HEALTH OF NATIONS: *PREVENTING A POST-PANDEMIC EMERGING MARKETS DEBT CRISIS*

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Currently, 60% of low-income countries are at "high-risk" of insolvency, necessitating debt relief, according to the International Monetary Fund. The enormity of the problem cannot be overstated; prospective economic collapse threatens hundreds of millions around the world.

At the same time, the tools to address these challenges are wholly inadequate. Typically, debt reduction is effectuated through statutory mechanisms; sovereign debt is a critical exception, as there is no bankruptcy court for countries. Historically, this void was filled through a complex architecture based on custom, 'soft law' and contractual mechanisms. However, that construct has grown increasing ill-suited for contemporary challenges. A new system for sovereign debt renegotiation – the Common Framework – was established in late 2020 to much fanfare. It has universally underwhelmed.

This Article is the first to analyze the Common Framework, finding that it has failed because: (i) it lacks institutional infrastructure; (ii) exacerbates conflicts amongst creditors; and (iii) delivers insufficient benefits for debtors, including unduly restricting many nations – perhaps most pertinently, Ukraine.

Yet, the Common Framework arguably remains the most viable toolset for addressing the coming sovereign debt crisis – thus, it must be amended, rather than discarded. To that end, this Article prescriptively recommends a number of steps. Most significantly, to support Common Framework implementation, the Article proposes establishing a 'Coordinating Forum' – a mechanism distinct from a court of law, instead intended to fill critical gaps in informational and coordinating infrastructure. At the same time, the Common Framework should provide greater benefits for debtors, while being open to more nations. Finally, it must require private investors to share the burden, with an emphasis on leveraging innovative ESG and climate-linked instruments – with Belize's recent restructuring, which tied debt reduction to environmental conservation, providing a template.

It is imperative that policymakers develop sufficient tools to address the coming sovereign debt storm. The economic and public health implications cannot be overstated; no nation should be forced to choose between vaccines and interest payments.

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INTRODUCTION

"60 percent of low-income countries are at high risk or already in debt distress" with "economic collapse" increasingly likely without "debt restructurings," the International Monetary Fund ("IMF") grimly warned.[1] Furthermore, "[r]ecent events in Ukraine have made the prospect of a new sovereign debt crisis both more imminent and more damaging."[2]

The enormity of the problem cannot be overstated. "We really are at risk of another lost decade for developing countries," decimating hard-won improvements in living standards and threatening hundreds of millions with abject poverty.[3] In an interconnected world, the impact would not be contained. As economies collapse, so do health systems, risking further outbreaks of Covid-19, and, possibly, worse global ailments.[4]

Especially for emerging markets, government – i.e., sovereign – finance is critical for economic development, directly affecting billions of people around the world. Coming into the Covid-19 pandemic, global debt levels were at record highs and have subsequently risen considerably, particularly for lower income nations. Now, the fundamental issue is that these countries simply owe far more than they can reasonably repay.

Debt restructuring is rarely pleasant; however, it has a history of being particularly untidy in the sovereign arena. This is in large part because of the first-order challenge of sovereign debt restructuring: there is no bankruptcy court for countries.[5] Yet, nations not infrequently run into financial difficulties, requiring a way to adjust their obligations.

Correspondingly, a complex debt resolution architecture developed based on a combination of custom, 'soft law' and contractual mechanisms. However, that "world has changed dramatically"[6] with post-2010

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[1] Kristalina Georgieva & Ceyla Pazarbasioglu, *The G20 Common Framework for Debt Treatments Must be Stepped Up*, INT'L. MON. FUND, (Dec. 2, 2021), https://blogs.imf.org/2021/12/02/the-g20-common-framework-for-debt-treatments-must-be-stepped-up/
[2] William Rhodes & John Lipsky, *Act Now to Prevent a New Sovereign Debt Crisis in the Developing World*, FIN. TIMES, (March 23, 2022), https://www.ft.com/content/faf73649-4e4e-481c-a245-55862ea644cb
[3] Jonathan Wheatley, *Poorest Countries Face $11Bn Surge in Debt Repayments*, FIN. TIMES, (Jan. 17, 2022), https://www.ft.com/content/4b5f4b54-2f80-4bda-9df7-9e74a3c8a66a; Lee C. Buchheit & G. Mitu Gulati, *Avoiding a Lost Decade - Sovereign Debt Workouts in the Post-COVID Era*, 16 CAP. MKT. L. J. 45-55 (2021).
[4] Hannah Kuchler, *Billions Required to Prevent Next Pandemic, Warns Epidemic Expert*, FIN. TIMES, (March 4, 2022), https://www.ft.com/content/dc0d8407-446d-4fb5-86a5-a628bed4d786.
[5] Anna Gelpern, *Sovereign Debt: Now What?,* YALE INT'L L. J. 47 (2016) (noting that sovereign restructuring is ultimately "a world without statutory, court-supervised bankruptcy, robust contract enforcement, or strong shared norms.")
[6] Alonso Soto, *China's Feud with Bondholders Could Reset Debt Workout Rules*, BLOOMBERG, (Oct. 25, 2020), https://www.bloomberg.com/news/articles/2020-10-25/china-s-feud-with-bondholders-could-reset-debt-workout-rules?sref=OOpRUZ8l

crises "exposing the regime's perennial failures and new shortcomings."[7] At it stands, the existing sovereign restructuring architecture appears increasingly ill-suited for the challenges ahead.

At the same time, sovereign debt restructuring is also enormously consequential, as it necessitates complex, often zero-sum, trade-offs regarding everything from healthcare to infrastructure to education spending. Millions of people have to live with those choices for decades, if not generations, to come.

During the pandemic, the world's poorest nations faced a "stark" dilemma, aptly expressed by Ethiopia's Prime Minister in the New York Times: "*Do we continue to pay toward debt or redirect resources to save lives and livelihoods?*"[8] Attempting to ease the burden, the Group of Twenty ("G20"), an intergovernmental forum of the world's largest economies, undertook two debt relief measures to support poor nations: (i) the Debt Service Suspension Initiative ("DSSI"); and (ii) the Common Framework for Debt Treatment Beyond the DSSI (the "Common Framework").

Enacted in April, 2020, the DSSI deferred – but did not reduce – poor nations' scheduled debt payments to free up funds for public health. The program expired on December 31, 2021 and was not extended.

The DSSI had two critical failings. First, "suspending payments rather than cancelling means countries will continue to pile up interest and face even bigger debt levels next year."[9] Second, private creditors were not required to provide debt relief, but merely asked to do so 'voluntarily.'[10] Few did so; "[r]egrettably, only one private creditor participated," the World Bank dryly noted.[11]

The G20 attempted to address the DSSI's failings through its November, 2020 Common Framework, which contemplates debt reductions and mandates that private creditors participate on "comparable terms."[12] So far, only three nations have attempted to use the Common Framework, and none have completed a restructuring. Yet, participants have experienced swift credit rating downgrades and degradation in market access. "[T]he Common Framework is yet to deliver on its promise," according to IMF Managing Director, Kristalina Georgieva; other have been less charitable, finding that it "appears to have failed."[13]

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[7] Anna Gelpern, *Sovereign Debt: Now What?,* YALE J. INTL LAW 46 (2016).
[8] Abiy Ahmed, *Why The Global Debt Of Poor Nations Must Be Canceled*, N.Y. TIMES, (April 30, 2020), https://www.nytimes.com/2020/04/30/opinion/coronavirus-debt-africa.html (Abiy Ahmed, Prime Minister of Ethiopia calling for debt relief, and further noting "[l]ives lost during the pandemic cannot be recovered.")
[9] Andrew England, Jonathan Wheatley & James Politi, *G20 Agrees Debt Relief for Low Income Nations*, FIN. TIMES, (April 15, 2020), https://www.ft.com/content/5f296d54-d29e-4e87-ae7d-95ca6c0598d5
[10] *See infra*, II.A.
[11] *See infra*, n. 128 and accompanying text.
[12] *See infra*, II.B.
[13] *See supra*, n. 1-2.

With that premise, this Article – the first to analyze the Common Framework – then explores two critical questions: why has the Common Framework failed, and, how can it be improved?

Some aspects of the Common Framework's underperformance reflect limitations inherent to debt restructuring without a dedicated forum; others appear to be of the mechanism's own making. Based on a comprehensive analysis of the full universe of pandemic-period sovereign restructurings, this Article attributes the Common Framework's failure to three sets of factors.

First, the Common Framework lacks sufficient institutional infrastructure to be effective. Commentators have observed that the "G20 has provided very few details on how the Framework will be operationalized."[14] The pre-pandemic restructuring architecture was imperfect, but provided some semblance of order and practical, if not legally binding, precedent. The Common Framework risks displacing this construct without replacing it with a comparable institutional structure. As a closely related matter, the Common Framework does little to address widely prevalent disclosure deficiencies, which have been identified as a critical roadblock to debt resolution – leading to a bitter impasse in Zambia's ongoing restructuring, for instance.[15]

Second, conflicts amongst creditors – with which sovereign restructuring is exceptionally rife – are exacerbated, rather than mitigated by the Common Framework.[16] As a threshold matter, private investors and the 'official sector' of governmental entities have inherently different interests; investors care about returns, governments tend to emphasize policy objectives. While the Common Framework rightly requires private creditors to share the burden, it does little to define how "comparable treatment" for them would be assessed or applied, setting the stage for protracted disputes. Further, against an overall more litigious sovereign debt backdrop, it is increasingly common for creditors to fight amongst themselves, forming competing groups and making it more difficult to reach an accord.

Third, the Common Framework has under-delivered for debtor nations. Utilizing it carries real costs – including debt downgrades and loss of market access – but, as of yet, few realized benefits.[17] At the same time, its scope and eligibility standards appear inapposite for the broader normative goal of addressing a likely emerging market debt crisis coming out of Covid-19. Many eligible nations are ill-suited for the

[14] CHRIS SUCKLING, THE G20'S COMMON FRAMEWORK, IHSMARKIT (March 2021).
[15] *See infra*, III.A.
[16] *See infra*, III.B.
[17] Stuart Culverhouse, *The G20's Common Framework Six Months On*, TELLIMER, (July 30, 2021), https://tellimer.com/article/the-g20s-common-framework-six-months-on ("Indeed, rather than encourage others to follow, perhaps the mixed reaction to Ethiopia's request has deterred others from doing so.").

Common Framework structure. Others, most in need of help are left out, including Sri Lanka, Lebanon and Ukraine.[18]

Yet, while the Common Framework has underwhelmed, it remains the most viable toolbox for resolving the coming sovereign debt crisis – thus, it must be improved, rather than discarded. To that end, this Article prescriptively suggests number of accretive steps towards facilitating resolution of sovereign distress coming out of the Covid-19 pandemic. The economic and public health implications cannot be overstated; no nation should have to choose between vaccines and interest payments.

To address the Common Framework's insufficient institutional infrastructure, this Article recommends establishment of a time-bound 'Coordinating Forum' to facilitate implementation. While the need to bind creditors is an oft-expressed purpose of a statutory bankruptcy forum, an additional, sometimes underappreciated, benefit is the shared infrastructure it provides. Reflecting that, the proposed 'Coordinating Forum' – wholly distinct from a court of law, or even restructuring architecture – would instead operate as shared informational and coordinating infrastructure between creditor groups and amongst individual parties.[19] The benefits could be vast, given extensive coordination, informational and process-oriented problems plaguing ongoing restructurings.

Additionally, in order to be effective, the Common Framework must offer more value for debtors. To that end, the Article recommends adopting a 'debt standstill' – or stay on payments and other contractual obligations – for countries utilizing the Framework. This would benefit both debtors and creditors by allowing the parties to focus on negotiations. In addition, the Article recommends expanding Common Framework access, so that those currently excluded may avail themselves of its now-expanded protections – with Sri Lanka, Lebanon and Ukraine being perhaps the most pertinent examples.[20]

At the same time, "comparability of treatment" – requiring private creditors to share the burden of debt relief – must be maintained, as doing otherwise risks a wealth transfer from taxpayers to investors. Yet, the requirement must also be clarified in scope and practical application. To that end, this Article recommends an emphasis on integrative solutions through instruments with asymmetric value to the respective parties, thus leveraging the range of distinctive interests inherent to a sovereign debt restructuring.

A number of long-standing and newly-developed strategies are well-suited to the task, including contingent instruments, tied to inputs such as GDP growth, and ESG-based structures, such as debt-for-

[18] *See infra*, III.C.
[19] *See infra*, IV.A.
[20] *See infra*, IV.B.

conservation swaps. Belize's recent restructuring, for instance, featured a transaction where investors accepted a slightly lower payment in exchange for the nation committing to fund specified nature conservation efforts.[21] Such methods hold particular potential by helping to ameliorate multiple challenges through one integrative solution.[22]

This Article is organized in four parts. Part I provides critical background regarding sovereign debt, focusing on distinctive features of sovereign obligations and tracing the historical arc of debt restructuring constructs. It then details how changes in the market have rendered the existing framework inapposite to contemporary needs. Part II describes in detail the G20's pandemic debt relief initiatives – the DSSI and Common Framework – and outlines sovereign restructurings in that period. Through examination of those recent matters, as well as historical precedents, Part III analyzes why the Common Framework has failed. Part IV prescriptively suggests ways in which the Common Framework can be improved by addressing the identified failings, and briefly concludes.

I. SOVEREIGN DEBT: MACROECONOMIC & LEGAL FOUNDATIONS

Sovereign debt – in simplest terms, obligations issued by the public sector – represents a unique class of asset, from both a descriptive and normative perspective. In descriptive terms, it is characterized by "limited legal enforceability," impacting instrument structure and fundamental lender-borrower dynamics.[23] Normatively, much of the distinctiveness stem from the nature of the borrower. A company is a nexus of contracts – legal fiction; a sovereign is a collective of humans, there is far less fictional about it.

Especially for emerging markets, government finance is critical for economic development and thus the lives of billions of people around the world. At the same time, sovereign restructuring is also exceptionally complex – and consequential. In the 1980s, for instance, a wave of sovereign distress resulted in what has been termed a "lost decade."[24] Today, that risk is ominously present; 60% of low-income nations are "at high risk or already in debt distress," the IMF warned.[25]

This Part I sets the stage for the Article's broader discussion. It is organized in three sections. First, it provides a brief overview of sovereign debt, focusing on the key players and instruments. Second, it

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[21] *See infra*, IV.C.
[22] AFKE ZEILSTRA, DEBT-FOR-CLIMATE: HITTING THREE CRISES WITH ONE SHOT? ATRADIUS (2022).
[23] Stephen Kim Park & Tim R Samples, *Distrust, Disorder, And the New Governance of Sovereign Debt*, HARVARD INTL L.J., (2021) (observing that "Sovereign debt is distinguished from corporate debt by its limited legal enforceability.").
[24] Lee C. Buchheit & G. Mitu Gulati, *Avoiding a Lost Decade - Sovereign Debt Workouts in the Post-COVID Era*, 16 CAP. MKT. L. J. 45-55 (2021).
[25] *See supra*, n. 1.

discusses the unique aspects of sovereign distress and debt restructuring. Finally, it outlines how the sovereign debt construct has evolved, resulting in new challenges for which the existing restructuring architecture appears increasingly ill-fitted.

A. Background & Taxonomy

Some contractual, structural and economic dimensions of sovereign obligations parallel the commercial, corporate counterpart.[26] Other critical features are distinct, including legal priority, enforcement and insolvency resolution.[27] Countries also borrow money for many of the same reasons as companies: they believe that they have sufficiently attractive opportunities with returns in excess of borrowing costs.[28] A key distinction, of course, is that this value creation is more diffuse, complex and non-linear than might be the case for commercial entities.[29]

1. Key Players

The complexity underlying sovereign borrowing necessitates a relatively unique mix of players, including other governments and supranational organizations. Broadly speaking, there are three core categories of lenders to sovereigns: (i) multilateral organizations, or international financing institutions ("IFI"); (ii) bilateral lenders; and (iii) the private sector.[30] Both multilateral and bilateral lenders are part of the "official sector," in other words, organizations ultimately reporting to governments and thus part of the political structure.[31]

Multilateral organizations include the IMF, World Bank and regional development banks. The IMF and World Bank were both founded in 1944 at the Bretton Woods conference with "complementary

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[26] Notably, many salient issues underlying sovereign debt, are best described through *macro*economics – the performance, structure and behavior of an economy as a whole—rather than microeconomics, which informs much of the economic analysis of law, particularly in respect of corporate governance, finance and distress. This is because sovereign debt endogenously implicates considerations including currency, balance of payments and monetary policy, which are all exogenous for corporate participants in the economy. Simply put, governments make fiscal and monetary decisions which impact companies, but are out of those entities' control.
[27] Mitu Gulati & George Triantis, *Contracts without Law: Sovereign Versus Corporate Debt*, U. CIN. L. REV. (2007).
[28] Additionally, borrowers may take on credit to refinance existing obligations, though the underlying logic is not dissimilar.
[29] The nature and structure of borrowing instruments is distinct for different types of economies, with sovereign debt encompassing the full spectrum between the safest and simplest securities, and some of the most complex instruments. For instance, U.S. treasuries are perhaps the simplest and most liquid financial instruments available, considered the financial equivalent of cash. In contrast, emerging market sovereign debt can be much higher risk and complexity, typically associated with specialist investors.
[30] Lee Buchheit, et al, HOW TO RESTRUCTURE SOVEREIGN DEBT: LESSONS FROM FOUR DECADES, PETERSON INST. INTL. ECON. at 4 (2019) (henceforth, "HOW TO RESTRUCTURE SOVEREIGN DEBT").
[31] As discussed below, these entities thus may have incentive structures at times distinct from purely 'commercial' parties. *See infra* III.B.

missions."[32] The IMF broadly focuses on crisis amelioration while the World Bank emphasizes economic development. Due to the interplay between these issues, the two organizations often collaborate. For our purposes, core IFI distinguishing characteristics are that their capital is supplied by multiple member nations and that they are specialists in working with developing nations, especially in times of crisis.[33]

Bilateral lenders refer to capital provided by individual nations, oftentimes through a specialized agency or organization. Typically, bilateral lending involves elements of concessionary or aid-oriented financing.[34] Historically, the bulk of this lending came from developed markets, largely the U.S. and Europe. More recently, a growing portion of bilateral lending has been supplied by large, fast-growing emerging markets. China, largely through its Belt & Road initiatives, has been most active, becoming the single largest bilateral lender. India, Saudi Arabia and the UAE have also extended significant capital.[35]

The private sector presents the most heterogenous and, for our purposes, complex category of lenders. Starting around the 1970s, private sector sovereign lending was dominated by large 'money center' banks, which were closely regulated and thus indirectly connected to their respective governments.[36] Over time, emerging markets matured, incorporating greater issuance of more widely syndicated bonds.[37] This evolution has introduced an expansive mix of new players into the sovereign financing and distress arena, ranging from mutual fund complexes and sovereign wealth funds to more aggressive hedge funds.[38]

2. Sovereign Capital Structure

The ex-post nature of remedies often significantly influences the ex-ante structure of borrowing instruments. Here, sovereign obligations are characterized by "limited legal enforceability" relative to corporate debt.[39] While sovereigns often waive immunity from suit, and are subject to Foreign Sovereign

[32] World Bank Group, *The World Bank Group and the International Monetary Fund (IMF)*, https://www.worldbank.org/en/about/history/the-world-bank-group-and-the-imf
[33] The World Bank is, amongst other functions, the leading development bank, specializing capital to foster economic growth and development. The IMF more often acts as a 'crisis lender' with extensive institutional expertise in distress resolution. The IMF's capital is provided by its members, with proportions based on their ownership share
[34] Lee Buchheit, et al, HOW TO RESTRUCTURE SOVEREIGN DEBT: LESSONS FROM FOUR DECADES, PETERSON INST. INTL. ECON. at 4 (2019).
[35] Kristalina Georgieva & Ceyla Pazarbasioglu, *The G20 Common Framework for Debt Treatments Must be Stepped Up*, INTL MON. FUND, (Dec. 2, 2021), https://blogs.imf.org/2021/12/02/the-g20-common-framework-for-debt-treatments-must-be-stepped-up/
[36] Ian Clark, et al, *Sovereign Debt Restructurings in Latin America: A New Chapter*, WHITE & CASE, (Oct. 25, 2021), https://www.whitecase.com/publications/insight/latin-america-focus/sovereign-debt
[37] *See infra*, I.B., discussing London club approach to debt restructuring.
[38] *See infra*, I.C.
[39] Stephen Kim Park & Tim R Samples, *Distrust, Disorder, And the New Governance of Sovereign Debt*, HARVARD INTL L.J., (2021) (observing that "Sovereign debt is distinguished from corporate debt by its limited legal enforceability.").

Immunity Act jurisdiction in the U.S., investors tend to discount the practical value of potential litigation.[40] Reflecting these unique considerations, four dimensions of sovereign debt are particularly relevant: (i) security; (ii) priority; (iii) governing law; and (iv) currency.

First, because of limitations on enforcement and exercise of liens, sovereign borrowing is typically on an unsecured basis, and thus supported by tax revenues.[41] That said, in something of a growing trend, obligations are sometimes secured by circumscribed revenue streams, most often commodity revenues or royalties.[42] Though "generally excluded"[43] from prior restructurings, that status may be shifting as the obligations grow. Such claims are, for instance, included in ongoing restructurings for Chad and the Republic of the Congo.[44]

At the same time, the largely unsecured nature of obligations does not mean that all creditors are on equal footing. To the contrary, a relatively complex priority hierarchy has developed amongst the different lender types.

Obligations to multilateral organizations are understood to be 'preferred' to all others and thus repaid in full before bilateral or private obligations – essentially a super-seniority analog.[45] The priority as between bilateral and private obligations is more complex. As a general proposition, "[b]ilateral lenders regard their credits. . . as senior to the commercial debts of the sovereign borrower," and common restructuring convention is understood to require at least "comparable" treatment, with potential for bilateral creditor seniority.[46] However, recent research has found that "[i]nconsistent with convention, bilateral (government-to-government) official loans are not senior to private creditors."[47] This issue is likely to be a major point of contention in ongoing and future restructurings.[48]

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[40] W. Mark C. Weidemaier, *Sovereign Immunity and Sovereign Debt*, 2014 U. ILL. L. REV. 67, 89–101, 106–07 (2014).
[41] "In short, it is relatively easy for creditors to get court judgments against a defaulting sovereign but relatively difficult for them to enforce those judgments." HOW TO RESTRUCTURE SOVEREIGN DEBT at 3.
[42] *See infra*, III.B, discussing Chad and the Congo.
[43] HOW TO RESTRUCTURE SOVEREIGN DEBT at 5 ("An important question is what categories of debt should be included in the restructuring pool. . . Any senior or collateralized debt obligation is also generally excluded.")
[44] *See infra*, III.B.
[45] An analog might be the super-priority debtor-in-possession structure common in United States bankruptcy. However, there are two principal distinctions. First, IFI facilities are often in place before bankruptcy. Second, DIP financing is subject to a competitive bidding process, as well as court review and approval.
[46] HOW TO RESTRUCTURE SOVEREIGN DEBT at 5. ("Bilateral lenders regard their credits—because they are not extended for profit but for public policy reasons, such as crises response, official development assistance, and trade development—as senior to the commercial debts of the sovereign borrower. . . . commercial lenders have sometimes contested this position.")
[47] Matthias Schlegl, Christoph Trebesch & Mark L.J. Wright, *The Seniority Structure of Sovereign Debt*, NBER, (2019) (confirming IMF super-seniority, followed by other IFIs)
[48] *See infra*, III.

Third, sovereign instruments can be issued under local or foreign law. While foreign law, typically New York or London, is more common, some sovereigns have expansive local law obligations – for instance, prior to its last restructuring Argentina had about $60 billion USD-equivalent of local law debt.[49] This is particularly consequential in a restructuring context, as the sovereign can, under certain circumstances, leverage the legislative process to make wholesale contractual changes, as occurred with Greece and Barbados.[50]

Finally, sovereign debt can be denominated in local or foreign currency, typically a 'reserve currency' such as U.S. dollars or Euros. All things being equal, a nation generally prefers to borrow in its own currency because, inflationary pressure aside, it can always print more. That precludes balance of payment issues which often lead to sovereign distress. Creditors, however, often prefer to lend in lower volatility "reserve" currencies, like dollars or Euros. In a recent example of this issue, Russia, which is subject to broad sanctions for its invasion of Ukraine, is seeking to exercise a contractual feature allowing it to repay bondholders in rubles, instead of dollars or euros.[51]

B. Sovereign Distress & Restructuring

From a legal perspective, sovereign debt restructuring is night-and-day relative to corporate processes, such as Chapter 11.[52] The most critical difference is that there is no centralized forum or process for adjusting the debts of a sovereign nation.[53] The myriad, complex reasons for this are largely rooted in

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[49] *See infra*, III.B.

[50] HOW TO RESTRUCTURE SOVEREIGN DEBT at 10-11; Patrick Bolton, Ugo Panizza & Mitu Gulati, *Legal Air Cover,* J. FIN. REG., Vol. 7, Issue 2, October 2021, 189–216 (describing impact of Greek legislative changes to debt instruments).

[51] Maria Elena Vizcaino, Irene Garcia Perez & Giulia Morpurgo, *Radio Silence on Russia Debt Payments Keeps Default Risk In Play*, BLOOMBERG, (March 16, 2022), https://www.bloomberg.com/news/articles/2022-03-16/russia-s-watershed-moment-for-bonds-is-a-117-million-payment?sref=OOpRUZ8l

[52] Thus, unlike the context for companies or individuals – where bankruptcy waivers are largely impermissible – for sovereign borrowers, debt restructurings are, in highly simplified terms, carried out through bilateral creditor negotiations followed by 'consensual' contract modifications. *See In re Weitzen*, 3 F. Supp. 698 (S.D.N.Y. 1933) (holding contractual agreement to waive the benefit of bankruptcy is unenforceable); *Fallick v. Kehr*, 369 F.2d 899, 904 (2d Cir. 1966) (noting in dictum that advance agreements to waive the benefits of bankruptcy are void); *In re Gulf Beach Dev. Corp.*, 48 B.R. 40, 43 (Bankr. M.D. Fla. 1985) (holding "the Debtor cannot be precluded from exercising its right to file Bankruptcy and any contractual provision to the contrary is unenforceable as a matter of law."); *See also*, Marshall E. Tracht, *Contractual Bankruptcy Waivers: Reconciling Theory Practice and Law,* 82 CORNELL L. REV. 301 (1997).

[53] Mooney, Charles W. Jr., *A Framework for a Formal Sovereign Debt Restructuring Mechanism: The KISS Principle (Keep It Simple, Stupid) and Other Guiding Principles*, MICH. J. INTL LAW (2015); William W. Bratton & G. Mitu Gulati, *Sovereign Debt Reform and the Best Interests of Creditors*, VAND. L. REV. (2004) ("The IMF has proposed a minimal bankruptcy architecture, one that would trump [unanimous action clauses] and facilitate restructuring in a majority action framework. The United States Treasury agreed on the need for majority action, but has registered a contractarian objection to the IMF's plan for a new statutory scheme."); *See* also Lev Breydo, *The IMF's Way Forward for Sovereign Restructuring*, REG. REV. (Dec. 17, 2014),

matters of sovereignty and jurisdiction.[54] Over the years, a number of suggestions have been put forth to establish a formal sovereign distress resolution framework.[55] Perhaps most prominently, in the early 2000's, the IMF proposed a sovereign debt restructuring mechanism (SDRM).[56] Despite "receiv[ing] support," the SDRM was ultimately unsuccessful, largely due to resistance from the U.S. as well as the private sector.[57] At present, there appears to be "little political enthusiasm for a resurrection of proposals for an institutionalised sovereign bankruptcy regime."[58]

A formal restructuring process is well-understood to confer a range of benefits to both the debtor and its creditors, including preventing a 'race' for limited assets, mitigation of coordination and collective action problems amongst parties, and binding 'hold-out' creditors.[59] Lacking a formal restructuring platform has meant that these issues continue to play a large role in sovereign distress.[60] Nonetheless, resolution of sovereign restructuring has occurred through a combination of 'soft law,' custom and contractual mechanisms.[61] The processes evolved over time, largely as a function of the respective constituencies involved.

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https://www.theregreview.org/2014/12/17/breydo-imf-restructuring/ (discussing IMF proposal for a sovereign restructuring mechanism); Patrick Bolton, et al, *Born Out of Necessity: A Debt Standstill for Covid-19* at 6, CENTER ECON. POLICY RESEARCH, (April 2020).

[54] *Id.*

[55] Odette Lienau, *The Challenge of Legitimacy in Sovereign Debt Restructuring*, 57 Harvard International Law Journal 151-214 (2016) (noting that during WWII, "Harry Dexter White, special adviser to the U.S. Treasury on international financial issues at the time, envisaged a dedicated commission that 'could approach the problem [of sovereign debt] with a great deal more objectivity than could be true of a bondholders' committee" but that such mechanism "never made it into the modern international economic order.")

[56] See ANNE O. KRUEGER, A NEW APPROACH TO SOVEREIGN DEBT RESTRUCTURING (2002), http://www.imf.org/external/pubs/ft/exrp/sdrm/eng/sdrm.pdf

[57] Mooney, Charles W. Jr., *A Framework for a Formal Sovereign Debt Restructuring Mechanism: The KISS Principle (Keep It Simple, Stupid) and Other Guiding Principles*, MICH. J. INTL LAW (2015) (noting "The [SDRM] proposal received support, but was eventually abandoned. One factor that contributed to its demise was the unwillingness of IMF members to submit to a tribunal that would encroach on a state's sovereignty. Another determinative factor was the ultimate opposition of the United States. Likely related to that opposition, and perhaps its primary source, was the strong opposition of the private sector to the IMF's SDRM proposal.")

[58] Patrick Bolton, Et Al, *Born Out of Necessity: A Debt Standstill for Covid-19* at 6, Center Econ. Policy Research, (April 2020) (the authors, a group of distinguished sovereign debt and restructuring experts, noting, during the depth of the crisis, that "We perceive little political enthusiasm for a resurrection of proposals for an institutionalised sovereign bankruptcy regime.")

[59] Stephen Kim Park & Tim R Samples, *Towards Sovereign Equity,* 21 STANFORD J. L. BUS & FIN. 245-8 (2016); *See also* Douglas G. Baird, *A World Without Bankruptcy*, 50 LAW & CONTEMP. PROBS. 173, 184 (1987) (articulating the need for legal mechanisms to address collective action problems in insolvency situations); Nicholas L. Georgakopoulos, *Bankruptcy Law for Productivity*, 37 WAKE FOREST L. REV. 51, 53 (2002) (addressing the productivity aims and collective action solutions in bankruptcy law).

[60] Chuck Fang, Et Al., *Restructuring Sovereign Bonds: Holdouts, Haircuts and the Effectiveness of CACs*, EUR CENTRAL BANK, (Jan. 2020). https://www.ecb.europa.eu/pub/pdf/scpwps/ecb.wp2366~5317a382b3.en.pdf

[61] Stephen Kim Park & Tim R Samples, *Distrust, Disorder, And the New Governance of Sovereign Debt*, HARVARD INTL L.J., (2021) (analyzing 'new governance' for sovereign debt).

1. Clubs & Committees

In the back half of the 20th century, emerging market sovereign lending was largely through multilateral organizations and bilateral lenders, with large commercial banks becoming more active in the 1970s and 1980s. This stable, largely homogenous lender base allowed for debt resolution through relatively informal mechanisms. In this period, restructuring matters were largely facilitated by the development of two lender coordinating organizations: the Paris Club of bilateral lenders, and London Club of commercial creditors, typically large banks.

The Paris Club was formed in 1956 to collectively resolve restructurings and coordinate with the multilateral organizations. Its membership includes 22 nations, after adding Israel in 2014, followed by Brazil and Korea in 2016.[62] Since its formation, the Paris Club has been involved in many, if not most, sovereign restructurings, having reached 477 agreements with 101 countries, covering $612 billion of debt as of February, 2022.[63] As the organization itself notes, it "has remained strictly informal" with "no legal basis or status." Its work is instead "based on a number of rules and principles agreed by creditor countries, which facilitates the decision making process and the conclusion of agreements."

These six underlying principles are: (i) solidarity, meaning that members act as a group; (ii) consensus, regarding decision-making; (iii) information sharing, members share views and information; (iv) a case-by-case approach, with decisions tailored to each individual debtor; (v) conditionality, in other words that relief is conditioned on reforms, particularly an IMF-program, which often serves a monitoring function;[64] and (vi) comparability of treatment.[65]

That last requirement is most crucial for our purposes, as the G-20 "common framework" described below largely incorporates this language, which is understood to correspond to a similar approach.[66] "Comparability of treatment" means that "[a] debtor country that signs an agreement with its Paris Club creditors should not accept from its non-Paris Club commercial and bilateral creditors terms of treatment of its debt less favorable to the debtor than those agreed with the Paris Club."[67] There are two reasons for this provision. First, allowing the potential for better terms to other creditors would in effect mean subsidizing them through taxpayers. Second, and perhaps most pertinently, the underlying logic of

[62] Lee Buchheit, et al, HOW TO RESTRUCTURE SOVEREIGN DEBT: LESSONS FROM FOUR DECADES, PETERSON INST. INTL. ECON. at 8 (2019).
[63] Paris Club, *About Us*, https://clubdeparis.org/en (summarizing restructuring involvement to date.)
[64] Mitu Gulati & George Triantis, *Contracts without Law: Sovereign Versus Corporate Debt*, U. CIN. L. REV. (2007) (noting IMF's role as "delegated monitor[].")
[65] HOW TO RESTRUCTURE SOVEREIGN DEBT at 9
[66] *See infra*, Part II.
[67] Paris Club, *The Six Principle*, https://clubdeparis.org/en/communications/page/the-six-principles

"comparable treatment" emphasizes ensuring balance of payments issues are resolved without a need for future rounds of support.[68]

The Paris Club's debt treatment evolved over the years based on debtor needs. The currently prevailing method is the co-called Evian Approach which emphasizes "tailor-made and concessional treatments," with debt readjustment taking many forms including "flow treatment, stock-reprofiling, and stock reduction (in exceptional cases)."[69]

While the Paris Club proved effective for bilateral and multilateral collaboration, coordination with the private sector is inherently more complex. One of the key tools developed for this purpose was the London Club, formed in 1970 and comprised largely of commercial bank lenders, at times incorporating "advisory committees" with fund managers holding sovereign bonds.[70] The London Club is "characterized by its informal, collaborative, and non-institutional nature," and is convened on a case-by-case basis.[71] During the 1980's, it worked "in tandem" with the Paris Club.[72] In the emerging market debt crisis between 1982 and 1998, bank advisory committees were frequently employed, but have decreased in prominence.[73] As syndicated bonds became more common, utilization of creditor committees increased, particularly for larger matters.

As the structure of sovereign lending changed – incorporating more bonds, and non-Paris Club bilateral lending – the influence of the Paris and London clubs waned, with London in particular becoming less active. [74]

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[68] HOW TO RESTRUCTURE SOVEREIGN DEBT at 16

[69] HOW TO RESTRUCTURE SOVEREIGN DEBT at 8; *See infra*, Part II.

[70] Michel Henry Bouchet, *Country Risk, Financial Crisis, And Debt Restructuring: Paris & London Clubs*, SKEMA BUSINESS SCHOOL, (2017), https://developingfinance.org/download/cr2017/11.%20Paris%20&%20London%20Clubs%20of%20Debt%20restructuring.pdf

[71] Stephen Kim Park & Tim R Samples, *Distrust, Disorder, And the New Governance of Sovereign Debt*, HARVARD INTL L.J., 187 (2021).

[72] GONG CHENG, JAVIER DIAZ-CASSOU & AITOR ERCE, FROM DEBT COLLECTION TO RELIEF PROVISION: 60 YEARS OF OFFICIAL DEBT RESTRUCTURINGS THROUGH THE PARIS CLUB, EUROPEAN STABILITY MECHANISM, (2016), https://www.esm.europa.eu/sites/default/files/wp20.pdf

[73] Lee C. Buchheit, *Use of Creditor Committees in Sovereign Debt Workouts*, 10 Bus. L. INT'l 205-8 (2009) (noting that the more than 25 debt crises between 1982 and 1998 were distinguished by creditors being "almost exclusively commercial banks" and being instruments being "mainly syndicated commercial bank loans, inter-bank lines and trade finance instruments, not bonds.")

[74] GONG CHENG, JAVIER DIAZ-CASSOU & AITOR ERCE, FROM DEBT COLLECTION TO RELIEF PROVISION: 60 YEARS OF OFFICIAL DEBT RESTRUCTURINGS THROUGH THE PARIS CLUB, EUROPEAN STABILITY MECHANISM, (2016), https://www.esm.europa.eu/sites/default/files/wp20.pdf (noting that starting "in the 1990s . . . the securitisation of sovereign debt kick-started by the Brady Plan, [] made it more difficult to coordinate debt-rescheduling negotiations with private creditors.")

2. Contracts & Collective Action Clauses

Changing investor composition heightened the limitations of existing informal restructuring mechanisms. Particularly as more sovereign debt transitioned to bonds, which traded more freely than loans, additional new investor profiles were introduced. Reflecting the perhaps more consensus-driven approach to restructuring, before the 2000's, typical sovereign debt contracts had provisions requiring unanimity in order to make changes.[75]

That did not interact well with changing creditor norms, particularly the rise of ever-more aggressive hedge funds, including so-called "vulture" investors pursuing 'hold-out' strategies. "Hold-outs" refers to creditors who decline to support a restructuring acceptable to other creditors with the goal of leveraging their position for higher payment.[76] Perhaps most infamously, certain Argentina 'hold-out' creditors – who rejected a 2005 restructuring accepted by 90% of other holders – spent a decade litigating and attempting to seize sovereign assets all over the world, at one point impounding an Argentine warship docked in Ghana.[77]

To address 'hold-out' issues and generally facilitate restructuring, a critical contractual innovation was developed: so-called collective action clauses, or CACs.[78] CACs are essentially a mechanism to bind creditors to a transaction upon reaching a requisite threshold of votes. The provisions can be (i) 'single series,' applying to solely a particular series of bonds, or (ii) 'global,' allowing modifications to be made by bondholders aggregated across series.[79]

The CAC provisions have developed over the years, registering approximately four phases, with each round "always be[ing] accretive."[80]

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[75] William W. Bratton & G. Mitu Gulati, *Sovereign Debt Reform and the Best Interests of Creditors*, VAND. L. REV. (2004).
[76] *See* HOW TO RESTRUCTURE SOVEREIGN DEBT at 6 ('Hold-out' strategies fall within the broader approaches of 'vulture funds,' which "may approach a sovereign debt restructuring with malice aforethought; they often intend from the outset to reject a negotiated settlement and to seek a preferential recovery at the sharp end of a lawsuit. Aggressive recovery strategies of this kind have sometimes significantly disrupted the orderly resolution of sovereign debts . . .")
[77] https://www.nytimes.com/2012/10/19/world/americas/seizure-of-argentine-ship-forces-shake-up.html
[78] *See* Mark C. Weidemaier & Mitu Gulati, *A People's History of Collective Action Clauses*, 54 VA. J. INT'T L.51 (2014).
[79] Mitu Gulati & Lee C. Buchheit, *Drafting a Model Collective Action Clause for Eurozone Sovereign Bonds*, 6 CAP. MKT. L. J. (July 2011).
[80] Mitu Gulati & Lee C. Buchheit, *The Argentine Collective Action Clause Controversy* 2-7 CAP. MKT. L. J. (2020). Some sources effectively combine the first two generations of CACs, as the first generation was not applicable to sovereign debt. *See* INTERNATIONAL MONETARY FUND, THE INTERNATIONAL ARCHITECTURE FOR RESOLVING SOVEREIGN DEBT INVOLVING PRIVATE-SECTOR CREDITORS—RECENT DEVELOPMENTS, CHALLENGES, AND REFORM OPTIONS (Sept 23, 2020).

In simplest terms, the first and second generations of collective action clauses were 'single series,' allowing modifications only for specific series of bonds.[81] The issue with these vintages was that most nations have multiple series of obligations outstanding.[82] Correspondingly, a creditor with 25% of the bonds of a series could block the restructuring for that class. In 2003, Uruguay's post-restructuring bonds – the third generation of CACs – rectified this weakness by allowing "aggregation" across series of instruments through a "two-tier" (or "dual-limb") structure through which modification required votes by both 85% of outstanding principal of all bonds, as well as 66 2/3% of each series of bonds.

While the third generation improved on certain weaknesses of prior iterations, the holdout problem remained, albeit subject to a higher threshold of 34%, rather than 25%. Correspondingly, in 2014, the International Capital Markets Association developed a new set of model documents, providing an additional way to restructure debt obligations pursuant to a single, 75% vote of the entire aggregated universe if, but only if, the proposed modification is "Uniformly Applicable" to all affected series.[83] That new prong, as Professors Buchheit and Gulati observe, "was the important innovation," as it avoided the risk of a hold-out creditor blocking a transaction, but balanced this with creditor protections through the Uniformly Applicable requirement.[84]

Sovereign bonds typically incorporate the then-prevailing 'market' provisions at the time of issuance, though that is not always the case. For instance, Lebanon which is currently undergoing a complex $31 billion external debt restructuring, has exclusively second generation series-by-series CACs.[85]

[81] The first generation was originated in 1879, with English law corporate bonds that permitted a "supermajority," typically 75%, "to approve modifications to the terms of the instrument." However, the provisions did not become widespread in U.S. bonds because "Following enactment of the predecessor of Chapter 11 in the United States in 1934, the U.S. Congress decided in 1939 to ban entirely the use of collective action clauses in corporate bonds issued to the public in the United States," as Professors Buchheit and Gulati observe, Id. 2-3 In 2002, a G-10-commissioned report drafted "a model collective action clause suitable for use in sovereign bonds governed by New York law." The provision built upon the first-generation CACs to incorporate greater protections for minority bondholders. *See* Mitu Gulati & Lee C. Buchheit, *The Argentine Collective Action Clause Controversy* 2-7 CAP. MKT. L. J. (2020).
[82] The first generation refers largely to English law corporate instruments, while the second generation corresponds to adoption in sovereign debt.
[83] "The Uniformly Applicable provision "made it clear that all series had to be offered the same new instrument or other consideration or the ability to select from the same menu of new instruments." *Id.* at 5. The fourth generation provided three distinct options as it retained the other two means of debt restructuring: (i) pursuant to a series-by-series vote (with a 75% voting threshold); and (ii) on an aggregated basis by a "two-tier vote" with a 66⅔% vote of the entire aggregated universe of bondholders and a 50% vote of each series in the aggregated pool.
[84] *Id.*
[85] *See* INTERNATIONAL MONETARY FUND, THE INTERNATIONAL ARCHITECTURE FOR RESOLVING SOVEREIGN DEBT INVOLVING PRIVATE-SECTOR CREDITORS—RECENT DEVELOPMENTS, CHALLENGES, AND REFORM OPTIONS at 30 (Sept 23, 2020) (henceforth, "IMF SOVEREIGN DEBT ARCHITECTURE"). At the same time, certain other important provisions have also evolved over time, but not necessarily incorporated by all sovereigns, including modified *parri passu* clauses. *See* Robin Wigglesworth, *Pari Passu Saga 2.0?,* FIN. TIMES, (March 9, 2022),

Furthermore, the instruments often have a long duration, and thus the existing stock of sovereign bonds features a variety of CAC vintages; 95% of sovereign bonds have "some form of CACs," but 50% lack the 'enhanced' fourth generation provisions.[86] As a result, some sovereigns have bonds subject to a mix of CAC versions – an issue that featured prominently in the 2020 restructurings of Argentina and Ecuador, and is implicated in Zambia's ongoing process.[87]

C. How the World Has Changed

Sovereign debt markets and investor profiles evolved as a function of changes in economic development and growth – the broad arc of which has been highly positive in the last half century. Between 1980 and 2022, emerging market and developing economy gross domestic product grew nearly 20-fold, from $2.77 trillion to $42.13 trillion.[88]

In simplified terms, during the post-WWII era, low and middle-income nations initially generally borrowed from multilateral organizations or on a bilateral basis, as private sector investors considered emerging markets too high risk. Over time, emerging nations' capital markets matured, incorporating increasing private sector involvement, beginning with loans from large commercial banks and subsequently expanding to a more diffuse investor base through syndicated bonds.

The last decade marked four consequential trends with respect to emerging market borrowing; The kindling for another big emerging markets debt crisis has been accumulating."[89]

First, debt levels grew significantly. The inter-crisis decade of the 2010s was characterized by "a fourth wave of global debt accumulation . . . with the largest, fastest, and most broad-based increase in debt in EMDEs in five decades."[90] Government debt increased from 30.3% of GDP in 2010 to 46.6% by 2018. Emerging market capital demand met supply through yield-driven western investors in a prevailing low-rate environment.

Second, the lender base grew much more diffuse and heterogenous. This was particularly pronounced for middle-income countries, which borrowed more from the private sector. Meanwhile, many low-income

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https://www.ft.com/content/2fd1a7cc-118f-428f-9607-10d73966e2f5 (discussing how Russia did not adopt modified *parri passu* clauses in respect of its sovereign bonds.)
[86] IMF SOVEREIGN DEBT ARCHITECTURE at 30.
[87] *See infra*, Part III.
[88] Measured on a current price constant basis. *See* IMF World Economic Outlook, *GDP Current Prices – Emerging Market and Developing Economies*, https://www.imf.org/external/datamapper/NGDPD@WEO/OEMDC.
[89] https://www.ft.com/content/f7157356-e773-47c4-b05d-8624a5ccfd03
[90] M. Ayhan Kose, et al, *What Has Been The Impact Of Covid-19 On Debt?*, 2 WORLD BANK GROUP, (Nov. 2021).

nations were able to turn to the bond markets for the first time.[91] The nature of bilateral borrowing changed as well, with a much larger portion provided by China, India and other middle-income nations.[92]

Third, borrowing arrangements grew more complex and heterogenous. Part of this was a function of new lender types, with State-Owned-Enterprises ("SoEs") in particular emphasizing distinctive loan terms and structures.[93] In addition, more borrowing was on a collateralized or quasi-collateralized basis, such as lending secured by commodity revenues, with SoEs and commodity trading firms acting as significant counterparties.[94]

Finally, disclosure and information quality declined.[95] This was in large part a function of the second and third trends, with new lenders utilizing new structures with fewer historical norms around disclosure. This matter has been documented as particularly acute in respect of bilateral Chinese lending, as well as credit extended by Chinese SoEs, with one recent study finding [75%] of agreements to have provisions precluding disclosure of the obligations.[96]

As an aggregate consequence of these trends, by 2020, sovereign borrowing was larger, and all-around more complex and fragmented than at any time in history.[97] Meanwhile, the machinery of debt restructurings – developed without many of the players now at "the table" – was arguably increasingly inapposite for the changing tasks ahead.

II. COVID-19 DEBT RELIEF INITIATIVES

"The dilemma Ethiopia faces is stark: Do we continue to pay toward debt or redirect resources to save lives and livelihoods? Lives lost during the pandemic cannot be recovered." – Abiy Ahmed, Prime Minister of Ethiopia[98]

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[91] In 2020, 23 DSSI eligible countries had assigned credit ratings, suggesting that they had issued tradeable debt. None had investment grade ratings. *See* Joint Ministerial Committee of The Boards of Governors of The Bank and The Fund on The Transfer of Real Resources To Developing Countries, *Joint IMF-WBG Staff Note: Implementation And Extension Of The Debt Service Suspension Initiative*, IMF-WBG at 15, 47 (Oct. 16, 2020).
[92] *See supra*, I.A.
[93] ANNA GELPERN, *et al*, HOW CHINA LENDS: A RARE LOOK INTO 100 DEBT CONTRACTS WITH FOREIGN GOVERNMENTS, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS, (March 2021) (henceforth, "HOW CHINA LENDS.")
[94] *See infra*, Part III, discussing Chad and The Congo.
[95] WILLIAM R. RHODES, *et al*, DEBT TRANSPARENCY: THE ESSENTIAL STARTING POINT FOR SUCCESSFUL REFORM, THE BRETTON WOODS COMMITTEE, (Jan. 2022) (henceforth, "DEBT TRANSPARENCY").
[96] HOW CHINA LENDS (noting that such provisions are generally distinct from the baseline sample of contracts).
[97] By Q4, 2019, right before the start of Covid-19, total global debt totaled about $255 trillion. Sovereign debt comprised about $70 trillion, with mature markets responsible for $53.3 trillion, or 105.2% GDP, and emerging markets for $16.7 trillion, equivalent to 53.2% of GDP.
[98] Abiy Ahmed, *Why The Global Debt Of Poor Nations Must Be Canceled*, N.Y. TIMES, (April 30, 2020), https://www.nytimes.com/2020/04/30/opinion/coronavirus-debt-africa.html

Emerging market sovereigns came into the Covid-19 pandemic with record-high debt levels, a fragmented creditor base and insufficient tools for resolving distress.[99] Against these already fragile conditions, the combined macroeconomic shock and global public health crisis risked creating a full-fledged economic collapse. To mitigate against this, multilateral organizations and bilateral lenders undertook a concerted global response to support lower-income nations. However, that response proved less effective than initially hoped.

The two facets of macroeconomic shock coupled with health crisis are, unfortunately intertwined as the impact of Covid-19 left lower-income nations in an economically weaker position to support their economies and citizens.[100]

From a macroeconomic perspective, Covid-19's impact was particularly violent for emerging markets. The first quarter of 2020 saw "record" capital outflows from emerging markets, meaningfully "larger than in previous crisis episodes," including the 2008-9 financial crisis. That constrained market access and increased the cost of capital at a particularly precarious time. Further, as investors sought safe havens, emerging market currencies plunged, making it harder to service foreign currency-denominated debts.[101]

A second important implication of the Covid-19 crisis is the policy response. From a Keynesian economics perspective, the traditional fiscal remedy for a demand shock is expansionary fiscal policy to fill the demand gap – in other words, government spending to make up for reduced activity, necessitating taking on more debt. The world's advanced economies took this approach. For instance, the U.S. passed the CARES Act and subsequent COVID stimulus legislation. The world's largest economies also adopted highly accommodative monetary policy, lowering interest rates in tandem.

Lower income nations lacked such Keynesian luxuries, however.[102] Though lower global interest rates provided some tailwind, reduced market access coupled with a lower ability to support additional debt – while staying current on existing obligations – left developing markets in a particularly difficult position.

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[99] M. Ayhan Kose, et al, *What Has Been The Impact Of Covid-19 On Debt?*, 2 WORLD BANK GROUP, (Nov. 2021).
[100] Guayaquil, Ecuador's commercial capital "likely had the world's most lethal outbreak of COVID-19 per capita," according to a recent study. Daniel Alarcón, *A Pandemic Tragedy in Guayaquil*, NEW YORKER, (March 7, 2022).
[101] *See supra*, I.2.
[102] Kevin Watkins, *Delivering Debt Relief for the Poorest*, IMF FIN. & DEV., (Fall 2020), https://www.imf.org/external/pubs/ft/fandd/2020/08/debt-relief-for-the-poorest-kevin-watkins.htm ("While rich countries have exploited the privilege that comes with borrowing in their own currencies to finance vast welfare and recovery programs at rock-bottom interest rates, most poor countries entered the economic crisis triggered by COVID-19 with limited fiscal space—and that space is shrinking.")

The early months of 2020 experienced "a record 29 sovereign downgrades," eight within the 'C' range, the rung right above default.[103] The year also registered six sovereign defaults, "five times higher than the average default rate in the 1983-2020 period." A seventh sovereign, Angola, restructured just its obligations to Chinese lenders[104], but not its bonds, thus not rendering a formal default for credit rating purposes.[105]

This Part of the Article is divided in two sections, focusing on the two primary programs for pandemic debt relief: (i) the Debt Service Suspension Imitative ("DSSI"), an emergency measure meant to provide temporary crisis-period relief, which expired on December 31, 2021; and (ii) the Common Framework for post-DSSI debt restructuring (the "Common Framework" or "CF"), which is intended to operate on a post-crisis basis to provide more comprehensive relief. The need for, and challenges with, implementation of these programs illustrated how the sovereign restructuring "world has changed dramatically."[106]

A. Debt Service Suspension Initiative

Recognizing the exceptional nature of the Covid-19 pandemic, official sector creditors implemented a series of emergency support measures for lowest-income nations. The first of these measures was the DSSI, the policy of which was premised on the idea that "[c]ountries receiving the assistance would be required to commit to using the relief to 'increase social, health or economic spending in response to the crisis.'"[107] Following a March, 25, joint IMF and World Bank statement "call[ing] on all official bilateral

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[103] Fitch Ratings, *Sovereign Defaults Set to Hit Record in 2020* (May 12, 2020). Additionally, based on the IMF's April 2020 World Economic Outlook, many already-stressed emerging markets that ultimately defaulted registered GDP contractions meaningfully worse than the 2020 global average of 3%; Lebanon's economy contracted 12%, Ecuador's 6.3%, Argentina's 5.7% and Zambia's 3.6%. Unsurprisingly, those nations also experienced a more challenging economic recovery.
[104] Karin Strohecker & Joe Bavier, *Angola Negotiates $6.2 Billion Debt Relief from Creditors: IMF*, REUTERS, (Sept. 2020), https://www.reuters.com/article/us-angola-imf/angola-negotiates-6-2-billion-debt-relief-from-creditors-imf-idUSKCN26C2CP
[105] Lusa, *Angola: Only Country to Restructure Private Debt Without Rating Downgrade – UN*, MACAU BUS., (March 22, 2021), https://www.macaubusiness.com/angola-only-country-to-restructure-private-debt-without-rating-downgrade-un/ ("Angola is the only country that has managed to restructure the debt it owes to private creditors without this implying a downgrade in its rating.")
[106] Alonso Soto, *China's Feud With Bondholders Could Reset Debt Workout Rules*, BLOOMBERG, (Oct. 25, 2020), https://www.bloomberg.com/news/articles/2020-10-25/china-s-feud-with-bondholders-could-reset-debt-workout-rules?sref=OOpRUZ8l (noting that "In previous debt crises of the 1980s and 1990s, rich western governments grouped in the so-called Paris Club and commercial banks mostly from the same countries worked together to write off loans in exchange for budget cuts and promises to curb corruption.")
[107] Andrew England, Jonathan Wheatley & James Politi, *G20 Agrees Debt Relief for Low Income Nations*, FIN. TIMES, (April 15, 2020), https://www.ft.com/content/5f296d54-d29e-4e87-ae7d-95ca6c0598d5

creditors to suspend debt payments from IDA countries that request forbearance,"[108] the G-20, a coordinating group of developed and developing nations, formally adopted the DSSI on April 15, 2020.[109]

Contextually, it is essential to recall that April 2020 represented a point of maximum uncertainty regarding the pandemic. Given the severe pressure building on developing markets, the urgent need for significant action became clear, but the particulars were less so. Thus, the DSSI emphasized ease of implementation over comprehensiveness, with applications under a simple, common term sheet.[110] The eligibility criterion was based on World Bank subsidized borrowing programs, and thus limited to 73 of the lowest-income countries in the world. [111] As discussed below, this standard was unduly limiting, excluding many nations in need of debt relief.

Crucially, the DSSI operated solely as a debt deferment, rather than reduction, intended to be 'NPV-neutral' for the lenders,[112] and repaid over 5 years.[113] It was only 'applicable' to bilateral creditors within the G-20, as well as the Paris Club which adopted it.[114] The IFIs, which recommended the DSSI, did not participate directly[115], but supported lower-income nations in other ways, including the IMF's Catastrophe Containment and Relief Trust.[116] Private sector participation was encouraged, but 'voluntary,' a problematic dimension of the program.[117]

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[108] Kristalina Georgieva & David Malpass, *Joint Statement World Bank Group and IMF Call to Action on Debt of IDA Countries*, IMF, (March 25, 2020), https://www.imf.org/en/News/Articles/2020/03/25/pr20103-joint-statement-world-bank-group-and-imf-call-to-action-on-debt-of-ida-countries

[109] G20 Research Group, *Communiqué: Virtual Meeting of the G20 Finance Ministers and Central Bank Governors Riyadh, Saudi Arabia*, G20, (April 15, 2020), http://www.g20.utoronto.ca/2020/2020-g20-finance-0415.html (henceforth, "G20 DSSI Communique").

[110] Professor Gelpern aptly described the DSSI as: "an attempt at quick resource mobilization [] distinct from debt or debt service relief, an attempt that brackets most debt-related issues for another day." *See* Anna Gelpern, *Now That Everyone Is on The Standstill Bandwagon ... Where To? Part I*, CREDITSLIPS, (April 20, 2020), https://www.creditslips.org/creditslips/2020/04/now-that-everyone-is-on-the-standstill-bandwagon-what-next-part-i.html

[111] Formally, eligibility was limited to all IDA-eligible nations and "least developed countries," as defined by the U.N. *See* G20 DSSI Communique.

[112] According to the term sheet, "The suspension of payments will be NPV-neutral," with "Treatment [to] be achieved either through rescheduling or refinancing." *See* G20 DSSI Communique.

[113] Initially, the DSSI contemplated a 3-year repayment period, which was subsequently extended to 5 years with a 1-year grace period. Statement, *Extraordinary G20 Finance Ministers and Central Bank Governors' Meeting*, G-20, (Nov. 13, 2020).

[114] There is significant overlap between the two, but also some distinctions with a few countries being members of one group but not the other.

[115] Alexander Nye, *Who's Afraid of Some (Not So Big Or Bad) Debt Relief?*, YALE SOM, (July 24, 2020), https://som.yale.edu/blog/whos-afraid-of-some-not-so-big-or-bad-debt-relief (describing a potential issue of IFI participation including reducing their lending capacity, and providing private creditors 'a free ride.')

[116] Press Release, *IMF Executive Board Approves Immediate Debt Relief For 25 Countries*, IMF, (April 13, 2020), https://www.imf.org/en/News/Articles/2020/04/13/pr20151-imf-executive-board-approves-immediate-debt-relief-for-25-countries

[117] *See infra*, II.B.2.

The DSSI was in effect between May 1, 2020 and December 31, 2021.[118] Of 73 eligible nations, 48 participated, receiving, in the aggregate, $12.9 billion of official sector payment deferrals, with $4.6 billion coming from the Paris Club.[119] Despite some initial uncertainties regarding China's level of participation[120] – it is a G-20 member, but not part of the Paris Club – it has been responsible for "by far the biggest contribution to the DSSI," deferring $5.7 billion of payments.[121] That said, the Paris Club also argued that the relatively low uptake of participation – and aggregate relief far short of the $20 billion target for 2020 alone – was because China deterred some eligible nations from seeking DSSI relief.[122]

While helpful for poorer nations during a time of great peril, beyond its inability to reduce debt owed, the DSSI suffered from a number of additional key weaknesses, including overly-limited eligibility criteria and lack of private sector participation.

1. Eligibility Criteria

The DSSI only applied to 73 so-called IDA nations, which refers to countries "with low per capita incomes" able to borrow from the International Development Association ("IDA"), one of the World Bank's operational lending categories. The other category is nations able to borrow from the International Bank for Reconstruction and Development ("IBRD"), which provides financing to middle income countries. So-called 'blend' countries are an intermediate category of DSSI-eligible IDA nations able to borrow from the IBRD.[123]

[118] Benjamin Fox, *G20 Agrees 'Final Extension' To $10 Billion Debt Service Suspension Scheme*, EURACTIV, (April 8, 2021), https://www.euractiv.com/section/economy-jobs/news/g20-agrees-final-extension-to-10-billion-debt-service-suspension-scheme/; *See* Press Release, *The Paris Club Has Fully and Successfully Implemented The DSSI And Its Extensions*, PARIS CLUB, (Feb. 23, 2022), https://clubdeparis.org/en/communications/press-release/the-paris-club-has-fully-and-successfully-implemented-the-dssi-and-its
[119] https://www.worldbank.org/en/topic/debt/brief/covid-19-debt-service-suspension-initiative
[120] Andrew England, Jonathan Wheatley & James Politi, *G20 Agrees Debt Relief for Low Income Nations*, FIN. TIMES, (April 15, 2020), https://www.ft.com/content/5f296d54-d29e-4e87-ae7d-95ca6c0598d5 ("China, the biggest bilateral lender to many poorer nations, has granted debt relief to creditor nations in the past but has preferred to do so on a bespoke basis rather than as part of any co-ordinated effort.")
[121] Jonathan Wheatley, *Chinese Loans Deter Poor Nations from Seeking Debt Relief, Says Paris Club Chair*, FIN. TIMES, (Dec. 30, 2021), https://www.ft.com/content/db7753b7-a2b5-469c-9441-e85afb44ea12
[122] Jonathan Wheatley, *Chinese Loans Deter Poor Nations from Seeking Debt Relief, Says Paris Club Chair*, FIN. TIMES, (Dec. 30, 2021), https://www.ft.com/content/db7753b7-a2b5-469c-9441-e85afb44ea12
("Some countries have decided not to apply for the final [DSSI] extension as they didn't want to create difficulties with China," [Emmanuel Moulin, chair of the Paris Club] said. "Some countries have preferred to talk to China and other creditors about new money rather than requesting help under the DSSI.'")
[123] These countries are at base IDA-eligible and thus for purposes of simplicity correspond to that category. *See* World Bank Group, *How Does the World Bank Classify Countries?* https://datahelpdesk.worldbank.org/knowledgebase/articles/378834-how-does-the-world-bank-classify-countries.

Generally, IDA and IBRD eligibility maps along income levels, with low-income nations corresponding to IDA and middle income to IBRD.[124] Though, the demarcation is imperfect, as shown in the table below which plots the World Bank operational lending categories against its income-based groupings.[125] For instance, low-income countries are all IDA eligible (with the exception of North Korea). Lower-middle income countries are somewhat more diffuse, with about half IDA eligible, 10 'blend' and 17 IBRD eligible. Upper middle-income countries are largely IBRD eligible, though 6 are IDA-eligible and 5 are 'blend.' 10 high income countries are eligible for IBRD, but the other 69 are generally ineligible for any of the World Bank programs, generally suggesting those to be wealthier nations.

		World Bank Operational Lending Category			
	Total	**IDA**	**Blend**	**IBRD**	**None**
High income	79	0	0	10	69
Upper middle income	55	6	5	42	2
Lower middle income	55	27	10	17	1
Low income	27	26	0	0	1
Total	**216**	**59**	**15**	**69**	**73**

The operational lending categories do not take into account fiscal or debt-specific dimensions. Thus, a country with lower income but also limited debt would be DSSI eligible, while one with slightly higher (though still relatively low) GNI-based income but very high debt would not be. For instance, some nations in severe financial distress, like Sri Lanka, narrowly miss eligibility cut-offs.[126] Other nations, like Lebanon, have seen income levels collapse due to financial distress, but are nonetheless not IDA eligible.

Some middle-income nations – including, most pertinently, Ukraine – are likely going to need significant debt assistance, but are also ineligible under the current terms.

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[124] The income-based groupings are based on level of economic development, which is assessed through gross national income (GNI) per capita, in U.S. dollars. GNI per capital computes the aggregate national income, calculated in accordance with the World Bank's Atlas methodology, and divides by the number of people. World Bank Data Compilation Methodology, *The World Bank Atlas Method - Detailed Methodology*, WORLD BANK GROUP, https://datahelpdesk.worldbank.org/knowledgebase/articles/378832-what-is-the-world-bank-atlas-method The classifications are: (i) under $1,045 for low-income; (ii) $1,046 to $4,095 for lower-middle income; (iii) $4,096 to $12,695 for upper-middle income; and (iv) above $12,695 for high-income. *See* Nada Hamadeh, Catherine Van Rompaey & Eric Metreau, *New World Bank Country Classifications by Income Level: 2021-2022*, WORLD BANK GROUP, (July 1, 2021), https://blogs.worldbank.org/opendata/new-world-bank-country-classifications-income-level-2021-2022.

[125] For the sake of relative simplicity, this Article will, at times, use the term emerging market and developing economies, or "EMDEs", to reference collectively upper-middle income, lower middle income and lower income nations.

[126] Sri Lanka, "Asia's top high-yield bond issuer expected to restructure debt and seek help from IMF," notes the Financial Times. *See* Tommy Stubbington & Benjamin Parkin, *Sri Lanka on Brink of Sovereign Bond Default, Warn Investors*, FIN. TIMES, (Feb. 7, 2022), https://www.ft.com/content/09e1159f-9c45-4379-b862-98cb5e30a4da

2. 'Voluntary' Private Sector Participation

Perhaps most problematically, neither the DSSI nor the Common Framework are legally binding upon private creditors. The G-20 called upon investors to voluntarily "participate in the [DSSI] on comparable terms."[127] Uptake proved limited; "[r]egrettably, only one private creditor participated," the World Bank dryly noted.[128]

Initially, the Institute of International Finance, a trade group representing 450 large asset managers, appeared supportive, "recommend[ing] that private creditors voluntarily grant IDA-eligible countries, upon request, debt payment forbearance . . . similar to what the official sector has announced."[129] A few weeks later, however, the IIF "backtracked," warning in a May 1, 2020 letter that "even requesting a suspension of debt service payments from the private sector could have dire consequences."[130]

One uncertainty – even more acute in respect of the Common Framework – was the potential contractual and credit rating implications of private sector participation. Moody's, for instance, noted that potential private sector participation "raises the prospects of losses to private-sector creditors, which from a credit perspective may constitute a default.[131] However, while some countries were placed on negative watch, none were downgraded.[132]

At least three countries unsuccessfully attempted to persuade private creditors to join the reprieve.[133] In May, 2020, Grenada, a small Caribbean island nation with about $94 million in outstanding foreign currency debt, requested "an 8-month moratorium on its obligations to the holders of its 2030 bonds, as per the terms of the COVID-19 G-20 initiative," noting the devastating impact of Covid-19 on its tourism-heavy economy.[134] The request did not appear to be successful, as Grenada was reported to have

[127] *See* G20 DSSI Communique.
[128] https://www.worldbank.org/en/topic/debt/brief/covid-19-debt-service-suspension-initiative
[129] https://www.reuters.com/article/health-coronavirus-debt-emerging-idINL5N2C36B1 ; https://www.iif.com/Publications/ID/3849/IIF-letter-to-IMF-World-Bank-OECD-and-Paris-Club-on-Debt-of-LICs. A separate creditor consortium, the so-called Africa Private Creditor Working Group, formed in May, 2020, arguing against a "one-size-fits-all solution," but does not appear to have progressed significantly. https://www.africapcwg.com/ ; https://www.bloomberg.com/news/articles/2020-05-15/private-creditors-form-group-to-negotiate-african-debt-relief?sref=OOpRUZ8l
[130] Patrick Bolton, *et al*, *How to Prevent a Sovereign Debt Disaster*, FOREIGN AFFAIRS, (June 4, 2020), https://www.foreignaffairs.com/articles/world/2020-06-04/how-prevent-sovereign-debt-disaster
[131] Moodys also noted that "In this context, the determination of whether or not the change in terms constitutes what we consider to be a distressed exchange and hence a default event depends on the degree of coercion, and specifically whether creditors are able to opt out and receive contracted cash flows on time and in full, without sanction." Moody's Sector In-Depth, *FAQ on the Credit Implications of Moratoriums on Private-Sector Debt*, MOODY'S INVESTORS SERVICE, (April 22, 2020).
[132] *See* IMF SOVEREIGN DEBT ARCHITECTURE.
[133] *See* IMF SOVEREIGN DEBT ARCHITECTURE at 14.
[134] https://www.latinfinance.com/daily-briefs/2020/5/11/exclusive-grenada-seeks-moratorium-on-debt-payments

made the payment.[135] Similarly, Zambia's creditors declined to participate, ultimately leading to default.[136]

This dynamic of debt relief from only certain creditors created natural "free rider problems" where "a group of private creditors would seek to benefit from the increased repayment capacity of eligible countries, generated by the official debt standstill, in order to keep obtaining debt repayment in full during this challenging time."[137] A group of UK-based scholars proposed a statutory solution preventing this outcome for inclusion in the Corporate Insolvency and Governance Bill 2020, but were ultimately unsuccessful.[138]

Lower income countries that applied for DSSI relief still spent $36.4 billion on external debt payments, with $14.9 billion going to private creditors, which suspended "just .2% of payments."[139] In other words, while helpful from a near-term liquidity perspective, the DSSI also arguably had the unintended effect of freeing up resources to repay the private sector, diverting those funds from public health spending.

B. G-20 Common Framework

The DSSI also did not reduce participating countries' debts, but merely deferred them.[140] Following program expiration at the end of 2021, nations will have to begin making payments on a now-expanded debt load. As a result, 60% of low-income countries are "at high risk or already in debt distress," the IMF warned.[141]

Recognizing the need to address the deeper debt sustainability issues, on November 13, 2020, the G-20 announced the Common Framework for Debt Relief Beyond the DSSI (the "Common Framework" or "CF"), which was also endorsed by the Paris Club.

The Common Framework is a logical extension of the DSSI, with the same eligibility criteria of IDA nations, but geared towards debt adjustment rather than forbearance. Substantively, the Common

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[135] https://www.latinfinance.com/daily-briefs/2020/5/15/grenada-makes-bond-payment-creditor
[136] *See infra.*
[137] Stephen Connelly, et al, *The G20 Debt Service Suspension Initiative: What Of Commercial Creditors?,* J. INTL BANKING FIN. LAW, (2020) 11 JIBFL 741.
[138] *Id.*
[139] https://jubileedebt.org.uk/press-release/g20-initiative-leads-to-less-than-a-quarter-of-debt-payments-being-suspended
[140] Andrew England, Jonathan Wheatley & James Politi, *G20 Agrees Debt Relief for Low Income Nations*, FIN. TIMES, (April 15, 2020), https://www.ft.com/content/5f296d54-d29e-4e87-ae7d-95ca6c0598d5 (noting "suspending payments rather than cancelling means countries will continue to pile up interest and face even bigger debt levels next year".)
[141] *See* n. 1.

Framework "in essence . . . looks like a typical Paris Club debt restructuring" with the "crucial innovation" of "bringing non-traditional bilateral creditors to the table,"[142] particularly China, given its vast bilateral lending portfolio. The CF structure also incorporates some aspects of the Paris Club approach, though also leaves many uncertainties. In many regards, the Common Framework can be described as closer to an update of the existing, but now-outdated, informal debt resolution architecture, rather than an attempt towards a structured 'formal' proceeding.

1. <u>Process</u>

The Common Framework process offers a flexible, but also only semi-structured approach. Indeed, practitioners have observed that the "G20 has provided very few details on how the Framework will be operationalized."[143] Broadly speaking, we can deconstruct it as three steps.

First, after the debtor country initiates the process, the IMF and World Bank conduct a debt sustainability analysis ("DSA").[144] The DSA sets the backdrop for the broader restructuring by assessing how much debt the nation can afford without falling back into distress.[145]

Second, the participating Paris Club and G-20 official bilateral creditors form a creditor committee ("CF Creditor Committee") to negotiate with the debtor towards execution of a legally non-binding Memorandum of Understanding ("MoU"). Unlike the DSSI, the Common Framework allows "debt reduction in net present value terms." However, "in principle" it expresses a preference against "debt treatments [though] debt write-off or cancellation," emphasizing debt reprofiling or other adjustment, aside from "the most difficult cases."[146]

Third, after executing the MoU, the debtor will be required to "to seek from all its other official bilateral creditors and private creditors a treatment at least as favorable as the one agreed in the MoU." This is a notable distinction from the DSSI, which nations could pursue without private sector participation.[147] The Common Framework term sheet provides that "[a]ssessment of comparable efforts will be based on

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[142] Stuart Culverhouse, *The G20's Common Framework Six Months On*, TELLIMER, (July 30, 2021), <u>https://tellimer.com/article/the-g20s-common-framework-six-months-on</u> ("Indeed, rather than encourage others to follow, perhaps the mixed reaction to Ethiopia's request has deterred others from doing so, together with the significant improvement in EM financing conditions since the Common Framework was announced last November.")
[143] CHRIS SUCKLING, THE G20'S COMMON FRAMEWORK, IHSMARKIT, (March 2021).
[144] *Id.* (observing the expectation that participants "undertake the IMF's Debt Sustainability Assessment (DSA) and an IMF program involving policy reforms and provision of additional IMF financing.")
[145] Computationally, it is somewhat akin to a combined valuation and liquidity analysis for corporate debtors.
[146] Per the term sheet, "The key parameters will include at least (i) the changes in nominal debt service over the IMF program period; (ii) where applicable, the debt reduction in net present value terms; and (iii) the extension of the duration of the treated claims."
[147] IMF common framework (June 24 2021)

changes in nominal debt service, debt stock in net present value terms and duration of the treated claims."[148] The "comparability" language is understood to reflect the Paris Club principle.[149]

Analytically, assessing comparability of treatment presents some challenges, especially depending on whether the debtor needs (i) liquidity relief; or (ii) to resolve debt sustainability.[150] The former represents a cash flow issue, rather than a fundamental inability to repay obligations. Thus, liquidity relief can be provided on an NPV-neutral basis, through a so-called 'reprofiling' of obligations, which emphasizes maturity extensions or flow-adjustments, i.e., alterations to payment schedules or relaxation of covenants.[151]

Debt unsustainability reflects a deeper problem, predicated on the sovereign simply owing more money than it can reasonably repay given its other priorities. In these cases, "[e]ven with sound policies, these countries are not likely to be able to service their debts, and a reduction in debt in present value terms is often necessary as part of a broader package to restore sustainable growth."[152] The level of required 'haircut' varies significantly, but, for the period between 2014 and mid-2020 averaged 23.2% on an NPV basis, and 29.03% on a market basis.[153]

With respect to comparability application, the IMF notes that in case of a 'reprofiling' liquidity issue, "private sector creditors would generally be expected to provide a comparable reduction in nominal debt service during that period along with an extension in the duration of those payments." However, "[i]f, instead, the MOU specifies a cut in the present value of debt, private creditors would generally be expected to provide at least that reduction."[154]

The underlying logic is that the Common Framework should not have the effect of subsidizing private sector investors with public funds.[155]

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[148] Statement, *Extraordinary G20 Finance Ministers and Central Bank Governors' Meeting*, G-20, (Nov. 13, 2020) (providing term sheet for Common Framework, and modifications to DSSI).
[149] *See supra*, n. 46. https://clubdeparis.org/en/communications/page/what-does-comparability-of-treatment-mean
[150] IMF common framework (June 24 2021)
[151] For instance, a nation may have a 3-year, $100 million obligation at a 10% interest rate, which it could not repay without diverting funds needed for public health purposes. However, it could repay the full $100 million in principal if the obligation was 're-profiled' to 10 years, with a flow-adjustment to a 5% rate instead of 10%.
[152] IMF SOVEREIGN DEBT ARCHITECTURE at 3.
[153] Average of debt exchanges in Table 1. *See* IMF SOVEREIGN DEBT ARCHITECTURE at 10.
[154] IMF SOVEREIGN DEBT ARCHITECTURE.
[155] *See supra*, I.B., discussing Paris Club.

2. Utilization

So far, only 3 nations – Chad, Ethiopia and Zambia – have applied to utilize the Common Framework, and none have successfully completed a restructuring, creating the overall perception of limited efficacy, despite the tremendous need. Congo Republic, an eligible DSSI-participant, determined to proceed outside of the Common Framework. At the same time, of the seven restructurings in 2020, four were completed without the CF, while Lebanon and Suriname are not be eligible for the Common Framework.

The table below summarizes the relevant set of proceedings, separated into three groups.[156] The first group, composed of Argentina, Lebanon, Ecuador, Suriname and Belize, reflects sovereigns that experienced 2020 defaults and would not be eligible under the DSSI or CF. Of that group, restructurings remain ongoing for Lebanon and Suriname, though the latter may be nearing conclusion.[157] The second group represents the three nations that are pursuing Common Framework applications, of which only Zambia defaulted in 2020 prior to the CF. The third group represents the two nations that pursued restructurings outside the CF despite being eligible. Angola's debt re-profiling was completed before the Common Framework became effective;[158] however, it notably did not attempt to pursue a broader subsequent transaction under the CF.[159]

As discussed below, the unique circumstances of each pandemic-era restructuring offers many relevant insights for assessing the challenges and opportunities associated with the Common Framework.

[156] Sovereign and Supranational Data Report, *Sovereign Default and Recovery Rates, 1983-2020*, Moody's Investors Service at 3, 46-9 (April 7, 2021); INTERNATIONAL MONETARY FUND, THE INTERNATIONAL ARCHITECTURE FOR RESOLVING SOVEREIGN DEBT INVOLVING PRIVATE-SECTOR CREDITORS—RECENT DEVELOPMENTS, CHALLENGES, AND REFORM OPTIONS at 10 (Sept 23, 2020).
[157] https://www.globalcapital.com/article/29opqjqx7dov82662s4jk/emerging-markets/em-latam/suriname-to-offer-creditors-oil-linked-bonds-sees-unique-esg-opportunity-in-restructuring
[158] https://www.macaubusiness.com/angola-only-country-to-restructure-private-debt-without-rating-downgrade-un/ ("Angola is the only country that has managed to restructure the debt it owes to private creditors without this implying a downgrade in its rating.")
[159] https://www.reuters.com/article/us-angola-imf/angola-negotiates-6-2-billion-debt-relief-from-creditors-imf-idUSKCN26C2CP

2020 & 2021 Sovereign Defaults, Restructurings & Common Framework Applications

	Impacted / Defaulted Debt ($MM)		Process		Resolution / Status		DSSI / CF	
Country	**Bonds**	**All Debt**	**Start Date**	**Description**	**Date**	**Current Status**	**Eligible?**	**Participating?**
Argentina	108,766	210,000	Feb-20	Missed Payment	Sep-20	Distressed Exchange	No	No
Lebanon	31,314	86,800	Mar-20	Missed Payment		Ongoing	No	No
Ecuador	17,283	17,283	Apr-20	Brief Technical Default	Aug-20	Distressed Exchange	No	No
Suriname*	675	675	Jul-20	Missed Payments		Ongoing	No	No
Belize*	527	527	Aug-20	Technical Default / Missed Payment	Nov-21	Distressed Exchange / Debt-Environment Swap	No	No
Zambia**	3,000	11,200	Nov-20	Missed Payment	Feb 2021 (CF App)	Ongoing; No Committee Formed	Yes	Yes (Both)
Chad	0	2,800	Jan-21	CF Application		Ongoing; CF Comm Formed April 2021	Yes	Yes (Both)
Ethiopia	1,000	30,000	Feb-21	CF Application		Ongoing; CF Comm Formed Sept 2021	Yes	Yes (Both)
Angola	8,000	47,200	Unknown		Sep-20	Re-Profile of Chinese Loans	Yes	DSSI Only
Congo	0	11,000	Jun-21	China agreement 'in principle'		Ongoing; Glencore negotiations	Yes	DSSI Only

**Belize and Suriname technically each underwent two defaults, however they are aggregated above for the sake of relative simplicity.*
***For Zambia, affected debt listed as $2.25 billion, but accounting for cross-defaults, process implicates full $3Bn of sovereign obligations.*

III. WHY HAS THE COMMON FRAMEWORK FAILED?

"[T]he Common Framework is yet to deliver on its promise," observed Kristalina Georgieva, the IMF's Managing Director.[160] Given the prospect of "economic collapse" in some nations, developing a viable approach to debt resolution is critically important – particularly given potential 'contagion' from Russia's invasion of Ukraine.[161] With that context, the remaining Parts III and IV of this Article respectively focus on two key questions:

- Why has the Common Framework failed; and
- What (if anything) can be done about it?

In many respects, the Common Framework's challenges reflect limitations inherent to debt restructuring without a dedicated forum. These challenges have, and will continue to, manifest through multiple facets, illustrated by ongoing, slow-moving restructurings.

[160] *See* n. 1; DANIEL MUNEVAR, THE G20 COMMON FRAMEWORK FOR DEBT TREATMENTS BEYOND THE DSSI: IS IT BOUND TO FAIL?, EURODAD, (Oct. 2020), "a Paris Club-based approach to address debt vulnerabilities by the G20, in the form of the "Common Framework for Debt Treatments beyond the DSSI", is unlikely to succeed. The predicted failure of the G20 response will condemn a large number of developing countries to a lost decade."
[161] https://www.bloomberg.com/news/articles/2021-12-02/imf-warns-of-economic-collapse-in-some-nations-without-debt-fix?sref=OOpRUZ8l

First, relative to the Paris Club, let alone a 'formal' proceeding, the Common Framework lacks critical infrastructure. Limited precedential guidance and inconsistent disclosure standards increase the frictions underlying processes and as between parties. Second, conflicts amongst creditors – with which sovereign restructuring is exceptionally rife – are exacerbated, rather than mitigated by the Common Framework. These conflicts occur both between the official and private sectors, with 'comparability' a key issue, and amongst different groups of private sector creditors.

Finally, the Common Framework has under-delivered for debtors. Utilizing it carries real costs – including debt downgrades and loss of market access – but, as of yet, few realized benefits.[162] At the same time, its scope and eligibility standards appear inapposite for the broader normative goal of addressing emerging market debt sustainability coming out of Covid-19. Many IDA-eligible nations are ill-suited for the Common Framework structure. Others, most in need of help are left out, including Sri Lanka, Lebanon and Ukraine.[163]

A. Limited Institutional Infrastructure

A formal debt resolution process provides numerous benefits, extensively documented in the literature, alongside the deficits of lacking a structured bankruptcy forum.[164] Beyond the ability to bind creditors through the force of law, an additional benefit of a structured bankruptcy system is extensive shared infrastructure. Parties have a clear comprehension around disclosures, required information, and corresponding legal steps. Over time, the procedures become more efficient and predicable. Historically, the Paris Club provided much of this infrastructure, developing significant precedent and a level of associated consistency over the years. The Common Framework risks displacing this construct without replacing it with a comparable institutional structure.

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[162] Stuart Culverhouse, *The G20's Common Framework Six Months On*, TELLIMER, (July 30, 2021), https://tellimer.com/article/the-g20s-common-framework-six-months-on ("Indeed, rather than encourage others to follow, perhaps the mixed reaction to Ethiopia's request has deterred others from doing so, together with the significant improvement in EM financing conditions since the Common Framework was announced last November.")
[163] Selcuk Gokoluk & Sydney Maki, *Russia's War Lifts Default Risk for Distressed Economies*, BLOOMBERG, (March 21, 2022), https://www.bloomberg.com/news/articles/2022-03-21/russia-s-war-lifts-default-risk-for-world-s-distressed-economies?sref=OOpRUZ8l (noting respective spreads of 11,370, 4,400 and 3,318 for Belarus, Ukraine and Sri Lanka as of March 22, 2022)
[164] *See supra*, I.B.

1. Unclear Precedents & Processes

In many ways, the Common Framework represents a moderate extension of the Paris Club, with additional players, including China, the "single largest bilateral creditor."[165] While bringing the right parties to the table is a significant step, the Common Framework lacks clarity about how the process would operate.

Unlike the Paris Club, which has 66 years of operating, if not legal, precedent developed over hundreds of transactions, the Common Framework is a new mechanism. The Paris Club principles and preferred restructuring treatments,[166] though custom rather than law, are nonetheless understood by the relevant constituencies and market participants. While the Common Framework adopted the Paris Club's comparability of treatment requirement, it does not appear to have incorporated the entirety of the Paris Club principles.[167] Indeed, in some respects, expanding the Paris Club to include new creditors rather than adopting the Common Framework would have reduced uncertainty. Though, tellingly and likely quite deliberately, that was not the approach taken.

This has important implications for both creditors and debtors.

For creditors, the Common Framework offers a rather disjointed coordination across classes, particularly as to the private sector. Unambiguously, the Common Framework adds value in facilitating official sector coordination – both amongst bilateral creditors, and with multilateral organizations. But it lacks a structured mechanism for engaging the private sector. This is notable because the Common Framework requires private creditor participation on 'comparable terms' in order to execute a restructuring. Beyond that, private creditor obligations represent a significant portion of the total capitalization for many debtors, substantively suggesting a need for resolution.

For debtors, procedural uncertainties increase implied costs and process friction. In 'traditional' Chapter 11 corporate bankruptcy, for instance, there are relatively clear trade-offs. The court's protection comes with certain costs, including reduced operating autonomy, disclosure requirements, likely extinguishment of equity and a formal default for credit rating purposes. However, there are also known benefits, including a structured resolution process shepherded by a neutral arbiter and underpinned by extensive precedent, providing a degree of clarity regarding the potential range of outcomes.

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[165] China is estimated to account for "over 25 percent of the total external debt of DSSI-eligible countries." *See* Jan Friederich, *China's Debt Relief to Support Liquidity in Stressed Emerging Markets*, EMER. MKT. VIEWS, (June 25, 2020), https://em-views.com/chinas-debt-relief-to-support-liquidity-in-stressed-emerging-markets
[166] *See supra*, n. 69 and accompanying text.
[167] *See supra*, II.B.

Here, the common framework's essentially semi-structured restructuring process is wanting. Like 'traditional' corporate bankruptcy, there is a clear starting point and at least an aspirational end goal. The path between them, however, appears too dimly lit. That uncertainty harms both process credibility and the very debtors that the Common Framework is intended to help.

2. Inadequate Disclosure Standards

Information and disclosure are a lifeblood of insolvency resolution. Without knowing how much the debtor owes, and to whom, it is impossible to reasonably or fairly allocate a limited pool of value. Informational limitations and deteriorating disclosure norms represent key challenges underlying changing sovereign debt markets as well as ongoing CF restructurings.

On a broad-based basis, sovereign debt disclosure quality has generally declined – "information opacity is widespread," according to a Bretton Woods report. This was been exacerbated by increased creditor heterogeneity and introduction of new lending instruments. For instance, a report found that amongst a set of 100 contracts, "[a]ll of the post-2014 contracts with Chinese state-owned entities . . . contain or reference far-reaching confidentiality clauses," committing "the debtor not to disclose any of the contract terms or related information unless required by law."[168] Furthermore, increased use of collateralized lending also adds opacity given unknown terms and risks of revenue diversion to specific creditors. Particularly in the restructuring context, enhancing and standardizing sovereign debt disclosure is simply essential. Otherwise, any "notion of equitable burden sharing [would be] little more than an empty slogan."[169]

Disclosure issues have been particularly prominent in the ongoing restructuring for Zambia, Africa's second largest copper producer, and an economy which came into the pandemic on already shaky financial footing.[170] Reflecting many of the changing sovereign debt trends, Zambia's $11.2 billion debt stack included $3 billion of 'Eurobonds,'[171] $1.9 billion of IFI obligations, $2.9 of non-Paris Club bilateral obligations, $2.1 billion owed to Chinese commercial lenders and state-owned enterprises ("SoEs"), and only $100 million of Paris Club debt.

[168] HOW CHINA LENDS at 6.
[169] DEBT TRANSPARENCY at 7.
[170] The IMF's August 2019 Article IV report found Zambia's debt capacity to be "weak" and determined it to be at high risk for external and general debt distress. "Public debt under current policies is on an unsustainable path," the IMF report concluded.
[171] Zambia's three series of Eurobonds have 'mismatched' CAC provisions, with two series, incorporating the 'second-generation,' series-by-series clauses – which are innately harder to restructure – and its 2027 maturity using the 'enhanced' CACs. *See supra*, Part I.B.

In April, 2020, Zambia formally sought and retained restructuring advisers. Subsequently, a bondholder committee formed, reported to hold 40% of outstanding Eurobonds. The restructuring process was almost immediately fraught with disclosure-related conflicts. First, there was uncertainty regarding the full extent of Zambia's obligations, especially to China and Chinese SoEs, with the sovereign's debt reported to be as high as $27 billion, rather than the $11.2 billion initially cited.[172] Second, there was disagreement regarding relative debt priority, with "core sticking points" including "a lack of clarity over the treatment of the Chinese loan holders versus Eurobond holders,"[173] particularly with respect to potential collateralized obligations in light of negative pledge clauses under Zambia's Eurobonds.[174]

Zambia requested DSSI payment deferral, which the Paris Club and Chinese government granted, though some Chinese official sector lenders insisted on Zambia first repaying prior arrears.[175] Private creditors, however, rejected Zambia's debt deferral consent solicitation, resulting in an October 13, 2020 missed coupon payment, and formal default by November, 2020.[176]

In February, 2021, Zambia formally applied to pursue relief under the Common Framework. However, the process has so far stalled, in large part due to continuing creditor tensions and mutual mistrust, particularly between bondholders and Chinese lenders. [177] A CF Creditor Committee has not yet been formed, though the sovereign is "optimistically" targeting a May, 2022 resolution. [178]

"The precedent set in Zambia is likely to be the one that everyone points to in the next couple of years as we have multiple sovereign debt workouts . . . This is the beginning of a new era," Bloomberg quoted

[172] https://www.reuters.com/article/zambia-debt/zambia-owes-nearly-27-billion-in-foreign-and-local-public-debt-idUSKBN2HA2L5

[173] "The core sticking points remain exactly the same: a lack of clarity over the treatment of the Chinese loan holders versus Eurobond holders, and the potential trajectory of an IMF program," one investor told Bloomberg. https://www.bloomberg.com/news/articles/2020-10-20/zambia-debt-relief-votes-postponed-with-default-clock-ticking?sref=OOpRUZ8l

[174] The negative pledge precludes the sovereign from granting another creditor liens under most circumstances. However the IMF has observed that these provisions are subject to generally limited enforcement.

[175] https://www.ft.com/content/aa43fb1c-8f44-495a-a9b5-69a00c7db4a9

[176] https://www.fitchratings.com/research/sovereigns/fitch-downgrades-zambia-long-term-foreign-currency-idr-to-rd-18-11-2020

[177] https://www.reuters.com/article/us-zambia-economy-idAFKBN2K63PH; https://www.fitchratings.com/research/sovereigns/zambias-imf-staff-level-deal-key-step-to-debt-restructuring-20-12-2021

[178] https://www.fitchratings.com/research/sovereigns/zambias-imf-staff-level-deal-key-step-to-debt-restructuring-20-12-2021

world-leading sovereign debt expert, Lee Buchheit.[179]

B. Creditor Conflicts

Conflicts between creditors are an inherent challenge to any insolvency process, but may be particularly acute for Common Framework implementation. The operative problem of dividing limited dollars results in creditor conflicts at multiple levels.

First, structural incongruencies in incentives result in frictions as between private creditors and the official sector. Second, complexities in application of 'comparability of treatment' have, and are likely to continue to, delay common framework proceedings. Finally, conflicts often arise amongst private creditors themselves, often resulting in competing groups with different objectives.

1. <u>Distinct Incentives: Official vs Private Sectors</u>

Much of the incongruence between private and official creditors' positions comes back to incentives.

Multilateral organizations, the 'preferred,' most-senior lenders, are focused on their missions regarding debt sustainability and economic development, acting on behalf of their member governments. Bilateral lenders essentially represent government credit, with taxpayers as residual stakeholders. For both sets of official sector creditors, the ultimate interests are at least not unconnected to political considerations.[180]

Private creditors, on the other hand, are purely commercial creatures, representing the interests of their direct or limited partner investors. This typically entails fiduciary responsibilities to protect the financial interests of those investors, including capital preservation. Acting otherwise, creditors may argue, could open them up to legal claims and subsequent litigation. In some respects, the involuntary nature of the Common Framework may make participation easier for private creditors. This is because previously, under the DSSI, they legally could 'sit out' and perhaps argue that doing so was needed to protect investor interests. Now, they do have such an option.

[179] Alonso Soto, *China's Feud with Bondholders Could Reset Debt Workout Rules*, BLOOMBERG, (Oct. 25, 2020), https://www.bloomberg.com/news/articles/2020-10-25/china-s-feud-with-bondholders-could-reset-debt-workout-rules?sref=OOpRUZ8l

[180] For instance, one could see that favoring an exceptionally accommodative approach for a sympathetic borrower, or a much harder line with a less palatable sovereign, irrespective of credit quality. Mitu Gulati & George Triantis, *Contracts without Law: Sovereign Versus Corporate Debt*, U. CIN. L. REV. (2007) (describing potential exceptions for Turkey with respect to IFI treatment.)

The private sector is also hardly homogenous, and these considerations may differ depending on their ultimate constituency, as well as strategy. ESG-focused vehicles, for instance, may potentially have more room for accommodation under the appropriate transaction structure.[181]

Private creditors' conflicts are likely to differ as between multilateral creditors and bilateral creditors, with the latter focused on comparability of treatment.[182]

Potential for private sector-IFI conflict stems from the IFI's position as 'preferred' and thus unimpaired creditors, and likely begins with the debt sustainability analysis, or DSA. In many respects, this is a variation of the more traditional valuation issues common in bankruptcy proceedings, as a DSA "is far from a precise science," particularly given unique dimensions of a sovereign, such as taxing power.[183] In the abstract, creditors' financial interests are best protected if the debtor nation has fewer additional obligations, minimizing potential alternative allocations of capital that could divert funds from repayment.

Particularly in situations where the IMF has a pre-Common Framework extension of credit, private sector bondholders could argue that the IMF and World Bank have incentives to be overly pessimistic with respect to debt sustainability, thus protecting their position.

Facets of this tension materialized in Argentina's 2020 restructuring. Coming into the process, Argentina had in place a record $56 billion IMF facility from 2018. The IMF provided a debt sustainability analysis, based on which Argentina made its first restructuring offer, which was summarily rejected by creditors.[184] Argentina subsequently made revisions, with an IMF technical report providing that there was "limited scope" for improvements while remaining consistent with debt sustainability.[185] However, the sovereign made two more rounds of revisions, ultimately increasing payouts by nearly 10 cents on the dollar. Of course, one could posit that the initial IMF figures were indeed correct with the IFIs and sovereign

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[181] For instance, one could see a fund manager positing to investors that accepting a slightly lower recovery than otherwise feasible would be consistent with broader societal goals, reflecting some of the dynamics in respect of Belize, though this question represents a matter for subsequent research. *See infra*, Part IV.
[182] *See infra*, III.B.2
[183] *See* HOW TO RESTRUCTURE SOVEREIGN DEBT ("A sovereign is also unlike other debtors in that the question of when it has become insolvent may be subject to considerable debate. A sovereign's assets, in light of its taxing power, are theoretically congruent with all of the assets in the debtor country. The question then becomes at what point the theoretical power to tax is limited by the economic and political impracticalities of doing so. Separately, there is genuine uncertainty around a sovereign's future earning capacity, as it partly depends on exogenous and difficult-to-predict factors. Conducting a sovereign debt sustainability analysis (DSA), one of the key roles of the International Monetary Fund (IMF) in the debt restructuring process, is far from a precise science.")
[184] https://som.yale.edu/blog/argentina-s-path-to-debt-relief-from-private-creditors
[185] https://www.imf.org/en/News/Articles/2020/06/01/pr20228-argentina-imf-staff-technical-statement

genuinely interested in debt sustainability, and private creditors solely incentivized to focus on a higher payout.[186]

2. Comparable Treatment?

Particularly given the lack of creditor participation in the DSSI, a thorny issue is likely to be application of the 'comparable treatment' requirement.

Comparability of treatment analysis is rarely simple, especially in circumstances where creditors provide different types of relief. For instance, some lenders may accept reductions in principal, while others may prefer to reduce or extend payment terms.[187] Methodologically, comparability is established through one or more of three distinct parameters, giving the Paris Club "significant leeway in determining whether [comparability of treatment] is achieved" which is often "generously evaluated."[188] Prior studies have found that "in past restructurings, the average difference in NPV reduction between the official and the private creditors is greater than 20 percentage points."[189] Because of this, some have advocated for adopting a simpler, consistent approach to the comparability of treatment analysis.[190]

Such innate pre-existing challenges are compounded by novel issues implicated through changes in debt structure and norms.

One such issue presented in the Chad and Congo restructurings is the treatment of collateralized or otherwise structurally senior debt. Historically, such obligations have not been impaired, however it is unclear whether that approach is viable in circumstances where collateralized structures represent large portions of total obligations. While structurally senior debt is typically repaid first, here the priority and security is circumscribed in respect of only certain debtor assets or cash flows, making it distinct from priority in a more traditional sense. Lack of disclosure compounds this, resulting in limited consistency across transactions.

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[186] Lee C. Buchheit, *Use of Creditor Committees in Sovereign Debt Workouts*, 10 Bus. L. INT'l 205, 210 (2009) (noting how "some committee members may attempt to use the process to promote their own vision of how sovereign debt problems should be addressed generally (a demand that the debtor country restructure its multilateral debt on equivalent terms is a classic example)."

[187] DANIEL MUNEVAR, THE G20 COMMON FRAMEWORK FOR DEBT TREATMENTS BEYOND THE DSSI: IS IT BOUND TO FAIL?, EURODAD, (Oct. 2020), (noting that "From a technical perspective, it is difficult for the Paris Club to establish comparability between creditors that choose to reschedule flows and those that restructure their stocks of debt.")

[188] DIEGO RIVETTI, ACHIEVING COMPARABILITY OF TREATMENT UNDER THE G20'S COMMON FRAMEWORK, WORLD BANK GROUP, (2021).

[189] *Id.* ; citing Schlegl M., Trebesch C., Wright M., *The Seniority Structure of Sovereign Debt* (2019). CESifo Working Paper No. 7632, available at SSRN: https://ssrn.com/abstract=3387668.

[190] DIEGO RIVETTI, ACHIEVING COMPARABILITY OF TREATMENT UNDER THE G20'S COMMON FRAMEWORK, WORLD BANK GROUP, (2021).

For instance, Chad was the first country to formally seek Common Framework relief, submitting its official request in late January, 2021.[191] Relative to Zambia and other sovereigns who have restructured obligations, Chad's debt structure is somewhat simpler, potentially facilitating resolution.[192] The IMF estimates that Chad's total external debts are approximately $2.8 billion, with about 40% owed to Glencore, the commodities trading giant, under an oil-for-cash transaction. The syndicated deal, of which Glencore holds about $347 million, was previously restructured in 2015 and again in 2018.[193] Chad has no outstanding Eurobonds.

Subsequent to Chad's application, a CF Creditor Committee was formed April 15, 2021, with representatives from the governments of China, France, India and Saudi Arabia. In June, the group executed a memorandum of understanding with Chad.[194] Subsequently, the sovereign approached Glencore to re-negotiate the loan agreement, which was understood to have to be restructured on "comparable" terms as the official creditor MoU, though the precise meaning is complex given the collateralized structure of the obligations. Those negotiations have been slower moving; however, the IMF and World Bank have publicly applied pressure on Glencore, calling for an agreement to be reached by the end of March, 2022.[195]

A related issue raised in Zambia's restructuring, is the appropriate classification of SoEs -- specifically, the extent to which an entity qualifies as "official sector" or not, given the complex ownership structure of Chinese state-owned banks.[196] Some have posited that private creditors "will refuse to agree to debt write-offs unless commercial creditors from China participate on similar terms," making implementation of comparable treatment "extremely difficult."[197] Theoretically, assuming truly 'comparable' treatment of

[191] https://www.reuters.com/article/us-chad-debt/chad-becomes-first-country-to-ask-for-debt-overhaul-under-g20-common-framework-idUSKBN29X0Q5
[192] *Id.*, quoting investor stating that "Chad is actually a country that is quite suitable for a common framework - it doesn't have any publicly traded external debt . . .I think the negative side effects of the common framework are much larger if it were a Kenya, Nigeria, Ghana or Angola.")
[193] https://www.bloomberg.com/news/articles/2021-09-10/chad-presses-glencore-to-expedite-talks-on-debt-restructuring?sref=OOpRUZ8l
[194] https://clubdeparis.org/en/communications/communique-presse/4th-meeting-of-the-creditor-committee-for-chad-under-the-common
[195] https://www.bloomberg.com/news/articles/2022-01-18/imf-urges-creditors-to-finalize-chad-debt-treatment-by-march-31?sref=OOpRUZ8l
[196] Some have suggested treating SoE loans with sovereign guarantees as part of the official sector. Alexander Nye, *Who's Afraid of Some (Not So Big Or Bad) Debt Relief?*, YALE SOM, (July 24, 2020), https://som.yale.edu/blog/whos-afraid-of-some-not-so-big-or-bad-debt- ("the PRC should at the very least consider its commercial loans with sovereign guarantees to be official bilateral debt that is therefore eligible for the standstill. Allowing the PRC count these debt as "private" lending may grant them an advantage in any restructuring process where private creditors are refusing to provide comparable treatment.")
[197] DANIEL MUNEVAR, THE G20 COMMON FRAMEWORK FOR DEBT TREATMENTS BEYOND THE DSSI: IS IT BOUND TO FAIL?, EURODAD, (Oct. 2020), (further noting that "Under the principle of comparability" private creditors "will

obligations, the classification of SoE obligations as between private and bilateral should not matter. In practice, however, it is likely to be highly consequential, as shown by historical recovery rate differences.

An additional concern is the scope of obligations that can be excluded from a common framework proceeding. This really raises two issues. The first is whether a Common Framework signatory can proceed in respect of a restructuring without the other members, as China is doing in respect of the Congo. While the Paris Club 'solidarity' principle would seem to preclude this, the Common Framework does not appear to have incorporated it. Second, while the Paris Club has traditionally recognized that certain small obligations may not warrant inclusion in a restructuring, a reasonable question is regarding the appropriate level. For instance, Ethiopia, indicated a desire not to restructure its $1 billion Eurobond, an admittedly small portion of its debts. That approach may be pragmatic – delaying a $30 billion transaction over the treatment of $1 billion appears value destructive -- but raises questions regarding the appropriate 'de minimis' threshold.

3. Intra-Private Sector Conflicts

Conflicts amongst private creditors are also common along multiple dimensions, ranging from contractual provisions to tactics. As a result, many of the potential benefits of creditor committees – which have been recognized for moving a process forward – are negated, as the debtor lacks a cohesive creditor group to work with. That may result in longer, more contentious and ultimately value-destructive multi-layered negotiations.[198]

The evolution of sovereign debt contracts has resulted in a complex stock of agreements.[199] Distinctions in contractual provisions can yield materially different payouts, presenting a core demarcation of interests and often yielding competing creditor groups. This dynamic was well illustrated by Argentina's 2020 restructuring,[200] and, to a lesser extent, Ecuador's restructuring, which mostly demonstrated how different tactics, particularly litigation aggressiveness, can yield distinct creditor groups.[201]

have the right to" refuse write-offs without participation from "commercial creditors from China," and that "this rationale also applies the other way round.")

198 Stephen Kim Park & Tim R Samples, *Distrust, Disorder, And the New Governance of Sovereign Debt*, HARVARD INTL L.J., (2021).

199 *See infra*, n. 86 and accompanying text; *See also*, Anna Gelpern, *Sovereign Debt: Now What?,* YALE J. INTL LAW 47 (2016) (noting, one of "two distinctive features of sovereign debt," as being that "the debt does not go away").

200 Lucy Hale, *A Tale of Two Defaults*, WILSON CENTER (Oct. 30, 2020), https://www.wilsoncenter.org/blog-post/tale-two-defaults

201 Kenneth Rapoza, *The Pandemic Blues: Ecuador Second Latin American Nation to Default in 4 Weeks*, FORBES (April 21, 2020), https://www.forbes.com/sites/kenrapoza/2020/04/21/the-pandemic-blues-ecuador-second-latin-american-nation-to-default-in-4-weeks/?sh=3f9f975573b8

In February, 2020, after the IMF declared its debt "unsustainable,"[202] Argentina began creditor negotiations, a prelude to the ninth sovereign default time in the nation's history.[203] Coming into the restructuring, Argentina had total private sector debt in excess of $133 billion, including $65 billion of foreign law obligations, denominated primarily in dollars and Euros. The obligations were issued under two sets of legal documents: (i) a 2005 Indenture as part of an earlier restructuring (the "Exchange Bonds"), with 'third generation' CACs which were harder to restructure;[204] and (ii) a 2016 document (so-called "Macri bonds") that generally incorporated the fourth generation, enhanced CACs, allowing for smoother modification.[205]

These contractual distinctions meant that it was much easier for creditors to create a 'blocking position' in the 2005 Exchange Bonds. Reflecting this reality, Argentina's initial offer provided those obligations a generally higher recovery.

	Argentina		Lebanon	Zambia	
Available CAC Type	**Exchange Bonds (2005 Indenture)**	**'Macri Bonds' (2016 Indenture)**	**Eurobonds - MTN Program**	**2022 and 2024 Eurobonds**	**2027 Eurobonds**
Single Series	75% aggregate principal	75% aggregate principal	75% principal of each series	75% principal of each series	75% aggregate principal
Multiple Series (Single Limb)[1]		75% aggregate principal			75% aggregate principal
Multiple Series (Dual Limb)[2]	85% aggregate principal + 66.67% of each series	66.67% aggregate principal + 50% of each series			66.67% aggregate principal + 50% of each series

[1] *Applies if "uniformly applicable" condition is met.*
[2] *Applies if "uniformly applicable" condition is not met.*

Through the course of the restructuring process, three separate creditor groups formed to negotiate with the sovereign.[206] Unsurprisingly, the groups with the higher-threshold bonds drove a harder bargain, holding out beyond acceptance of the transaction by other holders.

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[202] Press Release, *IMF Staff Statement on Argentina*, INTL MON. FUND (Feb 19, 2020), https://www.imf.org/en/News/Articles/2020/02/19/pr2057-argentina-imf-staff-statement-on-argentina
[203] Argentina technically delayed payment on certain other debts in August, 2020, however the February, 2021 default was the first implicating international restructuring considerations. "On August 28, 2020, the Argentine government delayed repayment on more than $8 billion of short-term debt and also signaled its intent to restructure portions of Argentina's medium-and long-term debt. *See* Elena Duggar, *Argentina Debt Restructurings*, MOODY'S INVESTORS SERVICE PRESENTATION at 6-7 (February 2020).
[204] The bonds featured higher than standard voting thresholds, allowing for amendment: (i) series-by-series with 75% of the vote or (ii) across multiple series, but requiring 85% of aggregate principal and 66.67% of each series of bonds.
[205] *See supra*, Part I, describing CAC provisions.
[206] The three groups were: (i) the Argentina Creditor Committee, whose holdings were never fully disclosed; (ii) the Ad Hoc Bondholder Group, with 25% of the 'Marci' Bonds and 15% of the Exchange Bonds (and thus at least one blocking position); and (iii) the Ad Hoc Group of Argentina Exchange Bondholders, with 16% of the Exchange

After jointly rejecting Argentina's initial offer, each of the creditor groups filed distinct, at times incompatible counter-proposals.[207] In subsequent back-and-forth, one group accepted in principle an improved offer, which was then rejected by the two other groups, which filed another counterproposal.[208] For the sovereign, this diffusion of authority resulted in additional transaction frictions, greater process uncertainty and ultimately a potentially higher payout.

Beyond contractual features, an additional demarcation amongst creditors is the relative willingness to utilize aggressive measures, including litigation as well as attachment and seizure of assets.[209] Ecuador's restructuring, though generally smoother than Argentina's, illustrated this dynamic.[210]

Ecuador had about $17.2 billion of Eurobond debt, divided across 10 series. Nine of the Eurobond series had essentially identical modification provisions, but one set, maturing in 2024, had higher thresholds. As a result, the 2024 bondholders formed a separate group that was ultimately able to recover a higher dollar value.[211] However, this did not necessarily slow the process for Ecuador, in part because the 2024 obligations represented a relatively smaller portion of aggregate obligations.

Ecuador's creditors ultimately formed three separate groups: (i) the 'core' creditor committee, with about 50% of the bonds; (ii) a 'Steering Committee' with a smaller position, but more aggressive investors; and (iii) a group of just the 2024 bonds.

The Steering Committee, which included a number of hedge funds, proved far more aggressive, rejecting offers accepted by others and attempted litigation to block the process at multiple points in time. This was unsuccessful, largely because the group did not hold a large enough amount of the bonds to hinder the process.

Bonds, allowing for a blocking position. *See* Press Release, *Joint Statement on Argentina Exchange Offer*, (May 4, 2020), https://www.prnewswire.com/news-releases/joint-statement-on-argentina-exchange-offer-301051633.html

[207] Walter Bianchi, Cassandra Garrison & Rodrigo Campos, *Argentina's Creditors Make Counter Offers as Debt Restructuring Deadline Nears*, REUTERS, (May 15, 2020), https://www.reuters.com/article/us-argentina-debt/argentinas-creditors-make-counter-offers-as-debt-restructuring-deadline-nears-idUSKBN22R39V

[208] Ben Bartenstein & Jorgelina Do Rosario, *Argentina Creditors Present New Offer as Differences Remain*, BLOOMBERG, (June 15, 2020), https://www.bloomberg.com/news/articles/2020-06-15/argentina-creditors-return-with-new-offer-as-differences-remain?sref=OOpRUZ8l

[209] Martin Guzman & Joseph E. Stiglitz, *How Hedge Funds Held Argentina for Ransom*, N.Y. TIMES, (April 1, 2016), https://www.nytimes.com/2016/04/01/opinion/how-hedge-funds-held-argentina-for-ransom.html

[210] Some have attributed the smoother process to the sovereign's somewhat less adversarial approach, though an equally plausible explanation is that Ecuador had a simpler capital structure and needed more limited debt relief.

[211] The Republic of Ecuador, *The Republic of Ecuador Announces Commencement of Consent Solicitation and Invitation to Exchange*, (Jul. 20, 2020), https://www.prnewswire.com/news-releases/the-republic-of-ecuador-announces-commencement-of-consent-solicitation-and-invitation-to-exchange-301095959.html

C. *Insufficient Benefits for Debtors*

Ultimately, the Common Framework cannot be effective unless it is sufficiently attractive to debtors; given the limited uptake, this has been a critical area of underperformance. Of 73 eligible nations, 48 utilized the DSSI, but only three have attempted the Common Framework -- despite the IMF finding that over 40 low-income nations are at or near financial distress. Further, the Republic of the Congo, a DSSI-participant, determined to pursue a restructuring outside of the common framework, underscoring low expectations.

Limited debtor participation can be attributed to three reasons. First, pursuing a common framework restructuring carries unambiguous costs – including reputational damage, rating downgrades and potential legal risks – with less concrete benefits, given the limited progress made by Chad, Ethiopia and Zambia over the course of a year.

Second, the framework may be inapposite relative to the specific capital structures and needs of many nations, particularly those with limited Paris Club obligations, such as Congo and Angola. At the same time, many nations which may benefit from the Common Framework are not able to utilize it, including Suriname and Lebanon, which are currently in default, and others like Sri Lanka and Ukraine which appear close to it.[212]

1. Market Repercussions

From the debtor perspective, hesitation to utilize the Common Framework represents a not-illogical cost-benefit analysis. "You know what it means for a country to say publicly it has problems paying its debts. .[t]he private sector will punish them. If a country has any choice, it won't do it."[213] For this reason, some nations, like Kenya, declined to participate even in the DSSI, even though that did not require private sector involvement.[214]

For many emerging market sovereign nations, market access has been a hard-fought and significant milestone, with both practical and normative implications. Borrowing from the bond market means that investors independently *want* to lend the nation money; they are not doing it because they *have* to. That

[212] Josyana Joshua, *Jay Newman Says Russia Could Lead Sovereign Debt Crisis*, BLOOMBERGLAW, (March 17, 2022), https://www.bloomberglaw.com/bloomberglawnews/bankruptcy-law/XAQDL30O000000?bna_news_filter=bankruptcy-law#jcite (noting "long list of countries that are on the edge" including Pakistan, Egypt, Ghana, Zambia, Lebanon, Venezuela, Sri Lanka, Tunisia, Russia and Ukraine, Gabon and Cameroon.)
[213] Jonathan Wheatley, *Poorest Countries Face $11Bn Surge in Debt Repayments*, FIN. TIMES, (Jan. 17, 2022), https://www.ft.com/content/4b5f4b54-2f80-4bda-9df7-9e74a3c8a66a
[214] https://www.jonesday.com/en/insights/2020/07/g20-debt-relief-for-developing-countries

represents a heightened level of freedom relative to reliance on concessionary capital. A potential degradation of that sovereignty presents non-trivial normative implications.

For credit rating agencies, a Common Framework transaction constitutes a default because it entails paying creditors less than contractually owed, even if done on a 'voluntary' basis pursuant to contractual collective action mechanisms. Fitch Ratings, for instance, is unambiguous in that pursuing a common framework restructuring "is unlikely to be compatible with a rating higher than 'CCC,'" because of the comparability requirement.[215] The rating would be lowered further as follows: to 'CC' upon indication that a CF transaction would involve private creditors, 'C' upon launching a consent solicitation and 'RD' following an accepted consent solicitation.

Consistent with the above, Fitch swiftly downgraded Ethiopia to 'CCC' after its February 1, 2020 announcement of a Common Framework restructuring for its approximately $30 billion of debt, primarily owed to the Paris Club and China, with only $1 billion Eurobonds outstanding.[216],[217] Moody's placed it on negative watch[218] and subsequently downgraded it to Caa1 and then Caa2, right above default.[219]

A CF Creditor Committee was formed on September 16, 2021, co-chaired by China and France,[220] and has held two meetings.[221] However, the parties appear to remain some distance from a broader resolution; on January 27, 2022, Fitch re-affirmed Ethiopia's 'CCC' rating, due to "the risk of a default event that may result from the government's participation in the G20 Common Framework (CF) debt relief

[215] Fitch Wire, *Common Framework Access Could Lead to Sovereign Debt Defaul*t, FITCHRATINGS, (Feb. 16, 2021), https://www.fitchratings.com/research/sovereigns/common-framework-access-could-lead-to-sovereign-debt-default-16-02-2021
[216] Fasika Tadesse, Samuel Gebre & Alonso Soto, *Ethiopia, Creditors Set Up Panel to Revamp $30 Billion Of Debt*, BLOOMBERG, (Sept. 17, 2021), https://www.bloomberg.com/news/articles/2021-09-17/ethiopia-creditors-set-up-panel-to-revamp-30-billion-of-debt?sref=OOpRUZ8l
[217] "The downgrade reflects the government's announcement that it is looking to make use of the G20 "Common Framework for Debt Treatments beyond the Debt Service Suspension Initiative (DSSI)" (G20 CF), which although still an untested mechanism, explicitly raises the risk of a default event." *See* Rating Action Commentary, *Fitch Downgrades Ethiopia to 'CCC'*, FITCHRATINGS, (Feb. 9, 2021), https://www.fitchratings.com/research/sovereigns/fitch-downgrades-ethiopia-to-ccc-09-02-2021.
[218] "[I]t is now clear that official sector lenders are intent on upholding the principle of comparable treatment of official and private sector lenders. It is therefore clear that the risk has risen that private sector creditors will incur losses, although it remains unclear how far that risk has risen." Rating Action, *Moody's Places Ethiopia's B2 Ratings on Review for Downgrade,* MOODY'S INVT. SERV., (March 10, 2021), https://www.moodys.com/research/Moodys-places-Ethiopias-B2-ratings-on-review-for-downgrade--PR_441947
[219] https://www.moodys.com/research/Moodys-downgrades-Ethiopias-rating-to-Caa2-outlook-negative--PR_455847
[220] Statement, *1st Meeting of The Creditor Committee for Ethiopia*, PARIS CLUB, (Sept. 28, 2021), https://clubdeparis.org/en/communications/press-release/1st-meeting-of-the-creditor-committee-for-ethiopia-28-09-2021
[221] Josyana Joshua, *Jay Newman Says Russia Could Lead Sovereign Debt Crisis*, BLOOMBERGLAW, (March 17, 2022), https://www.bloomberglaw.com/bloomberglawnews/bankruptcy-law/XAQDL30O000000?bna_news_filter=bankruptcy-law#jcite

initiative, given the mechanism's guiding principle of comparable treatment for both official and private creditors."[222]

That being said, Fitch indicated that a "rating would be updated to a level reflecting its post-restructuring fundamentals shortly thereafter," suggesting it could be short-lived. This was precisely the case with Ecuador. Following a broadly successful, non-contentious consent solicitation, Ecuador was briefly downgraded to 'RD,'[223] but upgraded 4 notches to 'B-' less than six months later.[224] After the transaction, Ecuador's financial health improved markedly, and its bonds were some of the best-performing in 2021.[225]

Thus, a downgrade is not a death knell for sovereigns, however it comes with a cost and correspondingly must provide a clear benefit to the debtor.

2. Inapposite to Debtor Needs

Some sovereigns, particularly those with limited Paris Club debt, may find the common framework sub-optimally suited to their particular needs. Angola and the Republic of the Congo – both DSSI-participants – present two examples of this dynamic. Further, a number of large restructurings completed before the Common Framework came into effect, including Argentina, Ecuador and Belize, potentially illustrate to apprehensive nations that the Common Framework is not essential.

In 2020, Angola utilized the DSSI to generate significant liquidity relief, estimated to total $571.5 million.[226] Later in the year, prior to Common Framework enactment, Angola executed a limited reprofiling of its obligations to three creditors – widely reported to be China, on a bilateral basis, and two Chinese state-owned banks – generating $6.3 billion in savings over three years.[227] Critically, Angola was

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[222] Rating Action Commentary, *Fitch Affirms Ethiopia at 'CCC'*, FITCHRATINGS, (Jan. 27, 2022), https://www.fitchratings.com/research/sovereigns/fitch-affirms-ethiopia-at-ccc-27-01-2022
[223] https://www.fitchratings.com/research/sovereigns/fitch-downgrades-ecuador-to-rd-20-04-2020
[224] https://www.fitchratings.com/research/sovereigns/fitch-upgrades-ecuador-to-b-outlook-stable-03-09-2020
[225] Maria Elena Vizcaino & Stephan Kueffner, *Ecuador Defaulted Last Year. Now Its Bonds are World's Best*, BLOOMBERG, (Aug. 2, 2021), https://www.bloomberg.com/news/articles/2021-08-02/ecuador-defaulted-last-year-now-its-bonds-are-the-world-s-best?sref=OOpRUZ8l
[226] Brief, *Debt Service Suspension Initiative*, WORLD BANK GROUP, (March 10, 2022), https://www.worldbank.org/en/topic/debt/brief/covid-19-debt-service-suspension-initiative
[227] https://www.reuters.com/article/us-angola-imf/angola-negotiates-6-2-billion-debt-relief-from-creditors-imf-idUSKCN26C2CP; IMF Art IV report; https://www.macaubusiness.com/angola-only-country-to-restructure-private-debt-without-rating-downgrade-un/ ("Angola was a kind of precursor of what the Common Framework for dealing with debt beyond the Debt Service Suspension Initiative [DSSI] should be, because in a way the authorities managed to negotiate with Chinese public and private creditors and had long talks and resolve the debt, before the launch of the Common Framework," [Vera Songwe, executive secretary of the United Nations Economic Commission for Africa] said. "They were lucky and did it quickly, but no country has yet gone through the process of the framework.")

able to accomplish this without triggering a default or even downgrade on its outstanding Eurobonds, ensuring continued market access. By addressing a smaller sub-set of its obligations, Angola was potentially able to resolve its near-term challenges more expediently, without foreclosing the possibility of a broader Common Framework restructuring in the future if one is ultimately needed.

After restructuring its debts to China, Angola entered into a $4.5 billion IMF facility, predicated on governance reforms and relaxing its currency peg.[228] In 2021, due to a combination of improved governance and rising oil prices, Angola received its first credit rating upgrade.[229]

Similarly, the Republic of the Congo, an IDA-eligible nation which utilized the DSSI, declined to participate in the Common Framework. As of 2020, the Congo had total debts of about $11 billion, with $7 billion in foreign currency.[230] Of those obligations, 12.16% are to multilateral creditors, 42.2% are bilateral – mostly to China – and 45.64% are private sector, the largest of which is oil-backed debt to commodity trading firms Glencore and Trafigura.[231]

In June, 2021, China "agreed in principle" to reschedule the Congo's $2.4 billion of debt, which "restored" debt sustainability, allowing for disbursement of IMF financing.[232] However, the IMF noted that the Congo's debt is formally "in distress" due to ongoing private creditor negotiations. In March, 2021, Congo restricted its obligations with Trafigura, however negotiations with Glencore remain ongoing.[233]

The Congo Republic has not publicly stated why it determined not to pursue a Common Framework restructuring, nor has it ruled out the option.[234] However, the decision may reflect the structure of its obligations, with China and the oil trading firms by far its largest creditors. Given the Congo's limited Paris Club exposure and more complex collateralized private sector credit, it may have concluded that

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[228] https://www.bloomberg.com/news/articles/2022-03-15/oil-boom-turns-angolan-kwanza-into-a-world-beating-currency?sref=OOpRUZ8l

[229] Candido Mendes, *Angola Eurobonds Surge as Moody's Lifts Ratings for First Time*, BLOOMBERG, (Sept 14, 2021), https://www.bloomberg.com/news/articles/2021-09-14/angola-gets-first-upgrade-of-sovereign-credit-rating-by-moody-s?sref=OOpRUZ8l (Moodys noted that "Stronger governance, in particular in the quality of the country's executive and legislative institutions, albeit from weak levels, is reflected in various aspects of the credit profile.")

[230] Based on IMF Article IV Report, at 29.

[231] https://www.reuters.com/article/congorepublic-debt-china/update-2-china-agrees-to-reschedule-congo-republics-2-4-bln-debt-minister-idUSL5N2O331M

[232] Art IV Report at 4 ("Recently, debt sustainability has been restored owing to the authorities' debt restructuring strategy . .. The authorities are actively negotiating the resolution of pending external arrears. Until this process is concluded and the negotiations with two external creditors are finalized, debt is classified as being "in distress."")

[233] https://www.reuters.com/article/africa-energy-congorepublic/congo-republic-seeks-glencore-loan-deal-within-a-year-says-oil-minister-idUSL8N2S06E2

[234] Notably, in reaffirming Congo's 'CCC' credit rating, Fitch explicitly noted that the grade "reflects the possibility that the authorities seek debt re-structuring under the Common Framework (CF) with a potential impact on private creditors."

negotiating directly with its largest creditors, without additional parties or the constraints of comparable treatment, would be preferable from an expediency and certainty perspective.

3. Unduly Limited Access

Paradoxically, while many common framework eligible nations are generally sub-optimally suited for it, many *ineligible* sovereigns could significantly benefit. This, in large part is because the eligibility criteria, is solely income-based, without taking into account debt levels or potential distress. For example, Lebanon and Suriname are currently undergoing long-running restructurings that may benefit from common framework access, but are ineligible. A number of middle-income nations are highly distressed, and likely to need relief in the near-term, including Sri Lanka and Ukraine.

While the pre-Common Framework pandemic-era restructurings illustrated that it is not per se *necessary* for a distressed sovereign, it may nonetheless be valuable and value accretive to individual debtors and their creditors. Further, in the event of a larger-scale wave of restructurings, which many believe to be possible, increased clarity regarding process and better coordination amongst parties is certain to add significant value.

IV. How Can The Common Framework be Improved?

"We really are at risk of another lost decade for developing countries," according to Rebeca Grynspan, secretary-general, United Nations Conference on Trade and Development;[235] at the same time, "the G20's effort to create a new system for debt renegotiation — the Common Framework for Debt Treatment — appears to have failed."[236]

While the Common Framework has underperformed thus far, its recognition of a broad set of issues represents a meaningful starting point that can be improved upon. Correspondingly, while an optimal solution may prove illusive, a number of accretive steps can be taken towards achieving the broader stated goals – facilitating resolution of sovereign distress coming out of the Covid-19 pandemic. The consequences are significant from both a public health and economic perspective; no nation should have to choose between vaccines and interest payments.

A. *Establish a 'Coordinating Forum'*

[235] Jonathan Wheatley, *Poorest Countries Face $11Bn Surge in Debt Repayments*, FIN. TIMES, (Jan. 17, 2022), https://www.ft.com/content/4b5f4b54-2f80-4bda-9df7-9e74a3c8a66a
[236] William Rhodes & John Lipsky, *Act Now to Prevent a New Sovereign Debt Crisis in the Developing World*, FIN. TIMES, (March 23, 2022), https://www.ft.com/content/faf73649-4e4e-481c-a245-55862ea644cb

Over the years, a significant volume of literature has been dedicated to the implications of lacking a dedicated forum for sovereign debt restructuring.[237] At the same time, the contemporary consensus appears to be that a permanent structure, such as the IMF's proposed SDRM lacks political palatability, notwithstanding potential benefits.[238] Yet, by addressing the identified shortcomings of the Common Framework, it may be possible to recreate many of the benefits in a more viable vehicle. A number of scholars and commentators have identified the need for tools beyond those available to facilitate restructuring on the other side of Covid-19.[239] Building off and synthesizing across those broadly compatible proposals, this Article proposes establishment of a time-bound 'Coordinating Forum' to support implementation of the Common Framework.

Critically, this proposed structure would be distinct from a court of law[240], and even restructuring architecture, but instead operate closer to shared quasi-institutional infrastructure to facilitate information flows and cross-creditor coordination.

The structure could have four interrelated guideposts, with a general emphasis towards simplicity.[241]

First, and consistent with proposals raised by scholars and commentators, the Coordinating Forum would be distinct from a court of law. Instead, the purpose would be closer to common informational and coordination infrastructure, distinct from even restructuring architecture. At present, the Common Framework lacks formal means of connecting the official and private sectors, in respect of not only negotiations but also information sharing and analytical collaboration. For instance, parties could develop consolidated, jointly used datasets, financial models and legal documentation. Particularly for legal documentation, this would be critical to ensuring consistency of provisions that incorporates best practices and recommendations, while 'cleaning up' the long-standing inconsistencies in documents

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[237] *See supra*, I.B.
[238] *See supra*, I.B.
[239] Professor Gelpern, for instance, suggested that "the G20 should call for the establishment of a Sovereign Debt Coordination Group consisting of sovereign borrowers and representatives of the official and private creditor community." *See* Anna Gelpern, Sean Hagan & Adnan Mazarei, *Debt Standstills Can Help Vulnerable Governments Manage The Covid-19 Crisis*, PIIE, (April 7, 2020), https://www.piie.com/blogs/realtime-economic-issues-watch/debt-standstills-can-help-vulnerable-governments-manage-covid. Similarly, the Group of 30 recommended "A standing consultative mechanism [that] can help build trust and promote consistency across Common Framework debt treatments."; G30, SOVEREIGN DEBT AND FINANCING FOR RECOVERY AFTER THE COVID-19 SHOCK: NEXT STEPS TO BUILD A BETTER ARCHITECTURE 3, 23 (2021) (further noting that "While such a group would not have any legal authority, it would have the capacity to convene creditors, collect and disseminate information, and facilitate negotiations among sovereign debtors and their creditors. It could also serve as a liaison with national financial regulators to monitor the impact of a standstill on the financial system and minimize the chances of systemic distress. Past sovereign debt and banking crises in the 1980s, and more recently in Europe a decade ago, used variants of this mechanism.")
[240] *Id.*
[241] See, e.g., Mooney, Charles W. Jr., *A Framework for a Formal Sovereign Debt Restructuring Mechanism: The KISS Principle (Keep It Simple, Stupid) and Other Guiding Principles*, MICH. J. INTL LAW (2015);

across and within sovereign debt structures. The informal mechanism approach would be consistent with historical practice of the Paris and London clubs, as well as certain prior precedents.[242] The value-add, however, would be neutral shared infrastructure through which the official and private sectors could coordinate.

Second, the Coordinating Forum should exist under neutral institutional auspices. This can present an innate challenge of balancing institutional expertise against institutional interest. However, a potential complexity with establishing a framework within the most experienced players – such as the IMF, World Bank or G20 – is that these entities also may be perceived to have some vested interests as lenders, compounded by the IFI's preferred creditor status, and because of the inherently political dimensions involved.[243] This is arguably compounded for the IFIs given their preferred creditor status. To that end, the United Nations Conference on Trade and Development (UNCTAD) proposal, endorsed by Professor Lienau, presents a potentially viable option, as it represents an institution with credibility in the eyes of all relevant constituencies, but also one without significant financial exposure.[244]
Third, the initiative should be time-bound – for instance, 4 years, with an extension option. While a temporary structure has inherent suboptimalities, it has the distinct advantage of being easier to establish, as the relevant constituencies would not be making a permanent commitment. Subsequently, if it performs well, it can always be extended or made permanent. If it disappoints, there is a built-in off-ramp.

Finally, the structure should ensure a high level of representation from and disclosure to citizens of the affected nations. Debt restructuring is highly consequential for those ultimate constituencies, however, they do not have a seat at the table.[245] Because the decisions made in respect of their sovereign obligations will impact the nation's citizens for years, if not generations to come, it is only fair that they have visibility into how those decisions are being made. For instance, as one relevant example, the Puerto Rico

[242] *See* Anna Gelpern, Sean Hagan & Adnan Mazarei, *Debt Standstills Can Help Vulnerable Governments Manage The Covid-19 Crisis*, PIIE, (April 7, 2020), https://www.piie.com/blogs/realtime-economic-issues-watch/debt-standstills-can-help-vulnerable-governments-manage-covid
[243] In a somewhat related concern, Professor Gelpern recommended that "*Because they implicate sensitive political judgments, IMF staff should not be the sole source of debt sustainability determinations," noting that "*DSA politics can threaten the IMF's credibility, and cast doubt on its impartiality." *See* Anna Gelpern, *Sovereign Debt: Now What?*, YALE J. INTL LAW 87 (2016).
[244] Odette Lienau, *The Time Has Come for Disaggregated Sovereign Bankruptcy*, EMORY BK DEV. (2021) (in respect of the UNCTAD mechanism, noting "Instead of a full-blown multilateral body with adjudicative functions, a more pragmatically achievable organization could be proposed and implemented, perhaps even by a small group of states and supporters, in order to serve as a focal point for ongoing activities designed to improve how the global community collectively deals with debt in the short, medium, and long term.")
[245] This is, sadly, particularly pronounced for less democratic nations.

Oversight Board was structured to ensure representation from the island and also held many of its meetings there, showing the relevant constituencies much deserved respect and consideration.[246]

B. Enhance Access & Process

A critical Common Framework failing has been limited debtor uptake, suggesting that the process should be made more valuable to a larger universe of debtors. Some relevant dimensions include increasing access, enhancing transparency and providing more concrete benefits to debtors.

First, the process should provide debtors with concrete upfront benefits, including a "comprehensive and sustained debt service payment standstill for the duration of the negotiation," as recommended by IMF Managing Director Kristalina Georgieva.[247] At present, simply applying under the Common Framework has costs, including a swift downgrade and potential deterioration in market access, long before any relief materializes.

A standstill would be valuable to debtors and creditors alike by allowing them to focus on the restructuring negotiations – that is indeed how Chapter 11 of the Bankruptcy Code operates. Ecuador's 2020 restructuring provides one example of a successful model. There, a 6-month standstill helped facilitate Ecuador's restructuring by providing the parties an undisturbed negotiating period. Ecuador paid creditors a relatively nominal consent payment for the standstill, which was subsequently netted against the sovereign's other obligations. Thus, creditors received a show of good faith on a cost-neutral basis to the debtor.

Such a structure could be adopted here by leveraging relatively limited amounts of IMF capital, consistent with a proposal raised by the Fund itself.[248] The Fund notes that in the event of "a COVID-related systemic sovereign debt crisis. ...additional instruments may need to be activated at short notice." It continues, adding that such instruments could "include IFI financing of cash or credit enhancements that lowers the risk, and hence increases the value, of the assets offered to creditors without reducing debt

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[246] *See* Clayton P. Gillette & David A. Skeel, Jr., *A Two-Step Plan for Puerto Rico*, INST. LAW & ECON. (2016) (providing board composition with "Three of five voting members from Puerto Rico"); Professor Mooney noted the viability of a court within the sovereign acting in the proceeding. *See*, Mooney, Charles W. Jr., *A Framework for a Formal Sovereign Debt Restructuring Mechanism: The KISS Principle (Keep It Simple, Stupid) and Other Guiding Principles*, MICH. J. INTL LAW (2015).
[247] *See supra*, n. 25.
[248] The IMF contemplates a not dissimilar approach, noting that "should a COVID-related systemic sovereign debt crisis requiring multiple deep restructurings materialize, . . . additional instruments may need to be activated at short notice. Since contractual reforms would require time to become effective, such instruments could only be either of a financial or statutory nature. The former could include IFI financing of cash or credit enhancements that lowers the risk, and hence increases the value, of the assets offered to creditors without reducing debt relief from the perspective of the debtor." IMF SOVEREIGN DEBT ARCHITECTURE at 3.

relief from the perspective of the debtor."[249] Here, the IMF could provide the nominal consent payment to creditors as an interest free loan to the debtor. That way, all parties gain through the Common Framework. The debtor receives an immediate breathing spell through a standstill, while creditors receive a consent payment as a show of good faith from the debtor. That good faith can help build trust and facilitate restructuring. The IMF would not be overly-burdened, given that the expenditure could act as a relatively small, short-term loan safeguarded by its existing preferred creditor, super-priority status.

Transparency is also an essential part of any process of debt adjustment. To that end, participation should not only require comprehensive debt disclosure, but also include safe harbors in respect of any debt non-disclosure provisions embedded in obligations. Irrespective of the governing law or terms of the contracts, a statutory fix is both possible and necessary to ensure that debtors feel unambiguously comfortable disclosing the full portfolio of their obligations without fear of potential consequence or adverse impact.

Finally, access to the Common Framework should be expanded, as urged by many including the IMF and G30.[250] At present, the focus solely on income, as measured by GNI, is inapposite, as that does not take into account a nation's debt levels or risk of distress. As a result, far too limited a universe of debtors are at the center of the Venn diagram between common framework eligibility and circumstances situated to benefit from it. Many nations that are eligible, are not well suited for the process, especially given the costs. Yet, other nations, that could benefit are ineligible, due to seemingly arbitrary circumstances. For instance, is it really fair that Ukraine would not be able to avail itself of Common Framework relief?

An objective approach could be widening access to include all IBRD-eligible[251] nations, which should encompass the majority of relevant countries. At the same time, a relatively permissive application option could be added for other nations that choose to seek relief. From a policy perspective, it is important to reiterate that these nations are not being given debt relief – but merely the option to seek uniform treatment in respect of bilateral lenders.

One could potentially take issue with expanding the scope of a program with identified shortcomings. However, another potential vantage point may be that by being applicable to a wider universe of debtors, the Common Framework may in fact be able to develop the scale needed to warrant developing more quasi-institutional infrastructure.[252]

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[249] *Id.*
[250] *See supra* n. 25, noting "the Common Framework should be expanded to other highly-indebted countries that can benefit from creditor coordination."
[251] *See supra*, I.A.1.
[252] G30, SOVEREIGN DEBT AND FINANCING FOR RECOVERY AFTER THE COVID-19 SHOCK: NEXT STEPS TO BUILD A BETTER ARCHITECTURE 23-5 (2021).

C. Innovative 'Comparability' Solutions

Given the challenges likely to be presented by the 'comparability of treatment' requirement, innovative, bespoke, solutions should be implemented to bridge potential gaps between parties while smoothing process implementation. Specifically, the emphasis should be on integrative value creation by leveraging instruments and exposures with asymmetric value to the respective parties. Conceptually, that approach takes advantage of the breadth of interests involved in sovereign restructuring matters. Policy considerations also suggest that the comparability requirement should not be relaxed, as it could incentivize private creditor 'free-riding' on tax-payer-provided benefits – in effect a regressive wealth transfer. A relevant premise is that private creditors are not providing 'debt relief' so much as engaging in an arms-length market restructuring transaction for out of the money credit, much as they would in a chapter 11 context.

Over the years, a number of strategies well-suited to the task have been developed, including contingent instruments, tied to inputs such as GDP growth, and ESG-based structures, such as debt-for-conservation swaps. These tools can offer the parties involved a set of logical trades.[253]

As one example, private sector demand for ESG-linked products is extremely high, suggesting that creditors may place a value on this type of exposure beyond the pure financials. The 2021 Belize restructuring, for instance, featured an exchange of an outstanding Eurobond for a slightly lower recovery value in exchange for the sovereign committing to specified conservation efforts.[254] ESG-linked solutions have been suggested in Zambia and Suriname's ongoing restructurings as well.

In a similar vein, research indicates some private market tendency to undervalue contingent instruments – structures that allow for additional returns based on the sovereign's future economic performance.[255] [256] Here, the official sector could be the party that values the instrument more highly, and is thus able to take the integrative leg of the trade, accepting a slightly smaller dollar value in exchange for an instrument the

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[253] To provide a highly simplified illustrative example, let's presume that a nation's Paris Club creditors have accepted what amounts to 70 cents on the dollar, but private creditors are unwilling to accept anything less than 75 cents, which would violate comparable treatment. Under the ESG swap approach, the private creditors could receive 70 cents in cash, and 5 cents through an environmental benefit undertaken by the sovereign, non-monetary value nonetheless valuable to them and palatable for Paris Club creditors to forego.

[254] See Patrick Bolton, *et al*, *Environmental Protection and Sovereign Debt Restructuring* (February 22, 2022), https://ssrn.com/abstract=4040395 (describing Belize transaction and related considerations).

[255] So, for instance, a contingent instrument economically worth 5 cents might be valued by creditors at only 2 cents, due to perceived monitoring issues or instrument complexity, for instance. *See* G30, SOVEREIGN DEBT AND FINANCING FOR RECOVERY AFTER THE COVID-19 SHOCK: PRELIMINARY REPORT AND CONCLUSION OF THE WORKING GROUP (2020); IMF SOVEREIGN DEBT ARCHITECTURE + Gelpern

[256] Stephen Kim Park & Tim R Samples, *Towards Sovereign Equity*, 21 STANFORD J. L. BUS & FIN. 245-8 (2016).

market undervalues. A logical division of labor might be for the IFIs to be responsible for measurement of inputs such as GDP, and corresponding data, while bilateral creditors own the exposure. The instruments could be made tradeable, so that once the market becomes comfortable with pricing the assets, the official creditors could sell them in the secondary market, realizing the latent value.

Additionally, commodity-linked instruments may provide a further source of integrative value. One structure may be commodity-linked securities; Argentina, for instance, suggested soy-linked contingent instruments during its 2020 restructuring. Another approach may be granting creditors out-of-the-money options based on the structure of a sovereign's production of commodities, to provide enhanced value in the event that commodity prices increase beyond expectations.

Finally, utilizing certain limited IMF backstops, as suggested by the Fund itself, could, albeit in a very limited context, potentially provide the final steps needed to bridge a gap between the parties and get a transaction over the edge.

CONCLUSION

The world is on the edge of an emerging markets debt crisis, with the potential to upend hundreds of millions of lives. Before the Covid-19 pandemic, emerging markets already had record debt levels, fragmented creditor constituencies and insufficient tools for resolving distress. The situation has grown far more dire, with 60% of low-income countries now at risk of insolvency.

At the same time, the historical sovereign debt restructuring architecture has grown increasing ill-suited for contemporary challenges. Meanwhile, the Common Framework – the G20's the newly-created mechanism for resolving sovereign distress – "appears to have failed."[257] That failure can be attributed to the Common Framework providing inadequate institutional infrastructure, exacerbating conflicts amongst creditors and failing to offer sufficient benefits for debtors.

Yet, while the Common Framework has underwhelmed, it arguably remains the most viable toolbox for resolving the coming sovereign debt crisis – thus, it must be improved, rather than discarded. To that end, a number of steps can, and should be taken, for facilitating post-pandemic sovereign distress resolution. Most significantly, this Article proposes establishing a time-bound Coordinating Forum to support implementation of the Common Framework. Wholly distinct from a court of law, the Coordinating Forum is instead intended to fill a critically-needed gap in shared informational and coordinating infrastructure. At the same time, Common Framework access should be expanded to a broader universe of nations,

[257] William Rhodes & John Lipsky, *Act Now to Prevent a New Sovereign Debt Crisis in the Developing World*, FIN. TIMES, (March 23, 2022), https://www.ft.com/content/faf73649-4e4e-481c-a245-55862ea644cb

including, perhaps most pertinently, Lebanon, Sri Lanka and Ukraine. Finally, "comparability of treatment" – which requires private creditor burden sharing – must be unambiguously enforced, and should aim to incorporate innovative instruments, with a specific emphasis on ESG and climate-linked transactions, for which Belize's recent environmental conservation-focused restructuring provides an attractive template.

It is imperative that policymakers develop sufficient tools for the coming sovereign debt storm. The implications of failing to act could not be more significant; no nation should be forced to choose between vaccines and interest payments.