and that necessitates the consultation of their coordination structure as well as the Central Bank and WAEMU authorities.

3.2.2-Regulation 09/07/CM/2007 provisions on the follow-up and control of the debt policy

WAEMU's regulation on public debt legal regime on the follow-up of the debt policy provides for two obligations of states parties. The first concerns informing the public about the overall debt situation of the country and the other pertains to the setting up of a committee in charge of the monitoring of the public debt policy.

Regarding the first obligation, the community regulation on public debt stipulates that members' states shall publish a report one time per year on the overall situation of the debt. This report shall contain':[88]

- The orientations and objectives of the public debt policy
- The stock and composition of the public debt including their currency breakdown as well as their classification by maturity date and interest rate structure
- The outcomes of the public debt policy including the sustainability of the debt and the use of the resources mobilized

WAEMU's regulation on public debt provides also that members' states shall ensure the availability, the accessibility as well as the quality and the preservation of information about public debt'.[89]

As for the establishment of a committee in charge of the monitoring of the debt policy, the regulation emphasizes that the main role of this committee shall be to coordinate the debt policy with the budgetary and the monetary policy. In that regard this committee will be responsible for:

[88] Regulation 09/2007/CM/WAEMU of 04 July 2007, establishing a reference framework on indebtedness policy and the management of the public debt in WAEMU, article 06.
[89] Regulation 09/2007/CM/WAEMU of 04 July 2007, establishing a reference framework on indebtedness policy and the management of the public debt in WAEMU article 07.

- Following the implementation of the national strategy on public debt
- Ensuring the coordination of organs intervening in the process of indebtedness and in the management of public debt
- Ensuring the respect of the government orientations on the sustainability of public finances as well as public debt
- Ensure compliance with the rules and regulations on public debt
- Issuing a reasoned opinion on any internal or external borrowing project as well any request for guaranty by the state or one of his components. On this point, the regulation clarifies that the referral of the coordination committee for its view on any internal or external borrowing project is compulsory. The opinion issued by the Coordination Committee takes into account' :[90]

  -The interest of the borrowing for the member state

  -The impact of the new debt on the service and the sustainability of the public debt

  -Its compatibility with the public indebtedness strategy

- Ensuring the share of information between the structures, organisms and administrations participating in the indebtedness process and to the management of the public debt

The regulation provides some indications regarding the members of the coordination structure. It clarifies that the coordination committee shall be presided by the Ministry of finances and composed of the representatives of the administrations and organisms involved in the indebtedness process and in the management of the public debt as well as any competent person or organisations that the state considers useful to include in this committee'.[91]

So the organ in charge of the monitoring of the public debt policy is simultaneously an organ with technical and police powers. If the content of its technical powers are largely defined as mentioned above, the regulation is silent regarding the content of its police attributions of ensuring compliance with the rules and regulations on public debt. That implies that the

[90] Regulation 09/2007/CM/WAEMU of 04 July 2007, establishing a reference framework on indebtedness policy and the management of the public debt in WAEMU article 09 (02&03)

[91] Regulation 09/2007/CM/WAEMU of 04 July 2007, establishing a reference framework on indebtedness policy and the management of the public debt in WAEMU article 10.

definition of the means for giving effect to the police powers of the coordination Committee are left at the discretion of the state parties.

On the issue of control of the public debt policy, in addition to the attributions of the Coordination Committee in this matter, the regulation contains specific provisions pertaining to the debt auditing.

Actually, it provides that the structures in charge of debt management or the use of resources borrowed may be subject to independent audit that calendar is decided by each member state. In that regard, the regulation clarifies that the Ministry of finances or any other competent body of the structures aforementioned may order an audit.

3.3-The Ivorian internal law on sovereign borrowing

As mentioned at the onset of this chapter, the Ivorian legal framework for public indebtedness is largely copied from the French public finances system. In this system there is no act dedicated to the issue of sovereign debt per se. As a result, sovereign borrowing legal regime is provided by fragmented sources, of which primarily the organic law relating to finance laws *(loi organique relative aux lois de finances).* The other sources are the constitution, the transparency code on public finance management, the public procurement code, the criminal code, the court of audit act, the statutes of public accountants and the act relating to procedures and modalities of management of projects financed or co-financed by financial and technical partners.

From a combined reading of those fragmented sources, one may subdivide the content of the Ivorian legal framework on sovereign debt in four parts: the Ivorian approach of due authorization in public indebtedness process, the implementation and management of sovereign indebtedness, sovereign debt and the control of public finances in Ivory Coast and finally the legal regime for transparency in the Ivorian legal framework for public indebtedness.

3.3.1-The Ivorian approach of the principle of due authorization in public indebtedness process

As a result of the consubstantiality between budgetary law and sovereign debt normative framework in French law of public finances, plagiarized in Ivory Coast legislation, due authorization of the budget implies due authorization of sovereign borrowing.

In other words, the budget approval process is concomitantly sovereign borrowing approval procedure. That implies that sovereign loans constitute a chapter of the budget.

The acceptance of the budget is obtained through the annual vote of the finance act (loi de finances). In the French system of public finances, the Finance Act is the act which determines for one calendar year the allocation of resources and expenditure of the state as well as the budgetary balance which results from such allocation'.[92] The Ivorian organic law relating to finance acts distinguishes three types of finance acts. Those are: The annual finance acts *(lois de finance de l'année)* , the amending finance laws *(lois de finance rectificatives)* and the discharge bills *(lois de règlement)'.*[93]

The annual finance acts refer to the general understanding of finance acts which is the roadmap of state's expenditures and resources for the coming year. The amending finance laws constitutes the mechanism by which the initial annual roadmap of states resources and expenditures projection may be modified due to unexpected factors like the decrease of state revenues, a change in the global economic environment etc. As for the discharge bill, it constitutes the final description of the revenues and expenditures executed during one financial year'.[94]

The authorization to contract sovereign loans is provided through the enactment of the annual financial acts and amending financial laws inasmuch as discharge bills are merely balance

[92] (French law) Organic law 692 of 01st August 2001 relating to financial laws, article 01 (Loi organique N°2001-692 du 1er Aout 2001 relative aux lois de finances, article 01). See also in Ivorian legislation Organic law n° 2014-336 of 05th June 2014 relating to financial laws, article 02 (Loi organique n°2014-336 du 05 Juin 2014 relative aux lois de finances, article 02).

[93] Organic law 336 of 05th June 2014 relating to financial laws, article 05.

[94] Organic law 336 (n°99 above), articles 43 to 51.

sheets which describe the achievements of the financial year. The enactment of annual financial acts and amending financial laws involves two main actors: the legislative power and the executive power. So, describing the content of the principle of due authorization in budget process in Ivory Coast entail the analysis of the roles of the parliament and the executive in the adoption of the budget and concomitantly of obtaining the go-ahead for borrowing.

The parliament's role regarding due authorization to contract sovereign loans in Ivorian legislation

Like in most democracies, as a general rule the adoption of financial laws in Ivory Coast is the exclusive jurisdiction of the parliament. The budget bill or financial law is prepared by the executive especially by the Ministry of finances. But its implementation requires prior approval of the parliament through a vote. In the context of public indebtedness, in addition to public resources approval, this vote concerns the approval of sovereign financial agreements, the authorisation of guarantees and approval granted by the state, the basic budgetary balance as enshrined in the convergence, stability and growth pact of WAEMU. The vote concerns equally the approval of the necessary steps in accordance with the applicable norms and regulations, for the realisation of borrowing operations'.[95]

However in the Ivorian legislation on public finances, this parliamentarian prerogative in adopting the budget and ipso facto defining sovereign borrowing policy is strictly laid down by law especially concerning the use by the parliamentarians of their right of amendment.

Actually, repeating word by word, the provisions of the article 40 of the French Constitution, the article 78 of the Ivorian supreme law has established a single and unique condition on the basis of which, parliamentarians might request an amendment of public indebtedness projections.

It provides that the amendments emanating from parliamentarians with respect to the vote of the budget are not admissible when their adoption will lead to a reduction of public resources

[95] Organic law 336 of 05th June 2014 relating to financial laws, article 44.

or to the creation or an increase of a public charge unless those amendments are accompanied by equivalent proposals of increase in state revenues or economies'.[96]

For a full understanding of the relevance of this provision for sovereign borrowing legal regime, it should be recalled that in the Ivorian's budgetary vocabulary public borrowing is listed in the national budget as a resource. So that means that the reference to the reduction of public resource mentioned above includes unequivocally public borrowing. This leads to the conclusion that the provision above implies that the parliament cannot request a reduction or withdrawal of sovereign borrowing project or convention unless it proposes an alternative mean of finding those funds that the proposed loan was supposed generating. To do so, the proposal of amendment must be accompanied by an equivalent proposal of augmentation in state revenues like tax increase for example'.[97]

It results from the above that, in Ivory Coast, the parliament has the general competence of voting the budget with a restricted leeway for amendment of sovereign borrowing projections. Grounds like odiousness of the debt or the violation of the respect of debt ratio to the GDP are not admissible for the amendment or rejection of a sovereign loan contract unless one provides alternative source of funds.

The parliament has 70 days for adopting the financial law'.[98] Failing that, the Ivorian legal framework on public debt provides for mechanisms of adoption of the budget which circumvents the parliament and put the executive at the centre of the authorization to borrow. The same goes for modification of the initial budget or of the adoption of the budget under emergency conditions.

The executive power and due authorization to sovereign borrowing in the Ivorian legislation

As mentioned in the previous section, the vote of the budget is under the exclusive jurisdiction of the parliament. It is therefore exceptionally that the executive power may legally authorize the coming into force of the budget without the usual procedure of the prior

[96] Act 513 of 01st August 2000 establishing the Constitution of the Republic of Ivory Coast, article 78.

[97] La discussion budgétaire , Section 1 du Chapitre 3 : les irrecevabilités financières (the budget debate, section 1 of the third chapter : inadmissible proposals of budget amendment) http://www.assemblee-nationale.fr/connaissance/lois_finances_lois_financement/section-03.asp (website of the French National Assembly, accessed 18 September 2017).

[98] Act 513 of 01st August 2000 establishing the Ivorian Constitution, article 80.

voting process of the parliament. Those exceptions concern cases where after 70 days the budget has not been adopted, and the possibility of adopting finance laws through the procedure of ordinances in the ambit of the enactment of amending financial laws or under emergency circumstances.

Regarding the first scenario, the Ivorian Constitution provides that in case where the parliament has not pronounced on the budget after 70 days, the President of the Republic may enact the budget by ordinance. However such enactment requires that in 15 days after the enactment of the budget by ordinance, the President of the Republic seized the parliament for an extraordinary meeting that purpose is the ratification of the enactment of the budget. In case where even after the fifteen days the parliament has not make his decision about the ratification of the ordinance , the budget is definitively established by ordinance taken by the head of state'.[99]

As for the second and the third scenario, for implementing its programme the constitution grants to the head of state the possibility to adopt laws including budgetary measures that normally fall within the jurisdiction of the parliament, through the process of ordinances'.[100] In French law, ordinances are measures taken by the government in a domain that fall within the jurisdiction of the parliament. The enactment of ordinances supposes prior authorisation through an enabling law from the parliament. Such law determines the domain as well as the period for which a specific authorization is granted to the head of state to take measures for implementing its programme'.[101]

So, through the process of ordinances applicable to budgetary measures the executive may satisfy the criterion of prior authorization to direct their sovereign debt policy including enter in loan agreements or modifying their debt servicing policy.

Essentially the principle of due authorization in sovereign borrowing is provided for in a flexible manner in the Ivorian legislation allowing the executive to implement its sovereign debt policy freely and leaving a narrow room of manoeuvre to the parliament for contradicting the borrowing policy of the government.

[99] Act 513 (n.105 above).

[100] Act 513 (n.106 above), article 75.

[101] French Constitution of 04th October 1958, article 38.

3.3.2-The Ivorian's budget legislation and the management of sovereign borrowing

Under the Ivorian budget's legislation management of the sovereign borrowing covers on one hand the legal regime for the management of budget credits and the legal framework for the monitoring of public debt.

Regarding the former, when the financial law comes into force, after the vote of the parliament or through an ordinance from the President of the Republic, the government takes regulatory measures for allocating the credits between the different state agencies especially the Ministries'.[102]

To that effect, accounting headings are opened in each Ministry for the management of the credits allocated by the budget.

The management of those credits is based on a golden rule of the French doctrine of public finance: The principle of separation between authorizing officers and accounting officers. This principle postulates that the person in charge of decision-making regarding revenues and expenditures to be executed on the basis of the credit allocated by the budget shall be different from the person in charge of handling of those funds'.[103] Authorizing officers have the power of taking spending initiatives and public accountants are the executants of the spending initiatives taken by authorizing officers.

Under the Ivorian budgetary legislation the Ministers and the presidents of constitutional institutions are the authorizing officers for the credits allocated to their departments or institutions. They may delegate all or part of their powers to public agents that are called in the jargon of public finances the authorizing officers by delegation. Public accountants appointed within those departments or institutions for handling of the credits allocated by the budget are the accounting officers that the principle above refers to'.[104]

In practice, the principles above applied in the context of the management of sovereign loans entails that if there is a particular project financed by a sovereign loan and related to the field of operation of a government department, the Minister in charge of this department will be the

[102] Organic Law 336 of 05th June 2014 relating to financial laws, article 64.

[103] Akpakpo MB « Financial democracy in francophone Africa (*Démocratie financière en Afrique Francophone)* » , (2015), page 48, Publications of fondation Friedrich Ebert Stiftung.

[104] Organic Law 336 of 05th June 2014 relating to financial laws, article 68 & 69.

authorizing officer for this project . The project coordinator will be the authorizing officer by delegation and the public accountant appointed within this department will be in charge of the execution of expenditure and the management of the financial accounting for this project.

So the management of budget credits which comprises equally the general organisational model of the use of sovereign borrowing funds notably in the framework of the implementation of government project, rests upon the separation between decision-makers regarding expenditures and the use of the credits and the performers of those financial decisions which are public accountants.

As for the latter, the Ivorian budgetary legal framework has assigned the monitoring of the debt to a specific organ: The National Committee on Public Debt.

The National Committee on Public Debt (hereinafter NCPD) has the task of':[105]

- Coordinating and following the sovereign debt policy
- Ensure the consistency of the sovereign debt policy with the development objectives of the financial capacity of the state

For achieving those objectives, the NCPD provides economic and technical impact analysis of new borrowings. It is also in charge of the elaboration of a medium term debt management strategy and of the analysis of the sustainability of the debt.

This committee is presided by the Ministry of Finances.

Finally, regarding the execution of the sovereign debt policy, the organic law relating to laws of finances empowers the Ministry of budget and finance for negotiating and signing agreements related to sovereign borrowings. He is also the single personality able to sign endorsements and guaranties agreements granted by the states to its subdivisions or third parties'.[106]

3.3.3-The Ivorian legal framework for accountability of government's agents intervening in public debt management in the Ivorian budgetary legislation

The Ivorian organic law relating to financial laws provides that public accountants and authorizing officers are personally liable for the management and control operations they

[105] Decree 424 of 30 November 2011 establishing the National Committee on Public Debt.
[106] Organic Law 336 of 05th June 2014 relating to financial laws, article 12.

perform. The budgetary legislation provides respectively for a legal framework for the implementation of the liabilities of publics accountants and of authorizing officers by delegation. In its distribution of those liabilities, the Ivorian legislation distinguishes between common accountability rules and the liabilities specific to each category of public official.

Common accountability rules of authorizing officers and public accountants intervening debt management

Common accountability rules applicable to public officials' concern disciplinary liability and criminal liability.

Regarding the first type of liability that legal regime is common for all states agents intervening in the management of the debt, it refers to management errors. Management errors are defined in the organic law relating to financial laws. Those are':[107]

- The violation of rules relating to the rules related to the implementation of revenues and expenditures of the state and other government organs
- The violations of rules pertaining to the management of state owned property or property belonging to other government organs
- The approval of a decision given in the circumstances mentioned above by an authority supervising or controlling those states organs
- An act of any person in the performance of its duties of attempting to grant to himself or to another person an undue advantage whether pecuniary or in kind
- An act of any person in the performance of its duties of attempting to grant to himself or to another person an undue advantage whether pecuniary or in kind and that are resulted in a damage for the state or any government organ
- The production of false certifications in the context of the liquidations of operations
- The voluntary omission of declarations to be submitted to tax authorities or the submission of incomplete or false declarations

Disciplinary liability is triggered by the financial judge. In the Ivorian context, this judge is the Court of Auditors.

As for the second type of liability, it concern criminal sanctions symmetrical to the disciplinary measures above. In fact, as a state party to the United Nations Convention against

[107] Organic law 336 of 05th June 2014 relating to financial laws, article 93.

Corruption, Ivory has adapted its criminal code to the definition of corruption offences highlighted in UNCAC. The Ivorian state has amended its criminal code for giving effect to the definition of bribery of national public official, bribery of foreign public official and official of public international organisation, abuse of functions, trading in influence, embezzlement of public funds and illicit enrichment. The penalties for those offences vary from one to ten year'.[108]

The specific liabilities of public accountants

The legal regime of specific liabilities of public accountants concerns their pecuniary liability. Public accountants are personally and pecuniary liable for the operations that are assigned to them. Their pecuniary liability applies in the following cases':[109]

- Ascertainment of shortfall of cash, moneys or securities
- Revenues not recovered by its fault
- An expenditure has been irregularly paid
- A public organ has been obliged to pay compensation to another public organ or to a third party by its fault

The pecuniary liability of public accountants can only be invoked either by the Ministry of Finance or by the Court of Auditors.

The specific liabilities of members' of the government as authorizing officers

Members of the government including the head of state enjoy a special liability regime. The speciality of this regime derives from the fact that unlike other government agents intervening in public debt management their liability for crimes and offences cannot be ascertained by the Court of Auditors, the Supreme Court or any other ordinary tribunal.

The liability for crimes and offences of members of the government can only be heard by a special tribunal: The High Court of Justice. The High Court of Justice is composed of members of parliament that the National Assembly votes at its first session'.[110]

[108] Ordinance 513 of 20th September 2013, repealing the provisions of paragraph 02 and 03 of the article 200-2 of the new Criminal code, article 28 to 56.
[109] Organic Law 336 of 05th June 2014 relating to financial laws, article 96.
[110] Act 513 of 01st August 2000 establishing the Ivorian Constitution, article 108.

The indictment of the members of the government must be passed by absolute majority vote of the members of the parliament. As for the President of the Republic its indictment must be passed by vote of two-third of parliament members. It is worth to point out that in the specific case of the President of the Republic, the High Court of Justice can hear a case against him in the case of high treason'.[111] The crime of high treason is not defined in Ivorian legislation.

Besides, the High Court of Justice only exists in the texts. It has never been implemented. That means that the members of the government are immunised de facto against any kind of prosecution for crimes and offences included those derived from sovereign debt management.

3.3.4-The system and modalities of control of responsible behaviour of agents operating in sovereign debt management

The Ivorian legal regime on budget law provides for three types of control with respect to agents responsible behaviour in the management of public debt. Those are administrative control, parliamentary control and judicial control. That pertains to the control of all chapters of the budget execution. The restriction of those types of control to the arena of sovereign borrowing allows us to perceive two types of control: The control a priori and the control a posteriori.

The control a priori of agents operating in sovereign debt management

The control a priori in the ambit of the use of the funds derived from sovereign borrowing refers to control before making any commitment or performing any payment. This type of control concerns mainly the examination of the execution of the spending initiatives by the public accountants and to a lesser extent the work of the authorizing officers by delegation. Control a priori with respect to sovereign borrowing funds is performed by a particular civil servant committed to this task: The financial controller.

The financial controller is a civil servant in charge of the control of the regularity of public spending. He works under the authority of the Ministry of finances. Its visa is imperative for the execution of public spending either in the context of expenditures of government departments or regarding project co-financed with sovereign loans. Its control a priori is

[111] Act 513 of 01st August 2000 establishing the Ivorian Constitution, articles 110 & 111.

performed at two levels of the administrative process for execution of public spending: The commitment of the expenditure and the order to pay.

At the level of commitment of expenditure the control concerns':[112]

- The quality of the fund administrator
- The availability of funds
- The usefulness and the evaluation of the expenditure cost

Regarding the order to pay the control relates to':[113]

- The conformity of the mandate with the commitment of expenditure
- The reality of the delivery of the service

In practice, in the context of projects financed through sovereign borrowing the financial controller verifies the required documents submitted before him by the project coordinator who is the authorizing officer for expenditures by delegation. The project coordinator transfers electronically and physically the order to pay with the supporting documents (proof of the delivery of the service) to the financial controller appointed for this project for the purpose of obtaining his visa'.[114]

The financial controller performs the different types of controls mentioned above. After its evaluation he decides either to affix its visa or to reject the order to pay of the authorizing officer by delegation.

In case of rejection, the project coordinator has three working days for reviewing its request for visa or approval of order to pay and sending it back to the financial controller. In case of approval of the order to pay by the financial controller, the project coordinator signs the order to pay and transfers it to the public accountant appointed to this project. It is only when the public accountant has received the supporting documents especially the order to pay with the visa of the financial controller that he may make payments'.[115] In case where a public accountant proceeds with a payment without prior approval from the financial controller, he

[112] Decree 121 of 22 February 1995, governing the attributions, organisation and functioning of financial control, article 02.
[113] Decree 121 of 22 February 1995, governing the attributions, organisation and functioning of financial control, article 02
[114] Decree 475 of 01 July 2015 relating to procedures and modalities of management of projects and programmes financed or co-financed by technical and financial partners, article 07.
[115] Decree 475 of 01 July 2015 relating to procedures and modalities of management of projects and programmes financed or co-financed by technical and financial partners, article 07.

could be subject to sanctions after a control a posteriori of the execution of public expenditures.

The control a posteriori

There are three modalities of control a posteriori: The parliamentary control, the control of the court of auditors and the control performed through audit institutions.

The parliamentary control

The parliamentary control is performed through on one hand the monitoring of the execution of the budget by the parliament during the financial year and on the other via the review of the discharge bill before the parliament at the end of a budget year.

As a matter of facts, during the financial year, the parliament through its finance Commission monitors the good implementation of the budget. In that purpose it may request investigations on any matter pertaining to the budget execution. It also has the power to request information from any state organ about the good execution of the budget. To do so, it may proceed with the hearing of Ministers or request from the Court of auditors any investigation necessary for its information'.[116]

As for the second aspect of the control a posteriori performed by the parliament, the discharge bill allows the parliament to operate an evaluation of the use of its authorization given to the government for raising revenues and make expenditures that is to say including contracting loans insofar as sovereign loans are part of the revenue chapter of the budget.

Actually, the discharge bill finds the final amount of the collection of revenue and of authorization of expenditure as well as the budgetary outcome that result from those amounts. To do so, the discharge bill is accompanied by a report from the Court of Auditors on the execution of the financial law and the declaration of conformity between the balance sheet of authorizing officers and those of public accountants. The financial law finds also the surplus

[116] Organic law 336 of 06th June 2014 relating to financial laws, article 89.

or the deficit resulting from the difference between the revenues and the expenditures of the state's budget'.[117]

So basically, in the Ivorian system of public finances the discharge bill is nothing more nothing less than a finding based on information brought by other institutions namely the Court of Auditors and the Ministry of finances about the execution of the budget. It is essentially an information that the parliament takes notice of. That is why the parliamentary control through the discharge bill in the francophone system is qualified as a "harmless hobby" in the control of public finances management'.[118]

The parliament is also just informed about the global execution of the budget including the funds deriving from sovereign loans on the basis of report pre-established by other states organs especially the Court of Auditors.

The control a posteriori performed by the Court of Auditors

The Court of Auditors is the judicial institution in the Ivorian budget implementation monitoring system which is dedicated to the control of public finances. Its main tasks are to judge the accounts of public accountants', management de facto and management errors .[119] Its secondary task is to audit the global management of public finances. In that capacity, as mentioned in the previous developments on parliamentary control, the Court of Auditors assist the parliament in its evaluation of the discharge bill through the production of a report on the execution of the financial law as well as the declaration of conformity between the accounts of public accountants and those of authorizing officers. It also audits state services and other public organisms'.[120]

With respect to audit in particular, in the context of project financed through sovereign loans, , the Court of Auditors may carry out audit of projects financed or co-financed through external loans on the basis of a prior agreement with the external funding partner'.[121] Those

[117] Organic law (n 123 above), articles 49 & 50.

[118] E Oliva, *« finances publiques (public finances) »* (2001), page 337.

[119] Organic law 336 of 05th June 2014 relating to financial laws, article 84.

[120]« Compétences et procédures devant la chambre des comptes (Jurisdictions and procedures before the Court of auditors) » http://courdescomptes.ci/ presentation.php?num=5 (accessed 18th September 2017).

[121] Decree 475 of 01st July 2015 governing procedures and management of projects financed or co-financed by financial and technical partners (Decret n° 475 du 01er Juillet 2015 relatif aux procédures et à la gestion des projets financés ou cofinancés par les partenaires techniques et financiers), article 36.

different reports are then consolidated in an annual report and submitted to the Ministry of finances and to the Ministry of budget which decide how to proceed with the report.

In short, the main focus of the control exercised by the Court of Auditors is the regularity of the accounts of public accountants. It also exercised its control over other public servants involved in public debt management including authorizing officers by delegation regarding the judgement of mismanagement errors. By contrast it does not have jurisdiction for controlling the main authorising officers (Ministers) and the head of state.

In the context of project financed or co-financed through external loans he may be entrusted with the task of external auditor if the external funding partner agrees.

Control performed through audit institutions

The Ivorian legal framework on audit of public finances and concomitantly the use of sovereign loan funds provides on one hand for audit in the general context of control a posteriori of the management of public finances and on the other for audit in the context of project financed or co-financed by external funding partners.

As for the first form of audit their initiation is the "province" of main authorizing officers. That means that the Minister of finances as the single main authorizing officer regarding the state revenues and the other Ministers as main authorizing officers for government department that they manage have the power to initiate audit. The President of the Republic also has the power to commission an audit. The authorizing officers and the President of the Republic may entrust the audit mission to any expert of their choice.'[122]

With respect to audit of projects financed or co-financed through external funding partners including sovereign loans, the Ivorian legislation provides for two categories of audit: External audit and internal audit.

Regarding external audit as mentioned in the previous section subject to prior agreement with the external financial partner of the project, the Court of Auditors is the external auditor by default for this category of project.

[122] Organic law 336 of 05th July 2014 relating to financial laws, article 82.

As for internal audit, it is ensured by the general inspectorate of finance equally on the basis of a prior agreement with the external funding partner. This organ in charge of control of public finances under the authority of the Prime Minister, exercises its mission of internal audit either upon seizure of the Ministry of finances or of the project coordinator or on its own initiative. Its audit reports are transmitted to the Ministry of finances, to the Minister of Budget, to the Minister of budget, to the project coordinator and to the external funding partner'.[123] Those different authorities decide with how to proceed with those reports.

3.3.5-The Ivorian budget law and transparency in sovereign debt management

The Ivorian legal framework on transparency of sovereign debt management comprises principles derived from on one hand from its transparency in public finances act and on the other requirements regarding the presentation of public debt in the budget.

The Ivorian transparency code on the management of public finances provide for an obligation of clarity in the share of competences and responsibilities between government members and the parliament with regard to the conduct of the budgetary policy, the choice of revenues and expenditures and the execution as well as the control of the budget control'. This obligation also applies at the lower lever in the share of competences and responsibilities at the lower level regarding public persons and administrations regarding public indebtedness. In the same spirit, the obligation of clarity equally applies to the definition of rules governing public procurement procedures'.[124]

By the same token, in line with the requirements about transparency of WAEMU's regulation on public debt, the Ivorian financial law provides that the budget shall contain an explanatory annex which describes the maturity profile of the sovereign debt as well as the state's indebtedness strategy. Still in compliance with WAEMU's regulation the financial law

[123] « Compétences et procédures devant la chambre des comptes (Jurisdictions and procedures before the Court of auditors) » http://courdescomptes.ci/_presentation.php?num=5 (accessed 18th September 2017).
[123] Decree 475 of 01st July 2015 governing procedures and management of projects financed or co-financed by financial and technical partners (Decret n° 475 du 01er Juillet 2015 relatif aux procédures et à la gestion des projets financés ou cofinancés par les partenaires techniques et financiers), article 35.
[124] Organic law 337 of 05th June 2014 relating to transparency in the management of public finances, articles 16, 18, 28, 29, 30 &34.

postulates that the description of the indebtedness strategy shall contain at least the following minimum indications':[125]

- The justification of the borrowing
- Debt ceilings and guarantees
- The portfolio's structure of the new borrowings
- The indicative terms of new borrowings

It shall also indicate the sustainability of the debt for the next fifteen years. Furthermore, the Ivorian transparency code prescribes that the government has the obligation to publish at least one time per year the level and the composition of its debt as well as the guarantees granted to public and private entities. By the same token, the transparency code obliges the state to give effect to access of the public of information on the budget through the provision to the public of explanatory documents on public finances especially an understandable brief guide on the budget'. [126]

That concludes the overview of the Ivorian legal framework on transparency in sovereign debt management. That also leads to the epilogue of the description of the Ivorian legal framework on sovereign borrowing and the opening of the phase of diagnosis of eventual shortcomings of this framework vis-à-vis the international standards on responsible borrowing.

3.4-Diagnosis of the Ivorian legal framework compliance with international standards on responsible borrowing

In parallel to the description plan of the Ivorian legal framework above this diagnosis of eventual shortcomings will start by the parliament powers with respect to the authorization to borrow, the establishment of a debt threshold and the parliamentary control of the sovereign debt policy. To be brief, that means this diagnostic will start by the issue of due authorization.

[125] Organic law 336 of 05th June 2014 relating to financial laws, article 45 (6).
[126] Organic law 337 of 05th June 2014 relating to transparency in the management of public finances, articles 42, 85 & 86.

Regarding the issue of debt ceiling in particular, in reason of its consubstantiality with the legal framework they will be treated concomitantly in the same section after the analysis of the Ivorian legal regime on due authorization . Then still in parallel with the description of the Ivorian framework in the previous section, this "diagnostic analysis" will look successively at the Ivorian legal regime on the fiduciary duty of states officials and its law on transparency in the management of public debt.

Finally this analysis will scrutinize the compliance of the Ivorian debt service and restructuring legal regime compliance with International standards on responsible borrowing.

3.4.1-Analysis of the compliance of the ivorian sovereign borrowing framework with the principles of due authorization and avoidance of over-borrowing

As mentioned in the previous section, one of the Ivorian constitutional budgetary principles states that amendments emanating from parliamentarians with respect to the vote of the budget are not admissible when their adoption will lead to a reduction of public resources or to the creation or an increase of a public charge unless those amendments are accompanied by equivalent proposals of increase in state revenues or economies. This provision implies that the parliament cannot request a reduction or withdrawal of sovereign borrowing project or convention unless it proposes an alternative mean of finding those funds that the proposed loan was supposed generating'.[127]

This provision "copied and pasted" from the article 40 of the French Constitution allows to foresee one of the patterns of the French Constitution of the fifth republic that Ivory Coast has "plagiarised" most of the provisions : The taming of the parliament vis-à-vis the executive power.

The "taming of the parliament" refers in the French system to the skinning of the parliament from certain of its powers at the benefit of the executive power. The "domestication of the parliament" reinforces considerably the powers of the executive and allows it to direct the government policy as it pleases without being "disturbed" by the parliament'.[128]

[127] Act 513 of 01st August 2000 establishing the Constitution of the Republic of Ivory Coast, article 78. See supra page 52.
[128] CM Fombad *"Separation of powers in African Constitutionalism"* (2016), page 17. See also J Guillaume *"la domestication du parlement sous la Vème République, (The Taming of the parliament under the fifth*

One of the fields of influence of this "domestication" of the parliament is sovereign borrowing policy where the executive has hands-free for borrowing. Those hands-free of the executive to borrow is also reflected in the limited power of control a posteriori executed by the parliament after the execution of the financial law where it just finds the final amount of the collection of revenue and of authorization of expenditure as well as the budgetary outcome that result from those amounts. In short, like in the French budgetary framework derived from its constitution of 1958 and that Ivory Coast "plagiarised", the power of the parliament with respect to budget is more an endorsement of the decisions of the executive power than a genuine assessment of those decisions. In reality, as a result of its limited margin of manoeuver derived from the budgetary framework its powers are more illusory than effective in the French budgetary model applied in Ivory Coast'.[129]

Such legal prerogative might be a positive weapon in the facilitation of the implementation of the government program in a democratic regime like the one of France. It might also be a "weapon of mass destruction", a powerful legal catalyst of irresponsible borrowing in a doubtful democracy like the one of Ivory Coast'.[130]

This constitutional provision is in conflict with the grounds for invalidity of sovereign loans contracts defined by international standards on responsible borrowing. In fact, as aforementioned states have the obligation to give effect to the definition of odious debt in their legal framework and acknowledge it as a ground for invalidity of a sovereign loan contract'.[131] The Ivorian legal framework for due authorisation do not recognize the odiousness of the debt as a ground for rejection of the parliament approval of a sovereign loan. Worse, it does not define any criteria at all that might justify the parliament rejection of a sovereign borrowing project.

The parliament is reduced to a mere organ of endorsement of the executive decisions regarding sovereign borrowing policy. It has no influence over the enforcement of debt ceilings as well as the control of the government debt policy. In a nutshell, the Ivorian legal framework deprives the parliament from playing its role as a counter power of the executive in budgetary matters.

Republic")(2011), page 4 https://www.docs-en-stock.com/droit-public-et-prive/domestication-parlement-ve-republique-127436.html (accessed 21 September 2017).

[129] A de laubadère *Droit public économique (public economic law)* third edition (1979), page 148 & 149.

[130] See democracy ranking 2016 http://democracyranking.org/wordpress/rank/democracy-ranking-2016/ (accessed on 20 September 2017).

[131] See supra pages 22& 23.

The distribution of powers between the executive and the legislative in budgetary legislation does not permit the parliament to play its role as the organ authorizing borrowing as mentioned in international standards on responsible borrowing.

3.4.2-Ivory Coast legal regime on the avoidance of over-borrowing and international standards on responsible borrowing

At the Community level as well as in its internal legislation, the Ivorian legal framework on public debt provides unambiguously for the obligation to mention debt ceilings and guarantees in an annex to the annual financial law. By contrast, the Ivorian sovereign debt legislation is also unambiguously silent about the definition, type of ceilings, legal effects and enforcement mechanisms of the ceilings mentioned in its budget law.

As a matter of facts, under international standards on responsible borrowing, enacting debt ceilings is not limited to the mere mention of the existence of debt ceilings in a national legislation. It entails defining clearly a threshold benchmark of indebtedness expressed either in a specific currency (Nominal terms) or in terms of debt ratio to GDP (relative terms)'. [132]

It also includes determining the category of debts covered by those ceilings (central government debt or local government debt or both or either domestic debt or foreign debt or both) as well as the procedure in place for derogating to those ceilings and finally the roles of states organs in the enforcement of those ceilings and the sanctions associated to the violation of the debt threshold.' [133]

Stipulating the obligation to mention debt ceiling without defining what are those limits of indebtedness that the government shall not exceed annually is turning the obligation to mention debt ceilings in nothing but an "empty legal verbiage" without any effect on the avoidance of over-borrowing. It means that the government may borrow within limits that it defines itself, in other words without limits.

It also entails that the legal offence of over-borrowing does not exist in the Ivorian legal framework insofar as there are no debt limits as such except those defined unilaterally by the government.

[132]DJ Watson *"Local governments management :Current issues and best practices"* (2016),page 156. See also EA, Awadzi (n 137 above) page 26.

[133] EA, Awadzi *"Designing legal framework for public debt management"* (2015), page 26, 27, 28.

In light of the above, it appears clearly that the Ivorian legal framework for public indebtedness has not given effect to setting debt limits as mentioned in international standards on responsible borrowing.

3.4.2-Analysis of the Ivorian legal framework compliance with the obligation to give effect to the fiduciary duty of states agents

Giving effect to the fiduciary duty of states agents imposes under International standards on responsible borrowing imposes upon governments four main obligations':[134]

- Defining a code of conduct which promotes integrity, honesty and protection of public interest for public officials participating in the public indebtedness process
- Defining corruption offences which involve public official as mentioned in UNCAC
- Providing for sanctions in case of violations of the code of conduct as well as the commission of corruption offences
- Establish an entity for investigating on corruption claims and other violations of public officials code of conduct

The Ivorian budget legal regime provides clearly for a code of conduct for public officials especially public accountants and authorizing officers by delegation. It also clearly defines corruption offences as mentioned in UNCAC and provides for sanctions against non-compliant public officials.

However its mechanism of monitoring of breach of the obligations resulting from the fiduciary duty of states agents exclude main authorizing officers from its scope of application. In fact, according to the Ivorian supreme law, main authorizing officers with respect to budget execution that is to say Ministers and the head of state can only be judged by the High court of Justice. The first defect of this court is that, it has a "political fragrance" insofar as it comprises only members of the Ivorian parliament and ipso facto has a questionable impartiality. The second defect and certainly the worse is that it only exists in texts. The High Court of Justice has never been implemented.

[134] Supra Section on fiduciary duty of states agents under UNCAC . UNCTAD *"Guidelines on Responsible Sovereign Lending and Borrowing"* (2014), page 49.

It logically follows that, in the Ivorian legal framework there are no mechanisms of sanctions for senior public officials who breaches rules pertaining to the code of conduct of public officials with respect to debt management, or perpetrate a corruption offense. As a result, only performers (public accountants and authorizing officers by delegation) might be held accountable on the basis of their fiduciary duty. The fiduciary duty of public officials in the Ivorian budget law refers only to the fiduciary duty of performers.

Such legal framework is clearly in conflict with the obligation to give effect to the fiduciary duty of public officials. On this point, it is worth to point out that the definition of public official that might be held accountable for their fiduciary responsibility in international standards on responsible borrowing encompasses not only performers, authorizing officers, holders of a public office whether elected or appointed or any person who performs a public function'.[135] Therefore the mechanism of sanctions for breach of fiduciary must provide for enforcement of sanctions against any public official including main authorizing officers.

In practice it means that, mechanisms should exist for enforcing the accountability of the Minister of finance as the main authorizing officer of the state budget. Enforcement mechanisms should also provide legal avenues for giving effect to the accountability of other Ministers as main authorizing officers for government department that they are in charge of and also for the President of the Republic.

3.4.3-Assessment of the Ivorian legal framework on transparency compliance with international standards on responsible borrowing

The Ivorian legal framework on transparency postulates an obligation of clarity in the definition of responsibilities and competencies of different states entities and agents intervening in public debt management. It provides also for an obligation of providing information on sovereign debt especially its maturity profile, the justification of the borrowing, debt ceilings and guarantees, the indicative terms and the portfolio structure of new borrowings as well as the state's public indebtedness strategy.

Moreover, the Ivorian transparency legal framework provides for measures aims at facilitating public access to information on public debt, inter alia, through the provision of explanatory documents on public debt.

[135] United Nations Convention against Corruption (2003), article 02(a).

So it follows from the above that in line with international standards on responsible borrowing the Ivorian legal regime on transparency provides both for data transparency and process transparency. However with respect to process transparency in particular there is a significant defect pertaining to compliance with the obligation of justification of borrowing under international standards on responsible borrowing.

Actually, as part of positive actions expected from debtors states for giving effect to the principle of transparency under UNCTAD principles in particular, they have to define clear borrowing purposes. To that effect UNCTAD standards on responsible borrowing emphasize that sovereign borrowing should be "restricted to specific purposes that are in public interest".[136]

Like for debt ceilings, the Ivorian legal framework in conformity with WAEMU's regulation on public debt imposes to mention in the financial law the justification of the borrowing. This transparency provision is not compliant with international standards on responsible borrowing which postulate debtors' states duty to define clearly in advance in its legislation the reasons for which it may have recourse to sovereign loans.

The absence of definition of borrowing purposes in advance is undoubtedly a normative gap favourable to wasted loans and a serious handicap for the extent of control that oversight bodies may exercise on the government indebtedness policy.

3.4.4-Inconsistencies of the Ivorian debt servicing restructuring and validity of sovereign loans framework with international standards on responsible borrowing

Principle 15 of UNCTAD principles on public debt provides for the duty of the sovereign borrower to provide in advance for a contingency plan which defines the strategy to be followed in case where the sovereign defaults its debt or any other situation which requires a restructuring of the debt.

In this regard, UN guiding principles on foreign debt and human rights have identified natural disasters and severe financial distress as situations which as situations which may require a restructuring of the debt. In the same spirit, UNCTAD principles emphasizes the duty of

[136] UNCTAD *"Guidelines on Responsible Sovereign Lending and Borrowing"* (2014), page 50.

debtor's states to provide in their legislation for conditions of economic or financial distress under which they have the right to temporarily suspend their debt.

In addition, UN guiding principles provide also for the duty of the borrowing state to take measures for preventing the sale or assignment of its borrowing to third parties without its consent. By the same token, it should also take positive actions to ensure that in case of sale or assignment of its borrowings to third parties all relevant provisions provided by the original loan remains into force'.[137]

Contrary to the recommendations of international standards on responsible borrowing, the Ivorian legal regime for public debt management is completely silent on the issue of a contingency plan or procedure to be followed in cases where a restructuring scheme becomes imperative. There are no definitions in its sovereign debt legal framework of situations which may justify a restructuring plan like severe financial distress or natural disasters or for the right of the Ivorian's state to temporarily suspend the service of its debt.

On top of that, in spite of having been victim of vulture funds proceedings as well as the current vulnerability of its debt to vulture funds actions as a result of the large numbers of its current commercial creditors',[138] there is no single provision in its budget law relating to the sale or assignment of debt to third parties. Actually, the Ivorian sovereign debt legal regime is silent about safeguard measures to protect itself in scenario of the sale of its debt to third parties especially regarding the intangibility of relevant provisions of the debt (interest rate, change of circumstances).

Besides, International standards on responsible borrowing provide for debtors state duty to define in advance conditions for the nullity of a debt contract. In this objective they have to clearly stipulate the effect on the debt contract as well as their obligation to service the loan of the involvement of their officials or their creditors in corrupted transactions or the odiousness of the debt on the contract. Regarding odiousness of the debt in particular, UN guiding principles have even defined criteria that debtor's states should take into account for the qualification of a debt as odious.

[137] United Nations guiding principles on sovereign debt and human rights (2011) , paragraphs 52, 59& 60.
[138] Vulture Funds in the Sovereign Debt Context, https://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-legal-support-facility/vulture-funds-in-the-sovereign-debt-context/ (accessed on 02nd August 2017).[t]

In conformity with UNCAC's chapter on criminalization of public officials involvement in corruption, the Ivorian state has clearly defined corruption offences as well as the penalties associated to those offences. By contrast, there is no trace in its legal framework of the impact on the service of its debt or the loan contract of the involvement of its officials or of the creditors in corrupted transactions in public indebtedness process.

CONCLUSION

The descriptive analysis above reveals different serious shortcomings in the Ivorian sovereign debt legal regime. At first, contrary to responsible borrowing standards on due authorization, the Ivorian legislation provides for a very week parliament legally "skinned" from its powers to enforce debt ceilings and to challenge the executive borrowing decisions.

Secondly contrary to debtors' states duties under the principles of transparency and avoidance of incidence of over-borrowing, the Ivorian sovereign debt legal regime neither define an indebtedness threshold nor borrowing purposes. Thirdly, in defiance of its obligations to give effect to fiduciary duty of public officials, there is a huge normative gap in the Ivorian legislation regarding the fiduciary responsibility of senior public officials for their borrowing decisions as well as their management of public debt.

Finally, there are is also a total absence of definition of criteria for the nullity of a loan contract. The same goes for a legal framework on debt servicing and restructuring where there is also a legal void in disregard of debt servicing and restructuring principles under international standards on responsible borrowing.

So the weakness of the parliament vis-à-vis the executive and the de facto "immunization" of senior public officials against any prosecution for any offence linked to their borrowing decisions provides the suitable conditions for the total control of the executive over borrowing decisions. Such total control of the executive added to the normative gap in the definition of debt ceilings, borrowing purposes as well as the absence of legal regime for safeguard measures on debt servicing and restructuring provide suitable legal conditions for irresponsible borrowing.

The next chapter will describe best practices on due authorization, debt ceilings, definition of borrowing purposes and debt servicing and restructuring that Ivory Coast may draw lessons from in order to address the shortcomings diagnosed above.

CHAPTER 4

INTERNATIONAL BEST PRACTICES: LESSONS FOR IVORY COAST

4.1-Introduction

In line with the diagnosis of the normative gaps in the Ivorian sovereign debt legal framework this analysis will look at best practices pertaining to debt ceilings , borrowing purposes, the definition of legal consequences of corruption in sovereign debt transactions, debt odiousness, and contingency plan on debt restructuring. It will also simultaneously look at the balance of powers between the government and the parliament in each of those situations as well as those of oversight bodies.

4.2-Debt ceilings practices compliant with international standards on responsible borrowing

A combined reading of best practices on debt ceilings suggests that for addressing a normative gap on debt ceiling like in the Ivorian case, the legislation concerned should look at the type of ceiling envisioned and the category of debt that such ceiling concerns, the legal instrument in which this ceiling will be enshrined and the legal effects of this ceiling.

4.2.1-Typology of debt limits, their scope of application and legal avenues for their establishment

There are two ways of defining debt limits in legislation: expressing it in nominal terms or in relative terms. Nominal terms refer to an absolute limit of the debt generally determined in a specific currency.

An example of nominal debt ceiling is the US model of debt limit. The public debt act of 1939 with its amendment of 1941 provides for a statutory debt limit. Any change to the indebtedness threshold requires prior approval of the parliament. The current debt ceiling expressed in nominal terms is of $19, 8 trillion'.[139]

As for debt ceilings expressed in relative terms it also provides for borrowing up to a certain limit. Unlike nominal terms, this limit is generally defined in terms of debt to the GDP ratio.

[139] The Hutchins Center explains: The debt limit https://www.brookings.edu/blog/up-front/2017/08/03/the-hutchins-center-explains-the-debt-limit/ (accessed 20th September 2017).

Mauritius is among countries which applies relative terms for defining debt ceilings. Its current debt ratio to GDP is 60%'.[140]

As for the scope of application, it refers to the category of debt obligations contracted by state entities to which the legal limit established applies (central government, local government, domestic debt or external debt, contingent liabilities).

There is no clear position on the best definition of the scope of debt. However, best practices suggest that multiple debt ceilings should be avoided. The good example in this regard is Nigeria where the debt ceiling concerned the aggregated debt of the federal state and local governments'.[141]

Finally, best practices provide that they are three ways through which debt ceilings may be set. Debt ceilings may be set in the Constitution. This case implies the supreme importance of those ceilings enjoying the status of constitutional norm. Examples of debt ceilings established through the by the state supreme law are those of Hungary and Poland that debt ceilings have been respectively established at 50 and 60% to GDP ratio. That entails rigidity in the process for amendment of such ceiling. Examples of debt ceilings established through the by the state supreme law are those of Hungary and Poland that debt ceilings have been respectively established at 50 and 60% to GDP ratio'.[142]

The second type of ceilings refers to limits established through a statute (budget law, fiscal responsibility law, public finance management Act…).This is the most widespread form of ceiling. The examples are Mauritius, Nigeria, and Switzerland. The last type of ceilings refers to debt limits annually established by the parliament'. As aforementioned United States is one of the pioneers of this model of establishment of debt ceilings. Brazil , New Zealand, Spain Canada and japan have also adopted this form of establishment of debt ceilings.[143]

4.2.2-Legal effects and enforcement mechanisms of debts ceilings

Best practices on debt ceilings postulate a clear definition of the effects of debt ceiling in budget legislation. This clarification concerns in particular the definition of legal consequences for loans contracted in breach of those ceilings. It also relates to the parliament powers for enforcing the debt limits.

[140] International Monetary Fund *" Mauritius : 2013 Article IV consultation"* , page 29.
[141] Act 31 of 30 July 2007 relating to the fiscal responsibility Act, section 42 (2).
[142] Constitution of the Republic of Hungary (2012) , article 36 (4). See also Constitution of the Republic of Poland with amendment of 2004, chapter 10.
[143] EA, Awadzi *"Designing legal framework for public debt management"* (2015), page 25.

Regarding legal impact on sovereign loans the best practices examples of Surinam and Brazil are edifying. Actually, the Republic of Suriname National debt Act of 2002 punishes by terms of nullity any agreement passed in violation of debt ceilings established under the National debt act.

In a similar vein, the Brazilian Fiscal Responsibility Act of 2000 invalidates any public debt contract passed in violation of that law. Under those circumstances, the Brazilian legislation provides for the reimbursement of the principal but excludes payment of interests and other financial charges'.[144]

As for enforcement mechanisms including the parliament power on that matter, the Hungarian Supreme law of 2011 states the parliament obligation to reject any budget measures which will lead to a breach of the 50% debt ratio to GDP established by the Constitution. By the same token, the US legal framework on public debt acknowledges the Congress as the sole institution able to suspend or increase the ceiling. In other words, the executive or more precisely the treasury has no authority to borrow when the debt threshold is reached except prior agreement of the Congress.

So, the best practices mentioned above suggest that loans contracted in breach of the debt limits shall be declared null and void. It results equally from the practices highlighted above that the parliament must be empowered for inhibiting any violation of the debt threshold and to authorize any derogation to the those limits.

4.3-Best practices regarding the establishment of borrowing purposes

There are various approaches of defining borrowing purposes in national legislation. Actually, one distinguishes the general fiscal purpose approach, the specific purpose model, the golden rule method and the monetary purpose approach.

Actually an example of the general fiscal purpose approach is the one enshrined in the Botswanan Finance and Audit act of 1970. This act states that "government may contract debts locally to meet current requirements".

[144] Brazilian Fiscal Responsibility Act of 2000, article 33 (1).

As for the second model of establishment of borrowing purposes the South African public financial management act definition of borrowing is one of the most relevant examples. It provides six reasons for which government may contract debt. Those are:

- Financing national budget deficits
- Refinancing debts which have reached maturity or "loan paid before the redemption date"
- Acquiring foreign currency
- Sustaining credit balances in the "National Revenue Fund" bank account
- Where necessary "regulate internal monetary conditions"
- Any other ground endorsed by the parliament through special resolution

The South African approach provides certainly one of the most comprehensive definitions of specific borrowing purposes.

Regarding borrowing purposes defined on the basis of monetary purposes, the Sierra-Leonean public debt management act of 2011 states that the state may contract loans for meeting the requests of the Central Bank "to issue government security in the sole objective of supporting monetary policy objectives.

As for the Golden rule method, the definitional approach used by the Nigerian Fiscal Responsibility Act is certainly one of the most prominent examples of the implementation of this model of definition. The Nigerian Act states that "government at all tiers shall only contract loans for capital expenditures and human development and on concessional terms".[145] So countries best practices described above show that debtors states like Ivory Coast may use either the general fiscal purpose approach or the specific purpose model or the Golden rule method or finally the monetary purpose approach, for complying with the definition of borrowing purposes under international standards on responsible borrowing. The choice of a definitional approach should be adequate for ensuring transparency of the borrowing process and allowing the parliament to oversee the government borrowing decisions.

[145] Act 31 of 30 July 2007 establishing the Fiscal Responsibility Act of the Republic of Nigeria, paragraph 41 (1a).

4.4-Best practices on the enforcement of fiduciary duty of senior public officials through strong institutions

As mentioned in the previous chapter, one of the serious lacunas of the Ivorian legislation on sovereign debt is the absence of legal provisions which can permit oversight institutions to held accountable senior public officials in particular the President of the Republic and its ministers in the context of the management of public finances. The Nigerian, Brazilian and the Surinamese legal framework for enforcement of fiduciary duty of every state official provide examples of best practices of legal frameworks enabling oversight institutions to held accountable senior public official.

The Nigerian budget legal regime provides for a fiscal responsibility commission in charge of monitoring and enforcing the Fiscal Responsibility Act, the Nigerian main act on fiscal operations. To do so, it has been entrusted with certain specific powers for giving effect to the fiduciary responsibility every public official. Actually, it has the power of ‘:[146]

- Obliging any person or state institution to disclose information pertaining to public expenditure and revenues
- Generate an investigation for the purpose of ascertaining any violation of the act by a person
- In case where the Commission has ascertained that a person has rendered himself/herself guilty of a punishable offence under the act , it shall forward the investigation report to the Attorney general for possible prosecution

So the Nigerian budget legal regime “equips” adequately the public debt management oversight body for giving effect to the fiduciary responsibility of senior public officials including catalysing their legal prosecution.

As for the Brazilian best practice example, the Brazilian fiscal responsibility law as well as its Fiscal crimes Act define criminal sanctions for public officials which have violated the public debt legal regime. Actually, the Fiscal crimes Act in particular provides for jail sentence as well ban of political office for senior public officials especially the President of Republic,

[146] Nigerian Fiscal Responsibility Act of 2007, Part 01, paragraph 02.

state governors and mayors of municipalities who have approved or conduct public credit operation in breach of the fiscal responsibility law or of Senate Resolutions.

As for Surinam's case, its public debt legislation hold responsible the Minister of finance and any other potential party involved personally liable for debt contracted or guarantees granted in breach of the debt ceiling during his term of office'.[147]

4.5-Best practices regarding debt servicing and debt restructuring legal framework

Best practices regarding debt servicing and debt restructuring refers to preventive measures taken by states for justifying an eventual suspension of the service of their debt or to provide the legal bases for a fair debt restructuring process. One of the common best practices used by states for anticipating a fair restructuring process is the inclusion of collective action clauses (hereinafter CACs) in the conditions and terms of bonds issued in foreign markets.

CACs are contractual provisions in long-term debt instruments that allow qualified majority holders of debt securities to impose to the minority changes in the financial terms of loans including inter alia restructuring schemes'.[148]

There are two general categories of CACs that are used by states in bonds transactions. Those are "majority rescheduling" provisions and "majority enforcement" provisions. The former refers to the empowerment of "qualified majority bondholders of an issuance to bind either before or after a default all other holders of that issuance to the financial terms of a restructuring". As for the latter, it describes the legal capacity of a majority qualified bondholders to prevent or more precisely to "limit the ability of minority creditors to enforce their rights following a default".[149]

So both types of CACs legally deprive rogue creditors to prevent the implementation of a fair restructuring process, a protection that countries which have not integrated CACs in their international bonds legal framework do not benefit when they default on their debt.

[147] EA, Awadzi *"Designing legal framework for public debt management"* (2015), page 50.
[148] EA, Awadzi (n.154 above).
[149] International Monetary Fund « The design and effectiveness of collective action clause » (2002), page 2.

Emerging markets like Argentina, Chile, Egypt, Mexico and Nigeria have integrated CACs in their government bonds'. [150] Even Eurozone countries since 2013 have made CACs mandatory for sovereign bonds issued under UK laws'.[151] That shows the critical importance of those provisions for any country in the world for avoiding poor restructuring plans.

Regarding the suspension of the servicing of the debt due to economic necessity, international provides the legal basis for debtors states to invoke necessity as a ground for suspension of their international obligations including the service of their debt. Actually article 25 of the draft articles on states responsibility provides that necessity may be invoked by state as the derogation to an international obligation under two conditions':[152]

- It is the only available avenue for the state for safeguarding an "essential interest against a grave and imminent peril"
- The derogation or violation of the international obligation concerned does not seriously impair an essential interest of the international community as a whole or of the states towards which the obligation exists

One of the best examples of states that have cleverly give effect to this provision in their internal law by extended it to financial crises is India. The Indian Constitution provides for their President ability to proclaim the state of emergency during times of political or financial crises. As part of the effects of this proclamation, the Constitution empowers the president to suspend whether necessary the execution of its debt obligations'.[153]

India has also integrated in its Bilateral Investment treaties, the exception of economic necessity as a ground for suspension of its obligations vis-à-vis investors that it so say including its creditors.

So debtor's states may draw inspiration from the Indian example for giving effect in their legislation to a debt servicing and restructuring framework which protects public interest and comply with International standards on responsible borrowing.

[150] UNCTAD *"Guidelines on Responsible Sovereign Lending and Borrowing"* (2014), page 46.
[151] Collective actions clause : No panacea for sovereign debt restructuring. https://www.pimco.com/en-us/insights/viewpoints/viewpoints/collective-action-clauses-no-panacea-for-sovereign-debt-restructurings/ (accessed 24 September 2017).
[152] Draft articles on Responsibility of States for internationally wrongful acts (2001), article 25.
[153] Indian constitution of 1949 with amendments, article 354.

That ends the description of best practices on the implementation of international standards on responsible borrowing. This description shows the variety and innovative best examples in Africa, Europe, Asia and America that Ivory Coast may draw inspiration from, in order to adapt its legal framework to responsible borrowing standards especially regarding the accountability of senior public officials, debt servicing and restructuring, due authorization, instead of copying everything from its former colonial power.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1-Recap

This research has interrogated the issue of the legal avenues for the enforcement of responsible borrowing in Ivory Coast. To do so, it has started by a description of international standards on responsible borrowing as well as the extent of the implementation of those standards in the Ivorian legislation on sovereign debt. Then from the comparison between the Ivorian public debt legislation and international standards on responsible borrowing, it has diagnosed several shortcomings of the Ivorian public debt legislation. It has also provided different avenues for addressing those shortcomings through a description of best practices in responsible borrowings.

5.2-Summary of findings

UNCTAD principles on responsible lending and borrowing (2012), UN guiding principles on foreign debt and human rights (2011) and United Nations Convention against Corruption (2003) constitute the main source of responsible borrowing standards. Those standards provide a similar content regarding the positive actions expected from states for the realization of responsible borrowing. Those positive actions concern the obligations to give effect in their legislation to the fiduciary duty of states agents, to transparency in the management of public finances and to a debt servicing and restructuring legal framework that protects public interest.

The Ivorian legislation on sovereign debt is composed by fragmented sources that provide rules on the parliament role and the executive role in the authorization to borrow, the fiduciary responsibility of state agents, the control as well as transparency in the management of public finances. But its assessment at the light of responsible borrowing standards reveals that the Ivorian public debt legislation is inconsistent with standards on due authorization, fiduciary duty of public officials, transparency and debt servicing and restructuring.

Those inconsistencies derive from the role granted to the parliament in the authorization to borrow, the absence of debt ceilings and definition of borrowing purposes as well as a debt servicing and restructuring legal regime which protects public interest.

For addressing those inconsistencies, Ivory Coast may draw lessons from best practices developed by Nigeria, South Africa, Lesotho, Suriname, Hungary , Poland , Brazil, India and United States on due authorization, debt ceilings, definition of borrowing purposes and debt servicing and restructuring.

5.3-Conclusion of the study

Ivory Coast "copied and pasted" (plagiarised) the French legal framework on sovereign debt in its legislation. As a corollary, it also plagiarised the shortcomings of its former colonial master's legislation. Those shortcomings concern mainly the concentration of borrowing decisions between the hands of the executive and its immunization against any prosecution resulting from those borrowing decisions.

To those precarious conditions are added the absence of debt ceilings and debt servicing and restructuring safeguard measures. Such legal arrangements inherited from the former colonial power have undoubtedly been the source of the longevity of irresponsible borrowing practices in Ivory Coast.

It is therefore necessary to "decolonize" the Ivorian legal system of sovereign debt management that is to stand out from such legal approach of sovereign borrowing which allows the executive to make sovereign borrowing decisions without counter power and the possibility of being held accountable.

So, instead of copying everything from their former colonial power, Ivory Coast should built its sovereign debt management legal framework on the basis of osmosis of best practices in this area. It should particularly draw inspiration from best practices applied by its African peers which have similar societal and institutional realities. It should also look at best practices from other nations on budgetary discipline especially enforcing debt ceilings and giving effect to the accountability of public officials.

5.4-Recommendations

For enforcing responsible borrowing on the basis of osmosis of best practices in this area described in the previous chapter, Ivory Coast should:

- In line with the obligation of transparency, address the fragmentation of its sovereign debt legal framework by providing a single act on sovereign borrowing
- Amend its debt ceiling legal regime by defining a specific type of ceiling, its enforcement mechanisms and the sanctions associated with its violation.

In that regard, the new act should give the power to the parliament in its constitution to reject any type of budget measures which breaches the debt limit legally established. Any derogation to this limit should also be adopted on the basis of a prior parliament authorization.

The act should also encompass sanctions. Like in best practice example provided by Surinam National debt Act of 2002, the sanction legal regime should provide for the personal liability of the Ministry of finances for breach of the indebtedness threshold which happen during its term. In addition, drawing inspiration from the Brazilian model of sanctions for senior public officials, the new act should comprise criminal sanctions for senior public officials especially prison terms and bans from public office for any senior public official including the President of the Republic and the Ministers who breach the sovereign debt act.

To that effect, based on the Nigerian best practice example on this matter, the Court of Auditors should be entrusted with the power to compel any public official including the President and the Ministers to disclose information on public revenues and expenditure.

The Court of Auditors should also be empowered to cause an investigation for ascertaining a violation of fiscal rules and forward its report to the attorney general for prosecution of the alleged wrongdoer in case where the investigation has ascertained a breach of fiscal rules by a public official.

Besides, the new act should clearly determine the legal effects on the service of the debt and the validity of the debt agreement, of loans contracted in violation of the provisions of the act especially debt ceiling and anti-corruption norms. By the same token, it should also define

odious debt and its legal effects on the service of the debt as well as the validity of the debt contract.

Finally, like in the Indian best practice example of debt servicing norms, the act should provide for the right of the Ivorian state to suspend temporarily the service of its debt in case of natural disaster or of financial distress. It should also impose the inclusion of collective action clauses in the conditions and terms of bonds issued in foreign markets and provide for a contingency plan to be followed in case of debt crisis.

The full implementation of the recommendations above will catalyse the healing of Ivory Coast from irresponsible borrowing.

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