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Original Article

Asset management companies, non-performing loans and systemic crisis: A developing country perspective

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ABSTRACT Nigeria's response to its 2009 banking crisis, which indicated exogenous and endogenous local and global risk factors for non-performing loans (NPLs), included the apparent orthodoxy of establishing an asset management company (AMCON). This article examines the justifications for and effectiveness of AMCON as a mechanism for resolving NPLs in a developing economy. Having compared Nigeria and Korea, the article argues that relief, restructuring, rehabilitation, recovery, resuscitation, responsibility, restitution and reoccurrence prevention, expressed as $RE = 7 \times Re - Re$, are critical goals. Doubting a one-size-fits-all model for resolving systemic banking crises, this article suggests a contextual approach that considers asset characteristics, operative legal and regulatory environment, and market capacity.

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INTRODUCTION

Local and global exogenous and endogenous internal risk factors for banking institutions include poor corporate governance, fraud and technical errors such as inappropriate investments, lending and dealings. Of similar effect are external factors such as global and local macroeconomic and political instability. Often manifested in crises are non-performing loans (NPLs) that may indicate weak asset quality, suggest systemic difficulties and affect bank viability in developed, emerging and developing countries. Scholars such as Jackson,[1] Olson,[2] Lou,[3] Heffernan[4] and Campbell,[5] who studied banking crises, linked NPLs to bank failure and insolvency, a relationship that made Beattie *et al* to observe that 'bad debts are by far the most common cause of bank failures'.[6] Options available to supervisors in such crises include direct and indirect support to troubled banks, takeover, sale, merger and liquidation. The Basel Committee identified a relatively recent method for dealing with asset quality problems as the transfer of loans and assets to a special purpose asset management company (AMC),[7] usually established to

own, manage and sell non-performing assets. Campbell observed that AMCs are now the 'most widely used and accepted method internationally' for dealing with NPLs, particularly in systemic crises.[5]

Nigeria's history of banking crises demonstrates the presence of internal and external triggers, although its 2009 crisis was directly highlighted by large-scale NPLs instigated by insider abuses, poor corporate governance practices, a hugely lopsided exposure to the capital market and the oil and gas sector, inadequate regulatory enforcement and other factors. First proposed as part of the 2004 banking consolidation exercise, the recently established Asset Management Corporation of Nigeria (AMCON) gathered momentum from the 2009 crisis and the government's desire to rescue troubled banks. The apparent orthodoxy of AMCs as resolution vehicles for NPLs is not unchallenged. Campbell, for example, argued that an AMC cannot prevent the emergence and accumulation of NPLs, and in developing countries it usually 'means that the problem [of NPLs] has only been moved to another place [and i]t has not been resolved'.[5]

This article therefore examines the justifications for AMCON and its effectiveness as a mechanism for resolving NPLs in a developing economy. It compares AMCON with Korea Asset Management Corporation (KAMCO), an AMC in a relatively more developed economy. Although Table 1 indicates similarities and differences in the causes of NPLs in the two countries, AMCON and KAMCO are both centralized asset management vehicles targeted at multiple financial institutions in systemic crises. In addition, Korea, like Nigeria, injected public funds in banks during its 1997–1998 crisis.[8] This article argues that relief, restructuring, rehabilitation, recovery, resuscitation, responsibility, restitution and reoccurrence prevention, expressed as ($RE = 7 \times Re - Re$), are critical goals in resolving non-performing assets. Suggesting a contextual approach that considers asset characteristics, operative legal and regulatory environment, and market capacity, and consistent with Woo's conclusions,[9] the article casts doubt on a one-size-fits-all model, as banking crises must be located in and cannot be divorced from their contexts.

The article continues as follows. The next section examines the global and local contexts of the Nigerian banking crisis and the regulatory and supervisory responses. The subsequent section analyses the triangular risks,

Table 1: Non-performing loans

	Korea 1997 crisis	*KAMCO solution*	*Non-KAMCO response*	*Nigeria 2009 crisis*	*AMCON solution*	*Non-AMCON response*
Global/transnational credit/risk contagion	×	—	×	×	—	×
Macroeconomic instability	×	—	×	×	—	×
Regulatory inertia	—	—	—	×	—	×
Universal banking	—	—	—	×	—	×
Poor corporate governance	—	—	—	×	—	×
Poor credit policies and monitoring	—	—	—	×	—	×
Insider abuses	—	—	—	×	—	×
Fraud and breach of trust	—	—	—	×	—	×
Political abuses and excessive exposure to governments and politically connected	—	—	—	×	—	×
Excessive sector exposure	—	—	—	×	—	×
Excessive exposure to single borrower or related group of borrowers	—	—	—	×	—	×
Lack of shareholder activism/monitoring	×	—	×	×	—	—

× =factor.

systemic crisis and AMC relationship, suggesting a role for $RE = 7 \times Re - Re$. The penultimate section subjects AMCON to the formula and demonstrates the inadequacies of universal models to banking problems and suggests a context-specific approach. The last section is the conclusion.

NIGERIA: 2009 CRISIS

The Central Bank of Nigeria (CBN) was established in 1959 following the 1958 banking crisis, but early experiences indicated a range of institutional, structural, capital adequacy and regulatory difficulties.[10] Deregulation and financial liberalization introduced by the 1986 structural adjustment programme (SAP) brought structural changes to the economy and aggravated bank problems and collapses.[11–13] SAP eased bank licensing requirements, causing an immense increase in the number of banks relatively small in assets and capitalization. By 1992, there were 120 banks of various sizes, although only 89 existed at the time of the 2004 consolidation exercise.[14] In 2005, when consolidation was concluded, 25 banks remained, whereas 13 banks that failed to increase capital lost their licences.[14] The consolidation exercise in some instances, however, resulted in forced mergers and acquisitions of healthy and troubled banks.[13]

The exercise also introduced a universal banking model, enabling banks to engage in traditional banking and activities such as investment banking, insurance and capital market operations.[15,16] The model permitted banks including troubled ones to establish complex corporate structures for alignment of traditional and non-banking roles. Such structures allowed abuses to reign, particularly capital, risk and regulatory arbitrage, and prevented effective regulation and supervision.[13] The universal banking model assumes as correct Lord Turner's assertion that 'a more formal and complete legal distinction of "narrow banking" from market making activities is not feasible'.[17] It emphasizes size and expansion, but the downside is its possible link to risks to financial stability by encouraging big banks that can amplify a systemic crisis risk.[18]

The 2007–2009 global financial crisis shared some common grounds such as capital inflows, bank deposits and excessive credit with Nigeria's 2009 crisis. Credit-related factors included excessive liquidity, credit and lending, poor risk management and excessive aggregate exposure.[19–22] Similarly, there were external sources of capital and credit in the period preceding the 2009 crisis,[20–23] although the endogenous components were more influential.[24,25] As the CBN governor, Sanusi, acknowledged,[24] Nigerian banks were not strongly integrated with the international financial system. Notwithstanding some global triggers the local crisis had peculiar risk management and corporate governance factors,[26] particularly 'bad lending decisions' borne out of 'gross irresponsibility, crass insensitivity' and 'monumental fraud'.[24] Bank deposits had boomed as a consequence of the 2004 consolidation exercise and from rising oil prices, which increased public revenue and spending and liquidity. Credit, particularly for margin lending and proprietary trading, flowed. The result was a rapid financialization indicated by huge increases in asset and share prices, including banks' stocks, and in the market capitalization of the national stock exchange, although with little benefit for the real economy.[24]

Undoubtedly, concentration of loan portfolios in particular sectors, locations or borrowers can cause crises. As asset prices generally follow a cycle, a bubble can affect banks if exposure is high, and a systemic crisis may be unavoidable if large banks or a number of banks are involved in concentrated excessive sector lending.[27–30] Olson's account of the American banking crisis in the 1980s, for example, found a direct link to concentrated loan portfolios.[2] Similarly, the oil price crash in 2008 precipitated a crisis in Nigerian banks with high lending exposure to the oil and gas sector and the capital market.

CBN officials and the media reported that a large proportion of NPLs came from the oil and gas sector and share purchase loans including margin loans for the purchase of the lending banks' shares.[13,23,31]

Despite existing codes,[32] banks' poor corporate governance culture contributed to the crisis. Banks ought to conduct due diligence and credit analysis to determine borrowers' creditworthiness and influence lending decision, appropriate credit limits and security. The objective is to eliminate, or at least reduce, banks' credit risk exposure. Credit risk is aggravated if due diligence and credit analysis are ignored because of greed, insider abuse or fraud, as was evident in the troubled Nigerian banks.[13,33] Weak boards lacking independence and effectiveness allowed inadequate risk appraisal and management including audit processes and provisioning. Rampant were unethical, fraudulent and illegal practices and insider abuses, particularly by chairs/CEOs who dominated boards. Abuses included granting loans without collateral, direct and indirect loans to insiders, relations and associates, manipulation of stock prices, and purchase of shares and sham capitalization using customer deposits.[24] Internal credit analysis and risk management systems including the single obligor rule that limited lending exposure were either non-existent or routinely ignored.[13]

Regulatory and supervisory inertia was another factor. The post-consolidation period witnessed gaps and weaknesses in regulatory framework, supervision, enforcement, and risk detection and management. The lack of coordination between different financial regulators and the CBN was evident, and the CBN's structures and processes for supervision of banks and enforcement were weak and inadequate. The CBN under the immediate past governor preferred a disguised emergency liquidity financing for banks troubled by NPLs by establishing a secondary discount window. This strategy did not address the underlying sources of NPLs in affected banks, and neither eliminated nor reduced NPLs that, instead, continued to grow. The regulatory environment was one of undue tolerance, weak and insufficient regulations, inadequacy of specialist regulators, lack of enforcement will, compromised and ineffective supervision, and poor risk appraisal and management.[13,23,24,31,33–35]

The CBN has now adopted a more interventionist approach to regulation rather than the laissez-faire attitude of the period immediately preceding the crisis.[24,36,37] It has announced a risk-based supervision involving early and prompt identification, evaluation and tackling of issues,[7] a paradigm shift generally guided by the Basel Committee's principles for corrective actions for remedying deficiencies and effecting changes in corporate behaviour. The principles include the fulfilment of supervisory objectives, timeliness, management commitment, proportionality and comprehensiveness.[7] Corrective actions may involve the suspension of shareholder rights, prohibition of distributions, removal of directors and officers, restrictions on director and executive compensation, and imposition of measures relating to corporate governance, capital adequacy, accounting, asset management and expenditure.[7]

Consequently, a joint CBN and Nigeria Deposit Insurance Corporation (NDIC) special investigation of Nigerian banks published its results on 14 August 2009 and 3 October 2009.[26,38] Nine banks were troubled; eight were insolvent; and one was sufficiently liquid, although insolvent overall. The first set of results indicated that five banks had aggregate NPLs at 40.81 per cent, lacked liquidity and regularly approached the CBN's Expanded Discount Window (EDW). The second batch of three banks showed similar indications. That the NPLs crisis in Nigerian banks was factually, or at least potentially, systemic was evident from the size of the troubled banks. The first five technically insolvent banks held or controlled about 30 per cent of the country's entire deposits.[38] Four were in the top 10 Nigerian banks and controlled significant proportions of the system's deposits,

credit, assets and liabilities. The liquidity and other problems of these relatively large-sized banks assumed a systemic dimension, as other banks were drawn in a costly bidding war for deposits.[21]

Having decided against nationalization or liquidation of troubled banks, the CBN took a number of measures.[25,26,38,39] First, it injected 620 billion naira (about US$4.1 billion) of public funds into the affected banks. For an economy of Nigeria's size, this was a huge sum, being about 2.5 per cent of the 2010 national Gross Domestic Product. The CBN also guaranteed foreign credit lines and inter-bank placements until 31 December 2010. The CBN's rescue of troubled banks was consistent with other national responses to the global financial crisis, including the United States where public funds were given to financial institutions as direct loans or to facilitate mergers.[40]

Second, the CBN in an unprecedented move on 14 August and 2 October 2009 dismissed the CEOs and executive directors of eight banks and appointed new CEOs and interim management committees in their place.[26,40] The CBN acted under Section 35(2) of the Banks and other Financial Institutions Act 1991 which permitted it to remove bank managers and officers notwithstanding the provisions of the corporate constitution and the contract of employment. Section 33, which is concerned with a failing bank, contains provisions for removal of bank directors and officers. Third, it initiated corporate governance-related reforms including a maximum 10-year CEO tenure. Notwithstanding some concerns,[38,41] Nigerian law permitted the CBN to enact such retroactive rules.[42] The CBN also proposed a corporate governance model to award bonuses and rewards on the basis of long-term profitability and prospects instead of fostering a short-termism culture. Fourth, it reported some CEOs and senior management officers to the Economic and Financial Crimes Commission for possible prosecution of fraudulent and other criminal conduct. The CBN in another unprecedented move published a list of significant debtors of troubled banks.[43] Sixth, banks, particularly the group of eight troubled banks, wrote off loans constituting about 66 per cent of their capital. Counter-cyclical regulatory requirements the CBN introduced included outlawing the use of customers' deposits and savings for proprietary trading, venture capital and capital market speculation and limiting capital market lending to a proportion of balance sheets.[24] These measures targeted ineffectual isolation of banks' debts to customers and unrestrained capital market lending and trading while restricting capital market involvement to equity-based speculation.

Aware of the contagion risk, the CBN in March 2010 jettisoned universal banking and adopted a functional model with classifications and minimum capital requirements based on focus, specialization and geographical spread.[38] Under the system, capital adequacy ratios are not universal but depend on bank type and riskiness, while banks are licensed as international, national, regional, mortgage and Islamic banks with different capital requirements.[24] This approach confirms the analysis of Freixas *et al* who argued that fused banking and non-banking functions in financial conglomerates hamper effective regulation and supervision, particularly in developing jurisdictions.[44]

Another significant response to the 2009 crisis was AMCON, a departure from the Basel Committee's suggestion[7] of liquidation as a more viable option where established deposit insurance systems, such as Nigeria's NDIC since 1988, exist. However, the Basel Committee also recommended using AMCs to separate impaired loans and assets from weak banks with a franchise value.[7] Some troubled banks such as Union Bank, one of Nigeria's oldest surviving banks, have recognizable brand names. The next part examines the risk, systemic crisis and AMC relationship as a foundation for analysis of AMCON.

RISK, SYSTEMIC CRISIS AND AMCs

Risk, systemic crisis and AMCs share a triangular cause, effect and manifestation

relationship. Risks may depend on time and environment of differing components and, irrespective of banks' location, generally relate to market, liquidity, operational, strategic, interest rate, foreign exchange and currency, political and credit factors, weak real economy and financial liberalization.[4,7,45,46] Credit risk, for example, usually arises from borrowers' potential default, inability or refusal to repay facilities. It may not stand alone but could be coupled with insider abuses, fraud and poor corporate governance practices. As the most common cause of banking problems, credit risk is often a corporate governance issue and linked to poor lending practices, non-compliance with policies and procedures, excessive loan concentration and risk taking, fraud, self-dealing and other criminal and unethical conduct.[7] Heffernan specified four ways of dealing with credit risk as interest rate, credit limit, security and diversification of loan portfolio.[4,5] Interest rate, which may relate to borrowers' characteristics, may be low where such characteristics indicate a small risk of default. Banks may require security, or limit funds available to particular borrowers. Diversification of loan portfolio enables banks to spread credit risk and avoid shocks if risk becomes systemic.

Weak banks usually lack good asset quality, positive reputation, profitability, capital adequacy and liquidity.[7] These factors, particularly asset quality, are a question of performance. Consequently, Woo defined 'non-performing assets' as 'debt instruments [loans and bonds] whose obligors are unable to discharge their liabilities as they become due'.[9] Asset impairment results from one or a combination of loss events including borrower's significant financial difficulty, insolvency and breach of contractual payment provisions.[47] Non-performing assets are closely connected to financial crises and the need to contain and resolve them is, therefore, critical to financial stability and macroeconomic management. This is largely a question of where and how to resolve the assets.[9]

Possible deleterious fallouts for national economies from banking crises require regulatory and supervisory actions to prevent and manage such crises and their disruptive and systemic effects with a view to maintaining financial stability.[21] The Basel Committee stressed that effective supervision should promote the maintenance of confidence in the financial system by preserving weak banks' assets at minimal costs even if a bank ceases to exist as a legal entity.[7] This recognizes the maintenance of stability and confidence in the financial system as a critical supervision objective.[7] Consequently, the Bank of England acknowledged that it '– and the world at large – had come to regard the taking of prompt and decisive action to prevent a spreading of a loss of confidence as one of the essential roles of a central bank'.[48] Although usually connected with large banks, systemic crises are not solely dependent on size, as in some instances an economy can withstand large bank failures and in others aggregated problems in small banks can have systemic impact.[7]

In systemic crises triggered by weak banks, supervisors can provide liquidity assistance usually from a central bank, solvency support from a government, reorganization and restructuring, as well as winding up, dissolution and liquidation. Objections to using public funds to rescue essentially private commercial enterprises include increased moral hazard, disincentive to corrective action and risk prevention and management, and direct and indirect costs to public funds.[40,49,50] The Basel Committee identified speed, cost-efficiency, flexibility, consistency, avoidance of moral hazard, and transparency and cooperation as guiding principles for supervision of weak banks.[7] As the protection of the financial system goal conflicts with the market approach, the Basel Committee stressed the need for 'right incentive balance' while observing that '[b]ank failures are a part of risk-taking in a competitive environment [and supervisors'] objectives of protecting the financial system and the interests of depositors are not incompatible with individual bank failures'.[7]

To deal with potential systemic crisis,[51] the orthodox view supports bailout of large-sized

financial institutions to prevent disastrous outcomes for such institutions and counterparties and far-reaching consequences for the economy. For example, rehabilitation of large non-performing assets is often preferred to outright liquidation, particularly if enormous social and political consequences loom.[9] Similarly, public fund support in the form of direct capital injection, loans, guarantees or AMCs may be given. Nevertheless, the Basel Committee insisted that public funds can be used for 'exceptional circumstances' justified only by a crisis' potentially systemic nature and the need to avoid disruptions to the credit and lending environment and the economy.[7] The Basel Committee advised that where weak banks receive public funds, shareholder moral hazard should be dealt with by appropriate dilution or elimination of shareholding interests.[7] This approach is increasingly followed, for instance, by the United States, which removed CEOs and diluted shareholders' equity of financial institutions rescued in the 2007–2009 crisis.[40]

AMC

Impaired assets require resolution through asset management processes involving identification and organization for the purposes of selling, *recovering*, *restructuring*, and writing off,[9] such corrective action enabling productive disposals of NPLs and providing *relief* to troubled banks. Apart from detection and acknowledgment of impaired assets, NPLs raise three major issues of prevention, management of existing NPLs, and handling of any resulting bank insolvency.[5] How effective these issues are dealt with is critical to banks' health and financial system stability. Their combined effect and prospects of (some) borrowers' improved repayment ability suggest the need for a mechanism for warehousing and managing NPLs until when disposals are feasible and productive.

AMCs may be established for this warehousing and managing role where NPLs are linked to a systemic crisis. Consequently, the Basel Committee defined an AMC as '[a] special purpose company set up by a government, a bank, or by private investors to acquire loans and other assets, a majority of which are impaired, for subsequent management (including restructuring) and in many cases, sale to investors'.[7] Woo described AMCs as 'public or private entities whose main function is to take over the nonperforming assets of distressed financial institutions, [and] are generally founded on the supposition that they can help facilitate financial restructuring and maximize the recovery of nonperforming assets at the same time'.[9] Individual or group of banks or investors can establish AMCs, but AMCs are usually public sector affairs because, as the Basel Committee put it, 'typically no private investor is available or interested, at least initially, in acquiring the sub-quality assets'.[7] The high costs involved dictate that AMCs are usually established in systemic crisis, or when a single large bank fails.[5]

Various objectives of AMCs have been put forward.[3,5,9] Woo identified facilitation of financial restructuring, high rate of recovery, speedy resolution and normalization of asset markets as the objectives of a sound asset management vehicle.[9] When asset quality problems arise, options include loan renegotiation, collateralization and writing off, particularly if loans are long term. Banks may not need to liquidate long-term assets to solve liquidity problems if AMCs exist. Distress is actually exacerbated and insolvency invited when to improve liquidity position banks are compelled to liquidate long-term assets often at low prices.[52] In contrast to disparate creditor constituency, an AMC can act as a single value-maximizing entity willing and able to take longer term approaches to value, price and benefit. As ordinary insolvency procedures emphasize asset disposal to generate distribution for creditors, quick or immediate inter-bank asset sale in insolvency is not improbable, for example in the United States.[53] Immediate (fire) sales cause dumping of assets and depress prices during glut.[54]

The main advantages of AMCs include improved marketability of banks to buyers and investors when balance sheet is rid of

toxic assets and facilitation of banks' valuation for capitalization or investment purposes. By acting as 'receptacle vehicles'[9] for non-performing assets and aiding the cleaning of banks, AMCs play *rehabilitative* and *resuscitative* roles. AMCs inspire what the Basel Committee labelled the 'good bank-bad bank separation', enabling banks to correct problems and focus on banking.[7] Banks can concentrate on their core business without the weight of toxic assets that AMCs can manage. AMCs can develop expertise in managing toxic assets and facilitate economy of scale, particularly where banks lack such skills.[9] Increased efficiency resulting from such expertise may ordinarily not be available to liquidators. AMCs can be in a strong position to recover NPLs, particularly where there are insider abuses or the same collateral is security for multiple lenders or borrowings.[9]

However, new publicly owned AMCs usually lack asset management expertise and infrastructure and are comparatively disadvantaged than banks.[9] Woo observed that AMCs disconnect and weaken the knowledge base of loans and transactions and reduce recovery probability and acquisition of good lending skills by banks' credit staff.[9] Recovery is also less likely where AMCs separate borrowers from banks that could have granted new funding, thereby weakening market discipline. Campbell argued that AMCs are generally ineffective, having found problems of poor resources, bureaucratic obstacles, lack of expertise and legal powers to enforce loan agreements and recover loans, and debilitating political interference.[5] This is particularly the case where AMCs are public institutions controlled by public officials and creating opportunities for political interference. Even where an AMC has been effective, its operations are often expensive and negatively affect the value of recoveries. He, for instance, found that the largely successful KAMCO was an expensive operation.[8]

In addition, public AMCs may have access to public funds, indicating state subsidy for banks and creating moral hazard. Arguing against using AMCs as a 'guarantee in advance for banks', Campbell observed that AMCs may encourage a reward system and not penalties for poor performance.[5] AMCs can have reverse negative effects on credit risk management by providing incentives for ignoring future NPLs. Campbell observed that 'AMCs by their very nature assist in the disposal of a problem but do nothing to prevent the occurrence, or reoccurrence, of the same problem'.[5] This observation seems correct as little incentive for risk control exists if a bailout in the shape of AMCs is a distinct possibility. AMC can therefore insulate banks from *responsibility* and consequences of poor decisions and performance. All things being equal, AMCs may not discourage irresponsible lending and may serve as incentives for lenders to extend credit even when they should not, as AMCs are a form of 'insurance' if lending goes bad. To be effective then, an AMC scheme ought to provide mechanisms for penalizing irresponsible lenders and compelling borrowers to repay facilities. This *restitution* mechanism can reduce *reoccurrence* by providing disincentives for irresponsible lending and borrowing.

Another difficulty is that AMCs may not distinguish illiquidity and insolvency. If a company is in financial trouble, its books can be repaired by injection of equity by existing shareholders and new investors. Insolvency may be another option. An AMC, however, does not encourage these options and may create what Ayotte and Skeel Jr described as 'game of chicken' where, first, potential investors argue that targets desperately require public funds and wait until such support is given before proceeding. Second, the management of troubled companies may decline to prepare for and follow realistic insolvency procedures while waiting for public funds.[40] It is one thing to use public funds to assist financial institutions to improve liquidity position on a short-term basis (and recover the assistance when the position improves), and another matter to commit funds to prop insolvent private enterprises. Insolvency possibility, whether or not it is farfetched, is a risk of being shareholders and residual claimants, and a reason for

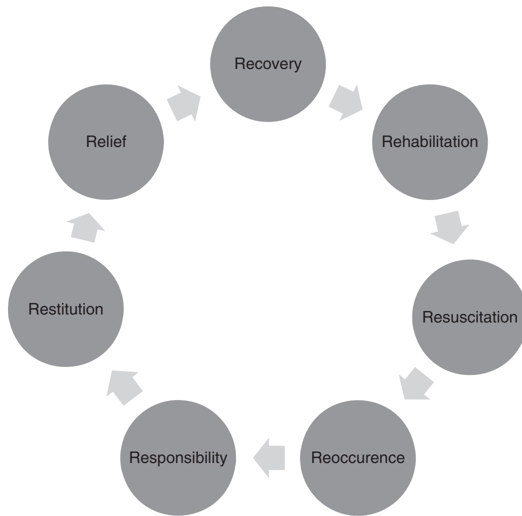

Figure 1: $RE = 7 \times Re - Re$ of NPLs.

including shareholders in the corporate governance process. By shielding investors from the consequences of abdication of *responsibility*, AMCs can provide a reduced incentive for investor activism.

In summary, this part demonstrates that the effectiveness of AMCs is determined by issues of relief, restructuring, recovery, resuscitation, rehabilitation, responsibility, restitution and reoccurrence, a formula for NPLs resolution that may be expressed as $RE = 7 \times Re - Re$. The next part relates the formula to AMCON (Figure 1), an entity designed as a multi-purpose vehicle for dealing with NPL-related matters.

AMCON

Established by Section 1 of AMCON Act 2010 as a body corporate, AMCON's authorized capital is, by Section 2, subscribed to by the CBN, the Ministry of Finance Incorporated and any other approved subscribers. The post-January 2011 10-year funding plan for AMCON's operations projected a pool of N1.5 trillion (about $10 billion), with the CBN providing one-third and the rest from banks.[55] Sections 6(1), 26 and 27 confirm that AMCON can issue bonds or other debt instruments as consideration for acquiring NPLs. The government's guarantee of AMCON's bonds and notes is likely to attract confidence and high rating for the instruments, although at huge costs to public funds. The Director-General of the Debt Management Office estimated a loss of 65 to 70 per cent of NGN1.35trillion (NGN878 billion) the government would contribute to AMCON's purchase of NPLs.[56,57]

AMCON, therefore, contradicts Basel Committee's preferred option of private sector solutions to bank problems without recourse to public funds.[7] The difficulty is that private sector techniques including merger and acquisition and purchase and assumption require target banks to be attractive to potential investors and acquirers, an attribute banks with serious asset quality problems lack. Public AMCs, like AMCON, intervene to satisfy the attractiveness pre-condition and incentivize private sector activity, and seem more efficient and provide economy of scale and other advantages than multiple private entities. For example, liquidation and sale are options when NPLs emerge with sale ordinarily assuring a healthier balance sheet. However, liquidation or immediate sale may be overwhelmed by difficulties including the size of NPLs. An immediate sale or one pursued under the insolvency process of asset collection, administration and disposal may not be successful because of the complexity of NPLs, including collection and valuation, time and resource constraints, and a lack of market for immediate purchase. Developing and emerging economies are particularly susceptible to such obstacles.[5]

Consequently, Nigeria's president assured that AMCON would stabilize and stimulate the recovery of the financial system by enhancing liquidity, assisting recapitalization, restructuring and refinancing, increasing the nation's credit rating, and promoting confidence in banks' balance sheets and the capital markets.[58–60] As financial crises make credit and lending inaccessible,[61] AMCON was established, first, to repair and clean up banks'

balance sheets and enable them to resume lending. The removal of NPLs and other toxic assets reduces the risk of non-compliance with statutory capital adequacy and liquidity requirements, leading to increased lending. As the debt overhang concept shows, a high debt–equity ratio hinders investment including in activities profitable for lenders and borrowers.[62] Second, AMCON would make troubled banks more attractive for mergers and acquisitions by local and foreign banks, facilitate recapitalization, and enhance further consolidation.[24,38] Nevertheless, AMCON's effectiveness as a crisis resolution vehicle depends on whether it achieves the objectives of a sound asset management vehicle, particularly NPLs resolution reflecting the $RE = 7 \times Re - Re$ formula.

RE = 7 × Re − Re?

Relief, recovery, rehabilitation, restructuring: Scope, autonomy, valuation, bridging

AMCON Act lacks a classification system notwithstanding that performing and non-performing loans were first distinguished in Nigeria's banking system in 1991.[13] Under Sections 24 and 61, the CBN can declare any class of bank assets eligible, a power that appears unrestricted. Declarations may refer to proprietary assets and 'contractual assets' such as negative pledge clauses, set-offs, flawed assets arrangements and subordination agreements, but it is not clear whether declarations can include choses in action and receivables. There are two major difficulties with this statutory opacity.

First, it does not indicate preference for any definitional approach. Definitions of NPLs vary with jurisdictions, although quantitative and qualitative approaches exist.[5] A quantitative approach suggests the need to wait until a time window for performance closes, and actions may not be taken even when information and signals reasonably suggest non-performance or default. A qualitative approach seems more amenable to monitoring developments and forestalling problems. From borrowers' perspective, however, a qualitative approach lacks the certainty and predictability a quantitative approach promotes. Second, AMCON's statute lacks modalities for resolving disputes about asset classification. KAMCO was assisted by a forward-looking asset classification system that considered the period of arrears, and borrowers' history, future performance, managerial competence, financial condition and cash flow. This dynamic classification recognized precaution as an important principle, and prioritized actual and potential NPLs for selective purchase and disposal.[8]

Further, AMCON's scope is unquestionably narrow. KAMCO could purchase NPLs and impaired assets from banks and other financial institutions such as non-bank lenders, and insurance, securities and investment companies,[8] but Section 61 definition of 'Eligible Financial Institution' restricts AMCON to banks' assets. If AMCON's objective is to encourage lending particularly to the real economy, its restriction to deposit money banks is not helpful as non-bank deposit and non-deposit money lending institutions also exist in Nigeria.[25] Microfinance banks, for example, which take deposits and give small loans have similar issues of irregularities, unethical practices, NPLs, poor corporate governance and credit management, insider abuses, and asset loss as deposit money banks.[63,64] The exclusion of the microfinance subsector questions the CBN's claim that its intervention was to protect depositors and creditors and prevent losses.[24]

Although empirical research, for example by Klingebiel,[65] suggests that narrowly focused AMCs are more likely to succeed than their peers with broad mandates, there are autonomy and pricing issues in AMCON's scheme. First, Section 29 provides that banks can voluntarily apply to AMCON for transfer of NPLs, but does not indicate whether and how banks can opt out. AMCON statute lacks dispute resolution provisions if, for example, a bank decides not to transfer NPLs on the expectation of future value appreciation. Section 25(2)

compels banks having NPLs level above a certain threshold to transfer NPLs, while Section 30 allows AMCON to acquire interest in or assets of failing banks if the NDIC in consultation with the CBN so requests.

Second, AMCON statute disregards independent existence of group members even when the 2004 consolidation exercise had created financial conglomerates. This could create problems as the ease of intra-group asset transferability may depend on group interest, a concept that also helps cross-border transfers.[66] Group interest is not part of Nigerian law, and consequently directors of group members may be liable for intra-group transfers. Third, an implicit assumption exists that AMCON's facilitation of lending would make banks lend. Nevertheless, banks should have not only the capacity and ability to lend, but be willing to lend to the real economy. No indication exists that AMCON or banks are compelled to give priority to NPLs of any sector, and no rules exist in Nigerian law to compel banks to lend at all or to the real economy.

Also relevant are valuation and pricing issues that were first raised when AMCON was proposed.[38] The determination of asset value and pricing, particularly during financial crises, is critical at the purchase and disposal stages and includes issues of who, when, how and timing.[9] Value and price may be enhanced by the predictability of acquisition, transfer and recovery of NPLs assured if the market recognizes an AMC. Consequently, pricing was a challenge for KAMCO and adversely affected its financial performance. Although it purchased NPLs at a discount, KAMCO made losses from pricing and high operating costs because of what He attributed to a pricing system that lacked market values and made generous payments for certain assets, particularly the government-directed inflated prices for the Daewoo group bonds.[8] Nevertheless, the pricing system KAMCO finally devised was more realistic and enhanced private participation in the NPLs market, which in turn allowed competition to the previous KAMCO monopoly.[8]

Under Sections 25 and 28 of AMCON Act, CBN guidelines determine valuation and pricing, although the CBN is required to be guided by independent advice, publish the valuation basis and ensure consistency of application. Arguably, guidelines ought to indicate methods for determining asset quality, value and transfer value. A key principle is that values should reflect 'a reasonable and prudent measurement'.[67] The alternatives are broadly current market or net present value, market value plus mark-up or premium, and fair value. However, relevant CBN guidelines reflect a discounted market value pricing.[68] Purchasing NPLs at a premium or higher than market price encourages increased recapitalization of troubled banks and enhances market liquidity. A forward-looking model is more likely to indicate a commercial operation and, as rises in oil prices are not entirely ruled out, it would positively affect borrowers' potential ability to repay. The recovery of borrowers' repayment ability would consequently impact on the value of NPLs transferred to AMCON.

AMCON statute does not indicate whether it should be operated as a for-profit or non-profit organization. Section 4(c) merely suggests 'the best achievable financial returns' and regard to the long-term economic value of assets and transaction, capital and other costs, while Section 5(f)(i) expects AMCON to consider the 'the best achievable price'. The provisions lack obligations for ensuring profitability or determining asset quality and value through transparent processes. If AMCON fails to break even, questions of state subsidy for failure and private debt may arise. The pricing structure should remove any perception that the state subsidizes or writes off the debts of the rich, powerful and connected. In politically sensitive transactions, price determination by an independent body such as the court in a transparent and open process may be helpful. Fair market value should be an overriding principle.[9]

AMCON statute suggests a focus on warehousing and management of assets for

future sale. Section 5 enables AMCON to acquire, hold, manage, realize and dispose of eligible assets and collaterals, which powers Sections 6(1)(n), 6(2)(c), 7 and 19(2)(f) permit to be exercised through subsidiary and other companies, agents and contractors. Clearly, a major objective of AMCs is to warehouse and sell NPLs when value could be maximized, but goals may conflict, for example between speedy recovery and disposal of asset, and maximization of value and market normalization. Consequently, AMCs' bridging role has to be balanced with the need for prompt and efficient assets disposal. Section 5 does not indicate whether and how those different objectives are balanced, while Section 4(c)(i) merely provides that assets' long-term economic value should be considered.

The rival approach was one of the reasons for KAMCO's success.[8] KAMCO preferred speedy disposal of acquired assets and maximization of value. Having flexibility in the manner and method of disposing assets, KAMCO cooperated with affected institutions and used diverse traditional and advanced disposal methods. Apart from purchase, its methods included blanket sales, quick sales, individual and pooled sales, write-offs and collections of rescheduled payments, recourse to original sellers, competitive local auctions and international bidding, issuance of asset-backed securities, and sales to joint venture AMCs and corporate restructuring companies.[8]

Recovery, rehabilitation, restructuring, resuscitation: Markets, environment

The establishment of AMCs assumes the existence of markets for NPLs disposal at future dates, a core component of asset management. As He found, a viable market was an important factor for KAMCO's relative success, including facilitation of restructuring processes and development of Korean financial market.[8] For instance, KAMCO was able to facilitate the 1998 takeover of five insolvent banks by healthy ones.[9] KAMCO allowed lending to proceed in a liquidity scarce environment, used securitization in operations, facilitated recovery of injected public funds and established a market for impaired assets. In that market were foreign and local investors encouraged and coordinated by KAMCO, although KAMCO became less dominant with time.[8] Korea's experience demonstrates that well-managed AMCs can help in internationalizing capital markets. Sales to joint ventures usually managed by specialized international firms and facilitated by securitization enabled management by specialists and encouraged the development and expansion of a market for NPLs and unimpaired assets. Financial institutions even made direct NPLs sales to local and foreign investors without recourse to KAMCO.[8]

Similarly, AMCON Act presupposes a market for facilitation of risk diversification and resource reallocation.[9] However, markets for immediate sale of NPLs are largely unavailable where the existence of NPLs is systemic, as banks that would ordinarily provide funds for purchases are themselves in difficulty. In addition, availability, quality and weakness of markets depend on a number of factors including the state of the banking sector and the national economy. Although significant in itself, banking and financial stability is only a component of the economy. Consequently, effective asset management requires a stable macroeconomic environment.[9] Nigeria's economy is largely tied to oil and gas and is susceptible to the vagaries of the sector, and lacks macroeconomic stability, sophisticated business culture, efficient markets and strong institutions. As Tables 2 and 3 show, Nigeria's economy is weaker than that of Korea and unlikely to be a strong prop to an NPLs market. Recent events including investor scepticism, lack of markets and court actions suggest obstacles to AMCON's facilitation of restructurings, mergers and acquisitions.[70–75] After almost two years of expectations, the CBN has now given 30 September 2011 as deadline for troubled banks to recapitalize or be liquidated.[71,76]

Table 2: 'Market' for NPLs

	2005		*2006*		*2007*		*2008*		*2009*	
	Korea-Nigeria		*Korea-Nigeria*		*Korea-Nigeria*		*Korea-Nigeria*		*Korea-Nigeria*	
GNI, Atlas method (current US$)	—	—	813 655 000 000	87 688 746 839	915 258 000 000	119 712 000 000	1 027 560 000 000	142 071 000 000	1 046 290 000 000	177 398 000 000
GNI per capita, Atlas method (current US$)	—	—	16 900	620	18 950	830	21 210	960	21 530	1170
GNI per capita, PPP (current international $)	—	—	22 760	1530	24 700	1790	26 620	1840	27 840	1980
GNI, PPP (current international $)	—	—	1 045 710 000 000	215 509 000 000	1 192 880 000 000	257 957 000 000	1 290 060 000 000	272 198 000 000	1 353 160 000 000	299 013 000 000
Foreign direct investment, net inflows (BoP, current US$)	—	—	6 308 500 000	4 982 546 589	3 586 400 000	8 823 502 346	1 784 400 000	6 032 054 729	2 200 300 000	3 635 553 931
Portfolio investment, equity (BoP, current US$)	3 282 100 000	750 777 001	8 390 900 000	1 769 162 521	28 727 900 000	1 447 330 958	41 247 000 000	4 684 043 272	—	—
Domestic credit by banking sector (% of GDP)	—	—	99.4	8.6	99.9	4.9	101.8	20.2	112.6	26.7
Domestic credit to private sector (% of GDP)	—	—	95.1	13.2	95.1	13.2	99.6	25.3	109.1	33.9
Firms using banks to finance investment (% of firms)	39.9	—	—	—	—	2.7	—	—	—	—
Market capitalization of listed companies (current US$)	—	19 355 650 000	—	32 819 360 000	—	86 346 840 000	—	49 802 816 757	—	33 373 813 692
Market capitalization of listed companies (% of GDP)	—	—	85.0	17.2	87.8	22.3	107.1	52.0	53.2	24.0
Banks' NPLs to total gross loans %	—	—	1.2	18.9	0.8	8.8	0.7	8.4	1.1	6.3
Ease of doing business (conducive regulatory environment) 1–181, 1=Best	—	—	—	—	—	—	23	120	19	125

Table 2 *continued*

	2005 Korea-Nigeria		*2006 Korea-Nigeria*		*2007 Korea-Nigeria*		*2008 Korea-Nigeria*		*2009 Korea-Nigeria*	
Private bureau coverage (% of adults)	0.0	0.0	0.0	0.0	0.0	0.0	90.4	0.0	93.8	0.0
Public credit registry coverage (% of adults)	80.7	0.0	76.6	0.0	74.2	0.0	0.0	0.1	0.0	0.0
Time to resolve insolvency (years)	1.50	2.00	1.50	2.00	1.50	2.00	1.50	2.00	1.50	2.00

Source: United Nations Conference on Trade and Development.[69]

Table 3: Banks and credit

	2005 Korea-Nigeria		*2006 Korea-Nigeria*		*2007 Korea-Nigeria*		*2008 Korea-Nigeria*		*2009 Korea-Nigeria*	
Banks' capital to assets ratio (%)	—	—	9.3	12.4	9.2	14.7	9.0	16.3	8.8	18.0
Banks' NPLs to total gross loans (%)	—	—	1.2	18.9	0.8	8.8	0.7	8.4	1.1	6.3
Risk premium on lending (prime rate minus treasury bill, rate, %)	—	10.3	—	6.9	—	10.1	—	7.3	—	—
Firms using banks to finance investment (% of firms)	39.9	—	—	—	—	2.7	—	—	—	—
Domestic credit by banking sector (% of GDP)	—	—	99.4	8.6	99.9	4.9	101.8	20.2	112.6	26.7
Domestic credit to private sector (% of GDP)	—	—	95.1	13.2	95.1	13.2	99.6	25.3	109.1	33.9

Source: United Nations Conference on Trade and Development.[69]

Robust credit rating systems are important to AMCs as they demonstrate credibility, consistency, promptitude and accuracy required for the emergence of NPLs markets, particularly for securitization and packaging processes to work and be sustained. In addition, credit rating generally determines the structure and attractiveness of securities.[9] However, the recent global financial crisis showed a role reversal and created a new focus for regulation of credit rating agencies.[77] Before 2009, lender and borrower information was largely unavailable, inaccurate or unreliable, particularly credit ratings of Nigerian banks.[13] To improve the national financial system and infrastructure, the CBN now requires recourse to at least two credit reference agencies as a condition precedent for loans and facilities.[36] This policy encouraged the emergence of credit referencing agencies in January 2010.[38] However, the performance of the three currently licensed credit reference agencies seems unsatisfactory and lacks a credible credit risk management system.[78]

As KAMCO demonstrates, a neutral tax framework is necessary for effective asset management as it prevents disincentives for asset transfer and disposal.[9,79] Unlike lenders under Korean law, KAMCO received special legal privileges including exemption from tax and abilities to transfer clean titles and obtain priority.[8] In contrast, Section 60 of AMCON Act, which excludes AMCON from capital gains tax, corporate income tax and stamp duties, contradicts Section 2(3), which subjects its authorized capital to registration and stamp duties. Furthermore, several tax regimes at the federal, state and local tiers of Nigeria's government are not harmonized.

AMCON's tenure is 10 years and, by Section 47, its remaining assets would on dissolution be proportionally distributed to its subscribers. The difficulty is that a permanent AMCON could create an enabling environment for a market for NPLs and unimpaired assets, encourage a private-sector-driven economy, and facilitate the acquisition, retention and transfer of critical asset management skills. As Sections 2 and 19(1)(d)(e) acknowledge possible private investment in AMCON and Section 5(f)(ii) provides support for asset securitization and refinancing, transfer of public-owned shares to private investors would be more helpful than outright dissolution. Although the emergence of private sector AMCs was not anticipated by the CBN and AMCON statute, the Korean experience shows that this possibility ought to be encouraged. KAMCO had a 5-year (1997–2002) tenure for acquisition of NPLs.[8] Although an NPLs market eventually emerged in Korea, He who argued against this limited span suggested KAMCO's continued existence because of its experience and expertise in managing and advising on NPLs. He proposed that KAMCO's public-owned shares should be sold to investors so that it could exist as a private entity.[8]

Recovery, responsibility, restitution, reoccurrence: Qualifications, enforcement

Relevant skills and competence enable AMCs to achieve their goals, while professionalism reduces political influence in favour of commitments to commercial principles. KAMCO's history before its metamorphosis as an AMC demonstrated some experience and expertise in managing and disposal of assets, even if such assets were not all NPLs. Originally established in 1962 firstly to dispose non-performing assets of Korea Development Bank, KAMCO remit gradually expanded to other financial institutions, real estate management and, later, management and sale of confiscated and state-owned properties. After its 1997 reorganization as an AMC, KAMCO increased its level of expertise through conscious efforts and with the assistance of international bodies.[8]

In contrast, AMCON apparently lacks persons with specialist skills including credit and transaction risk management.[38] The qualification and character of AMCON's employees and governing bodies are therefore

critical, particularly to avoid a forum for political rewards and patronage. Although Section 13(d) disqualifies debtors from membership of AMCON's board and Section 16 prohibits conflict of interest and requires board members and employees to disclose interest, the provisions for the composition, appointment and removal of AMCON's board lack sufficient suggestions of independence to withstand political and other pressures. Under Section 10, board members are appointed by the president on the recommendation/nomination of the Ministry of Finance, the CBN and the NDIC, subject to the senate's confirmation. The president can, on CBN's recommendation under Section 14(2), remove board members including where it is considered necessary or expedient. The involvement of political offices in the appointment and removal processes raises concerns because of Nigeria's unenviable history of management of government-owned corporations.

Despite the suggestion of independence in Sections 1(4) and 6(3), AMCON is practically an arm of the CBN, a relationship evident from Sections 4(c)(iv), 5(b), 6(5), 8, 10(2), 12, 17(4), 21–28 and 56–57, which permit the CBN (and in some instances in collaboration with the Ministry of Finance) to issue guidelines, directions and approvals. Public funding of AMCON could justify control by the CBN and Ministry of Finance, as it would enable them to ensure consistency and compliance with government policy, check abuses, and prevent an uncontrollable entity. Nevertheless, a conflict of interests exists in CBN's roles as a regulator/supervisor under Sections 57 and 58 and a participant/decision maker. Balancing CBN's roles as supervisor, regulator, shareholder and reporting authority may be difficult.

For example, CBN may be in a difficult position in promoting and sustaining confidence in AMCON and its instruments, particularly where AMCON suffers from corporate governance and operational problems. The question is whether the CBN would indirectly harm itself by taking corrective action against AMCON. Apart from the question of whether CBN has relevant AMC expertise, the 2009 crisis indicated failures in its regulatory and supervisory functions. Despite some extra-regulatory factors, the crisis was occasioned by banks' non-compliance with rules and regulators' ineffective enforcement of existing regulations including the statutory single obligor rule[13,80] (recently restated in the CBN guidelines)[36] and the requirement of security and collateral for loans.[81] These two examples were largely flouted by powerful individuals and organizations and constituted a huge component of NPLs in the troubled banks.[13]

Further, as the Basel Committee observed, transparency, expertise, sound management and appropriate incentives in operations are essential for recoveries by AMCs and their overall effectiveness.[7] For example, the rehabilitation and restructuring roles may involve negotiation with debtors for redefinition of contractual terms, concessions and compromises.[9] Where low recovery prospects and high maintenance costs exist, asset management may require that relevant assets be written off.[9] Consequently, Section 5(g) allows AMCON to perform activities and functions necessary, incidental or conducive to its objectives, while Sections 6(1)(l) and 6(5) specifically permits undertaking of debt forgiveness, forbearance and compromise. Although this power is subject to the public interest, the requirement of the CBN's recommendation and approval of the Minister of Finance may not exclude political considerations and inadequate transparency. None of the troubled banks was government owned, but political interference in AMCON could not be ruled out. The 2009 crisis largely confirmed findings in other contexts that closely linked the quality of corporate governance in developing countries to the nature and political connections of the management, board and controlling shareholders.[82]

Critical to AMCON, therefore, is transparent and effective enforcement of rules

including AMCON's statute, CBN guidelines and other regulations governing banking business and operations.[36] To be effective, AMCON would fundamentally attack what Sanusi described as 'the nexus of money and influence' in Nigerian society,[24] a reference to people who control Nigeria's economic and political powers. Such people were 'the management that stole money in the name of borrowing, the gamblers that took depositors funds to speculate on the stock market and manipulate share prices, the billionaires and captains of industry whose wealth actually was money belonging to the poor which they "borrowed" and refused to pay back'.[24]

The CBN's 2009 list of bank debtors showed a significant proportion of political office holders and associated persons and companies.[43] It could be that AMCON's apparent neutral status makes it more likely than banks to recover NPLs to connected persons or instigated by insider abuses, and also sustain a credit discipline culture. However, evidence now indicates that debtors, who regard AMCON as a mechanism for socialization of private debts, use various means including connections to political power, exploitation of the judicial administration system and media patronage to frustrate debt recovery efforts.[83]

With board membership of representatives of public authorities and other persons and supervision by the Financial Supervisory Commission (FSC),[8] KAMCO's public status and supervision was a challenge to its operational autonomy. KAMCO was largely publicly owned and funded, and a subsidiary of Korea Development Bank (KDB) and operated its NPLs business through the Non-Performing Asset Management Fund, which was organized as a separate legal entity. The relevant ministry and KDB contributed about 71 per cent of KAMCO's shares and funding via government-guaranteed bonds and loans from KDB, whereas financial institutions contributed nearly 29 per cent. The bonds were later made tradable and listed on the stock exchange, although it was originally intended that the Bank of Korea would purchase them as its statute required.[8] A striking case of political policy considerations was the purchase of the Daewoo group bonds, which negated commercial principles.[8] However, He observed that the political and economic environment, including Korea's culture of fiscal conservatism, scrutiny of public debt and pursuit of recovery of public funds, was critical to KAMCO's success.[8] In addition, a non-governmental organization,[84,85] Peoples' Solidarity for Participatory Democracy (PSPD), which emerged just before the 1997 crisis, led a largely successful shareholder activism through litigation, derivative claims, negotiations, shareholder proposals and other tools.[86]

Therefore, recovery as a component of asset management depends on the effectiveness and efficiency of the supporting environment, particularly the legal, regulatory and supervisory frameworks and procedures.[9] Critical to AMCON is that regulators should not be 'agents and protectors of those they were supposed to regulate'.[24] Existing before the 2009 crisis were procedures and prudential guidelines in place for preventing, detecting and acknowledging NPLs and requiring internal control, monitoring systems, proper accounting requirements and appropriate provisions for bad loans. Nevertheless, whether banks followed the procedures or a proper oversight was exercised by regulators is a different issue. For example, it is one thing to have criminal sanctions and another to engage in diligent prosecution to secure conviction. A recent Attorney-General and Minister for Justice was widely regarded to have used his position and powers for the benefit of corrupt and powerful members of the political and economic elite.[87] It is instructive that shortly after the NPLs problem was announced and before AMCON's establishment, a relatively high debt recovery rate was achieved by the troubled banks themselves through internal debt officers and by using external forces such as commercial debt collectors, statutory anti-corruption bodies, particularly the Economic and Financial Crimes

Commission and other security agencies.[88] This demonstrates that AMCON can achieve its debt recovery goal if the will exists.

Responsibility, restitution, reoccurrence: Legal, institutional prop

AMCON's statute tackles some of the debtor-related abuses that led to the bloated NPLs through a mix of civil and criminal sanctions. Section 37 requires AMCON to pursue available civil and criminal remedies against borrowers and obligors and prevents it from granting forbearance, waiver or debt forgiveness for 'tainted eligible bank assets', concerning transactions involving insider abuses or breaches of statutory rules and regulations. Section 54 criminalizes false claims aimed at defeating the realization of property used as collateral and negligent, wilful or reckless false statements in relation to loans and guarantees. However, it elevates to crimes ordinarily civil matters subject to contractual and non-contractual remedies for misrepresentation and deceit without clearly justifying such drastic responses and indicating whether pre or post-contract situations are affected.

In any event, Sections 36(8) and 4(9) of Nigeria's Constitution, which preclude retrospective criminalization and penalty, imply that no acts or omissions committed before AMCON can trigger criminal prosecution or attract criminal penalties not in existence at the time of the commission. AMCON's statute may provide little help for punishing acts such as margin lending, which lacked legal and regulatory frameworks before the 2009 crisis.[24] Consequently, the CBN, the Securities and Exchange Commission and other regulators acting as the Financial Services Regulation Coordination Committee have agreed to issue joint guidelines to address the problems of margin lending.[89] This example confirms that banking supervision including the management of weak banks requires proper legal and institutional prop.[90–93]

Supervision may also be ineffective where, for example, the legal and administration of justice system is too weak to support efficient and prompt dispute resolution. AMCs require legal systems that facilitate and support prompt sale, disposal and liquidation of assets, and expeditious resolution of disputes and claims. Despite AMCON's special powers under Sections 48 to 52 to facilitate debt recovery, Nigeria's system largely lacks adequate and speedy protection and enforcement of rights.[31] Inordinate court delays are not uncommon as Table 4 shows. Section 53 appears to recognize the difficulties by suggesting the designation of a Federal High Court judge to exclusively adjudicate on AMCON-related matters. Nevertheless, the court would still operate with the relatively slow rules of practice and procedure. A simple solution could have been a specialized court with its own rules.

Despite the increasing importance of dispute resolution in banking regulation,[94] AMCON's framework lacks provisions on alternative dispute resolution (ADR), including the implications of ADR clauses in loan contracts. ADR mechanisms can prevent lengthy and costly litigation that may defeat AMCON's objectives and are more likely than litigation to guarantee confidentiality and prevent undue and damaging publicity. As contractual ADR provisions may affect the nature and extent of parties' rights,[95] AMCON's omission of ADR provisions means almost exclusive litigated resolution for disputes. Early events suggest abundance of AMCON-related litigation,[70–75] including shareholder challenge of CBN's planned sale of troubled banks.[71,72,74,75] A litigation cloud can deter investors, particularly foreigners.

Also potentially litigious are provisions permitting AMCON to dispense with asset owners' consent before transferring assets to third parties even when contracts require such consents. While Section 33 requires banks to notify debtors and guarantors when AMCON acquires NPLs, Section 34(1) indicates that the acquisition is a special assignment. By

Table 4: Legal and regulatory props

	2005		*2006*		*2007*		*2008*		*2009*	
	Korea-	*Nigeria*	*Korea-*	*Nigeria*	*Korea-*	*Nigeria*	*Korea-*	*Nigeria*	*Korea-*	*Nigeria*
Strength of Legal Rights index (0=weak to 10=strong)	7.0	8.0	7.0	8.0	7.0	8.0	7.0	8.0	7.0	8.0
Start-up procedures to register a business (number)	10.0	9.0	10.0	9.0	10.0	9.0	10.0	8.0	8.0	8.0
Time required to start a business (days)	17	43	17	43	17	34	17	31	14	31
Time to prepare and pay taxes (hours)	290	1120	290	1120	290	1120	250	938	250	938
Highest marginal tax rate, corporate rate (%)	27.5	30	27.5	30	27.5	30	27.5	30	24.2	30
Highest marginal tax rate, individual rate (%)	35.0	NA	35.0	NA	35.0	NA	35.0	NA	35.0	NA
Ease of doing business (1=most business friendly regulations)	—	—	—	—	—	—	23	120	19	125
Ease of doing business (conducive regulatory environment) 1–181, 1=Best	—	—	—	—	—	—	23	120	19	125
Logistics performance index overall (1=low to 5=high)	—	—	3.52	2.40	—	—	—	—	3.64	2.59
Time to resolve insolvency (years)	1.50	2.00	1.50	2.00	1.50	2.00	1.50	2.00	1.50	2.00

Source: United Nations Conference on Trade and Development.[69]

Sections 34(2) and 39 an acquisition or sale by AMCON is a clean transfer even if it derogates from contractual restrictions or requirements for consent, notification, registration, authorization or licence. Commentators, like Woo,[9] suggest that AMCs require such provisions for removal of obstacles to clean transfer of titles to be effective. AMCON's ability to purchase NPLs and assets free and clear of liabilities like restrictions, liens, setoffs and other claims is an attractive feature it shares with insolvency proceedings where assets are generally purchased free of claims and liabilities.[96] It enables enjoyment of this major advantage of insolvency without going through insolvency processes, including possible liquidation.

Nevertheless, the clean transfer provisions including Section 39, which, unlike Section 34, is not subject to the Land Use Act 1976, face hurdles under Nigerian law. Although Section 315(6) of the Constitution provides that the 1976 Act, which requires state governors' consent for transfers of land titles, is deemed a federal enactment and a matter in the Exclusive Legislative List, Section 315(5) provides that the statute is a constitutional provision alterable only in accordance with the stringent provisions of Section 9(2). The AMCON statute, therefore, seems invalid to the extent it ignores state governors' consent to land transactions.

In addition, lender–borrower relationships are ordinarily private arrangements, and as self-regulating transactions, lenders and borrowers can agree on respective rights and obligations, protected interests and appropriate debt level. Although the purchase of NPLs creates a relationship between AMCON, borrowers and guarantors, nothing in AMCON Act indicates an ordinary lender–borrower relationship. Rather, several provisions suggest an attempt to rewrite the private law of obligations using public law. In accordance with Sections 34(1)(4), 35 and 36, AMCON steps into the shoes of banks, but it is not an assumption of responsibility and obligation for all purposes. For example, Sections 32 and 44

compel banks to indemnify AMCON if collateral is invalid or unenforceable and for errors, omissions, misstatements and other liabilities. Sections 39 to 44 suggest a principle of assumption of rights free of obligations. Under Section 43, AMCON is not liable for banks' misrepresentation, breach of contract, duty or trust, or other legal or equitable wrong and right of action is exercisable against banks only. Section 42 restricts debtors to damages against banks and not AMCON if banks fail to disclose or record representation they made to debtors. The provisions that absolve AMCON from liability are arguably in line with the basic privity doctrine that non-parties to contracts cannot be subjected to liabilities without their consent.[97] Nevertheless, as AMCON can take enforcement action without assuming liabilities, a litigation triangle involving debtors/asset owners and banks is possible, particularly where banks are not in a position to fulfil obligations to debtors.

Of similar litigious effect are provisions that disregard underlying loan contracts. As 'associate' in the right to 'assemble freely and associate with other persons' guaranteed by Section 40 of the Constitution ordinarily indicates joining up with other persons to achieve a purpose, it does not preclude a loan contract. Insistence on the sanctity of contract on this ground cannot be ruled out just as when governments or administrative agencies unilaterally rewrite the rules of private bodies or enterprises. In addition, the courts have jurisdiction over administrative decisions. In addition to Sections 4(8) and 36 of the Constitution, which guarantee the right of access to the courts, Sections 6(1) and (6)(b) confirm the courts' power to decide horizontal and vertical disputes. Section 36(1) guarantees the right to fair hearing, while Section 36(2)(b) precludes provisions making administrative decisions final and conclusive.

Further, AMCON statute introduces a degree of uncertainty to the established rules for security interests. First, by Sections 34(2)(b) and 45, AMCON has the powers and rights of registered owners, although it is not compelled to register securities. The difficulties are twofold. Registration requirements provide a notice of interest, which is defeated if entities having significant security interests are allowed to bypass registration. Uncertainty is likely for third-party dealings with banks or debtors/asset owners, as such parties are unlikely to be aware of changes in ownership or transfers of security interests. Second, Section 40 disrupts priority rules by permitting AMCON to discharge prior security interests even when vesting orders have been obtained. Foreclosure may be meaningless, as the statute does not consider attempts to realize or foreclose security and the equity of redemption. Even if Nigerian courts confirm the legality and effectiveness of provisions that curtail contractual rights or bypass registration and priority rules, foreign courts where assets are located may have different views. Although AMCON statute assumes that relevant assets are all subject to Nigerian law and courts, in reality jurisdiction is also determined by the location of assets such as real property and shares. For instance, common law confers jurisdiction over land on the court of its location.[98]

CONCLUSION

Nigeria's 2009 systemic problems and the recent global financial crisis brought attention to the regulatory agenda by demonstrating the need for central banks' regulatory and supervisory role in maintaining financial stability and designing measures for dealing with pro-cyclical systemic risks. Nigeria's crisis was a reoccurrence of the problems of poor corporate governance, insider abuses, political patronage, weak supervision and inadequate enforcement of regulations.[99] The business environment and system weaknesses, including unsophisticated and passive regulators, investors and consumers had encouraged excessive risk and malpractices. Inadequate, inaccurate and belated disclosure and inter-bank collusion led to information asymmetry in banks' relationship with regulators, investors and

consumers, and inadequate and ineffective investor and consumer protection regimes. An expensive and arduous judicial process hindered right enforcement when actions were taken.[24]

Consequently, huge NPLs exposures weakened the banking system. Although Nigeria's history of banking crises indicates different remedial measures at different periods, the CBN preference for fund injection and establishment of AMCON, a public AMC, was unprecedented. It was the first time rescue of troubled banks was a main objective, a departure from previous interventions, which focused on nationalization and liquidation. This article has demonstrated that rather than the elixir for banking problems, AMCON is an essentially ambitious project. AMCON exists in a largely mono-economy and an environment with weak infrastructure and market and inefficient and ineffective public institutions lacking transparency and independence.

Guided by the Basel Committee's observation that effective supervision of weak banks and remedial programmes entail clear identification and distinction of symptoms and causes of problems,[7] this article demonstrates that it is appealingly simple to resolve NPLs through AMCs. The article argues that effective resolution in the $RE = 7 \times Re - Re$ formula, as illustrated by Figure 1, requires consideration of historical, institutional, cultural, political and legal environments and dynamics. As Kama observed, '[a]ll banking crises are different even if they share a number of common characteristics' and 'there is no uniform effect neither is there any single remedy to each crisis, but each brings its own surprises and risks'.[25] The article compares AMCON and KAMCO, showing that banking reforms and remedial programmes including the use of AMCs cannot be isolated from the socio-political environment, particularly in developing countries. A one-size-fits-all AMC model does not exist and a uniform approach to apparently global financial crises may not work if country and system-specific causes, concerns and solutions are not considered.

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