WHAT ROLE DO PREVIOUS PROPOSALS PLAY IN THE QUEST FOR A GLOBAL RULE OF LAW FOR SOVEREIGN DEBT RESTRUCTURING? AN ANALYSIS OF THE CHANGING RESTRUCTURING ARCHITECTURE

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ABSTRACT

For decades, the complexities arising from sovereign debt restructuring ("SoDR") have been at the center of legal and policy debates, and this is more so within the COVID-19 context. In consequence, the legal literature has tried to address the critical question: how can the existing SoDR landscape be reformed in order to strike a balance between the requirement for more sustainable results for both creditors and for sovereign debtors? This has occurred in two contexts: first, there have been attempts to develop measures that are politically feasible in the near term and that are geared towards post-pandemic recovery. Secondly, the concept of a more ambitious international framework for debt restructuring has been rekindled, notwithstanding short-term political obstacles to achieving this. This article focuses on and advocates for the latter, an international debt restructuring framework that will require ambitious reform.

Studies have been conducted to evaluate the various reform proposals for the SoDR landscape; nonetheless, there are still significant gaps in these evaluations. Among the shortcomings in the literature is the absence of a comprehensive legal review that outlines a wide range of both procedural and substantive criteria by which proposals that seek to actually reform the

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debt architecture should be evaluated. Further is the question of how relevant are the reform proposals that predate the COVID-19 pandemic. Lastly, although numerous academics have performed reviews of various sets of mechanisms, there is a notable absence of voices from African scholars and institutions that may give an African perspective on the reform of the system of SoDR. As such, this article seeks to contribute to filling these gaps.

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INTRODUCTION

Financial crises, debt sustainability, and sovereign debt renegotiation and restructuring have all emerged as serious issues for both developing and developed countries. These challenges not only have a bearing on countries at different stages of development, but they also generate multidimensional issues that span across economic, legal, social, and political disciplines. This article is developed in the shadow of the global COVID-19 pandemic and the Russo-Ukrainian War, both of which are causing significant economic consequences, particularly hurting developing countries' capacity to fulfil their debt commitments, especially African countries. The policy discussion about the SoDR of foreign debt has resurfaced, and the issue of whether the present framework and processes can adequately lead to better outcomes for lenders and borrowers is pertinent once again. As such, the present situation almost makes it self-evident that the subject of SoDR is important and reminds us why the discussion is timely.

The establishment of a framework or global rule of law for the restructuring of foreign sovereign debt is one of the key subjects of scholarly and policy debate on sovereign debt. Today though, the conversation inadvertently concentrates on the responses to the COVID-19 pandemic and strategies for post-pandemic recovery. With each crisis that occurs, it is becoming more evident that what is ideal is broader and more ambitious legal reform of the debt restructuring architecture. The challenges of COVID-19 bring the debate back to the idea that "In the longer run, a debt framework is urgently needed, as it would lead to more realistic creditor behaviour and therefore reduce the inherent pro-cyclicality in the international credit market."[1] An additional complexity is also the need to find ways to frame a global mechanism in a way that incorporates climate change efforts, and other environmental, social and governance ("ESG") concerns.

In 2014, the United Nations General Assembly passed the Resolution Towards the Establishment of a Multilateral Legal Framework for Sovereign Debt Restructuring Processes.[2] Since then, no progress has been made on the development of a global rule of law for debt restructuring, and, to an extent, the idea of reform of the global architecture through a global rule of law is continuously said to be crucial and yet too politically ambitious, at least in the short term. Despite the political difficulties, it is still important to explore broad-based reform for the debt architecture through the establishment of an international framework as a long-term goal.

Currently, there is a Common Framework ("Common Framework") for debt treatment beyond the Debt Service Suspension Initiative ("DSSI") developed by the G20 countries, which, unlike what the name suggests, is

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[1] Regina Bernhard & Christian Kellermann, *Against All Debts? Solutions for Future Sovereign Defaults*, 1 J. INT'L RELS. & GLOB. TRENDS 116, 128 (2008).

[2] G.A. Res. 68/304 (Sept. 9, 2014).

actually a case-by-case mechanism that is initiated by qualifying debtor countries. Up to 2023, only three African countries—Chad, Ethiopia, and Zambia—have sought debt relief using the Common Framework, and Ghana may join the countries seeking debt treatment.[3] While the Common Framework is a step in the right direction, it is safe to say that there is no broad-based international framework for debt restructuring and that debt treatments are heavily dependent on the contractual arrangements between debtors and their various types of creditors. The COVID-19 pandemic was another reminder of the complexity of the lack of an international framework. Resultantly—while proposals are explored in response to the need for economic recovery, private sector participation in restructuring efforts, and incorporation of environmental, social, and corporate governance ("ESG") issues—the idea of an international rule of law for restructuring should not be abandoned. Neither should the reform proposals that even predate the COVID-19 pandemic be left to gather dust.

The previous debate on the reform agenda must be revived. Further, there is a need for incorporating the voice of African scholars that can provide an African perspective on SoDR reform, which is a view that is not well represented although African countries are often the debtors in restructurings. This article seeks to do both.

This article firstly highlights the current state of debt restructuring, with a focus on the bilateral and multilateral initiatives to help sovereigns in the face of COVID-19. The second part outlines what I feel are critical considerations of an ideal strategy for reform. The third part evaluates several reform options for SoDR. The section evaluates these suggestions by identifying the proposer, outlining the proposal's essential elements, outlining the key difficulties that each intends to address, and concluding with an analysis of the proposal's benefits and downsides. These fall within broad categories: (1) statutory reform options for SoDR, (2) ideas to enhance the current market-based approach, and (3) semi-formal and informal conflict settlement and institutional structures. Finally, the article finishes with concluding comments, having established a clear map of all key options and responding to the critical issue—is this proposal the most suitable option, but if not, why?

I. THE SOVEREIGN DEBT RESTRUCTURING REGIME, A MINEFIELD OF COMPLEXITIES?

A. What Is the Current State of Debt Restructuring?

The past three years of the COVID-19 pandemic has seen one of our

[3] Karin Strohecker, Jorgelina Do Rosario & Christian Akorlie, *Exclusive: Ghana Poised to Request Debt Relief Under G20 Common Framework*, REUTERS (Jan. 5, 2023) https://www.reuters.com/world/africa/ghana-poised-request-debt-relief-under-g20-common-framework-sources-2023-01-04/ [https://perma.cc/H2XD-QQJZ].

generation's most grave public health, socio-economic, and economic crises. For developing and low-income countries, the pandemic has compounded pre-existing developmental problems and structural disparities.[4] The short-term funding needs of emerging markets and developing economies ("EMDEs") are estimated at USD 2.5 trillion.[5] Debt levels in EMDEs are likely to climb by 10% to 15% in the short to medium term.[6] In assessing the African continent's debt performance for instance, the African Development Bank noted that the COVID-19 pandemic has resulted in the continent's worst recession in over 50 years, with the decline in Gross Domestic Product ("GDP") of 2.1% in 2020, with a doubling of fiscal deficits (to 8.4% of GDP).[7] As a result, the debt service difficulties of EMDEs and regions like Africa that have historically been plagued with unsustainable debt require restructuring. The Debt Service Suspension Initiative was initiated by the G20 in response to rising challenges in debt repayment resulting from the pandemic.[8] The program, which concluded in December 2021, suspended the debt payments of forty-eight of the qualifying seventy-three low- and lower-middle-income countries.[9] This program did not result in broad-based private sector participation in debt restructuring, but rather it demonstrated the need for broader restructuring beyond temporary debt payment suspension. In an effort to promote long-term debt sustainability through deeper restructuring, and to include private sector debt, the Common Framework replaced the DSSI.[10] The Common Framework, however, has been seen as a "long, drawn-out process with a vague and uncertain end and no interim relief" that is struggling to maintain its credibility because, amongst other issues, "[a]greement on general principles has proved much harder to translate into

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[4] Dean Karlan & Christopher Udry, *Measuring COVID's Devastating Impact on Low- and Middle-Income Countries*, KELLOGG INSIGHT (July 1, 2021), https://insight.kellogg.northwestern.edu/article/covids-impact-on-low-and-middle-income-countries [https://perma.cc/KD7C-T5LU].

[5] Thomas Stubbs et al., *Whatever It Takes? The Global Financial Safety Net, Covid-19, and Developing Countries*, WORLD DEV., Sept. 2020, at 1.

[6] AFR. DEV. BANK, AFRICAN ECONOMIC OUTLOOK 2021: FROM DEBT RESOLUTION TO GROWTH 7 (2021).

[7] *Id*. at 7–8.

[8] Shruti Jain, *G20's Debt Service Suspension Initiative: A Historical Comparison*, OBSERVER RSCH. FUND. (June 28, 2022), https://www.orfonline.org/expert-speak/g20s-debt-service-suspension-initiative/ [https://perma.cc/L938-FA3X].

[9] *COVID 19: Debt Service Suspension Initiative*, WORLD BANK GRP. (Mar. 10, 2022), https://www.worldbank.org/en/topic/debt/brief/covid-19-debt-service-suspension-initiative [https://perma.cc/67DL-QTR3].

[10] PARIS CLUB, COMMON FRAMEWORK FOR DEBT TREATMENTS BEYOND THE DSSI 1 (2021), https://clubdeparis.org/sites/default/files/annex_common_framework_for_debt_treatments_beyond_the_dssi.pdf [https://perma.cc/ZDQ9-QBZ8].

operational outcomes."[11] The main challenges of the Common Framework are that, so far, it has not resulted in an expeditious process and the levels of adequate restructuring and creditor equity have yet to be seen. Notably, significant delays have occurred in the cases of Zambia, Chad and Ethiopia.[12] Private creditors who voluntarily participate in the Common Framework are required to provide "treatment at least as favorable as the one agreed in the MOU (a legally non-binding memorandum of understanding between debtors and creditors)."[13] There is little clarity on how the requirement of equivalent relief from private creditors will be enforced.

The sovereign debt restructuring landscape is fragmented. Different classes of debt are restructured through different formal and informal institutional mechanisms. Bilateral debt is restructured by direct negotiations with individual official creditors or through the Paris Club.[14] Multilateral debt has been restructured in the past using once-off multilateral initiatives like the Heavily Indebted Poor Countries Program ("HIPC") and Multilateral Debt Relief Initiative ("MDRI").[15] The London Club is used to restructure commercial bank debt.[16] The restructuring of bonds is done through a contractual approach.[17] This fragmented approach has raised various concerns, and "the need to further strengthen the international architecture for debt restructuring" remains.[18] The Common Framework is indeed necessary; however, the question lingers whether pursuing a case-by-case approach in the form of the Common Framework is adequate reform. This question is especially pertinent for African countries, which are especially vulnerable to climate change, human rights violations, and other negative

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[11] Masood Ahmed & Hannah Brown, *Fix the Common Framework for Debt Before It Is Too Late*, CTR. FOR GLOB. DEV. (Jan. 18, 2022), https://www.cgdev.org/blog/fix-common-framework-debt-it-too-late [https://perma.cc/AST5-3XS2].

[12] *Id*.

[13] Homi Kharas & Meagan Dooley, *Debt Distress and Development Distress: Twin Crises of 2021* 14 (Brookings Inst., Global Working Paper No. 153, 2021), https://www.brookings.edu/wp-content/uploads/2021/03/Debt-distress-and-development-distress.pdf [https://perma.cc/6X2R-FGMC].

[14] *See id*. at 10.

[15] *See id*. at 13; PARIS CLUB, *supra* note 10, at 2 n.1.

[16] *See* Magalie Masamba, *Reflections on the Current Reality of Africa's Debt Landscape*, AFRONOMICSLAW (Jan. 26, 2021), https://www.afronomicslaw.org/category/african-sovereign-debt-justice-network-afsdjn/reflections-current-reality-africas-debt [https://perma.cc/X7Y9-4QFD].

[17] Tapas Strickland, *Sovereign Debt Restructuring: Recent Issues and Reforms*, RSRV. BANK OF AUSTL. BULL., Dec. 2014, at 73, 73, https://www.rba.gov.au/publications/bulletin/2014/dec/pdf/bu-1214-9.pdf [https://perma.cc/NL46-3ELN].

[18] Kristalina Georgieva, *Opening Remarks at Mobilizing with Africa II High-Level Virtual Event*, INT'L MONETARY FUND [IMF] (Oct. 9, 2020), https://www.imf.org/en/News/Articles/2020/10/09/sp100920-opening-remarks-at-mobilizing-with-africa-ii-high-level-virtual/ [https://perma.cc/CVX7-PLM7].

consequences of debt and other crises.

B. Understanding the Issues: What Are the Legal Problems in Debt Restructuring?

Debt restructuring is a procedure which results from bilateral agreements between the creditor and the debtor that modify the conditions of debt service.[19] This entails a legal process dealing with either the exchange of unsettled sovereign debt for new debt instruments or the modification of the terms of the existing debt.[20] The legal process may be pre-emptive of default or occur post-default.[21] In either case, restructuring may entail either debt rescheduling to extend the debt's maturity or debt reduction (or a "haircut"), i.e., the lowering of the nominal value or interest rate of the existing debt.

Among the leading issues in the current regime is that there is no formal mechanism to govern the restructuring of distressed debt, and secondly, the informal legal procedures that do presently guide restructuring processes are spread across various legal regimes.[22] Unlike other forms of insolvency procedures, whether individual, corporate or even municipal, that are typically conducted under the shadow of overarching national insolvency legislations, an equivalent does not exist in the context of SoDR.[23] Instead, the SoDR regime comprises several voluntary principles and *ad hoc* processes.[24] The lack of a coherent SoDR governance system is the primary challenge currently faced in the SoDR landscape. This incoherence is evident from the multiplicity of legal procedures and of legal institutions dealing with SoDR disputes, both nationally and internationally. This incoherence has

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[19] *See* Strickland, *supra* note 17, at 73.

[20] *See generally* Lee Buchheit et al., *The Sovereign Debt Restructuring Process*, *in* REVISITING DEBT SOVEREIGNTY (2013) (discussing "the process of restructuring a sovereign's debt once this step becomes unavoidable").

[21] *See generally* Tamon Asonuma & Christoph Trebesch, *Sovereign Debt Restructuring: Preemptive or Post-Default*, 14 J. EUR. ECON. ASS'N 175, 175 (2016) (showing "that sovereign debt restructurings can be implemented in two main ways: preemptively or post-default").

[22] Juan Pablo Bohoslavsky & Carlos Esposito, *Principles Matter: The Legal Status of the Principles on Responsible Sovereign Financing*, *in* SOVEREIGN FINANCING AND INTERNATIONAL LAW: THE UNCTAD PRINCIPLES ON RESPONSIBLE SOVEREIGN LENDING AND BORROWING 73, 73–74 (Carlos Esposito et al. eds., 2013).

[23] IMF, THE INTERNATIONAL ARCHITECTURE FOR RESOLVING SOVEREIGN DEBT INVOLVING PRIVATE-SECTOR CREDITORS 7 (2020), https://www.imf.org/en/Publications/Policy-Papers/Issues/2020/09/30/The-International-Architecture-for-Resolving-Sovereign-Debt-Involving-Private-Sector-49796 [https://perma.cc/F5Z5-FMMZ].

[24] *See* Rodrigo Olivares-Caminal, *The Pari Passu Clause in Sovereign Debt Instruments: Developments in Recent Litigation*, 72 BANK FOR INT'L SETTLEMENTS: BIS PAPERS, July 2013, at 121, 122, https://www.bis.org/publ/bppdf/bispap72u.pdf [https://perma.cc/57EU-PHQJ].

resulted in forum shopping and uncertainty in legal interpretations.[25] As such, the crux of the fragmentation issue is the lack of a single institutional setup for SoDR dispute resolution, as well as the lack of uniform rules or procedures. This raises the tension between on one hand, creating predictability, and on the other hand ensuring flexibility that will encourage participation in a restructuring process.

Further, the impact of past case law has also demonstrated that reform in the current regime is greatly reactionary. An example of the strains caused by the legal treatment of SoDR matters includes the tension between the interpretation of provisions in debt contracts by national courts and practical understanding of these clauses by debtors and creditors.[26] A prime example is the highly criticized judicial interpretation of the *pari passu* clause in Argentina's 2005 and 2010 debt restructurings. The interpretation made by Judge Thomas Griesa in the 2012 New York District Court injunction brought by NML Capital on Argentina's breach of the *pari passu* clause is noteworthy.[27] The *NML Capital* judgment is among others that, at the time, caused much anxiety and alarm in academic and policy making circles.[28] To Gelpern, the judgement had not only "clearly shaken the sovereign universe," but also "may spell the End of the World for sovereign immunity [and]

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[25] *See* U.N. Conference on Trade & Development, *Sovereign Debt Workouts: Going Forward Roadmap and Guide*, at 3, (Apr. 2015) [hereinafter UNCTAD], https://unctad.org/system/files/official-document/gdsddf2015misc1_en.pdf [https://perma.cc/4NXS-G6MM].

[26] *See generally* Julianne Ams et al., *Sovereign Default*, *in* SOVEREIGN DEBT: A GUIDE FOR ECONOMISTS AND PRACTITIONERS 275, 276–77 (S. Ali Abbas et al. eds., 2019) (providing examples in Jamaica, Ukraine, Uruguay, and Russia).

[27] This case is cited most for its controversial interpretation of the *pari passu* clause. The interpretation of the *pari passu* clause in this judgement prevented Argentina from making payments to its restructuring debtors without also making rateable payments to holdout creditors, a decision that was unanimously upheld by the Second Circuit Court of Appeals. *See* NML Cap., Ltd. v. Republic of Argentina, No. 08 Civ. 6978 (TPG), 2012 WL 5895784 (S.D.N.Y. Nov. 21, 2012); NML Cap., Ltd. v. Republic of Argentina, 699 F.3d 246, 250 (2d Cir. 2012).

[28] Among the parties alarmed by the *NML Capital* judgment was the United States. In its *amicus curiae* in support of Argentina's petition for rehearing the *NML Capital* case, the United States Solicitor General argued that the judgment threatens the core of its international debt restructuring policy. *See* Brief for the United States of America as Amicus Curiae Supporting Respondents, NML Cap., Ltd. v. Republic of Argentina, 699 F.3d 246 (2d Cir. 2012) (No. 12-105-cv(L)), 2012 WL 6777132, at *3 ("The panel's reasoning that preferential payment can breach a *pari passu* clause threatens core U.S. policy regarding international debt restructuring."); *see also* Brief for the United States of America as Amicus Curiae in Support of Reversal, NML Cap., Ltd. v. Republic of Argentina, 699 F.3d 246 (2d Cir. 2012) (No. 12-105-cv(L)), 2012 WL 1150791, at *28–29 (noting that this type of injunction "is particularly likely to raise foreign relations tensions"). For a discussion of the reaction of academics to this controversial judgement, see discussion *infra* Section IV.C.4.

sovereign debt as we know it."[29] Today, nothing much has changed in how reform efforts are developed in the restructuring world. Reform is generally done in a piecemeal manner in response to issues as they arise. Further, it is also clear that every few decades the world is again reminded of the need for a more comprehensive approach.

In highlighting the issues in the SoDR landscape, Bernhard and Kellermann note a dilemma that has plagued the SoDR literature and policy debates: "[W]hen sovereign debt restructuring becomes necessary and unavoidable, what regime would provide orderly restructuring, while safeguarding the balance of rights of both the creditor and the debtor?"[30] Also pertinent now is the writers' view that "there is still no international consensus on how to establish an orderly and transparent restructuring mechanism. But systemic proneness to debt crises shows that a solution is urgently required."[31] The difficulties inherent in SoDR are abundantly clear; nevertheless, the solutions are not. The varying conceptualizations of challenges in SoDR have resulted in a range of responses during the last two decades from a diverse range of parties with disparate interests.[32] Ultimately, the deadweight costs of default are tied to the institutions and legal framework that control the interaction between creditors and debtors.[33] Resultantly, a leading question on the current restructuring landscape is why the "institutions and legal frameworks are currently such that they give rise to deadweight costs of default."[34] One response to this issue is that change is arduous and slow. The view that reform aimed at a comprehensive international approach could take time and effort has resulted in a diversity of alternative solutions. All of the reform proposals addressed in this article are predicated on the same basic assumption—that the existing *ad hoc* methods for SoDR result in suboptimal outcomes, and they only address distinct thematic areas.[35]

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[29] *See* Anna Gelpern, *Known Unknowns in Pari Passu . . . and More to Come*, CREDIT SLIPS (Oct. 28, 2012, 5:05 AM), https://www.creditslips.org/creditslips/2012/10/unknown-unknowns-in-pari-passu-and-more-to-come.html [https://perma.cc/UHH5-5XM7].

[30] Bernhard & Kellermann, *supra* note 1, at 116–17.

[31] *Id*. at 116.

[32] *See id*. at 117.

[33] FEDERICO STURZENEGGER & JEROMIN ZETTELMEYER, DEBT DEFAULTS AND LESSONS FROM A DECADE OF CRISES 270 (2006).

[34] *Id*.

[35] HOLGER SCHIER, TOWARDS A REORGANISATION SYSTEM FOR SOVEREIGN DEBT: AN INTERNATIONAL LAW PERSPECTIVE 38 (2007).

II. HOW SHOULD WE EVALUATE SOVEREIGN DEBT REFORM PROPOSALS?

A. What Makes a Proposal a Better Solution?

Broadly, there are three types of restructuring reform proposals: firstly, comprehensive statutory reform; secondly, strengthening of boilerplate contractual provisions and development of soft law norms, principles, and standards; and finally, developing new, semi-formal mechanisms.[36] Any restructuring framework, irrespective of the category it falls under, should consider how to tackle procedural, substantive, and normative factors. Addressing these factors are necessary for a mechanism to operate smoothly. Another important consideration is whether a mechanism will be accepted by stakeholders or the legitimacy of a proposal.

From a procedural perspective, the main considerations that should be determined from the outset relate to how the process is initiated and by whom and how will it be conducted. There are further considerations that promote orderly participation in the restructuring process, including questions of how to bind parties to the process, and how to achieve collective action. Finally, there are the considerations that impact the stability of the debtor, including a temporary stay on litigation during the restructuring and a temporary suspension of payments to avoid a rush to exit by creditors.

From a substantive perspective, the critical considerations include a determination of what kinds of debt claims a mechanism will deal with and the supervisory institution and the authority it wields. Further, there are questions of conflict resolution and access to interim funding throughout the restructuring process, as well as the treatment of this new debt. Finally, as part of the substantive considerations, the broader normative foundation of a mechanism is important. Specifically, the question arises of what comprises the normative foundation of a mechanism and how will it incorporate ESG issues, human rights, and developmental concerns.

Various studies have evaluated the different reform proposals in the SoDR landscape.[37] A review of the legal literature reveals that no comprehensive criteria for assessing potential SoDR reform proposals have been developed.[38] Nonetheless, some authors specify criteria based on their

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[36] Bernhard & Kellermann, *supra* note 1, at 121–28.

[37] *See, e.g.*, NOURIEL ROUBINI & BRAD SETSER, IMPROVING THE SOVEREIGN DEBT RESTRUCTURING PROCESS: PROBLEMS IN RESTRUCTURING, PROPOSED SOLUTIONS, AND A ROADMAP FOR REFORM (2003); Udaibir S. Das et al., *Sovereign Debt Restructurings 1950-2010: Literature Survey, Date, and Stylized Facts* 88–91 (IMF, Working Paper No. 12/203, 2012) (including table of proposals).

[38] *See* ROUBINI & SETSER, *supra* note 37, at 7 ("No single proposal realistically could be expected to provide a comprehensive solution to the full range of problems that arise in a sovereign debt restructuring.").

observations of the challenges of SoDR.[39] While these criteria predate the COVID-19 pandemic, which has raised newer complexities, they are still instructive and relevant today. Of note are the views of Bernhard and Kellermann, who state that a proposal should include a vast number of stakeholders and be inclusive.[40] This also necessitates the involvement of institutional representation and requires that processes be fair in terms of cost-sharing and resolve collective action and coordination challenges effectively.[41] Another important, and still relevant, view is that of Mesjasz, who suggests four fundamental criteria for evaluating and comparing various institutional arrangements: (1) a streamlined procedure capable of resolving all debt claims; (2) autonomous decision-making; (3) an independent evaluation of the debtor's fiscal and economic status; and (4) a legal foundation for implementing the negotiated solutions.[42] Finally, Berensmann and Herzber emphasize the need to evaluate reform proposals by the following crucial criteria:

- determination of who has the right to initiate a procedure;[43]
- determination of who has the power of decision making, for instance a neutral third party, such as an arbitral tribunal;[44]
- costs of a proposed mechanism;[45]
- creditor coordination;[46]
- legal basis of the proposal;[47]
- sanction mechanisms in response to non-compliance with a restructuring plan;[48] and

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[39] *See, e.g.*, Das et al., *supra* note 37, at 92–95 (discussing IMF & Institute of International Finance [IIF] criteria).

[40] Bernhard & Kellermann, *supra* note 1, at 125.

[41] *Id.*

[42] Lidia Mesjasz, *Directions for Reforms of Sovereign Debt Restructuring*, 7 TRENDS WORLD ECON. 107, 114 (2015).

[43] For an in-depth assessment of the various options on initiating and terminating restructuring procedures, see Kathrin Berensmann & Angélique Herzberg, *International Sovereign Insolvency Procedure: A Conceptual Look at Selected Proposals?* 4–6 (German Dev. Inst., Discussion Paper No. 23/2007, 2007). https://core.ac.uk/download/pdf/71734596.pdf [https://perma.cc/J7F5-R493].

[44] *See id.* at 6.

[45] *See id.* at 11–12.

[46] For an assessment of the two main issues of creditor voting and creditor committees, see *id.* at 12–16.

[47] The question here is not just whether a convention is the best solution, but also how to allow for tailor-made features rather than a one-size-fits-all approach. This necessitates a delicate balance between certainty and adaptability. *See id.* at 15–16.

[48] *See id.* at 16.

- information sharing.[49]

B. Legitimacy as the Key to Acceptance of Proposed Reform

A crucial prerequisite for a suggested SoDR proposal is legitimacy, which will impact whether a proposal will be accepted by the relevant stakeholders. The legitimacy of a mechanism is "an attribute that makes it worthy of consideration and voluntary compliance and/or support."[50] Lienau evaluates the need for legitimacy via the prism of an institutional approach to SoDR, whether completely formal or semi-formal. In this respect, Lienau asserts that the concept of legitimacy is utilized to bolster compliance and support for a novel mechanism, devoid of any coercion or self-interest.[51] Accordingly, Lienau splits the idea of legitimacy into three important components in her evaluation of its validity: legitimacy of the source of a mechanism;[52] formulation of legitimate processes;[53] and "outcome or

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[49] Information exchanges may not include engagement with civil society organizations or non-governmental organizations because, although theoretically viable, it is not practically feasible. *See id*. at 17.

[50] Odette Lienau, *Legitimacy and Impartiality in a Sovereign Debt Workout Mechanism* 3 (Cornell L. Fac. Publ'ns, Working Paper No. 1110, 2014), https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2499&context=facpub [https://perma.cc/ZHN5-7CLB]. In a later article, however, Lienau acknowledges the difficulty of assessing a framework on the basis of legitimacy. This difficulty arises from the fact that legitimacy is what she describes as "conceptually slippery," in that it means different things for different people. Applying such a concept does therefore raise complexities. *See* Odette Lienau, *Legitimacy and Impartiality as Basic Principles for Sovereign Debt Restructuring*, 41 YALE J. INT'L L. ONLINE 97, 99 (2016).

[51] *See* Odette Lienau, *The Challenge of Legitimacy in Sovereign Debt Restructuring*, 57 HARV. INT'L L.J. 151, 154 (2016).

[52] The legitimacy of the source of a mechanism necessitates that the institution from which a tool is derived adheres to the core values of a legitimating group(s). When applied to the SoDR landscape where change is desirable, this raises issues about how a novel body will be founded, whether it matches fundamental SoDR ideals, and whether the community deems it a genuine source of a proposed SoDR mechanism. *See* Lienau, *supra* note 50, at 7–9.

[53] Formulating legitimate processes necessitates the establishment of processes that are already in accordance with acknowledged and existing procedures, norms, and standards. As a result, despite the development of innovative processes, significant deviation from the recognized status quo that lacks a conceptual base may prompt questions of legitimacy among SoDR participants.

The process or implementation legitimacy entails various elements including—ongoing participation in the SoDR process by diverse groups, including NGOs etc; ownership of the process; comprehensiveness or full involvement which requires collective action of creditor coordination; transparency, a general principle that should govern any SoDR process; provision of a reasoned decision; efficiency of the process; and the possibility of review of decisions by an external entity. *See id*. at 9–11.

substantive legitimation."[54]

Any suggested mechanism with a stronger institutional emphasis, whether semi-voluntary or a formal instrument like a convention, should satisfy the legitimacy test. In theory, it should reflect the various features of each of the legitimacy components outlined above. In reality, however, examining legitimacy is difficult. The assessment may have diverse outcomes depending on how a population affected by restructuring defines legitimacy of a mechanism, how one identifies which outcomes are most significant, and so on.[55] Further, striking a delicate balance between the three components of legitimacy is complex.

Developing countries, particularly African countries (whose perspectives are not adequately represented in the debate over SoDR reform), may place a high premium on outcome or substantive legitimation, especially the human rights outcomes of SoDR.[56] In this respect, reform of a broader SoDR landscape should achieve procedural efficiency and fairness. Fairness requires an environment that prioritizes developmental issues. Furthermore, as Rossi points out, fairness necessitates the formation of "a global economic order that helps developing countries achieve sustained economic growth, full employment, protection of the environment and nature, and, fundamentally, that guarantees people the right to lead a life in dignity, with autonomy and freedom."[57]

Fairness in restructuring outcomes can be fostered by incorporating some level of participation of various stakeholders. According to the U.N. Conference on Trade and Development ("UNCTAD") roadmap, the question

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[54] As is the case for the definition of legitimacy, different players in SoDR may view positive economic outcomes differently. For instance, for debtors it could be returning debt levels to sustainable levels; for creditors it could be recuperating as much of their investment as is possible; while for other organizations (such as NGOs) it could be 'global justice' through the redistribution of wealth.

Outcome or substantive legitimation, as the name implies, necessitates establishing and determining the expected positive substantive outcomes of a SoDR process based on specified targets. These positive substantive outcomes may include: positive economic and financial outcomes; fundamental humanitarian impact on citizens of the debtor state; adherence to other substantive principles or doctrines (within the law of contract, public international law, etc., such as the doctrine of unclean hands, unconscionability, and fraudulent transfer); and uniformity. Lienau does however caution that uniformity should be applied with caution; otherwise, a legitimate proposal could "perhaps [lead] to uniformly problematic results." *See id*. at 7, 12.

[55] *See id*. at 7 ("Of course, there can be tensions between particular legitimizing characteristics—for example, maximum efficiency and broad participation—which would have to be balanced at both a general institutional level and within any particular debt workout situation.").

[56] *Id*. at 12.

[57] *See* Julieta Rossi, *Sovereign Debt Restructuring, National Development and Human Rights*, 23 SUR INT'L J. HUM. RTS. 185, 193 (2016).

of participation comes within the concept of legitimacy.[58] It mentions that "[t]he principle of legitimacy further requires opening the initial roundtable to all stakeholders concerned in the restructuring, including civil society. The roundtable should decide on mechanisms to enable the participation of these groups in the subsequent process. This may include notice-and-comment procedures and amicus curiae briefs."[59] The participation of stakeholders other than the debtor and creditor has mostly been a concern of civil society organizations.[60] The issue of engagement, for example, has been addressed in the Ten Core Civil Society Principles developed by the European Network on Debt and Development ("Eurodad"), where Principle Ten states that:

> 10. Participation: the procedure must be participatory and all stakeholders have the right to be heard. This includes borrowers, lenders and individuals/organisations which represent citizens in the debtor nation affected by decisions taken by the arbitration panel. All must argue, prove and document their points (rather than quibble between themselves which is the current situation).[61]

III. LOOKING BACK AND LOOKING AHEAD: WHAT ARE THE PAST AND PRESENT SODR REFORM PROPOSALS?

A. Proposals That Seek Comprehensive Statutory Reform

This section examines historical and current initiatives for debt restructuring architecture reform. As a starting point, it examines statutory reform proposals. The idea of comprehensive statutory reform is predicated on the school of thought that the procedural issues in restructuring (including creditor participation and coordination) and the substantive issues (including human rights, climate change, and development impacts of debt restructuring) require a more robust approach. Within the statutory approach, there exists two options in regard to how formal such an approach should be, and whether it should be within the international public law or national law landscape. The first approach is the most formal option, being a convention or a Sovereign Debt Restructuring Mechanism that is domesticated into the national law through signing and ratification.[62] The second option is a model

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[58] UNCTAD, *supra* note 25, at 55.

[59] *Id*. at 35.

[60] *See, e.g.*, EURODAD, A FAIR AND TRANSPARENT DEBT WORK-OUT PROCEDURE: 10 CORE CIVIL SOCIETY PRINCIPLES (2009), https://www.platformdse.org/wp-content/uploads/Eurodad-debt-workout-principles_FINAL.pdf [https://perma.cc/8K7C-FVFN] (outlining ten principles described as essential components of an international sovereign debt work-out mechanism).

[61] *Id*. at 6.

[62] *See* Steven L. Schwarcz, *Sovereign Debt Restructuring: A Model-Law Approach*, 6 J. GLOBALIZATION & DEV. 343, 348 (2015).

law that can be adopted and adapted to fit the local context.[63]

1. The Sovereign Debt Restructuring Mechanism ("SDRM")

The idea of statutory reform of SoDR has been part of the legal and financial literature and policy debates for many decades. Policy debates in the 1970s and 1980s did not spur any serious efforts to create a mechanism.[64] In 2014, the United Nations General Assembly passed a Resolution Towards the Establishment of a Multilateral Legal Framework for Sovereign Debt Restructuring Processes; [65] however, the substantive contents and nature of the mechanism have not been agreed on and no progress has been made. The Sovereign Debt Restructuring Mechanism ("SDRM") in the early 2000s is presently the most ambitious effort at creating statutory reform.

In 2002, the International Monetary Fund ("IMF") recommended establishing a SDRM as a legislative reform of the SoDR framework.[66] Anne Krueger, the first deputy managing director of the IMF, spearheaded the proposal for an SDRM as a response to the inefficient, delayed and holdout plagued restructurings of the time.[67] The SDRM was seen as a gap-filling mechanism to supplement for the absence of a system that prevents creditor disruptions and holdouts, binds minority creditors, encourages debtors to "act responsibly" and provides a priority status for emergency financing during restructuring.[68] The 'debtor' under the SDRM is considered to comprise either the central government or, where consent is obtained from the debtor, it may be activated by the central bank or an equivalent entity, or public authorities that are not restricted to a local statutory debt restructuring

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[63] *See id*.

[64] *See* Jérôme Sgard, *How the IMF Did It: Sovereign Debt Restructuring Between 1970 and 1989*, 11 CAP. MKTS. L.J. 103, 124 (2016).

[65] G.A. Res. 68/304 (Sept. 9, 2014).

[66] The SDRM required a change to the IMF's Articles, with three-fifths of members voting power necessary. A lack of substantial political backing, concerns about the IMF's position as lender of last resort while simultaneously being the custodian of the mechanism, and the possible high costs of running and enforcing the system were among the reasons why the SDRM proposal was not accepted. *See generally* ANNE O. KRUEGER, IMF, A NEW APPROACH TO SOVEREIGN DEBT RESTRUCTURING: PRELIMINARY CONSIDERATIONS 16–18 (2001), https://www.imf.org/external/NP/pdr/sdrm/2001/113001.pdf [https://perma.cc/SC8M-XVJR] ("Notwithstanding the economic benefits such a mechanism could bring, there may be a general political reluctance among the membership to take such an ambitious step.").

[67] *See* ANNE O. KRUEGER, IMF, A NEW APPROACH TO SOVEREIGN DEBT RESTRUCTURING 2 (2002), https://www.imf.org/external/pubs/ft/exrp/sdrm/eng/sdrm.pdf [https://perma.cc/TS39-9DQJ].

[68] Brad Setser, *The Political Economy of the SDRM*, *in* OVERCOMING DEVELOPING COUNTRY DEBT CRISES 317, 325–26 (Barry Herman et al. eds., 2008).

framework.[69] Eligibility under the SDRM was limited to the right to receive payment arising from commercial contracts, as well as judgments on disputes arising from these contracts if enforcement was sought outside of the debtor state and if governed by foreign law.[70] The SDRM excludes multilateral debt and left open the question of its application to bilateral debt.[71]

Under the SDRM, sovereigns could initiate restructuring only after the debtor demonstrates that eligible debt levels are unsustainable.[72] Following that, the debtor must furnish the Dispute Resolution Forum ("DRF") with lists of claims that are either included under the SDRM, claims restructured through other methods, and claims completely excluded from any restructuring.[73] Creditors would submit their claims for registration and verification at the same time.[74] The DRF was not intended to be a court, but rather an arbitral body similar to the International Centre for the Settlement of Investment Disputes ("ICSID").[75] The forum would be made up of arbitrators nominated by a panel appointed by the IMF's Managing Director.[76] The arbitral panels themselves would be chosen from the pool of arbitrators by the DRF's president.[77]

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[69] *See Report of the Managing Director to the International Monetary and Financial Committee on a Statutory Sovereign Debt Restructuring Mechanism*, IMF (Apr. 8, 2003) [hereinafter IMF SDRM Report], https://www.imf.org/external/np/omd/2003/040803.htm [https://perma.cc/MW6D-EK3R] (distilling text of report); *see also* IMF, *Report of the Managing Director to the International Monetary and Financial Committee on the IMF's Policy Agenda* 15–17 (Apr. 2003), https://www.imf.org/external/np/omd/2003/041103.pdf [https://perma.cc/EL4U-B5Y5] (discussing SDRM proposal).

[70] The following are claims excluded from this mechanism:

> (i) Claims that benefit from a statutory, judicial or contractual privilege, . . . unless such a privilege: (i) was created after activation [of the SDRM] and (ii) arises from legal enforcement proceedings against a specified debtor;
> (ii) Guarantees or sureties, unless the underlying claim benefiting from such a guarantee or surety is in default;
> (iii) Wages, salaries and pensions;
> (iv) Contingent claims that are not due and payable, unless such contingent claim possesses a market value;
> (v) Claims held by international organizations. . .; and
> (vi) Claims held by foreign governments or qualified governmental agencies[.]

IMF SDRM Report, *supra* note 69.

[71] MAURO MEGLIANI, SOVEREIGN DEBT: GENESIS - RESTRUCTURING - LITIGATION 570 n.45 (2015).

[72] LEX RIEFFEL, RESTRUCTURING SOVEREIGN DEBT: THE CASE FOR AD HOC MACHINERY 268 (2003).

[73] MEGLIANI, *supra* note 71, at 571; *see also id*. at 574.

[74] *See id*. at 571–72.

[75] *See id*. at 573.

[76] *Id*.

[77] *Id*.

During the restructuring process, debtors may require emergency financing from various sources such as the capital markets or even the IMF as a lender of last resort.[78] Attracting this financing during the restructuring process would require granting priority status. Among the mandatory features of a new mechanism, it is proposed for the need to exclude new finance from the restructuring.[79] Nonetheless, for the sake of transparency and to avoid reckless borrowing, financing would be subjected to some form of creditor vote.[80] The SDRM includes a temporary stay of enforcement that would apply when a debtor suspends payments but before a restructuring agreement is in place.[81] However, this would not be an automatic stay and could require collective action clauses ("CACs").[82]

The establishment of the SDRM required an amendment of the IMF's Articles, with the required votes in favor amounting to three-fifths of the members carrying 85% of the voting power.[83] Krueger proposed that the role of the IMF would be minimal, and she admitted the motivation to amend the IMF's Articles was to bind countries rather than develop an entirely new treaty framework.[84] The SDRM appealed to some debtor countries as it could potentially encourage early restructuring, reduce the voting threshold, and facilitate emergency financing during restructuring by granting new creditors priority.[85] However, it was the proposal's lack of wide political support, as evidenced by the voting results, that ultimately led to its failure.

The SDRM was rejected for various reasons. Among the concerns was the IMF's dual role in the restructuring processes and a conflict of interest that could arise. The IMF was seen as both a facilitator of the restructuring

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[78] *See id*. at 579 & n.101.

[79] *Id*. at 570.

[80] *Id*.

[81] *See* KRUEGER, *supra* note 67, at 15–16.

[82] IMF, *Proposed Features of a Sovereign Debt Restructuring Mechanism*, Policy Papers, at 5, (Feb. 2003), https://www.imf.org/external/np/pdr/sdrm/2003/021203.pdf [https://perma.cc/Z636-6USP]; Sebastian Grund & Mikael Stenstrom, *A Sovereign Debt Restructuring Framework for the Euro Area*, 42 FORDHAM INT'L L.J. 795, 841 & n.212 (2019).

[83] IMF SDRM Report, *supra* note 69; *see also* Articles of Agreement of the IMF, Art. XXVIII, 60 Stat. 1401, 2 U.N.T.S. 39.

[84] Anne O. Krueger, *Sovereign Debt Restructuring: Messy or Messier?*, IMF (Jan. 4, 2003), https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp010403 [https://perma.cc/5HEK-DK4D] (noting that if even a few countries fail to adopt a new treaty, this could encourage creditors to circumvent the treaty). Still, most IMF members would need to ratify the treaty, while others might need to domesticate the treaty by enacting local laws. *See* RIEFFEL, *supra* note 72, at 269.

[85] John F. Crean, *Sovereign Debt Restructuring Mechanisms: Unintended Consequences of the 2002 IMF Proposal* 9, 11 (Univ. Toronto Dep't Econ., Working Paper No. 452, 2012), https://www.economics.utoronto.ca/public/workingPapers/tecipa-452.pdf [https://perma.cc/C6BB-V3ZT].

process and a participant or creditor.[86] The IMF would play a very central role within the SDRM beyond administration. Its functions included providing endorsements both for a restructuring plan that would be approved by creditors and for activation of a creditor stay.[87] Additionally, the exclusion of domestic debt from the SDRM raised fear of preferential treatment of domestic creditors.[88] Some thought that the mechanism made restructuring too simple, thus increasing the cost of lending.[89] Moreover, the SDRM could introduce a layer of unpredictability. Creditors would be unable to predict the activation moment of the SDRM proceedings, such proceedings that would result in runs by short term lenders.[90] Finally, the unpredictability of the SDRM might result in the "cessation of payments" by the debtor and an increased number of debtors that turn to the SDRM prematurely.[91]

While this effort at a legislative approach did not take off, it is quite informative on the primary procedural and substantive questions that need to be resolved, and, more significantly, it is proof of the need for a more impartial institution to house and administer a mechanism. Finding a sufficiently representative institutional home for a restructuring mechanism is difficult. Despite the perception that it is a more democratic and representative organization, the United Nations General Assembly's efforts are limited to producing resolutions. Unfortunately, throughout the COVID-19 pandemic, the United Nations General Assembly has played no significant part in the present debt debate.

2. A Model Law Approach

The statutory approach is not limited to a fully-fledged convention. Schwarcz proposes a cross-jurisdictional law-making instrument (a national or even subnational model law), as opposed to multilateral solutions (an international convention or treaty).[92] The model law approach—or "uniform law"—entails the development of legislation that national (or subnational)

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[86] Mechele Dickerson, *A Politically Viable Approach to Sovereign Debt Restructuring*, 53 EMORY L.J. 997, 1020–21 (2004) (suggesting that conflict of interest arises as IMF "is a creditor . . . [with] an incentive to push for legislation that requires the private sector to make large concessions"). In fact, the IMF publicly noted its frustration with the use of multilateral debt to serve "private sector, often high-risk debt." *Id*. at 1021.

[87] *See* KRUEGER, *supra* note 67, at 23–24.

[88] *See* Dickerson, *supra* note 86, at 1020.

[89] *Id*. at 1021.

[90] *See* Crean, *supra* note 85, at 13.

[91] *Id*.

[92] *See* STEVEN L. SCHWARCZ, CTR. FOR INT'L GOVERNANCE INNOVATION, A MODEL-LAW APPROACH TO RESTRUCTURING UNSUSTAINABLE SOVEREIGN DEBT 1–3 (2015) (last updated Oct. 2017).

governments incorporate into a specific domestic legal context.[93]

The model law approach is a more politically viable option because it requires adoption by only a few major jurisdictions, like New York or England.[94] The approach is incremental, as Schwarcz describes that it could be pursued in tandem with a more comprehensive reform option.[95] Schwarcz develops a draft model law, seeking to "reduce (a) the social costs of sovereign debt crises, (b) systemic risk to the financial system, (c) creditor uncertainty, and (d) the need for sovereign debt bailouts, which are costly and create moral hazard."[96] The model law covers all payment claims and is not limited to bond debt.[97] Additionally, it covers instruments with both long-term and short-term maturities and does not discriminate on the nationality of the creditor or currency.[98] However, the claims covered under a model law exclude a debtor's internal obligations.[99]

In terms of creditor coordination, the model law approach presented by Schwarcz differs from the SDRM. It prefers the exclusion of the creation of official creditor committees.[100] The model legislation requires supermajority voting and aggregation of votes in its consideration of collective action (and holdouts in particular), therefore invalidating CACs in debt contracts.[101] It

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[93] *Id*. at 2–3.

> The UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration exemplifies a model law that has been uniformly enacted in an international context; the Uniform Commercial Code (UCC) in the United States exemplifies a model law that has been uniformly enacted in a subnational context.

Id. at 3.

[94] *Id*. at 1, 3.

[95] *Id*. at 3.

[96] *Id*. at 5.

[97] Schwarcz, *supra* note 62, at 356.

[98] *See* SCHWARCZ, *supra* note 92, at 5. According to Article 2(2) of the model law,

> the term "monies borrowed" shall include the following, whether or not it represents the borrowing of money per se: monies owing under bonds, debentures, notes, or similar instruments; monies owing for the deferred purchase price of property or services, other than trade accounts payable arising in the ordinary course of business; monies owing on capitalized lease obligations; monies owing on or with respect to letters of credit, bankers' acceptances, or other extensions of credit; and monies owing on money-market instruments or instruments used to finance trade; . . .

Id.

[99] Schwarcz, *supra* note 62, at 357 (including pension and retiree obligations, tax refunds, unpaid salaries to public employees, or social program payments).

[100] *See id*. at 365–66.

[101] Steven L. Schwarcz, *A Proposal for UNCITRAL Research: A Model Law Approach to Sovereign Debt Restructuring* 5–6 (Duke L. Sch. Pub. L. & Legal Theory Series, Working Paper No. 2017-50, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3000544 [https://perma.cc/X94Z-MHMG].

does not, however, reject the idea of CACs. It recommends that either the debtor or the creditor may opt-out of this feature and instead utilize CACs or that contracts including CACs be excluded from the model law provision.[102] While CACs and statutorily enforced supermajority voting rules address the same issue, CACs fall short of resolving the holdout problem completely. Schwarcz correctly notes that a considerable transition period remains during which all bonds will contain these provisions.[103] Moreover, the model law takes liquidity into account throughout the restructuring process and prioritizes new creditors over existing creditors.[104] The model law, on the other hand, provides the concept of notification of this new funding and the chance to block it.[105] This is to avoid "overinvestment."[106] Further, the model law proposal does not provide a stay on litigation or the suspension of payments.[107] According to Schwarcz, a stay is not only unnecessary to resolve restructuring, but it may provide incentives for creditors to prefer submitting themselves to a jurisdiction that has not enacted the model law over one that has (and is thereby limited by a stay).[108]

The idea of a model law was a response to the fears arising out of the *NML Capital* case and the interpretation of the *pari passu* clause. In the context of the post-COVID-19 world, the model law would not adequately deal with the systemic issues that plague countries such as climate and human rights impact of unsustainable debt. Also, while the model law is a form of statutory reform, it falls short of unifying what is already a fragmented regime as it requires reform within the limited context of a legal jurisdiction. The complexity that has been again demonstrated in debt discussion within the COVID-19 era has shown the need for an approach that tackles coordinating different forms of debt and ensuring comparability of treatment between different creditors to encourage participation. A model law cannot fully tackle this this. However, within the current context, the literature developed on the model law is very instructive on how we can grapple with some key substantive considerations in restructuring, irrespective of the mechanism.

B. Proposals That Seek to Strengthen the Ad Hoc *Approach to SoDR (Contractual Approach)*

Presently the normative framework and the procedural rules that govern SoDR are determined in contracts and, if provided, voluntary codes of

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[102] *Id.* at 13.

[103] *Id.* at 4.

[104] *Id.* at 6–7.

[105] *Id.* at 7.

[106] Schwarcz, *supra* note 62, at 361.

[107] Schwarcz, *supra* note 101, at 12.

[108] *Id.* at 19–20.

conduct or principles.[109] Both are integral parts of the *ad hoc* machinery. The contractual approach entails market-based innovations to reform the SoDR process in response to issues as they arise. The market-based approach requires the development of contractual tools to resolve collective action issues. In effect, Dickerson's "pure contractual approach" to restructuring requires:

- including CACs in all the new bond issues;
- incorporating CACs in the existent bond issues, for instance, through the use of exchange offers with exit consents and negotiating with bondholders; and
- "convinc[ing] all bondholders across all issues and all non-bondholder creditors to agree to the proposed restructuring."[110]

The failure of the SDRM resulted in a preference for a market-based approach to debt restructuring. This approach was most preferred by the United States, European Union, and EU member states; multilateral organizations such as the IMF; creditor organizations, such as the International Capital Market Association ("ICMA"); just to name a few.[111] The IMF also acknowledges the central role of CACs. In fact, it advocated for a two-pronged approach.[112] The outcome of the debate on the SDRM was the decision to abandon the statutory approach in the wake of concerted efforts to include CACs in new bond issues of key emerging market economies.[113] As opposed to seeing the SDRM as an absolute failure, Setser is of the view that it demonstrates the impact that public sector initiatives may have on market outcomes, and it "helped to change the informal 'norms' governing the sovereign debt market."[114] In particular, Setser notes that "[t]he IMF's serious pursuit of an international bankruptcy regime clearly contributed to Mexico's decision to introduce collective action clauses. It pushed leading sovereign debt lawyers to develop more ambitious clauses

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[109] *See, e.g.*, Robert Gray, *Towards a Debt of Sovereign Debt Restructuring*, LMA NEWS 3, 4 (July 2003), https://www.icmagroup.org/assets/documents/RBG%20Article.PDF [https://perma.cc/ES7C-AD9G].

[110] Dickerson, *supra* note 86, at 1016.

[111] Charles W. Mooney, Jr., *A Framework for a Formal Sovereign Debt Restructuring Mechanism: The Kiss Principle (Keep It Simple, Stupid) and Other Guiding Principles*, 37 MICH. J. INT'L L. 56, 59 (2015).

[112] Richard Euliss, *The Feasibility of the IMF's Sovereign Debt Restructuring Mechanism: An Alternative Statutory Approach to Mollify American Reservations*, 19 AM. U. INT'L L. REV. 107, 120 (2003).

[113] IMF, *The International Architecture for Resolving Sovereign Debt Involving Private-Sector Creditors: Recent Developments, Challenges, and Reform Options*, Policy Papers, at 7, 21, (Sept. 2020).

[114] Setser, *supra* note 68, at 319.

that 'aggregated' votes across several separate bonds . . . ."[115]

It is becoming abundantly clear to the markets, debtor countries, international organizations, and other stakeholders with an interest on debt management, such as Credit Rating Agencies and civil society, that when a crisis hits there are many considerations to be made that fall short of a debt contract. The COVID-19 pandemic is only the most recent lesson on the need for more global coordination to restructure debt. Tackling debt within the context of the pandemic demonstrated that a market driven approach to debt restructuring within a complex debt landscape is very difficult. However, one can assume that the pandemic is only one of many crises to come and that future restructurings and other debt treatments will only become increasingly complex. While reform—for instance, through the development of the G20's Common Framework—is a step in the right direction as it acknowledges a need for more global coordination, it is only a step towards more broad-based reform that is needed.

C. Semi-Formal and Voluntary Dispute Resolution and Institutional Arrangements

Proposals for alternative semi-formal procedures to SoDR were made in the discourse arising from the *NML Capital* case in an effort to find a middle ground between the market-based approach and the statutory approach. Today, these proposals have received no attention in debate as the focus has shifted to COVID-19 era restructuring, which instead focuses on how to bring everyone to the table, including major creditors such as China and private creditors. Prior to COVID-19, several ideas emerged to not only establish a neutral place for debt restructuring, but also to handle other substantive concerns and to resolve disputes. These proposals for semi-formal institutions/arrangements include Kathrin Berensmann and Frank Schroeder's International Debt Forum, Christopher Paulus and Steven Kragman's Sovereign Debt Tribunal, and Kunibert Raffer's proposal of drawing on general provisions of the U.S. insolvency law on municipalities.[116] These proposals are discussed below.

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[115] *Id.*

[116] *See generally* Kathrin Berensmann & Frank Schroeder, *A Proposal for a New Sovereign Debt Framework (SDF) for the Prevention and Resolution of Debt Crisis in Middle-Income Countries* (German Dev. Inst., Discussion Paper No. 2/2006, 2006), https://www.die-gdi.de/uploads/media/2-2006.pdf [https://perma.cc/8BED-JY5Z]; Christoph G. Paulus & Steven T. Kargman, Reforming the Process of Sovereign Debt Restructuring: A Proposal for a Sovereign Debt Tribunal (Apr. 7, 2008) (preliminary draft), https://www.un.org/esa/ffd/wp-content/uploads/2008/04/20080408_Kargman-Paulus-Paper.pdf [https://perma.cc/XAL2-RP7C]; Kunibert Raffer, *Internationalizing US Municipal Insolvency: A Fair, Equitable, and Efficient Way to Overcome a Debt Overhang*, 6: CHI. J. INT'L L. 361 (2005) [hereinafter *US Municipal Insolvency*]; Kunibert Raffer, *What's Good for the United States Must be Good for*

1. The International Debt Framework ("IDF")

The International Debt Framework ("IDF") is an institutional arrangement aimed at the resolution of a financial crisis, which Berensmann and Schroeder suggest should be hosted within the G20.[117] It comprises restructuring processes initiated by a distressed debtor, which culminates in the formation of an IDF Commission as the supervisory body.[118]

Bernhard and Kellermann note that this mechanism constitutes a middle ground as it both blends the use of voluntary principles and creates an institutional framework.[119] The choice of the G20 is motivated by the view that it has been a successful forum for discussions of financial issues such as dealing with financial stability and managing sudden capital inflows and outflows.[120] The IDF targets all forms of sovereign debt accrued by emerging countries (multilateral, bilateral and private), aiming to ensure equal treatment.[121] The IDF has been designed to fulfil two functions—the prevention of crises through communication and transparency, and their resolution if they do occur.[122] It is broadly a system aimed at promoting transparency and good faith negotiations between parties in the SoDR system.[123] From a normative perspective, the IDF merely requires non-binding principles, of which Berensmann and Schroeder have proposed using the Institute of International Finance's ("IIF") Principles for Stable Capital Flows and Fair Debt Restructuring in Emerging Markets.[124]

When looking at restructuring today, the IDF can in some ways be likened to the Common Framework, although it specifically tackles the debts of low-

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the World: Advocating an International Chapter 9 Insolvency, *in* FROM CANCUN TO VIENNA: INTERNATIONAL DEVELOPMENT IN A NEW WORLD (Bruno Kreisky F. Int'l Dialogue ed., 1993) [hereinafter *Good for the World*], https://homepage.univie.ac.at/kunibert.raffer/kreisky.pdf [https://perma.cc/TP3R-KJ74].

[117] *See generally* Berensmann & Schroeder, *supra* note 116. The G20 comprises governments and central banks from leading financial centers. Its member states comprise Australia, Argentina, Brazil, Canada, China, European Union, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, the United Kingdom, and the United States. *About G20*, G20, https://www.g20.org/about-the-g20/ [https://perma.cc/HDM2-KW5T].

[118] *See* Berensmann & Schroeder, *supra* note 116, at 9–16.

[119] *See* Bernhard & Kellermann, *supra* note 1, at 123–24.

[120] Berensmann & Schroeder, *supra* note 116, at 1.

[121] *Id*. at 14.

[122] *Id*. at 10.

[123] *Id*. at 11.

[124] *Id*. at 10–11. *See generally* IIF, PRINCIPLES FOR STABLE CAPITAL FLOWS AND FAIR DEBT RESTRUCTURING IN EMERGING MARKETS (Mar. 31, 2005), https://www.iif.com/Portals/0/Files/content/Regulatory/Principles%20for%20Stable%20Capital%20Flows%20and%20Fair%20Debt%20Restructuring%20in%20Emerging%20Markets.pdf [https://perma.cc/LT2H-YXLY].

income economies that participated in debt suspension during the COVID-19 pandemic. The Common Framework may be seen as one of the incremental steps towards a comprehensive mechanism for restructuring. However, the main concern, especially for African countries when it comes to reform of the restructuring architecture, is whether there is transparency and a seat at the table. The IDF, and perhaps the Common Framework, raises the question on whether the international financial architecture is exclusionary of African countries from a governance perspective. In this respect, the question arises whether the G20 is adequately representative—especially from a developing country's perspective and even more so from an African country's perspective. If not, it precludes any advocacy of the continent's concerns, perspective, and experiences. While the group includes countries that may be considered the financial powerhouses of the world, there is only one African country represented—South Africa. As such, when looking at the future of reform of the financial architecture, it should be borne in mind that creating a seat at the table is important, especially when it comes to finding solutions to global debt issues.

2. Sovereign Debt Tribunal ("SDT")

The Sovereign Debt Tribunal emanates from the desire for a mechanism to resolve SoDR disputes outside the context of national courts.[125] The SDT is an international arbitration-based dispute resolution process.[126] It is seen as one of the incremental steps towards a global mechanism.[127] The strategy proposed here is to borrow critical features of the statutory proposals as part of an incremental approach towards a statute.[128]

As a procedure, the SDT approach requires a contract between the parties that will detail the important elements that the parties have agreed upon. Among these include the manner in which the procedure is initiated, creditor coordination and creditor committees, the applicable law, and the binding effect of awards.[129] The SDT process would be initiated by a debtor who issues an "announcement of a default"; however, the trigger event will be set out in the relevant contract.[130] Arbitral awards made under the SDT will be binding only on creditors who have arbitration provisions.[131] The SDT plan

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[125] *See* Paulus & Kargman, *supra* note 116, at 3.

[126] *Id*. at 4, 6.

[127] *Id*. at 3–4.

[128] *Id*. at 3.

[129] *Id*. at 10–11.

[130] *Id*. at 12; *id*. at 12–13 ("[W]ho shall be permitted to pull these triggers? . . . [E]ither the sovereign alone or the creditors as well. . . . [F]or political reasons, pulling the trigger might be left alone to the sovereign debtor or to the sovereign debtor and creditors acting in unison.").

[131] *Id*. at 12.

does not include a provision for a stay of enforcement.[132]

As the governing law, the authors recommend that universal insolvency law concepts defined by international organizations be used, rather than the laws of a given country.[133] These principles relate to insolvency for corporations, and the authors note that some adjustments will need to be made to adapt to sovereigns.[134] However, they do not justify the choice of these principles or provide a substantive analysis of the adjustments required for the sovereign context.

The SDT, like other proposals similar to it, is limited in that it is not an all-inclusive and comprehensive mechanism but rather purely a dispute resolution mechanism. As such, not only is it limited in that it aims to create a neutral dispute resolution mechanism and not actually facilitate the restructuring process, it also cannot tackle broader issues such as climate change and human rights. On the other hand, further discussion of dispute resolution mechanisms is important as the question of how debt disputes are resolved is part of the process of broad-based reform.

3. Fair Transparent Arbitration Process ("FTAP")

This proposal aims to create both a transparent procedure and a "fair, equitable, and feasible" option for SoDR.[135] The idea of a Fair Transparent Arbitration Process ("FTAP") is predicated on the use of *ad hoc* arbitration as a SoDR resolution mechanism and, therefore, does not require the costly creation of a new institutional arrangement.[136] In terms of this proposal, the arbitral process should provide the debt relief and the restructuring terms.[137]

The FTAP restructuring process is launched by a sovereign debtor, as is

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[132] *Id*. at 11 n.15, 12.

[133] The authors propose the use of voluntary principles like the World Bank Principles and Guidelines of an Effective Insolvency System, UNCITRAL Legislative Guide on Insolvency Law and IMF Orderly & Effective Insolvency Procedures. *Id*. at 14. Further, on the subject of governing law, Paulus and Kargman pose a series of crucial questions:

> What shall be the relevant law for a proceeding of the Sovereign Debt Tribunal? If it is the law of a particular jurisdiction, shall issues of public international law (such as, for instance, the controversial question of "odious debts") be neglected, in toto or partially? What about the eminently important question of inter-creditor equity in cases where some bondholders, because bonds were issued under the laws of various jurisdictions, will be judged under English law, whereas other bonds, for example, will be judged under the laws of New York and yet others under German law?

Id. at 13.

[134] *Id*. at 14.

[135] *US Municipal Insolvency*, *supra* note 116, at 361, 364. Raffer additionally notes "[f]airness is tested by whether creditors *actually* get what they can reasonably expect under the circumstances." *Good for the World*, *supra* note 116, at 3–4 (emphasis in original).

[136] *See Good for the World*, *supra* note 116, at 6.

[137] *See* Bernhard & Kellermann, *supra* note 1, at 123.

the case with municipal restructuring under Chapter 9 of the U.S. Bankruptcy Code, which allows municipalities to enter a restructuring process voluntarily by submitting a petition or bankruptcy declaration.[138] Bernhard and Kellermann observe that, in addition to emphasizing sovereignty, the FTAP emphasizes debtor protection through a stay on enforcement against a debtor, comparable to the standstill in Sections 921 and 922 of the U.S. Bankruptcy Code.[139] The stay on enforcement involves both a payment suspension and a stay on litigation.[140] The initiation of the process triggers the stay on enforcement; however, Raffer notes that the arbitral panel "must endorse or reject the stay."[141]

Under the administrative and dispute resolution arrangements of the FTAP, the disputing parties select the panel of arbitrators and determine the rules, as is the case with international arbitration generally.[142] The parties nominate an equal number of arbitrators, "who in turn elect one more person to achieve an odd number."[143] The arbitrators' role in this procedure is limited to rendering a binding judgement when the parties are unable to resolve their disagreement. When representative organizations establish that an agreement made by the parties may have a negative impact on the debtor's population, the arbitrator will also give a binding decision.[144] The panel's decision-making function becomes relevant only when the parties to the restructuring have disagreed. The awards imposed under the FTAP are binding on the parties and provide a "sanction mechanism to enforce final awards."[145]

Bernhard and Kellermann criticize the FTAP for failing to appropriately address the holdout issue.[146] The FTAP makes no mention of supermajority voting criteria.[147] While Bernhard and Kellermann consider the FTAP to be the "best ideal-type solution" since it addresses the "rush-to-the-exit" and "rush-to-the-courthouse," they believe it may be improved in terms of handling holdouts.[148] They suggest that this void be filled by borrowing from the IDF's exit consents.[149]

An important feature of this mechanism is that it creates room for participation of a broad array of stakeholders. Among the instances in which

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[138] 11 U.S.C. §§ 301, 901(a).

[139] Bernhard & Kellermann, *supra* note 1, at 122–23.

[140] *Id*. at 127.

[141] *US Municipal Insolvency*, *supra* note 116, at 365.

[142] Bernhard & Kellermann, *supra* note 1, at 122–23.

[143] *Id*. at 122.

[144] *Id*. at 123.

[145] *Id*. at 126.

[146] *Id*. at 118–19.

[147] *See id*. at 126–27.

[148] *Id*. at 127

[149] *Id*.

the panel of arbitrators may adjudicate on a matter under FTAP procedures, is "if representative organizations show that an agreement would impose too heavy a burden on the population."[150] Raffer recommends that, similar to Chapter 9 of the U.S. Bankruptcy Code which grants affected populations the ability to be heard, representatives of affected parties engage in the arbitral process via representative organizations.[151] Trade unions, employee committees, international organizations, non-governmental organizations ("NGOs"), and other grassroots organizations are examples of these representational organizations.[152] In addition to enabling civil society organizations and other interested parties to participate, the FTAP takes human rights issues into account.[153] This is accomplished largely by considering the uniqueness of public functions, which include continuously delivering social services. In the sovereign debt context, the principle of debtor protection requires that a debtor still be "allowed to maintain basic social services essential to the health, safety, and welfare of its inhabitants."[154]

4. Sovereign Debt Forum ("SDF")

A similar proposal to Raffer's is put forward by Richard Gitlin and Brett House—the Sovereign Debt Forum ("SDF"). The SDF proposal creates institutional reform while still relying on a contractual approach. It aims to develop a "proactive, predictable and consensus-driven" mechanism for SoDR.[155] Further, the SDF proposes the use of pre-existing codes of conduct and principles.[156]

The main strength of the SDF is that, by creating a venue and environment

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[150] Bernhard & Kellermann, *supra* note 1, at 123.

[151] *See US Municipal Insolvency*, *supra* note 116, at 364. The Chapter 9 process grants affected persons, including municipal employees as represented by association and unions, a right to be heard. This right to be heard in the SoDR context has been interpreted in different ways. Rogoff and Zettelmeyer equate participation of affected third parties to being on a panel, stating "trade unions, NGOs or churches could function as arbitrators speaking on behalf of the citizens in the debtor countries." Raffer believes that Rogoff and Zettelmeyer have "seriously misinterpret[ed]" the proposal. *See id*. at 364 & n.13 (quoting Kenneth Rogoff & Jeromin Zettelmeyer, *Early Ideas on Sovereign Bankruptcy Reorganization: A Survey* (IMF, Working Paper No. 02/57, 2002)); *see also Good for the World*, *supra* note 116, at 5.

[152] *See US Municipal Insolvency*, *supra* note 116, at 364.

[153] *See id*. at 370.

[154] Bernhard & Kellermann, *supra* note 1, at 122.

[155] RICHARD GITLIN & BRETT HOUSE, CTR. INT'L GOVERNANCE INNOVATION, A BLUEPRINT FOR A SOVEREIGN DEBT FORUM 21 (2014), https://www.cigionline.org/sites/default/files/cigi_paper_27_0.pdf [https://perma.cc/R45Q-AJJT].

[156] *Id*. at 15 ("The SDF. . . would operate in a manner broadly consistent with the IIF's Principles for Stable Capital Flows and Fair Debt Restructuring. . ., the [UNCTAD's] Principles on Responsible Sovereign Lending and Borrowing, . . . and the IMF's lending into arrears policies. . . .").

for proactive and early dialogue between different stakeholders as sovereign debt challenges arise, the SDF seeks to ensure timely and more organized restructuring to reduce the stigma associated with debt distress, which in turn would foster an environment of early and open engagement and a sense of ownership of a restructuring plan by both debtors and creditors.[157] Moreover, the SDF may provide a forum for discussing broader issues, like human rights and climate change, as it could include a varied range of impacted stakeholders, such as civil society and other organizations that reflect the interests of communities.

The SDF addresses the question of collective action using a contractual method.[158] In this regard, Gitlin and House suggest various *ex post* acts as part of the SDF's framework.[159] These include, but are not limited to, the incorporation of aggregated CACs into bond instruments and the revision of the Eurozone model CAC to include aggregation.[160] It also includes methods to guarantee cost-sharing and transparency on the side of creditors, as well as steps to "immunize" payments from the possible impact of the *NML Capital* case which demonstrated the challenge of creditor coordination in bond debt restructuring.[161] In addition, the SDF permits for the voluntarily suspension of legal action, subject to ongoing good faith discussions.[162]

In calling for the SDF, Gitlin and House make three critical observations on what the 2008 financial crisis and others have demonstrated thus far. Firstly, they note that, due to the exorbitantly high *ex ante* costs of tackling distressed debt, SoDR comes "too little," "too late."[163] They advocate for the establishment of a mechanism that facilitates early and proactive dialogue on adequate responses to debt distress.[164] Secondly, the authors note that "once a crisis has taken hold, . . . [there is a need] to assess whether it faces a problem of illiquidity or insolvency, and to design appropriate action . . . ."[165]

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[157] *Id*. at 11.

[158] *Id*. at 19.

[159] *Id*. at 19–20.

[160] *Id*. at 19. Beyond *ex post*, their proposals include: (1) *ex ante* proposals that focus on imposing more significant limitations and oversight on sovereign borrowing, as well as the use of "[m]ultilateral insurance reserved for debt beneath preordained limits," and (2) *in medias res* proposals that relate to the revision of "IMF's lending into arrears policy"; measures to ensure interim financing during restructuring—specifically "Vienna Initiative-style debtor-in-possession financing through automatic rollovers"; and use of contingent convertible bonds—"sovereign CoCos." *Id*.

[161] *See id*. at 16–18.

[162] *Id*. at 18.

[163] Richard Gitlin & Brett House, *The Sovereign Debt Forum: A Snapshot*, CTR. INT'L GOVERNANCE INNOVATION (Feb. 15, 2014), https://www.cigionline.org/articles/sovereign-debt-forum-sdf-snapshot/ [https://perma.cc/MV58-WVUU].

[164] *Id*.

[165] *Id*.

Finally, the authors state the following:

> [T]he failure of around half of the [CACs] in the 2012 Greek debt exchange and the recent rulings in *NML v. Argentina* underscore that further efforts are needed to reduce the *ex post* costs of crisis resolution by ensuring that a restructuring can be made effective once its terms have been agreed.[166]

Based on these challenges, the authors propose the establishment of the SDF, "an incorporated non-profit, membership-based organization that would provide an independent standing body to research and preserve institutional memory on best practices in sovereign debt restructuring."[167]

5. Can We Learn from the Previous Proposals for Semi-Formal and Voluntary Dispute Resolution and Institutional Arrangements?

The semi-formal solutions discussed in this section comprise proposals in the agenda for the development of a global rule of law for SoDR; however, they are not comprehensive debt restructuring mechanisms. The IDF, SDT, and FTAP all require the use of contracts and non-binding principles. The SDF, further, proposes the creation of an institutional arrangement to complement other proposals, like the FTAP and others. The proposals discussed all take an approach that deal with specific issues. What they share is their varied attempts to (1) improve creditor coordination, (2) agree on shared principles to govern the restructuring process, and (3) facilitate dispute resolution more effectively. To a more limited extent they deal with the treatment of broader issues and outcomes such as human rights, environmental rights, and development impacts, indirectly. The extent to which this is done is by creating room for stakeholder participation that could arise in the inclusion of these issues.

These proposals came at a time when the idea of an international statute on debt restructuring did not seem politically viable. Part of the complexity includes the legal feasibility of a convention in its application to current debt. The political realities may not have changed, as there is still a preference for case-by-case approaches. However, the rationale for the creation of a comprehensive approach to restructuring and a global rule of law is to:

- create predictability and stability, through the legal certainty of norms;
- promote fairer outcomes for all parties (in the treatment of creditors and offering debtors a fresh start);
- reinforce legitimacy through its very adoption and accountability

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[166] *Id.*

[167] Schwarcz, *supra* note 62, at 16 n.88 (citing GITLIN & HOUSE, *supra* note 155); *see also* Gitlin & House *supra* note 163 ("The SDF could be incorporated as a nonprofit institution in an appropriate jurisdiction.").

of all parties;
- thwart a race to the bottom in sovereign debt regulation; and
- ensure that the normative foundation on which a new approach should be based rests on sound principles, provides mechanisms that promote and protect human rights, and accounts for the developmental concerns of vulnerable countries.

While there is indeed appeal in a more informal structure that may be perceived as promoting more flexibility, legal uncertainty should not be mistaken for flexibility, despite the thin line separating the two. Neither should legal certainty presuppose undesired inflexibility. In the end, the challenge of the SoDR framework, in the words of Daniel Bradlow,

> could be corrected if all states could agree on one entity to which to delegate the responsibility to coordinate the development of international standards dealing with economics and finance issues and social, human rights and cultural matters. Such coordination would ensure that all these factors are taken into account in processes, such as SODRs, that are ultimately holistic in nature and are experienced as such by their stakeholders.[168]

D. Approaches to Debt Restructuring from the COVID-19 Era

Recognizing the complexity of the challenges in SoDR points toward the need for creative solutions, but also viable options for sovereign debt restructuring. Proposals made within the COVID-19 era have incorporated debt swap options, like debt-equity, debt-for-nature, and debt-for-development swaps. Two proposals that incorporate some form of debt swap options include: (1) the use of climate-linked bond instruments; and (2) the use of modern-day, Brady Bond-like restructuring instruments.[169] A final proposal seeks the establishment of a special purpose vehicle, known as the Debts of Vulnerable Economies ("DOVE") fund.[170] The common thread between these initiatives is an aim to promote private creditor participation while also addressing ESG issues to varied degrees.

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[168] Daniel Bradlow, *A Parallel Lines Ever Meet? The Strange Case of the International Standards on Sovereign Debt and Business and Human Rights*, 41 YALE J. INT'L L. 236 (2016).

[169] *See generally* ULRICH VOLZ ET. AL, BOS. UNIV. GLOB. DEV. POL'Y CTR., DEBT RELIEF FOR A GREEN & INCLUSIVE RECOVERY: SECURING PRIVATE SECTOR PARTICIPATION AND POLICY SPACE FOR SUSTAINABLE DEVELOPMENT (2021); Ying Qian, *Brady Bonds and the Potential for Debt Restructuring in the Post-Pandemic Era* (Bos. Univ. Glob. Dev. Pol'y Ctr., Working Paper No. 018, 2021).

[170] Daniel D. Bradlow, *A Proposal for a New Approach to African Debt*, JUST MONEY (May 20, 2022), https://justmoney.org/daniel-bradlow-a-proposal-for-a-new-approach-to-african-debt/ [https://perma.cc/QX5Z-AUH3].

1. Linking Debt Relief to Climate Change: Debt Relief for a Green and Inclusive Recovery?

Ulrich Volz, Shamshad Akhtar, Kevin P. Gallagher, Stephany Griffith-Jones, Jörg Haas, and Moritz Kraemer have developed the proposal of a Debt Relief for a Green and Inclusive Recovery, which they describe as "an ambitious, concerted, and comprehensive debt relief initiative that should be adopted on a global scale to free up resources to support recoveries in a sustainable way, boost economies' resilience, and foster a just transition to a low-carbon economy."[171] This proposal is aimed at scaling-up investment in climate resilience and encouraging private sector participation.[172] The authors acknowledge the challenge of protracted restructuring and note the following:

> Past debt crises ought to have taught us that avoiding proactive and purposeful debt restructurings will delay recoveries and ultimately drive up the cost for debtors and creditors alike. The world is still at high risk of repeating the mistakes that resulted in two lost decades of development in the 1980s and 1990s.[173]

The proposal addresses both low- and middle-income countries' debt restructuring linked with the need to free up resources that will be aligned to climate and development goals.[174] They propose the creation of a Guarantee Facility for Green and Inclusive Recovery managed by the World Bank to incentivize private participation in restructurings.[175] The Guarantee Facility would provide credit enhancements for new bonds that would be swapped for old debt, with an element of debt relief that would be linked to policy and budgetary reforms.[176] Further, it would require that participating governments strengthen debt management, transparency, and domestic resource mobilization.

2. A New Spin on Brady Bonds in the Post-Pandemic Era?

Ying Qian has examined the Brady Bond-like debt restructurings for the post-COVID-19 era. The Brady Bond transactions were widely used in distressed debt resolution for developing countries in the 1980s–1990s and proved to be successful, especially in Latin America.[177] Brady Bonds are a transaction structure initiated by debtors with the aid of the IMF and World

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[171] ULRICH VOLZ ET AL., *supra* note 169, at 9.

[172] *See id*. at 23, 32.

[173] *Id*. at 9.

[174] *Id*.

[175] *Id*. at 3–4.

[176] *Id*. at 32 (stating that "[g]overnments receiving debt relief would develop their own Green and Inclusive Recovery Strategy," in consultation with all the relevant stakeholders).

[177] Qian, *supra* note 169, at 1.

Bank to restructure commercial debt. They resulted in haircuts and the exchange of distressed debt for secured and tradable bonds.[178] Additionally, they tied debt relief to economic policy improvement in the debtor.[179] Commercial banks participated in the restructuring "in exchange for greater assurance of collectability in the form of principal and interest collaterals."[180] In describing the structure of Brady Bond restructuring, Qian notes that,

> [t]he principal amount was usually collateralized by specially issued U.S. Treasury 30-year zero-coupon bonds, purchased by the debtor country using proceeds from loans given by the IMF or the World Bank, and the country's own foreign currency reserves. There was also a rolling interest payment guarantee, covering 12–24 months of interest payments using securities of at least double A-rated credit quality.[181]

In this proposal, debtors could motivate creditor participation by creating more attractive instruments such as state-contingent debt instruments like commodity-linked bonds.[182] The suggestion here then is to adapt this approach to address climate-related considerations, for instance through climate-linked instruments.[183] The underlying motivation is that climate initiatives are actively pursuing green/climate-related financing opportunities, and with all these financial resources available, restructuring could take advantage of this.[184]

3. Reforming the Sovereign Debt Architecture Through a Debts of Vulnerable Economies ("DOVE") Fund?

In an opinion piece published on the onset of the COVID-19 pandemic, Danny Bradlow posed the question of whether "Africa needs a DOVE fund[,] or should we starve so we can pay our debts?"[185] The proposed DOVE fund is an independent, special-purpose investment entity that purchases African foreign currency debt bonds trading "on the open market at the prevailing discount price."[186] The DOVE fund could also be linked to broader social and environmental considerations, for example by linking restructuring to climate and social impacts, by the use of international standards of the

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[178] *Id*. at 3.

[179] *Id*. at 3

[180] *Id*.

[181] *Id*. at 2.

[182] *Id*. at 12.

[183] *Id*. at 14–15, 17.

[184] *Id*. at 2.

[185] Daniel Bradlow, *Africa Needs a DOVE Fund: Or Should We Starve So We Can Pay Our Debts?*, INTER PRESS SERV. (May 19, 2020), https://www.ipsnews.net/2020/05/africa-needs-dove-fund-starve-can-pay-debts/ [https://perma.cc/KXP6-ZXD7].

[186] *Id*.; Bradlow, *supra* note 170.

fund.[187]

Bradlow describes that, after purchasing the debt instruments of countries that want to participate in restructuring, the Fund would notify other bondholders that it plans to engage in future negotiations concerning that particular African country's bonds.[188] It would then notify both debtors and markets of a debt standstill linked to an ongoing crisis in an effort to allow a country to recover from an economic shock.[189] The DOVE fund would encourage other private sector creditors to join in a similar suspension of debt payments and also to adhere to guiding principles that the DOVE fund develops.[190] Bradlow correctly points towards the fact that many financial institutions are signatories to the U.N. Principles on Responsible Investment and have internal human rights, environmental, and social policies.[191] In order to get the DOVE fund to accept a debt restructuring, Bradlow notes that it must meet the following four criteria:

> (i) [T]he restructuring process must allow for the engagement of as many African debt stakeholders as possible.
> (ii) [T]he restructuring must adhere to a set of guiding principles derived from widely accepted international standards. . . .
> (iii) [T]he restructuring must free up resources, in fact, are invested into socially and environmentally sustainable development activities. It should include a monitoring mechanism to ensure that all parties to the transaction are accountable for their compliance with its terms.
> (iv) [T]he debt restructuring must preserve, as far as possible, the debtor's access to international financial markets to the greatest extent practicable.[192]

The DOVE Fund Principles, in my opinion, are the most valuable aspect of the work done on the DOVE Fund so far, and the component that can be used immediately. These are not only timely (released in late 2022), but they are also specifically aimed at meeting the needs of African countries. The eight principles include the following:

- A restructuring process that is driven by the "*Guiding Norms"* of "credibility, responsibility, good faith, optimality, inclusiveness, and effectiveness";
- "*Transparency*," which requires information sharing;

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[187] Bradlow, *supra* note 185 (providing examples like "the UN Guiding Principles on Business and Human Rights, the Principles on Responsible Investment, and the UNCTAD Principles on Promoting Responsible Sovereign Lending and Borrowing").

[188] *Id*.

[189] *Id*.

[190] *Id*.

[191] *Id*.

[192] Bradlow, *supra* note 170.

- "*Due Diligence*," which should be conducted by both the debtors and creditors;
- "*Optimal Outcome Assessment*," which involves the parties to share on the potential outcomes of a restructuring;
- "*Monitoring*";
- "*Inter-Creditor Comparability*";
- "*Fair Burden Sharing*"; and
- "*Maintaining Market Access*."[193]

CONCLUSION

This paper has assessed approaches for SoDR reform. While the focus today is on recent frameworks like the DSSI and Common Framework, decades of learning from the scholarly literature that predates the COVID-19 pandemic remains relevant to the reform agenda but seems to have been discarded. A solution to the issues discussed thus far requires a coherent and comprehensive approach that broadly provides for orderly restructuring, protects against predatory creditor behavior, assists a debtor country in maintaining sustainable debt levels, provides for emergency financing, and ensures that human rights are fully protected. The development of a comprehensive framework is a complex task that can involve a difficult process that requires, among other things, determination of (1) the mechanism for binding both debtor governments and their creditors; (2) the mechanism's administration; and (3) the adjudication of disputes. Certain considerations must be made while developing such a mechanism, including the following:

- Should the international framework be formal (in the form of a treaty or convention) or informal (in the form of a non-binding or flexible international instrument)? If a convention is favored, how should creditors from non-signatory nations be treated?
- Who will act as the supervisory/regulatory authority? What are the body's functions, authorities, and responsibilities, as well as rules on dispute resolution?
- What procedural norms, including those governing dispute resolutions, would govern such a framework?
- What kind of debt is covered under the framework—long-term or short-term?
- Should the framework be prospective or retroactive?

The study reviewed the options for SoDR reform that have been offered so far. It revealed that while there are generally two broad approaches (the

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[193] Daniel Bradlow, *A Proposal for a New Approach to Restructuring African Eurobonds: The DOVE Fund and Principles*, SOUTH CENTRE (Nov. 4, 2022) https://www.southcentre.int/wp-content/uploads/2022/11/SV242_221104.pdf [https://perma.cc/6B99-NZN3].

contractual and statutory) that exist at the opposite ends of a spectrum, various proposals have been developed that exist within this spectrum. While what may be described as the in-between approaches that are viewed as incremental, the more recent literature on SoDR—by 'incrementalists' in particular—seems to reveal a sense of giving up on establishing a statutory mechanism, yet a global rule of law on SoDR still remains relevant. It is possible, though, that the COVID-19 pandemic will serve as a turning point in the fight for global SoDR legislation. The pandemic has not only underscored debtors' difficulties and vulnerabilities, especially in EMDEs, but it has also shown that piecemeal restructurings are not the best choice. Despite the political limitations of more ambitious reform in the short term, the conversation should not die down and more ambitious reform proposals should still be discussed among academics and policy makers.