

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

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Sixty percent of low-income countries are currently at “high-risk” of insolvency, necessitating debt relief, according to the International Monetary Fund. The enormity of the problem cannot be overstated; a prospective sovereign debt crisis and economic collapse threatens hundreds of millions of people around the world.

At the same time, the tools to address these challenges are wholly inadequate. Typically, debt reduction is effectuated through statutory systems; 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 increasingly 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 provides an early assessment of the Common Framework, finding that it has failed because it: (i) lacks institutional infrastructure; (ii) exacerbates conflicts amongst creditors; and (iii) delivers insufficient benefits for debtors while unduly restricting nations’ eligibility—including, perhaps most pertinently, Ukraine and Sri Lanka.

Yet, because it remains the “only game in town” for addressing the coming sovereign debt crisis, the Common Framework must be amended, rather than discarded—and, 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, intended to fill critical gaps in informational and coordinat-

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** Because this Article was largely written in early 2022 (and goes to print in early 2023), it may not capture certain subsequent developments in the sovereign debt and restructuring arenas. While the Article tries to clearly delineate any associated points of uncertainty, the reader should bear in mind that most information, data and figures provided herein are accurate as of approximately early-to-mid-2022. Certain discussion may be impacted by subsequent developments or new information not available at the time of writing and publication.

ing infrastructure. In addition, the Common Framework should provide greater benefits for debtors, while being available to more nations.

Finally, the Common Framework must require private investors to share the burden, which this Article posits can be accomplished by leveraging innovative ESG and climate-linked instruments, with Belize's recent 'debt-for-nature' restructuring transaction—which tied debt reduction to environmental conservation—providing an attractive 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, sovereign (i.e., government) finance is critical for economic development, directly affecting billions of people around the world. Coming into the Covid-19 pandemic, global debt levels were already at record highs and have subsequently risen considerably, particularly for low-

¹ Kristalina Georgieva & Ceyla Pazarbasioglu, *The G20 Common Framework for Debt Treatments Must be Stepped Up*, IMF BLOG (Dec. 2, 2021), <https://blogs.imf.org/2021/12/02/the-g20-common-framework-for-debt-treatments-must-be-stepped-up/> [<https://perma.cc/VP L7-8X9Q>].

² William Rhodes & John Lipsky, *Act Now to Prevent a New Sovereign Debt Crisis in the Developing World*, FIN. TIMES (Mar. 23, 2022), <https://www.ft.com/content/faf73649-4e4e-481c-a245-55862ea644cb> [<https://perma.cc/HS6K-QCQK>].

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> [<https://perma.cc/UPY8-8LA2>]; Lee C. Buchheit & Mitu Gulati, *Avoiding a Lost Decade—Sovereign Debt Workouts in the Post-Covid Era*, 16 CAP. MKTS. L.J. 45, 45–46 (2021).

⁴ Hannah Kuchler, *Billions Required to Prevent Next Pandemic, Warns Epidemic Expert*, FIN. TIMES (Mar. 3, 2022), <https://www.ft.com/content/dc0d8407-446d-4fb5-86a5-a628bed4d786> [<https://perma.cc/959D-WC87>].

er-income nations.⁵ Now, the fundamental issue is that many of 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.⁶ 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”⁷ with post-2010 crises “expos[ing] the regime’s perennial failures and new shortcomings.”⁸ As 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?”⁹ 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 Initia-

⁵ Xuehui Han et al., *The Pre-Pandemic Debt Landscape—and Why It Matters*, IMF BLOG (Feb. 1, 2021), <https://www.imf.org/en/Blogs/Articles/2021/02/01/the-pre-pandemic-debt-landscape-and-why-it-matters> [<https://perma.cc/QUF3-XBLV>] (“Many countries entered the pandemic with elevated debt levels . . . global debt—public plus private—reached \$197 trillion in 2019 . . . Higher debt can potentially reduce the ability of governments to react to the COVID-19 crisis . . .”); see also LAZARD, GOVERNMENT DEBT IN ROUGH WATERS 2 (2020), <https://www.lazard.com/media/451399/20200929-whitepaper-en-final.pdf> [<https://perma.cc/JZ6R-U75J>] (noting that “[p]ublic debt levels have reached unprecedented levels, and the trend is upward”).

⁶ Anna Gelpern, *Sovereign Debt: Now What?*, 41 YALE J. INT’L L. 45, 51 (2016) (noting that sovereign restructuring is ultimately “a world without statutory, court-supervised bankruptcy, robust contract enforcement, or strong shared norms”).

⁷ Alonso Soto, *China’s Feud with Bondholders Could Reset Debt Workout Rules*, BLOOMBERG (Oct. 25, 2020, 4:00 PM), <https://www.bloomberg.com/news/articles/2020-10-25/china-s-feud-with-bondholders-could-reset-debt-workout-rules> [<https://perma.cc/NX46-S9GL>].

⁸ Gelpern, *supra* note 6, at 46.

⁹ Abiy Ahmed, *Why the Global Debt of Poor Nations Must Be Canceled*, N.Y. TIMES (Apr. 30, 2020), <https://www.nytimes.com/2020/04/30/opinion/coronavirus-debt-africa.html> [<https://perma.cc/7C9T-KZ2N>] (Abiy Ahmed, Prime Minister of Ethiopia calling for debt relief, and further noting “[l]ives lost during the pandemic cannot be recovered.”).

tive (“DSSI”); and (ii) the Common Framework for Debt Treatment Beyond the DSSI (the “Common Framework”).¹⁰

Enacted in April of 2020, the DSSI deferred—but did not reduce—lower-income nations’ scheduled debt payments to free up funds for public health.¹¹ The program expired on December 31, 2021 and was not extended.¹²

The DSSI had two critical failings. First, “suspending payments rather than cancelling mean[t] countries [would] continue to pile up interest and face even bigger debt levels next year.”¹³ Second, private creditors were not required to provide debt relief, but merely asked to do so “voluntarily.”¹⁴ Few did so; “[r]egrettably, only one private creditor participated,” the World Bank dryly noted.¹⁵

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.”¹⁶ By mid-2022, only three nations attempted to use the Common Framework; none have completed a restructuring.¹⁷ Yet, participants have experienced swift credit rating downgrades and degradation in market access.¹⁸ “[T]he Common Framework is yet to deliver on its promise,” according to IMF Managing Director, Kristalina Georgieva; others have been less charitable, finding that it “appears to have failed.”¹⁹

With that premise, this Article—the first to analyze the Common Framework—then explores two critical questions: (i) why has the Common Framework failed; and, (ii) 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.

¹⁰ Georgieva & Pazarbasioglu, *supra* note 1.

¹¹ *See infra* Section II.A.

¹² Georgieva & Pazarbasioglu, *supra* note 1.

¹³ Andrew England et al., *G20 Agrees Debt Relief for Low Income Nations*, FIN. TIMES (Apr. 15, 2020), <https://www.ft.com/content/5f296d54-d29e-4e87-ae7d-95ca6c0598d5> [<https://perma.cc/S7QK-YVVQ>].

¹⁴ *See infra* Section II.A.

¹⁵ *See infra* note 161.

¹⁶ *See infra* Section II.B.

¹⁷ Hung Tran, *The G20’s Unfinished Business: Don’t Let Debt Do Us Part*, ATL. COUNCIL (Feb. 14, 2022), <https://www.atlanticcouncil.org/blogs/new-atlanticist/the-g20s-unfinished-business-dont-let-debt-do-us-part/> [<https://perma.cc/BAL4-S6WZ>].

¹⁸ Karin Strohecker, *Downgrade Fears Will Deter Countries from Joining G20 Debt Relief framework—World Bank*, REUTERS (Feb. 23, 2021, 11:05 AM), <https://www.reuters.com/article/us-emerging-debt-worldbank-idUSKBN2AN26G> [<https://perma.cc/YK7Q-CMGS>].

¹⁹ *See* Georgieva & Pazarbasioglu, *supra* note 1; Rhodes & Lipsky, *supra* note 2.

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.”²⁰ 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 restructuring, for instance.²¹

Second, conflicts amongst creditors—with which sovereign restructuring is exceptionally rife—are exacerbated, rather than mitigated, by the Common Framework.²² As a threshold matter, private investors and the “official sector” of governmental entities have inherently different interests; investors focus on returns, while 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.²³ 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 Common Framework structure. Others, most in need of help, are left out—including Sri Lanka, Lebanon, and Ukraine.²⁴

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.

²⁰ Chris Suckling, *The G20’s Common Framework*, IHS MARKIT (Mar. 16, 2021), <https://ihsmarkit.com/research-analysis/g20s-common-framework.html> [<https://perma.cc/TAR3-4G7Q>].

²¹ See *infra* Section III.A.

²² See *infra* Section III.B.

²³ Stuart Culverhouse, *The G20’s Common Framework Six Months On*, TELLIMER Rsch. (July 30, 2021), <https://tellimer.com/article/the-g20s-common-framework-six-months-on> [<https://perma.cc/5FEE-X8VQ>] (“Indeed, rather than encourage others to follow, perhaps the mixed reaction to Ethiopia’s request has deterred others from doing so. . .”).

²⁴ See *infra* Section III.C.

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 in the traditional sense—would instead operate as shared informational and coordinating infrastructure between creditor groups and amongst individual parties.²⁵ The benefits of this intentionally incremental step could be vast, given the extensive coordination, informational, and process challenges plaguing ongoing restructurings—and disincentivizing much-needed new ones.

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 Common 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 to middle-income nations, 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.²⁶

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 as well as practical application; furthermore, it must be enforced. To help with the comparability logjam, 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 gross domestic product ("GDP") growth, and environmental, social and governance ("ESG")-based structures, such as debt-for-conservation swaps.²⁷ 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.²⁸ Such methods hold particular potential by helping to ameliorate multiple challenges through one integrative solution.²⁹

²⁵ See *infra* Section IV.A.

²⁶ See *infra* Sections IV.B.2.

²⁷ See *infra* notes 409-11 and accompanying text.

²⁸ See *infra* Section IV.C

²⁹ Afke Zeilstra, *Debt-for-Climate: Hitting Three Crises with One Shot?*, ATRADIUS (Feb. 3, 2022), <https://atradius.us/reports/economic-research-debt-for-climate-hitting-three-crises-wit>

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 of a political entity with legal authority over a territory—represents a unique class of asset, from both descriptive and normative perspectives. In descriptive terms, it is characterized by “limited legal enforceability,” affecting instrument structure and fundamental lender-borrower dynamics.³⁰ Normatively, much of the distinctiveness stems from the nature of the borrower. A company is a nexus of contracts—legal fiction; a sovereign, in contrast, represents a collective of people, 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 debt restructuring is also exceptionally complex—and consequential.³¹ In the 1980s, for instance, a wave of sovereign distress resulted in what has been termed a “lost decade.”³² Today, that risk is ominously present; “60 percent of low-income countries are at high risk or already in debt distress,” the IMF has warned.³³

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 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.

h-one-shot.html [https://perma.cc/KP3F-7URY].

³⁰ Stephen Kim Park & Tim R Samples, *Distrust, Disorder, and the New Governance of Sovereign Debt*, 62 HARV. INT'L L.J. 175, 180 (2021) (observing that “[s]overeign debt is distinguished from corporate debt by its limited legal enforceability”).

³¹ Carmen M. Reinhart, *The Post-Crisis Economy's Long Debt Hangover*, PROJECT SYNDICATE (Apr. 21, 2016), <https://www.project-syndicate.org/commentary/debt-restructuring-needed-as-policy-option-by-carmen-reinhart-2016-04> [https://perma.cc/4XGN-JM62].

³² Buchheit & Gulati, *supra* note 3, at 46–47.

³³ Georgieva & Pazarbasioglu, *supra* note 1.

A. *Background & Taxonomy*

Some contractual, structural and economic dimensions of sovereign obligations parallel the commercial, corporate counterpart.³⁴ Other critical features are distinct, including legal priority, enforcement, and insolvency resolution.³⁵ Countries 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.³⁶ 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.³⁷

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:³⁸ (i) multilateral organizations, commonly known as international financing institutions (“IFI”); (ii) bilateral lenders;³⁹ and (iii) the private sector.⁴⁰ Both multilateral and bilateral lenders are part of the “official sector:” organizations

³⁴ Notably, many (if not most) salient issues underlying sovereign debt, are best described through *macroeconomics*—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 that affect companies, but are out of those entities’ control. *See generally* G. Chris Rodrigo, *Micro and Macro: The Economic Divide*, in FINANCE AND DEVELOPMENT: BACK TO BASICS 6 (IMF 2017).

³⁵ Mitu Gulati & George Triantis, *Contracts Without Law: Sovereign Versus Corporate Debt*, 75 U. CIN. L. REV. 977, 977–78, 986, 1003 (2007).

³⁶ *Id.* at 979. Additionally, borrowers may take on credit to refinance existing obligations, though the underlying logic is not dissimilar.

³⁷ *Id.* at 986. 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, US 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 complex, typically associated with specialist investors.

³⁸ ALEXIS RIEFFEL, PRINCETON UNIV., THE ROLE OF THE PARIS CLUB IN MANAGING DEBT PROBLEMS 2 (Ellen Seiler ed., No. 161, 1985) (“The procedures for resolving an international debt crisis resemble a three-ring circus,” some scholars have observed.).

³⁹ *Id.* at 3. As discussed subsequently, this category is further bifurcated between Paris Club and non-Paris Club lenders.

⁴⁰ Lee Buchheit et al., *How to Restructure Sovereign Debt: Lessons from Four Decades* 5 (Peterson Inst. for Int’l Econ., Working Paper No. 19-8, 2019).

that ultimately report to governments and are thus at least adjacent to the political structure.⁴¹

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 missions.”⁴² 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.⁴³

Bilateral lenders refer to capital provided by individual nations, oftentimes through a specialized agency or organization.⁴⁴ Typically, bilateral lending involves elements of concessionary or aid-oriented financing.⁴⁵ Historically, the bulk of this lending came from developed markets, largely the United States and Europe. More recently, a growing portion of bilateral lending has been supplied by large, fast-growing emerging economies. China, largely through its Belt and Road Initiative, has been most active, becoming the single largest bilateral lender.⁴⁶ India, Saudi Arabia, and the United Arab Emirates (“UAE”) have also extended significant capital.⁴⁷

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 close-

⁴¹ See *infra* Section III.B. As discussed below, these entities thus may have incentive structures at times distinct from purely “commercial” parties.

⁴² *The World Bank Group and the International Monetary Fund (IMF)*, THE WORLD BANK, <https://www.worldbank.org/en/about/history/the-world-bank-group-and-the-imf> [<https://perma.cc/96XN-VM9V>].

⁴³ See *Overview of International Financial Institutions (IFIs)*, GOV'T OF CAN., <https://www.tradecommissioner.gc.ca/development-developpement/mdb-overview-bmd-apercu.aspx?lang=eng> [<https://perma.cc/38RU-ACSW>] (Feb. 24, 2020). The World Bank is, amongst other functions, the leading development bank, specializing capital to foster economic growth and development. *Id.* The IMF more often acts as a “crisis lender” with extensive institutional expertise in distress resolution. See *About the IMF*, INT'L MONETARY FUND, <https://www.imf.org/en/About/Factsheets/IMF-Lending> [<https://perma.cc/3VFF-WKBP>]. The IMF's capital is provided by its members, with proportions based on their ownership share. *Id.*

⁴⁴ Nancy Lee et al., *Calling All Official Bilateral Creditors to Poor Countries: Switch to IDA Concessional Terms as Part of COVID-19 Response*, CTR. FOR GLOB. DEV. (April 8, 2020), <https://www.cgdev.org/blog/calling-all-official-bilateral-creditors-poor-countries-switch-ida-concessional-terms-part> [<https://perma.cc/7CGM-YMXP>].

⁴⁵ Buchheit et al., *supra* note 40, at 5.

⁴⁶ Anna Gelpern et al., *How China Lends: A Rare Look into 100 Debt Contracts with Foreign Governments* 3 (Peterson Inst. Int'l Econ., Working Paper No. 21-7, 2021).

⁴⁷ See Georgieva & Pazarbasioglu, *supra* note 1.

ly regulated and thus indirectly connected to their respective governments.⁴⁸ Over time, emerging markets matured, incorporating greater issuance of more widely syndicated bonds.⁴⁹ 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.⁵⁰

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.⁵¹ While sovereigns often waive immunity from suit, and are subject to Foreign Sovereign Immunity Act jurisdiction in the United States, investors tend to discount the practical value of potential litigation.⁵² 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.⁵³ That said, in something of a growing trend, obligations are sometimes secured by circumscribed cash flows, most often commodity revenues or royalties.⁵⁴ Though “generally excluded”⁵⁵ 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 (“the Congo”).⁵⁶

Second, the largely unsecured nature of obligations does not mean that all creditors are on equal footing. To the contrary, a relatively complex priority hi-

⁴⁸ See *infra* Section I.B.1 (discussing London Club approach to debt restructuring). 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> [<https://perma.cc/J5FG-JUUY>].

⁴⁹ See *infra* Section I.B.2.

⁵⁰ See *infra* Section I.B.2.

⁵¹ Park & Samples, *supra* note 30, at 180 (observing that “[s]overeign debt is distinguished from corporate debt by its limited legal enforceability”).

⁵² W. Mark C. Weidemaier, *Sovereign Immunity and Sovereign Debt*, 2014 U. ILL. L. REV. 67, 90–91, 101, 106–07 (2014).

⁵³ Buchheit et al., *supra* note 40, at 3 (“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.”).

⁵⁴ See *infra* Section III.B (discussing Chad and the Congo).

⁵⁵ Buchheit et al., *supra* note 40, 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.”).

⁵⁶ See *infra* Section III.B.

erarchy has developed amongst the different lender types. Obligations to multi-lateral organizations are understood to be “preferred” to all others and thus repaid in full before bilateral or private obligations—essentially a super-seniority analog.⁵⁷ 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.⁵⁸ However, recent research has found that “[i]nconsistent with convention, bilateral (government-to-government) official loans are *not* senior to private creditors.”⁵⁹ This issue is likely to be a major point of contention in ongoing and future restructurings.⁶⁰

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 United States Dollar (“USD”)-equivalent of local law debt.⁶¹ 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.⁶²

Fourth, sovereign debt can be denominated in local or foreign currency, typically a “reserve currency,” such as USD 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.⁶³ That precludes balance of payment

⁵⁷ An analog might be the super-priority debtor-in-possession (“DIP”) 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. *See generally* Matthias Schlegl et al., *The Seniority Structure of Sovereign Debt* 7–8 (Nat’l Bureau of Econ. Rsch., Working Paper No. 25793, 2019).

⁵⁸ Buchheit et al., *supra* note 40, 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 . . .”).

⁵⁹ Schlegl et al., *supra* note 57, at 2–3, 8–9 (confirming IMF super-seniority, followed by other IFIs).

⁶⁰ *See infra* Part III.

⁶¹ *See infra* Section III.B.

⁶² Buchheit et al., *supra* note 40, at 10–11; *see* Patrick Bolton et al., *Legal Air Cover*, 7 J. FIN. REGUL. 189, 193 & n.7 (2021) (describing impact of Greek legislative changes to debt instruments).

⁶³ Joe Rennison & Isabella Simonetti, *A Strong Dollar Is Wreaking Havoc on Emerging Markets. A Debt Crisis Could Be Next.*, N.Y. TIMES, <https://www.nytimes.com/2022/10/05/business/strong-dollar-emerging-market-debt-crisis.html> [<https://perma.cc/H2EL-VP2F>] (Oct. 6, 2022) (This dynamic is demonstrated by the impact of strengthening the US dollar, which “forces countries to use more of their own currency to buy the same quantity of

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 unlawful invasion of Ukraine⁶⁴—is seeking to exercise a contractual feature purportedly allowing it to repay dollar and euro-denominated bonds in rubles.⁶⁵

B. *Sovereign Distress & Restructuring*

From a legal perspective, sovereign debt restructuring is night-and-day relative to corporate processes, such as Chapter 11.⁶⁶ The most critical difference is that there is no centralized forum or process for adjusting the debts of a sovereign nation.⁶⁷ The myriad, complex reasons for this are largely rooted in matters of sovereignty and jurisdiction.⁶⁸ Over the years, a number of suggestions

goods And because they borrow in dollars, they have to pay interest in dollars, which adds to their financial distress”).

⁶⁴ See Lev E. Breydo, *Political Default. The Implications of Weaponizing Global Financial Infrastructure*, 56 U.C. DAVIS L. REV. ONLINE 53 (2023).

⁶⁵ See Lev E. Breydo, *Russia’s Roulette. Sanctions, Strange Contracts & Sovereign Default*, 60 SAN DIEGO L. REV. (forthcoming March 2023) (discussing complex currency-specific provisions in Russian sovereign debt); see also Maria Elena Vizcaino et al, *Radio Silence on Russia Debt Payments Keeps Default Risk in Play*, BLOOMBERG (Mar. 16, 2022, 3:38 PM), <https://www.bloomberg.com/news/articles/2022-03-16/russia-s-watershed-moment-for-bonds-is-a-117-million-payment> [<https://perma.cc/D9SP-9AJ7>].

⁶⁶ 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 “[t]he 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 generally Marshall E. Tracht, *Contractual Bankruptcy Waivers: Reconciling Theory Practice and Law*, 82 CORNELL L. REV. 301 (1997).

⁶⁷ Charles W. Mooney Jr., *A Framework for a Formal Sovereign Debt Restructuring Mechanism: The KISS Principle (Keep It Simple, Stupid) and Other Guiding Principles*, 37 MICH. J. INT’L L. 57, 58 (2015); William W. Bratton & G. Mitu Gulati, *Sovereign Debt Reform and the Best Interest of Creditors*, 57 VAND. L. REV. 1, 4 (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*, REGUL. REV. (Dec. 17, 2014), <https://www.theregreview.org/2014/12/17/breydo-imf-restructuring/> [<https://perma.cc/6JW2-BHCM>] (discussing IMF proposal for a sovereign restructuring mechanism); Patrick Bolton et al, *Policy Insight 103: Born Out of Necessity: A Debt Standstill for COVID-19*, CENTRE ECON. POL’Y RSCH., Apr. 21, 2020, at 6, https://cepr.org/system/files/publication-files/103119-policy_insight_103_born_out_of_necessity_a_debt_standstill_for_covid_19.pdf [<https://perma.cc/4L7L-HWB3>].

⁶⁸ See *supra* note 67.

have been put forth to establish a formal, sovereign distress resolution framework.⁶⁹ Perhaps most prominently, in the early 2000s, the IMF proposed a sovereign debt restructuring mechanism (“SDRM”).⁷⁰ Despite initially receiving “support,” the SDRM was ultimately unsuccessful, largely due to the United States Treasury’s reluctance⁷¹ and private sector resistance.⁷² At present, there appears to be “little political enthusiasm for a resurrection of proposals for an institutionalised [sic] sovereign bankruptcy regime.”⁷³

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, mitigating coordination and collective action problems amongst parties, and binding “hold-out” creditors.⁷⁴ Lacking a formal restructuring platform has meant that these issues continue to feature prominently in sovereign distress.⁷⁵ Nonetheless, resolution of sovereign restructuring has occurred through

⁶⁹ Odette Lienau, *The Challenge of Legitimacy in Sovereign Debt Restructuring*, 57 HARV. INT’L L. J. 151, 152–53 (2016) (noting that during WWII, “Harry Dexter White, special adviser to the United States 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’ (alteration in original) (citation omitted)).

⁷⁰ See ANNE O. KRUEGER, INT’L MONETARY FUND, A NEW APPROACH TO SOVEREIGN DEBT RESTRUCTURING 2, 4 (2002), <http://www.imf.org/external/pubs/ft/exrp/sdrm/eng/sdrm.pdf> [<https://perma.cc/Q3L7-TH97>].

⁷¹ Mark Sobel, *Strengthening Collective Action Clauses: Catalysing Change—The Back Story*, 11 CAP. MKTS. L.J. 3, 4–6 (2016) (noting that the United States “Treasury was sceptical [sic] that the SDRM could be made to work in practice. There were concerns about politicization of the mechanism. There were questions about the possible impact on official debt. There was no appetite for pursuing an international agreement that could result in a supranational body having the authority to supplant core US sovereign decision making or judicial authority”).

⁷² Mooney, *supra* note 67, at 58–59 (“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.”).

⁷³ Bolton et al., *supra* note 67, at 1, 6 (the authors, a group of distinguished sovereign debt and restructuring experts, made the observation during the depth of the Covid-19 crisis.”).

⁷⁴ Stephen Kim Park & Tim R. Samples, *Towards Sovereign Equity*, 21 STAN. J.L., BUS. & FIN. 240, 245–47 (2016); see also Douglas G. Baird, *A World Without Bankruptcy*, 50 L. & 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).

⁷⁵ Chuck Fang et al., *Restructuring Sovereign Bonds: Holdouts, Haircuts and the Effectiveness of CACs 4* (Eur. Cent. Bank, Working Paper No. 2366, 2020), <https://www.ecb.europa.eu/pub/pdf/scpwps/ecb.wp2366~5317a382b3.en.pdf> [<https://perma.cc/2XJA-9Q35>].

a combination of “soft law,” custom, and contractual mechanisms.⁷⁶ The processes evolved over time, largely as a function of the respective constituencies involved.

At a high level, as detailed below, this progression can be divided into three phases: (i) first, the “club and committee” oriented period of roughly the 1970s to the 1990s; (ii) second, reflecting the market transition from loans to syndicated bonds, the more contractually focused 2000s; and (iii) finally, the present, “dramatically” changed world of sovereign finance.

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 twenty-two nations, after adding Israel in 2014, followed by Brazil and Korea in 2016.⁷⁷ Since its formation, the Paris Club has been involved in many, if not most, sovereign restructurings; as of February, 2022 it had reached 477 agreements with 101 countries, covering \$612 billion of debt.⁷⁸ As the organization itself notes, it “has remained strictly informal” with “no legal basis or status.”⁷⁹ 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.”⁸⁰

These six underlying principles are: (i) solidarity (members act as a group); (ii) consensus regarding decision-making; (iii) information sharing between members; (iv) a case-by-case approach, with decisions tailored to each individual debtor; (v) conditionality, with debt relief conditioned on reforms, particu-

⁷⁶ See generally Park & Samples, *supra* note 30 (analyzing “new governance” for sovereign debt).

⁷⁷ Buchheit et al., *supra* note 40, at 8.

⁷⁸ *The Paris Club and Argentina Conclude a Debt Rescheduling*, CLUB DE PARIS (Oct. 22, 2022), <https://clubdeparis.org/en> [<https://perma.cc/3CGW-3XTU>] (summarizing restructuring involvement to date).

⁷⁹ *What Are the Main Principles Underlying Paris Club Work?*, CLUB DE PARIS, <https://clubdeparis.org/en/communications/page/what-are-the-main-principles-underlying-paris-club-work> [<https://perma.cc/7FZM-HU9L>].

⁸⁰ *Id.*

larly an IMF program, which often serves a key monitoring function;⁸¹ and (vi) comparability of treatment.⁸²

That comparability of treatment requirement is most crucial for our purposes, as the G-20 Common Framework largely incorporates this language, which is understood to imply corresponding to a similar approach.⁸³ “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.”⁸⁴ There are two reasons for this provision. First, allowing the potential for better terms to other, non-Paris Club creditors would in effect mean subsidizing those parties through taxpayers.⁸⁵ Second, and perhaps most pertinently, the underlying logic of “comparable treatment” emphasizes ensuring that balance of payments issues are resolved without a need for future rounds of support.⁸⁶

The Paris Club’s debt treatment evolved over the years based on debtor needs. The currently prevailing method is the so-called Evian Approach that emphasizes “tailor-made and concessional treatments,” with debt readjustment taking many forms, including “flow treatment, stock reprofiling, and stock reduction (in exceptional cases).”⁸⁷

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.⁸⁸ The London Club is “characterized by its informal, collaborative, and non-institutional nature,” and is convened on a case-by-case basis.⁸⁹ During the 1980s, it worked “in tandem” with the Paris Club.⁹⁰ In the emerging market debt crisis between 1982 and 1998, bank advisory committees were frequently employed, but have

⁸¹ Gulati & Triantis, *supra* note 35, at 978 (noting IMF’s role as “delegated monitor[]”).

⁸² Buchheit et al., *supra* note 40, at 9.

⁸³ See *infra* Part II.

⁸⁴ *The Six Principles*, CLUB DE PARIS, <https://clubdeparis.org/en/communications/page/the-six-principles> [<https://perma.cc/H797-6JUV>].

⁸⁵ Gong Cheng et al., *From Debt Collection to Relief Provision: 60 Years of Official Debt Restructurings Through the Paris Club* 43–45 (European Stability Mechanism, Working Paper No. 20, 2016).

⁸⁶ See Buchheit et al., *supra* note 40, at 16.

⁸⁷ *Id.* at 8; see *infra* Part II.

⁸⁸ See Michel Henry Bouchet, *Country Risk, Financial Crisis, and Debt Restructuring: Paris & London Clubs*, SKEMA BUS. SCH., Oct. 25, 2017, at 27, <https://developingfinance.org/download/cr2017/11.%20Paris%20%20London%20Clubs%20of%20Debt%20restructuring.pdf> [<https://perma.cc/9YUM-DJM5>].

⁸⁹ Park & Samples, *supra* note 30, at 187.

⁹⁰ Cheng et al., *supra* note 85, at 7.

since decreased in prominence.⁹¹ 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.⁹²

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 2000s, typical sovereign debt contracts had provisions requiring unanimity in order to make changes.⁹³

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” refer to creditors who decline to support a restructuring acceptable to other creditors with the goal of leveraging their position for higher payment.⁹⁴ Perhaps most infamously, certain Argentina “hold-out” creditors—who rejected a 2005 restructuring accepted by 90 percent 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.⁹⁵

To address “hold-out” issues and generally facilitate restructuring, a critical contractual innovation was developed: so-called collective action clauses, or CACs.⁹⁶ CACs are essentially a mechanism to bind creditors to a transaction

⁹¹ See Lee C. Buchheit, *Use of Creditor Committees in Sovereign Debt Workouts*, 10 BUS. L. INT’L 205, 207–08 (2009) (noting that the more than twenty-five debt crises between 1982 and 1998 were distinguished by creditors being “almost exclusively commercial banks” and instruments that were “mainly syndicated commercial bank loans, inter-bank lines and trade finance instruments, not bonds”).

⁹² Cheng et al., *supra* note 85, at 8 (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”).

⁹³ Bratton & Gulati, *supra* note 67, at 20.

⁹⁴ See Buchheit et al., *supra* note 40, at 5, 12 (“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”).

⁹⁵ See Emily Schmall, *Seizure of Ship from Argentina Forces Shake-Up*, N.Y. TIMES (Oct 18, 2012), <https://www.nytimes.com/2012/10/19/world/americas/seizure-of-argentine-ship-forces-shake-up.html> [<https://perma.cc/DE8N-SB43>].

⁹⁶ See Mark C. Weidemaier & Mitu Gulati, *A People’s History of Collective Action Clauses*, 54 VA. J. INT’L L. 51, 53 (2014).

upon reaching a requisite threshold of votes.⁹⁷ 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.⁹⁸

The CAC provisions have developed over the years, registering approximately four phases, with each round “always be[ing] accretive.”⁹⁹

In simplest terms, the first and second generations of collective action clauses were “single series,” allowing modifications only for specific series of bonds.¹⁰⁰ The issue with these vintages was that most nations have multiple series of obligations outstanding.¹⁰¹ Correspondingly, a creditor with 25 percent 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 percent of the outstanding principal across all bonds, as well as 66-and-2/3 percent of each series of bonds.¹⁰²

While the third generation improved on certain weaknesses of prior iterations, the hold-out problem remained, albeit subject to a higher threshold of 34 percent, rather than 25 percent.¹⁰³ 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 percent vote of the entire aggregated universe of bonds if, and only if, the pro-

⁹⁷ See Mitu Gulati & Lee C. Buchheit, *Drafting a Model Collective Action Clause for Eurozone Sovereign Bonds*, 6 CAP. MKTS. L.J. 317, 320 (2011).

⁹⁸ Mitu Gulati & Lee C. Buchheit, *The Argentine Collective Action Clause Controversy*, 15 CAP. MKT. L.J. 464, 466 (2020).

⁹⁹ *Id.* at 466. Some sources effectively combine the first two generations of CACs, as the first generation was not applicable to sovereign debt. See INT’L MONETARY FUND, THE INTERNATIONAL ARCHITECTURE FOR RESOLVING SOVEREIGN DEBT INVOLVING PRIVATE-SECTOR CREDITORS—RECENT DEVELOPMENTS, CHALLENGES, AND REFORM OPTIONS (2020) [hereinafter, IMF SOVEREIGN DEBT ARCHITECTURE].

¹⁰⁰ The first generation was originated in 1879, with English law corporate bonds that permitted a “supermajority,” typically 75 percent, “to approve modifications to the terms of the instrument.” Gulati & Buchheit, *supra* note 98, at 464. However, the provisions did not become widespread in US bonds because “[f]ollowing enactment of the predecessor of Chapter 11 in the [United States] in 1934, the US Congress decided in 1939 to ban entirely the use of collective action clauses in corporate bonds issued to the public in the [United States].” *Id.* at 465. As Professors Buchheit and Gulati observe, in 2002, a G-10-commissioned report drafted “a model collective action clause suitable for use in sovereign bonds governed by New York law.” *Id.* The provision built upon the first-generation CACs to incorporate greater protections for minority bondholders. See *id.* at 464–65.

¹⁰¹ The first generation refers largely to English law corporate instruments, while the second generation corresponds to adoption in sovereign debt. *Id.*

¹⁰² *Id.* at 466.

¹⁰³ See *id.*

posed modification is “Uniformly Applicable” to all affected series.¹⁰⁴ 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.¹⁰⁵

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.¹⁰⁶ Furthermore, the instruments often have a long duration, and thus the existing stock of sovereign bonds features a variety of CAC vintages; 95 percent of sovereign bonds have “some form of CACs,” but 50 percent lack the “enhanced” fourth generation provisions.¹⁰⁷ 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.¹⁰⁸

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 GDP grew nearly twenty-fold, from \$2.77 trillion to \$42.13 trillion.¹⁰⁹

¹⁰⁴ *Id.* at 467. 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.” 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 percent voting threshold); and (ii) on an aggregated basis by a “two-tier vote” with a 66 and 2/3 percent vote of the entire aggregated universe of bondholders and a 50 percent vote of each series in the aggregated pool. *Id.* at 467–68.

¹⁰⁵ *Id.* at 468.

¹⁰⁶ See IMF SOVEREIGN DEBT ARCHITECTURE, *supra* note 99, at 30; Tom Perry & Laila Bas-sam, *Lebanon on Verge of Debt Default, Barring Last-Minute Deal: Sources*, REUTERS (Mar. 6, 2020, 6:38 AM), <https://www.reuters.com/article/us-lebanon-crisis/lebanon-on-verge-of-debt-default-barring-last-minute-deal-sources-idUSKBN20T1XZ> [<https://perma.cc/ZHQ3-CXZG>]. At the same time, certain other important provisions have also evolved over time, but not necessarily incorporated by all sovereigns, including modified *pari passu* clauses. See Robin Wigglesworth, *Pari Passu Saga 2.0?*, FIN. TIMES (Mar. 9, 2022), <https://www.ft.com/content/2fd1a7cc-118f-428f-9607-10d73966e2f5> [<https://perma.cc/HA8N-779Z>] (discussing how Russia did not adopt modified *pari passu* clauses in respect of its sovereign bonds).

¹⁰⁷ IMF SOVEREIGN DEBT ARCHITECTURE, *supra* note 99, at 30.

¹⁰⁸ See *infra* Part III.

¹⁰⁹ Measured on a current price constant basis. See *Emerging Market and Developing Economies*, INT’L MONETARY FUND, <https://www.imf.org/external/datamapper/profile/OEMDC> [<https://perma.cc/BS4F-6839>].

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; “[t]he kindling for another big emerging markets debt crisis has been accumulating.”¹¹⁰

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 emerging market and developing economies (“EMDEs”) in five decades.”¹¹¹ EDME government debt increased from 30.3 percent of GDP in 2010 to 46.6 percent by 2018.¹¹² 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 nations were able to turn to the bond markets for the first time.¹¹³ The nature of bilateral borrowing changed as well, with a much larger portion provided by China, India, and other middle-income nations.¹¹⁴

Third, borrowing arrangements became 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.¹¹⁵ 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.¹¹⁶

¹¹⁰ Colby Smith & Robin Wigglesworth, *Why the Coming Emerging Markets Debt Crisis Will Be Messy*, FIN. TIMES (MAY 11, 2020), <https://www.ft.com/content/f7157356-e773-47c4-b05d-8624a5ccfd03> [<https://perma.cc/49XL-NK6P>].

¹¹¹ M. Ayhan Kose et al, *What Has Been The Impact Of COVID-19 On Debt?* 2 (World Bank Grp., Working Paper No. 9871, 2021).

¹¹² *Id.* at 32.

¹¹³ In 2020, 23 DSSI eligible countries had assigned credit ratings, suggesting that they had issued tradeable debt. *See* Joint Ministerial Comm. of the Bds. of Governors of the Bank & the Fund on the Transfer of Real Res. to Dev. Countries, *Joint IMF-WBG Staff Note: Implementation and Extension of the Debt Service Suspension Initiative*, DC2020-007, at 15, 45 (Oct. 16, 2020). None had investment-grade ratings. *Id.* at 15 n.17.

¹¹⁴ *See supra* Section I.A.

¹¹⁵ *See generally* Gelper et al., *supra* note 46.

¹¹⁶ *See infra* Part III (discussing Chad and the Congo).

Fourth, disclosure and information quality declined.¹¹⁷ 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 “most” agreements to have provisions precluding disclosure of the obligations.¹¹⁸

As an aggregate consequence of these trends, by 2020, the sovereign borrowing market was larger, more complex and more fragmented than at any time in history.¹¹⁹ Meanwhile, the machinery of debt restructurings—developed without many of the players now at “the table”—grew increasingly inapposite for the challenging 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 Ethiopia¹²⁰

Emerging market sovereigns came into the Covid-19 pandemic with record-high debt levels, a fragmented creditor base, and insufficient tools for resolving distress.¹²¹ 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 a macroeconomic shock coupled with a 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.¹²²

¹¹⁷ See generally WILLIAM R. RHODES ET AL., BRETTON WOODS COMM., DEBT TRANSPARENCY: THE ESSENTIAL STARTING POINT FOR SUCCESSFUL REFORM (2022).

¹¹⁸ Gelpert et al., *supra* note 46, at 6 (noting that such provisions are generally distinct from the baseline sample of contracts).

¹¹⁹ By Q4, 2019, right before the start of Covid-19, total global debt totaled about \$255 trillion. Spriha Srivastava, *Global Debt Surged to a Record \$250 Trillion in the First Half of 2019, Led by the US and China*, CNBC (Nov. 15, 2019, 4:09 AM), <https://www.cnbc.com/2019/11/15/global-debt-surged-to-a-record-250-trillion-in-the-first-half-of-2019-led-by-the-us-and-china.html> [https://perma.cc/VE54-GYSF]. Sovereign debt comprised about \$70 trillion, with mature markets responsible for about \$52 trillion, or 105.2 percent GDP, and emerging markets for about \$20 trillion, equivalent to 53.2 percent of GDP. *Id.*

¹²⁰ Ahmed, *supra* note 9.

¹²¹ Kose et al., *supra* note 111, at 1–2.

¹²² 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 (Mar. 7, 2022), <https://www.newyorker.com/magazine/2022/03/14/a-pandemic-tragedy-in-guayaquil> [https://perma.cc/33BT-MFH6].

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 2008–2009 financial crisis.¹²³ 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.¹²⁴

A second important implication of the Covid-19 crisis was 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.¹²⁵ The world's advanced economies took this approach. For instance, the United States passed the CARES Act and subsequent Covid-19 stimulus legislation.¹²⁶ The world's largest economies also adopted highly accommodative monetary policy, lowering interest rates in tandem.¹²⁷

Lower-income nations lacked such Keynesian luxuries, however.¹²⁸ 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.

The early months of 2020 experienced a record twenty-nine sovereign downgrades, including eight within the "CCC/CC/C/RD" range, encompassing the rung right above default as well as "restricted default" events.¹²⁹ The year

¹²³ INST. OF INT'L FIN., CAPITAL FLOWS REPORT: SUDDEN STOP IN EMERGING MARKETS 3 (2020).

¹²⁴ See *supra* Section I.A.2.

¹²⁵ Sarwat Jahan et al., *What Is Keynesian Economics?*, 51 FIN. & DEV. 53, 53–54 (2014).

¹²⁶ *Here's Everything the Federal Government Has Done to Respond to the Coronavirus So Far*, PETER G. PETERSON FOUND. (Mar. 15, 2021), <https://www.pgpf.org/blog/2021/03/heres-everything-congress-has-done-to-respond-to-the-coronavirus-so-far> [<https://perma.cc/3DSB-2L2R>].

¹²⁷ U.N. Dep't of Econ. & Soc. Affs., *The Monetary Policy Response to COVID-19: The Role of Asset Purchase Programmes*, at 1–2, Policy Brief No. 129 (Feb. 2022).

¹²⁸ Kevin Watkins, *Delivering Debt Relief for the Poorest*, INT'L MONETARY FUND (2020), <https://www.imf.org/external/pubs/ft/fandd/2020/08/debt-relief-for-the-poorest-kevin-watkins.htm> [<https://perma.cc/J2LP-KPZU>] ("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.")

¹²⁹ *Sovereign Defaults Set to Hit Record in 2020*, FITCH RATINGS (May 12, 2020, 4:11 AM), <https://www.fitchratings.com/research/sovereigns/sovereign-defaults-set-to-hit-record-in-2020-12-05-2020> [<https://perma.cc/34GU-ZYE3>]. 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 percent; Lebanon's economy contracted 12 percent, Ecuador's 6.3 percent, Argentina's 5.7 percent, and Zambia's 3.5 percent. INT'L MONETARY FUND, WORLD ECONOMIC OUTLOOK:

also registered six sovereign defaults, “five times higher than the average default rate in the 1983-2020 period.”¹³⁰ A seventh sovereign, Angola, restructured just its obligations to Chinese lenders,¹³¹ but not its bonds, thus not rendering a formal default for credit rating purposes.¹³²

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 Initiative (“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”), 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.”¹³³

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.”¹³⁴ Following a March 25 joint IMF and World Bank statement “call[ing] on all official bilateral creditors to suspend debt payments from IDA countries that request forbearance,”¹³⁵ the G-20, a co-

THE GREAT LOCKDOWN 22–24 (2020). Unsurprisingly, those nations also experienced a more challenging economic recovery. *Id.*

¹³⁰ MOODY’S INVS. SERV., SOVEREIGN DEFAULT AND RECOVERY RATES, 1983–2020, at 2 (2021) (“We observed six defaults for Moody’s-rated issuers in 2020 compared with an average of one to two defaults per year in the previous decades. . . . As of the end of 2020, the one-year default rate stood at 4.2%, five times higher than the average default rate in the 1983–2020 period.”).

¹³¹ Karin Strohecker & Joe Bavier, *Angola Negotiates \$6.2 Billion Debt Relief from Creditors: IMF*, REUTERS (Sept. 21, 2020, 8:16 AM), <https://www.reuters.com/article/us-angola-imf/angola-negotiates-6-2-billion-debt-relief-from-creditors-imf-idUSKCN26C2CP> [<https://perma.cc/5SDB-29EC>].

¹³² LUSA, *Angola: Only Country to Restructure Private Debt Without Rating Downgrade—UN*, MACAU BUS. (Mar. 22, 2021), <https://www.macaubusiness.com/angola-only-country-to-restructure-private-debt-without-rating-downgrade-un/> [<https://perma.cc/2U36-FECJ>] (“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. . . .”).

¹³³ Soto, *supra* note 7 (noting that “[i]n 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”).

¹³⁴ England et al., *supra* note 13 (citation omitted).

¹³⁵ Kristalina Georgieva & David Malpass, *Joint Statement World Bank Group and IMF Call to Action on Debt of IDA Countries*, INT’L MONETARY FUND (Mar. 25, 2020),

ordinating group of developed and developing nations, formally adopted the DSSI on April 15, 2020.¹³⁶

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.¹³⁷ The eligibility criterion was based on World Bank subsidized borrowing programs, and thus limited to seventy-three of the lowest income countries in the world.¹³⁸ 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 net present value (NPV)-neutral for the lenders,¹³⁹ and repaid over five years.¹⁴⁰ It was only “applicable” to bilateral creditors within the G-20, as well as the Paris Club that adopted it.¹⁴¹ The IFIs, which recommended the DSSI, did not participate directly,¹⁴² but supported lower-income nations in other ways, including through the IMF’s Catastrophe Containment and Relief Trust.¹⁴³ Private sector participation was encouraged, but “voluntary”—a problematic dimension of the program.¹⁴⁴

<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> [<https://perma.cc/7KS4-CLUY>].

¹³⁶ G20 Research Group, Communiqué: Virtual Meeting of the G20 Finance Ministers and Central Bank Governors Riyadh, Saudi Arabia (2020), <http://www.g20.utoronto.ca/2020/2020-g20-finance-0415.html> [hereinafter, G20 DSSI Communiqué].

¹³⁷ 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 (Apr. 20, 2020, 12:36 PM), <https://www.creditslips.org/creditslips/2020/04/now-that-everyone-is-on-the-standstill-bandwagon-what-next-part-i.html> [<https://perma.cc/SJ6Q-DZ85>].

¹³⁸ Formally, eligibility was limited to all IDA-eligible nations and “least developed countries,” as defined by the U.N. See G20 DSSI Communiqué, *supra* note 136.

¹³⁹ According to the term sheet, “[t]he suspension of payments will be NPV-neutral,” with “[t]reatment [to] be achieved either through rescheduling or refinancing.” *Id.*

¹⁴⁰ Initially, the DSSI contemplated a three-year repayment period, which was subsequently extended to five years with a one-year grace period. Int’l Monetary Fund, *Statement: Extraordinary G20 Finance Ministers and Central Bank Governors’ Meeting*, at 2 (2020) [hereinafter IMF, *G20 Statement*].

¹⁴¹ There is significant overlap between the two, but also some distinctions with a few countries being members of one group but not the other. *Id.* at 4.

¹⁴² Alexander Nye, *Who’s Afraid of Some (Not so Big or Bad) Debt Relief?*, YALE SCH. OF MGMT. (July 24, 2020), <https://som.yale.edu/blog/whos-afraid-of-some-not-so-big-or-bad-debt-relief> [<https://perma.cc/9A8B-JNZ6>] (describing a potential issue of IFI participation including reducing their lending capacity and providing private creditors “a free ride.”).

¹⁴³ Kristalina Georgieva, *IMF Executive Board Approves Immediate Debt Relief For 25 Countries*, INT’L MONETARY FUND (Apr. 13, 2020), <https://www.imf.org/en/News/Articles/2>

The DSSI was in effect between May 1, 2020, and December 31, 2021.¹⁴⁵ Of seventy-three eligible nations, forty-eight participated, receiving, in the aggregate, \$12.9 billion of official sector payment deferrals, with \$4.6 billion coming from the Paris Club.¹⁴⁶ Despite some initial uncertainties regarding China's level of participation¹⁴⁷—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.¹⁴⁸ 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—was because China deterred some eligible nations from seeking DSSI relief.¹⁴⁹

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 seventy-three so-called International Development Association (“IDA”) nations, one of the World Bank's operational lending categories, which refers to countries “with low per capita incomes” able to borrow from the IDA.¹⁵⁰ The other category is nations able to borrow from the

020/04/13/pr20151-imf-executive-board-approves-immediate-debt-relief-for-25-countries [https://perma.cc/ZD2H-PVPX].

¹⁴⁴ See *infra* Section II.A.2.

¹⁴⁵ Benjamin Fox, *G20 Agrees ‘Final Extension’ to \$10 Billion Debt Service Suspension Scheme*, EURACTIV (Apr. 7, 2021), <https://www.euractiv.com/section/economy-jobs/news/g20-agrees-final-extension-to-10-billion-debt-service-suspension-scheme/> [https://perma.cc/H9MY-5CWP]; see also *The Paris Club Has Fully and Successfully Implemented the DSSI and Its Extensions*, CLUB DE PARIS (Feb. 23, 2022), <https://clubdeparis.org/en/communications/press-release/the-paris-club-has-fully-and-successfully-implemented-the-dssi-and-its> [https://perma.cc/F6ZK-8VRB].

¹⁴⁶ *Debt Service Suspension Initiative: Q&As*, WORLD BANK (Mar. 10, 2022), <https://www.worldbank.org/en/topic/debt/brief/debt-service-suspension-initiative-qas> [https://perma.cc/T8JE-98X8].

¹⁴⁷ England et al., *supra* note 13 (“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.”).

¹⁴⁸ Jonathan Wheatley, *Chinese Loans Deter Poor Nations from Seeking Debt Relief, Says Paris Club Chair*, FIN. TIMES (Dec. 29, 2021), <https://www.ft.com/content/db7753b7-a2b5-469c-9441-e85afb44ea12> [https://perma.cc/JZB2-MSHF].

¹⁴⁹ *Id.* (“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.” (citation omitted)).

¹⁵⁰ See *How Does the World Bank Classify Countries?*, WORLD BANK, <https://datahelpdesk.worldbank.org/knowledgebase/articles/378834-how-does-the-world-bank-classify-countries> [https://perma.cc/RH84-JGUX].

International Bank for Reconstruction and Development (“IBRD”), which provides financing to middle-income countries.¹⁵¹ So-called “blend” countries are an intermediate category of DSSI-eligible IDA nations able to borrow from the IBRD.¹⁵²

Generally, IDA and IBRD eligibility maps along income levels, with low-income nations corresponding to IDA and middle-income to IBRD.¹⁵³ Though, the demarcation is imperfect, as shown in the table below, plotting the World Bank operational lending categories against its income-based groupings.¹⁵⁴ 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, ten “blend” and seventeen IBRD eligible.¹⁵⁵ Upper-middle-income countries are largely IBRD eligible, though six are IDA eligible and five are “blend.” Ten high-income countries are eligible for IBRD, but the other sixty-nine are generally ineligible for any of the World Bank programs, generally suggesting those to be wealthier nations.¹⁵⁶

¹⁵¹ *See id.*

¹⁵² These countries are at base IDA-eligible and thus for purposes of simplicity correspond to that category. *See id.*

¹⁵³ The income-based groupings are based on level of economic development, which is assessed through gross national income (GNI) per capita, in US dollars. *The World Bank Atlas Method - Detailed Methodology*, WORLD BANK, <https://datahelpdesk.worldbank.org/Knowledgebase/articles/378832-what-is-the-world-bank-atlas-method> [<https://perma.cc/7AEF-PAQA>]. 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. *Id.* 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 et al., *New World Bank Country Classifications by Income Level: 2021–2022*, WORLD BANK BLOGS (July 1, 2021), <https://blogs.worldbank.org/opendata/new-world-bank-country-classifications-income-level-2021-2022> [<https://perma.cc/V22K-Y9V5>].

¹⁵⁴ 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. *See World Bank Country and Lending Groups*, WORLD BANK, <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups> [<https://perma.cc/66DB-5HFF>].

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

TABLE 1: SUMMARY STATISTICS: WORLD BANK 2021 LENDING CATEGORIES¹⁵⁷

	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) Gross National Income (“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.¹⁵⁸ Other nations, like Lebanon, have seen income levels collapse due to financial distress, but are nonetheless not IDA eligible.¹⁵⁹

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

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.”¹⁶⁰ Uptake proved limited. “Regrettably, only one private creditor participated,” the World Bank dryly noted¹⁶¹—and even that was “simply a national development bank that identified itself as a private creditor.”¹⁶²

¹⁵⁷ Based on World Bank data set as of 2021 and does not incorporate July 2022 updates.

¹⁵⁸ Sri Lanka, “Asia’s top high-yield bond issuer,” is expected “to restructure debt and call on the IMF for assistance,” 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> [<https://perma.cc/EP9Z-5TTE>].

¹⁵⁹ *The World Bank in Lebanon*, WORLD BANK, <https://www.worldbank.org/en/country/lebanon/overview> [<https://perma.cc/Q46X-K9DR>].

¹⁶⁰ See G20, COMMUNIQUE: G20 FINANCE MINISTERS & CENTRAL BANK GOVERNORS MEETING 1–2 (2020).

¹⁶¹ *Debt Service Suspension Initiative*, WORLD BANK (Mar. 10, 2022), <https://www.worldbank.org/en/topic/debt/brief/covid-19-debt-service-suspension-initiative> [<https://perma.cc/XT87-GBGY>].

¹⁶² Indermit Gill & Lee C. Buchheit, *Targeted Legislative Tweaks Can Help Contain the Harm of the Debt Crises*, BROOKINGS (June 27, 2022), <https://www.brookings.edu/blog/future>

Initially, the Institute of International Finance (“IIF”), 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.”¹⁶³ 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.”¹⁶⁴

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.”¹⁶⁵ However, while some countries were placed on negative watch, none were downgraded “merely for requesting the DSSI.”¹⁶⁶

At least three countries unsuccessfully attempted to persuade private creditors to join the reprieve.¹⁶⁷ In May 2020, Grenada, a small Caribbean island nation with about \$94 million in outstanding foreign currency debt, requested “an eight-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

e-development/2022/06/27/targeted-legislative-tweaks-can-help-contain-the-harm-of-debt-crises/ [https://perma.cc/4J6R-69SF].

¹⁶³ Reuters Staff, *IIF: Private Creditors Should Grant Poorest Nations Debt Payment Relief*, REUTERS (Apr. 15, 2020, 9:10 AM), <https://www.reuters.com/article/health-coronavirus-debt-emerging-idINL5N2C36B1> [https://perma.cc/RF53-96BA]; IIF Authors, *IIF Letter to IMF, World Bank, OECD and Paris Club on Debt of LICs*, INST. OF INT’L FIN. (Apr. 9, 2020), <https://www.iif.com/Publications/ID/3849/IIF-letter-to-IMF-World-Bank-OECD-and-Paris-Club-on-Debt-of-LICs> [https://perma.cc/DN7S-CG8N]. A separate creditor consortium, the so-called Africa Private Creditor Working Group, formed in May 2020, argued against a “one-size-fits-all solution,” though the initiative does not appear to have progressed significantly as of mid-2022. Afr. Priv. Creditor Working Grp., *Private Creditors establish the Africa Private Creditor Working Group* (May 15, 2020), <https://www.africapcwg.com/> [https://perma.cc/4HW4-H48C]; Alonso Soto, *Private Creditors Form Group to Negotiate Africa Debt Relief*, BLOOMBERG (May 15, 2020), <https://www.bloomberg.com/news/articles/2020-05-15/private-creditors-form-group-to-negotiate-african-debt-relief?sref=OOpRUZ81> [https://perma.cc/4PJ9-DCVB].

¹⁶⁴ Patrick Bolton et al., *How to Prevent a Sovereign Debt Disaster*, FOREIGN AFFS. (June 4, 2020), <https://www.foreignaffairs.com/articles/world/2020-06-04/how-prevent-sovereign-debt-disaster> [https://perma.cc/YA7J-57A8].

¹⁶⁵ Moody’s also noted that [i]n 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 INVS. SERV., FAQ ON THE CREDIT IMPLICATIONS OF MORATORIUMS ON PRIVATE-SECTOR DEBT 1, 4–5 (2020).

¹⁶⁶ See IMF SOVEREIGN DEBT ARCHITECTURE, *supra* note 99, at 13.

¹⁶⁷ *Id.* at 13, 27–28.

of Covid-19 on its tourism-heavy economy.¹⁶⁸ The request did not appear to be successful, as Grenada was reported to have made the payment.¹⁶⁹ Similarly, Zambia's creditors declined to participate, ultimately leading to default.¹⁷⁰

This dynamic of debt relief from only certain creditors created natural “free-rider problem[s]” 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.”¹⁷¹ 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.¹⁷²

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 0.2% of debt payments.”¹⁷³ 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 was by its nature a stop-gap, crisis-era measure to defer, but not reduce, eligible countries' debts.¹⁷⁴ Following program expiration at the end of 2021, DSSI participants—including the 60 percent of low-income countries “at high risk or already in debt distress”—would have to begin making payments on a now-expanded debt load.¹⁷⁵

Recognizing the need to address the deeper debt sustainability issues, on November 13, 2020, the G-20 announced the Common Framework for Debt

¹⁶⁸ Letter from Hon. Keith C. Mitchell, Grenada Prime Minister and Minister for Finance, to Christopher Olsen, Vice President of The Bank of New York Mellon (May 4, 2020) (on file with author); Daniel Bases, *Grenada Seeks Moratorium on Debt Payments*, LATINFINANCE (May 11, 2020), <https://www.latinfinance.com/daily-briefs/2020/5/11/exclusive-grenada-seeks-moratorium-on-debt-payments> [https://perma.cc/G6YN-BNS8].

¹⁶⁹ Daniel Bases, *Grenada Makes Bond Payment—Creditor*, LATINFINANCE (May 15, 2020), <https://www.latinfinance.com/daily-briefs/2020/5/15/grenada-makes-bond-payment-creditor> [https://perma.cc/H5XG-MZPF].

¹⁷⁰ See *infra* note 205 and accompanying text.

¹⁷¹ Stephen Connelly et al., *The G20 Debt Service Suspension Initiative: What of Commercial Creditors?*, 35 BUTTERWORTHS J. INT'L BANKING & FIN. L. 741, 742 (2020).

¹⁷² *Id.* at 741.

¹⁷³ *G20 Initiative Leads to Less than a Quarter of Debt Payments Being Suspended*, DEBT JUSTICE (Oct. 12, 2021), <https://jubileedebt.org.uk/press-release/g20-initiative-leads-to-less-than-a-quarter-of-debt-payments-being-suspended> [https://perma.cc/YD4Y-YDVN].

¹⁷⁴ See, e.g., England et al., *supra* note 13 (noting that “suspending payments rather than cancelling means countries will continue to pile up interest and face even bigger debt levels next year”).

¹⁷⁵ See Georgieva & Pazarbasioglu, *supra* note 1.

Relief Beyond the DSSI (the “Common Framework” or “CF”), which was also endorsed by the Paris Club.¹⁷⁶

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. In essence, the Common Framework “looks like a typical Paris Club debt restructuring” with the “crucial innovation” of “bringing non-traditional bilateral creditors to the table”¹⁷⁷—including China, one of the largest bilateral lenders globally.¹⁷⁸ Operationally, the CF structure incorporates aspects of the Paris Club approach—though it also leaves many uncertainties. Thus, 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. Process

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.”¹⁷⁹ Broadly speaking, we can deconstruct it into three steps.

First, after the debtor country initiates the process, the IMF and World Bank conduct a debt sustainability analysis (“DSA”).¹⁸⁰ The DSA sets the backdrop for the broader restructuring by assessing how much debt the nation can afford without falling back into distress.¹⁸¹

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.”¹⁸² However, “in principle” it expresses a

¹⁷⁶ Paris Club, *Common Framework for Debt Treatments Beyond the DSSI* (2020), https://clubdeparis.org/sites/default/files/annex_common_framework_for_debt_treatments_beyond_the_dssi.pdf [<https://perma.cc/9MVS-PH6X>].

¹⁷⁷ Culverhouse, *supra* note 23.

¹⁷⁸ Jorgelina Do Rosario, *Analysis: China Casts Giant Shadow Over Emerging Nations’ Chase for Debt Relief*, REUTERS (July 4, 2022, 3:43 AM), <https://www.reuters.com/markets/rates-bonds/china-casts-giant-shadow-over-emerging-nations-chase-debt-relief-2022-07-03/> [<https://perma.cc/GG97-RCMC>]; *see, e.g.*, Lex Rieffel, *Normalizing China’s Relations with the Paris Club*, STIMSON CTR. (Apr. 30, 2021), <https://www.stimson.org/2021/normalizing-chinas-relations-with-the-paris-club/> [<https://perma.cc/XM2Q-XNKE>].

¹⁷⁹ Suckling, *supra* note 20.

¹⁸⁰ *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”).

¹⁸¹ Computationally, it is somewhat akin to a combined valuation and liquidity analysis for corporate debtors.

¹⁸² IMF, *G20 Statement*, *supra* note 140, at 2.

preference against debt treatments through “debt write-off or cancellation,” emphasizing debt reprofiling or other adjustment, aside from “the most difficult cases.”¹⁸³

Third, after executing the MoU, the debtor will be required “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.”¹⁸⁴ This is a notable distinction from the DSSI, which nations could pursue without private sector participation.¹⁸⁵ The Common Framework term sheet provides that “[a]ssessment of comparable efforts will be based on changes in nominal debt service, debt stock in net present value terms and duration of the treated claims.”¹⁸⁶ The “comparability” language is generally understood to reflect the Paris Club principle¹⁸⁷—though, some have argued “this is not necessarily true,” instead positing that each sovereign’s Official Creditor Committee would have discretion in “assessing whether private sector involvement meets the comparability of treatment principle.”¹⁸⁸

Analytically, assessing comparability of treatment presents some challenges, especially depending on whether the debtor needs: (i) liquidity relief; or (ii) to resolve unsustainable debt.¹⁸⁹ 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).¹⁹⁰

Debt unsustainability reflects a deeper problem, predicated on the sovereign simply owing more money than it can reasonably repay given its other priorities. In such 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

¹⁸³ *Id.* (“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.”).

¹⁸⁴ *Id.* at 3.

¹⁸⁵ See CRAIG BEAUMONT & DALIA HAKURA, INT’L MONETARY FUND, *THE COMMON FRAMEWORK: UTILIZING ITS FLEXIBILITY TO SUPPORT DEVELOPING COUNTRIES’ RECOVERY* 6 (2021).

¹⁸⁶ IMF, *G20 Statement*, *supra* note 140, at 3 (providing term sheet for Common Framework, and modifications to DSSI).

¹⁸⁷ See generally *What Does Comparability of Treatment Mean?*, CLUB DE PARIS <https://clubdeparis.org/en/communications/page/what-does-comparability-of-treatment-mean> [<https://perma.cc/DDV8-PP8P>].

¹⁸⁸ LAZARD, *HOW TO MAKE SOVEREIGN DEBT RESTRUCTURINGS MORE EFFECTIVE* 5 (2020).

¹⁸⁹ See BEAUMONT & HAKURA, *supra* note 185, at 3.

¹⁹⁰ For instance, a nation may have a three-year, \$100 million obligation at a 10 percent 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 “reprofiled” to ten years, with a flow-adjustment to a 6.75 percent rate instead of 10 percent.

growth.”¹⁹¹ The level of required “haircut” varies significantly, but, for the period between 2014 and mid-2020 averaged 23.2 percent on an NPV basis, and 29.03 percent on a market basis.¹⁹²

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. [But], [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.¹⁹³

The underlying logic is that the Common Framework should not have the effect of subsidizing private sector investors with public funds.¹⁹⁴

2. Utilization

So far, only three nations—Chad, Ethiopia, and Zambia—have applied to utilize the Common Framework, and none have successfully completed a restructuring,¹⁹⁵ creating the overall perception of limited efficacy, despite the tremendous need.¹⁹⁶ Congo Republic, an eligible DSSI-participant, determined to proceed outside of the Common Framework.¹⁹⁷ At the same time, as detailed

¹⁹¹ BEAUMONT & HAKURA, *supra* note 185, at 3.

¹⁹² IMF SOVEREIGN DEBT ARCHITECTURE, *supra* note 99, at 10 tbl. 1 (detailing average of debt exchanges).

¹⁹³ BEAUMONT & HAKURA, *supra* note 185, at 6.

¹⁹⁴ See *supra* Section I.B. (discussing the Paris Club).

¹⁹⁵ As of mid-November 2022, Chad appeared close to reaching an agreement under the Common Framework. However, as discussed subsequently, this agreement largely stemmed from the fact that Chad’s creditor committee determined that “no debt relief from official bilateral creditors is currently needed given the surge in oil prices.” *Meeting of the Creditor Committee for Chad under the Common Framework*, CLUB DE PARIS (Oct. 13, 2022) <https://clubdeparis.org/en/communications/press-release/meeting-of-the-creditor-committee-for-chad-under-the-common-framework-0> [https://perma.cc/75VK-FD7Z] [hereinafter *Meeting of the Chad Creditor Committee*]. In other words, rather than effectuating a successful CF Transaction, Chad instead simply no longer needed a restructuring—allowing it to repay its debts in full (subject to limited reprofiling), which all parties could happily agree to. In some respects, from a US Chapter 11 analog, the shift in oil prices made Chad a so-called “solvent debtor,” akin to cases such as Ultra Petroleum. Andrea Shalal, *Exclusive: Glencore, Chad Creditors Agree in Principle on Terms of Debt Treatment*, REUTERS (Nov. 11, 2022, 12:40 AM) <https://www.reuters.com/world/africa/exclusive-glencore-chad-creditors-agree-principle-terms-debt-treatment-source-2022-11-10/> [https://perma.cc/TH5K-PKWA].

¹⁹⁶ David Lawder, *IMF Calls for Quick Creditor Agreements on Chad, Ethiopia, and Zambia Debts*, REUTERS (July 14, 2022, 10:10 AM), <https://www.reuters.com/world/africa/imf-calls-quick-creditor-agreements-chad-ethiopia-zambia-debts-2022-07-14/> [https://perma.cc/5K33-B3RK].

¹⁹⁷ The Congo reached a restructuring accord with China in June 2021, following a March 2021 deal with commodities trading firm Trafigura. Reuters Staff, *Update 2-China Agrees to*

in Table 2 below, of the seven restructurings in 2020, four were completed without the CF, while Lebanon and Suriname are not eligible for the Common Framework.¹⁹⁸

Table 2 below summarizes the relevant set of proceedings, separated into three groups.¹⁹⁹ 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.²⁰⁰ 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;²⁰¹ however, it notably did not attempt to pursue a broader subsequent transaction under the CF.²⁰²

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

Reschedule Congo Republic's \$2.4 bln Debt – Minister, REUTERS (June 21, 2021, 8:34 AM) <https://www.reuters.com/article/congorepublic-debt-china/update-2-china-agrees-to-reschedule-congo-republics-2-4-bln-debt-minister-idUSL5N2O331M> [<https://perma.cc/AC4X-XNYS>] (“Chinese President Xi Jinping has agreed in principle to reschedule Congo Republic’s debt . . . [a] move [that] would help unlock stalled International Monetary Fund lending.”). The IMF subsequently noted that Congo’s “[d]ebt is assessed as sustainable following substantial debt restructuring and implementation of prudent fiscal policy.” See *IMF Staff Reaches Staff-Level Agreement on the First Review of the Extended Credit Facility Arrangement with the Republic of Congo*, INT’L MONETARY FUND (April 20, 2022), <https://www.imf.org/en/News/Articles/2022/04/19/pr22123-IMF-Staff-Reaches-Staff-Level-Agreement-First-Review-ECF-Republic-Congo> [<https://perma.cc/EEN9-5CCM>].

¹⁹⁸ See Lawder, *supra* note 196; IMF SOVEREIGN DEBT ARCHITECTURE, *supra* note 99, at 9; MOODY’S INV. SERV., *supra* note 130, at 46–48.

¹⁹⁹ See MOODY’S INV. SERV., *supra* note 130, at 3; see also IMF SOVEREIGN DEBT ARCHITECTURE, *supra* note 99, at 10.

²⁰⁰ Oliver West, *Suriname to Offer Creditors Oil-Linked Bonds, Sees ‘Unique’ ESG Opportunity in Restructuring*, GLOBALCAPITAL (Feb. 8, 2022, 9:57 PM), <https://www.globalcapital.com/article/29opqjx7dov82662s4jk/emerging-markets/em-latam/suriname-to-offer-creditors-oil-linked-bonds-sees-unique-esg-opportunity-in-restructuring> [<https://perma.cc/MS75-JHRS>]; Netty Idayu Ismail, *Lebanon’s Bond Restructuring Faces More Delays After Election*, BLOOMBERG: MARKETS (May 20, 2022, 12:13 AM), <https://www.bloomberg.com/news/articles/2022-05-20/lebanon-s-bond-restructuring-faces-more-delays-after-election> [<https://perma.cc/6NFF-H868>].

²⁰¹ LUSA, *supra* note 132 (“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.”).

²⁰² Strohecker & Bavier, *supra* note 131.

TABLE 2: 2020 & 2021 SOVEREIGN DEFAULTS, RESTRUCTURINGS & COMMON FRAMEWORK APPLICATIONS²⁰³

Country	Impacted / Defaulted Debt (\$MM)		Process		Resolution/Status		DSSI / CF	
	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 ²⁰⁴	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 ²⁰⁵	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 ²⁰⁶	1,000	30,000	Feb-21	CF Application		Ongoing; CF Comm Formed Sept 2021	Yes	Yes (Both)
Angola	8,000	47,200	Unknown ²⁰⁷		Sep-20	Re-Profile of Chinese Loans	Yes	DSSI Only
The Republic of the Congo	0	11,000	Jun-21	China agreement 'in principle'		Ongoing; Glencore Negotiations	Yes	DSSI Only

²⁰³ Analysis updated through Q1-2022 and may not reflect subsequent developments; sources based on analysis of Moody's, IMF and Bloomberg data.

²⁰⁴ Belize and Suriname technically each underwent two defaults in the analysis period; the defaults are aggregated above for the sake of relative simplicity.

²⁰⁵ For Zambia, affected debt listed by Moody's as \$2.25Bn, but accounting for cross-defaults, process implicates full \$3Bn of sovereign obligations.

²⁰⁶ Ethiopia did not default on its \$1Bn Eurobond and is attempting to exclude it from the CF process.

²⁰⁷ Start date unknown due to bilateral nature of the process.

III. WHY HAS THE COMMON FRAMEWORK FAILED?

“[T]he Common Framework is yet to deliver on its promise,” observed IMF Managing Director, Kristalina Georgieva; others have been less charitable, finding that it “appears to have failed.”²⁰⁸ Against the backdrop of a “sovereign debt crisis” that “could soon spread,”²⁰⁹ developing a viable debt resolution approach is critically important for avoiding “economic collapse”—an increasingly acute prospect following Russia’s invasion of Ukraine.²¹⁰ Yet, despite broad-based recognition of these challenges, “little progress” has been made, with the November 2022 G20 meeting recognizing “the deteriorating debt situation” facing “vulnerable middle income countries,”²¹¹ but offering “few concrete solutions.”²¹²

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 to improve 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 restructurings resembling “slow-motion tragedy.”²¹³

First, relative to the Paris Club, let alone a “formal” proceeding, the Common Framework lacks critical institutional infrastructure. Limited precedential guidance and inconsistent disclosure standards increase the inherent 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 at multiple levels—including between official and private creditors, as well as

²⁰⁸ See Georgieva & Pazarbasioglu, *supra* note 1; Rhodes & Lipsky, *supra* note 2.

²⁰⁹ Rennison & Simonetti, *supra* note 63.

²¹⁰ Ana Monterio, *IMF Warns of Economic Collapse in Poor Nations Without Debt Fix*, BLOOMBERG: ECONOMICS (Dec. 2, 2021, 6:33 AM), <https://www.bloomberg.com/news/articles/2021-12-02/imf-warns-of-economic-collapse-in-some-nations-without-debt-fix?sref=OOpRUZ81> [<https://perma.cc/68WN-7M42>].

²¹¹ *G20 Bali Leaders’ Declaration*, WHITE HOUSE (Nov. 16, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/11/16/g20-bali-leaders-declaration/> [<https://perma.cc/M6EQ-TBDZ>].

²¹² Notably, the G20 recognized that “one member”—widely recognized to be China—“has divergent views on the debt issues” presented by the G20 meeting statement. Alan Rapoport, *Defaults Loom as Poor Countries Face an Economic Storm*, N.Y. TIMES (Dec. 3, 2022), <https://www.nytimes.com/2022/12/03/business/developing-countries-debt-defaults.html> [<https://perma.cc/6LLS-TZCF>].

²¹³ Indermit Gill, *It’s Time to End the Slow-Motion Tragedy in Debt Restructurings*, BROOKINGS: FUTURE DEVELOPMENT (Feb. 25, 2022), <https://www.brookings.edu/blog/future-development/2022/02/25/its-time-to-end-the-slow-motion-tragedy-in-debt-restructurings/> [<https://perma.cc/ZZX9-TLVQ>].

amongst different private sector creditors—with the “comparability” requirement a key issue.²¹⁴

Finally, the Common Framework has under-delivered for debtors. Utilizing it carries real costs—including debt downgrades and reduced market access—but, as of yet, few realized benefits.²¹⁵ At the same time, its scope and eligibility standards appear inapposite for the broader normative and practical goals of addressing emerging market debt sustainability coming out of Covid-19. Many 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.²¹⁶

A. *Limited Institutional Infrastructure*

An extensive literature details the benefits of a formal debt resolution process as well as the deficiencies innate to lacking a structured bankruptcy forum.²¹⁷ Beyond top-of-mind concerns regarding binding recalcitrant creditors through the force of law, an additional, often underappreciated benefit of a bankruptcy system is the associated institutional infrastructure. Legal systems, including bankruptcy,²¹⁸ are understood to represent a form of infrastructure—“shared means to many ends”²¹⁹—which reduces frictions and increases process clarity for all constituencies.²²⁰ In the domestic Chapter 11 bankruptcy context, for instance, parties have clear comprehension around disclosures, required information, and corresponding legal steps. Over time, the processes and procedures have become more efficient and predictable, growing ever-more valuable.

Historically, the Paris Club provided much of this infrastructure, developing significant precedent and a level of associated consistency over the years.

²¹⁴ See generally LAZARD, *supra* note 188.

²¹⁵ Culverhouse, *supra* note 23 (“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.”).

²¹⁶ Selcuk Gokoluk & Sydney Maki, *Russia’s War Lifts Default Risk for Distressed Economies*, BLOOMBERG, <https://www.bloomberg.com/news/articles/2022-03-21/russia-s-war-lifts-default-risk-for-world-s-distressed-economies?sref=OOpRUZ8l> [<https://perma.cc/VTX3-L7AZ>] (Mar. 21, 2022, 1:34 AM) (noting respective spreads of 11,370, 4,400 and 3,318 for Belarus, Ukraine, and Sri Lanka as of March 22, 2022).

²¹⁷ See *supra* Section I.B.

²¹⁸ See generally Robert K. Rasmussen, *COVID-19 Debt and Bankruptcy Infrastructure*, 131 YALE L.J. 337 (2021).

²¹⁹ See BRETT M. FRISCHMANN, *INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES* 4 (2012).

²²⁰ See Bill Henderson, *Legal Infrastructure and the Forgotten Story of the Restatements (207)*, LEGAL EVOLUTION (Nov. 1. 2020), <https://www.legalevolution.org/2020/11/legal-infrastructure-and-the-forgotten-story-of-the-restatements-207/> [<https://perma.cc/DY3V-HE5C>].

The Common Framework risks displacing this construct without replacing it with a comparable institutional structure.

1. *Unclear Precedents & Processes*

In many ways, the Common Framework represents a moderate extension of the Paris Club²²¹ with additional players, including China, the “single largest bilateral creditor.”²²² While bringing the right parties to the table is a significant step, the Common Framework lacks clarity about how the process operates.

Unlike the Paris Club, which has sixty-six 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,²²³ though custom rather than law, are nonetheless well-known by the relevant constituencies and market participants. While the Common Framework is understood to have adopted the Paris Club’s comparability of treatment requirement,²²⁴ it does not appear to have incorporated the entirety of the Paris Club principles.²²⁵ 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.²²⁶ 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—indeed, “[p]rivate creditors complain that the restructuring terms are reached . . . without their inputs, and their concerns are not taken into consideration.”²²⁷ This can be particularly problematic because private creditors consti-

²²¹ Reflecting this perspective, Professor Sean Hagan asked (at a panel event on the broader topic) whether the Common Framework should be viewed as a “Paris Club 2.0.” See generally Institute of International Economic Law, *Whither the Common Framework I Sovereign Debt Forum*, YOUTUBE (Sept. 14, 2022), <https://www.youtube.com/watch?v=kWL3Kf24L0c> [https://perma.cc/JT5P-WF6M].

²²² 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*, EMERGING MKT. VIEWS (June 25, 2020), <https://em-views.com/chinas-debt-relief-to-support-liquidity-in-stressed-emerging-markets> [https://perma.cc/57VZ-XCC5].

²²³ See *supra* note 87 and accompanying text.

²²⁴ Even that is not entirely certain, however, as some have posited. See *supra* Section II.B.

²²⁵ See *supra* Section II.B.

²²⁶ Rieffel, *supra* note 178.

²²⁷ Hung Tran, *Zambia: A Template for Debt Restructuring?*, ATL. COUNCIL (Sept. 8, 2022), <https://www.atlanticcouncil.org/blogs/econographics/zambia-a-template-for-debt-restructuri>

tute large portions of many debtors' capital structures, and the Common Framework requires their participation on "comparable terms" to execute a restructuring. This set of issues began to present itself in Zambia's CF proceeding, with creditors criticizing the IMF's restructuring framework as "arbitrary."²²⁸

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.

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 process credibility and ultimately the very debtors that the Common Framework was created 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—"[i]nformation opacity is widespread," according to a Bretton Woods report.²²⁹ This has been exacerbated by increased creditor heterogeneity and introduction of new lending instruments. For instance, a report found that amongst a set of one hundred 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."²³⁰ Furthermore, increased use of collateralized lending also adds opacity given unknown terms and potential for revenue diversion to specific creditors. Particularly in the restructuring context, enhancing and standardizing sovereign debt disclosure is simply essential. Oth-

ng/ [https://perma.cc/P7B6-L3YX].

²²⁸ Rachel Savage, *Zambia's Bondholders Slam IMF Debt Relief Targets as 'Arbitrary'*, REUTERS (Sept. 15, 2022, 1:27 AM), <https://www.reuters.com/world/africa/zambias-bondholders-slam-imf-debt-relief-targets-arbitrary-2022-09-14/> [https://perma.cc/Z3WX-7MTB].

²²⁹ RHODES ET AL., *supra* note 117, at 7.

²³⁰ Gelpert et al., *supra* note 46, at 6.

erwise, any “notion of equitable burden sharing [would be] little more than an empty slogan.”²³¹

Disclosure issues have been particularly prominent in the ongoing restructuring for Zambia, Africa’s second largest copper producer, and an economy that came into the pandemic on already shaky financial footing.²³² Reflecting many of the changing sovereign debt trends, Zambia’s initially-disclosed \$11.2 billion debt stack included \$3 billion of “Eurobonds,” \$1.9 billion of IFI obligations, \$2.9 of non-Paris Club bilateral obligations, \$2.1 billion owed to Chinese commercial lenders and SoEs, and only \$100 million of Paris Club debt.²³³

In May 2020, Zambia formally retained restructuring advisers.²³⁴ Subsequently, a bondholder committee formed, reported to hold 40 percent of outstanding Eurobonds.²³⁵ 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.²³⁶ Second, there was disagreement regarding relative debt priority, with “core sticking points” including “a lack of clarity over

²³¹ RHODES ET AL., *supra* note 117, at 7.

²³² See Bruno Venditti, *Visualizing the World’s Largest Copper Producers*, ELEMENTS (Dec. 1, 2022) <https://elements.visualcapitalist.com/visualizing-the-worlds-largest-copper-producers/> [https://perma.cc/8PVV-KMSW] (summarizing world’s largest copper producers, and Zambia’s four percent share of global production). 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, and concluding that “[p]ublic debt under current policies is on an unsustainable path.” *Staff Report for the 2019 Article IV Consultation—Debt Sustainability Analysis*, INT’L MONETARY FUND (July 11, 2019); Rachel Savage, *Zambia Aims to Agree Debt Relief with Official Creditors Soon*, REUTERS: AFRICA (Oct. 8, 2022, 1:36 AM), <https://www.reuters.com/world/africa/zambia-aims-agree-debt-relief-with-official-creditors-soon-2022-10-08/> [https://perma.cc/ZFG6-TC7Z].

²³³ See *supra* Section I.B; International Monetary Fund, *Zambia: Staff Report for the 2019 Article IV Consultation—Debt Sustainability Analysis*, at 3 (July 2019). Note that the data is constantly fluctuating and changing from year to year. 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.

²³⁴ Joseph Cotterill & David Keohane, *Zambia Hires Lazard to Advise on \$11bn Debt Burden*, FIN. TIMES (May 27, 2020), <https://www.ft.com/content/aca519a5-4ea3-42ba-ba20-6b93ca1a51e5> [https://perma.cc/V4EM-HRBJ].

²³⁵ Marc Jones, *Zambia’s Bondholders Form Group for Debt Talks*, REUTERS (June 23, 2020, 9:18 AM), <https://www.reuters.com/article/zambia-bonds-restructuring-idAFL8N2E056W> [https://perma.cc/8DMS-4TMX].

²³⁶ Reuters Staff, *Zambia Owes Nearly \$27 Billion in Foreign and Local Public Debt*, REUTERS (Oct. 20, 2021, 2:59 PM), <https://www.reuters.com/article/zambia-debt/zambia-owes-nearly-27-billion-in-foreign-and-local-public-debt-idUSKBN2HA2L5> [https://perma.cc/VQ Q7-TL5Y].

the treatment of the Chinese loan holders versus Eurobond holders,²³⁷ particularly with respect to potential collateralized obligations in light of negative pledge clauses under Zambia's Eurobonds.²³⁸

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.²³⁹ Private creditors, however, rejected Zambia's debt deferral consent solicitation, resulting in an October 13, 2020, missed coupon payment, and bond default by November 2020.²⁴⁰

In February 2021, Zambia formally applied to pursue a restructuring under the Common Framework, "optimistically" targeting a May 2022 resolution.²⁴¹ "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 world-leading sovereign debt expert, Lee Buchheit.²⁴²

²³⁷ Matthew Hill & Taonga Clifford Mitimangi, *Zambia Gets Lifeline with Time Running Out to Avoid Default*, BLOOMBERG (Oct. 20, 2020, 5:02 AM), <https://www.bloomberg.com/news/articles/2020-10-20/zambia-debt-relief-votes-postponed-with-default-clock-ticking?sref=OOpRUZ8I> [<https://perma.cc/J9LA-EWTA>] ("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.).

²³⁸ 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. See IMF SOVEREIGN DEBT ARCHITECTURE, *supra* note 99, at 34.

²³⁹ Joseph Cotterill et al., *Zambia Resists Chinese Pressure on Arrears*, FIN. TIMES (Oct. 12, 2020), <https://www.ft.com/content/aa43fb1c-8f44-495a-a9b5-69a00c7db4a9> [<https://perma.cc/M7B6-HLZ9>].

²⁴⁰ *Fitch Downgrades Zambia's Long-Term Foreign-Currency IDR to 'RD'*, FITCH RATINGS (Nov. 18, 2020, 11:36 AM), <https://www.fitchratings.com/research/sovereigns/fitch-downgrades-zambia-long-term-foreign-currency-idr-to-rd-18-11-2020> [<https://perma.cc/Z3JY-ZMJA>].

²⁴¹ See Ben Clarke, *Zambia Seeks Relief Under G20's New Common Framework*, GLOB. RESTRUCTURING REV. (Feb. 9, 2021), <https://globalrestructuringreview.com/article/zambia-seeks-relief-under-g20s-new-common-framework> [<https://perma.cc/4QD7-LPWJ>] ("Zambia's ministry of finance announced it had become the third African country to request debt relief under the G20's new common framework this week," in February 2021); Chris Mfula et al., *Zambia Aims for IMF Debt Deal in May—Finance Minister*, REUTERS (Feb. 1, 2022, 7:54 AM), <https://www.reuters.com/markets/funds/zambia-aims-imf-debt-deal-may-finmin-2022-02-01/> [<https://perma.cc/V2AE-828N>] ("Zambia expects an International Monetary Fund (IMF) debt health check to be finalised this month, to strike a restructuring deal with creditors by April and get a formal agreement with the fund signed off in May, its finance minister said."); see also *Zambia's IMF Staff-Level Deal a Key Step to Debt Restructuring*, FITCH RATINGS (Dec. 20, 2021, 4:28 AM), <https://www.fitchratings.com/research/sovereigns/zambias-imf-staff-level-deal-key-step-to-debt-restructuring-20-12-2021> [<https://perma.cc/BV4U-KK3X>].

²⁴² Soto, *supra* note 7.

At first, Zambia's Common Framework process largely trod water for a year-and-a-half due to continuing creditor tensions and mutual mistrust, particularly between bondholders and Chinese lenders.²⁴³ A critical gating issue in this regard was classification for China's state-controlled lenders, as discussed below.²⁴⁴ By mid-2022, progress began to emerge; a sixteen-nation CF Creditor Committee formed on June 16, 2022, with China and France serving as co-chairs.²⁴⁵ Shortly thereafter, on July 30, 2022, the CF Creditor Committee announced their support for a \$1.4 billion IMF relief program for Zambia,²⁴⁶ while unsurprisingly reiterating the position that:

Zambian authorities are expected to seek from all private creditors and other official bilateral creditors debt treatments on terms at least as favorable as those being considered by the creditor committee, in line with the comparability of treatment principle.²⁴⁷

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 such conflicts at multiple levels.

First, structural incongruencies of incentives drives frictions as between private creditors and the official sector.²⁴⁸ Second, complexities in application of "comparability of treatment" have delayed, and are likely to continue to de-

²⁴³ *Id.*; see also Mfula et al., *supra* note 241; *Zambia's IMF Staff-Level Deal a Key Step to Debt Restructuring*, *supra* note 241.

²⁴⁴ See Brad Setser, *Zambia's Chance to Set the Global Financial Architecture*, *FIN. TIMES* (Oct. 5, 2022), <https://www.ft.com/content/e8e95a2d-97bd-46ab-b55d-6542a9e2ad3> [<https://perma.cc/9WVX-BH4V>].

²⁴⁵ *1st Meeting of the Creditor Committee for Zambia under the Common Framework for Debt Treatments Beyond the DSSI*, PARIS CLUB (June 16, 2022), <https://clubdeparis.org/en/communications/press-release/1st-meeting-of-the-creditor-committee-for-zambia-under-the-common> [<https://perma.cc/R3JV-JAGN>].

²⁴⁶ *2nd Meeting of the Creditor Committee for Zambia Under the Common Framework for Debt Treatments Beyond the DSSI*, PARIS CLUB (July 18, 2022), <https://clubdeparis.org/en/communications/press-release/2nd-meeting-of-the-creditor-committee-for-zambia-under-the-common> [<https://perma.cc/37XD-MLBG>] ("The creditor committee supports Zambia's envisaged IMF upper credit tranche (UCT) program and its swift adoption by the IMF Executive Board.") [hereinafter *2nd Meeting*]; Gayatri Suroyo & Rachel Savage, *Zambia Debt Relief Pledge Clears Way for \$1.4 Billion Program, Says IMF*, *REUTERS* (July 30, 2022, 8:36 AM), <https://www.reuters.com/world/africa/g20-chair-says-zambias-creditors-commit-negotiate-restructuring-terms-2022-07-30/> [<https://perma.cc/ZUM6-QNSC>].

²⁴⁷ *2nd Meeting*, *supra* note 246.

²⁴⁸ Official sector conflicts—particularly between Paris Club lenders and China—also present a significant issue, including with respect to entity classification. See Setser, *supra* note 244 ("A surge in lending by Chinese state institutions has disrupted existing norms and institutions for co-operation. There is not full agreement on even basic questions like whether Chinese lenders are public or private.").

lay, Common Framework proceedings. Finally, conflicts often arise amongst private creditors themselves, often resulting in competing groups with different objectives.

1. Distinct Incentives: Official vs Private Sectors

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

Multilateral organizations—the “preferred,” or most-senior lenders—act on behalf of their member governments with a focus towards economic development and debt sustainability. 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 policy and political considerations.²⁴⁹

Private creditors, in contrast, are purely commercial creatures, representing the interests of their direct or limited partner investors. This typically entails fiduciary responsibilities to such investors, including capital preservation. Acting otherwise, creditors may argue, could open them up to legal claims and subsequent litigation. From that perspective, the involuntary nature of the Common Framework may, in some respects, 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. The Common Framework removes that option.

At the same time, the private sector is hardly homogenous, representing a wide range of investment strategies, objectives, and investor constituencies. For instance, as discussed below in Part IV, ESG-focused investors may potentially have more room for accommodation under appropriate transaction structures.²⁵⁰

Private creditors are likely to exhibit conflicts with both multilateral and bilateral creditors, though the nature of the friction is likely to differ, with the former rooted in structural and policy priorities, and the latter largely regarding comparability of treatment.²⁵¹

The underlying cause of potential private sector-IFI conflict stems most closely from the parties' distinct incentive structures. The proximate drivers manifest due to the IFIs' “preferred” creditor capital structure position com-

²⁴⁹ As a consequence, irrespective of credit quality, one could see political considerations incentivizing accommodative treatment for certain sympathetic borrowers, or a harder line with a less palatable sovereign. *See* Gulati & Triantis, *supra* note 35, at 989 (describing potential exceptions for Turkey with respect to IFI treatment.).

²⁵⁰ 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.

²⁵¹ *See infra* Section III.B.2.

bined with key process oversight roles.²⁵² Operationally, under the Common Framework, the IMF performs a debt sustainability analysis, or DSA,²⁵³ for the debtor sovereign. The DSA is critical because it sets the pecuniary contours of a Common Framework transaction,²⁵⁴ but is not subject to public disclosure. Like all forecast-driven analyses, the DSA “is far from a precise science,”²⁵⁵ and one made more complex by unique dimensions of a sovereign, such as taxing power. For bondholders, the DSA is critical in respect of transaction terms,²⁵⁶ which they are required to accept on comparable terms, creating significant potential analytical disputes.

Additionally, reflecting structural priority differences, creditors’ financial interests are, all things being equal, best protected if the debtor nation has fewer additional obligations, minimizing potential alternative allocations of capital that could divert funds from repayment.²⁵⁷ 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 to protect their positions.

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 2018.²⁵⁸ The IMF provided a DSA, based on which Argentina made its

²⁵² In many respects, this mimics common bankruptcy incongruences between senior secured and junior creditors.

²⁵³ The DSA is an integrated fiscal and economic analysis used to estimate, based on a portfolio of inputs, debt carrying levels deemed “sustainable” in light of policy perspectives and priorities. See *Debt Sustainability Analysis: Introduction*, INT’L MONETARY FUND <https://www.imf.org/external/pubs/ft/dsa/> [<https://perma.cc/Q4Q4-RTMS>], (July 28, 2017).

²⁵⁴ See Chris Mfula, *Zambia Debt Relief to Mix Haircuts, Maturity Extensions—Finmin Official*, REUTERS (Sept. 1, 2022, 9:05 AM) <https://www.reuters.com/world/africa/zambia-debt-relief-mix-haircuts-maturity-extensions-finmin-official-2022-09-01/> [<https://perma.cc/H9QK-Y2E3>] (“The IMF’s Debt Sustainability Analysis . . . will form the basis of debt restructuring negotiations with Zambia’s creditors.”).

²⁵⁵ In some respects, however, these challenges closely echo more traditional valuation issues common in bankruptcy. See Buchheit et al., *supra* note 40, at 3 (“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. . . .”).

²⁵⁶ Mfula, *supra* note 254 (noting that “The IMF’s Debt Sustainability Analysis [] will form the basis of debt restructuring negotiations with Zambia’s creditors”).

²⁵⁷ This would also arguably be consistent with IFI policy priorities; however, given the higher propensity of shallow restructurings, it is not clear that this occurs in practice.

²⁵⁸ See Carolina Millan & Patrick Gillespie, *With \$56 Billion Loan in Danger, IMF Officials Fly to Argentina*, BLOOMBERG (Aug. 26, 2019, 8:16 AM), <https://www.bloomberg.com/news/articles/2019-08-26/with-56-billion-loan-in-danger-imf-officials-fly-to-argentina> [<https://per>

first restructuring offer—which was summarily rejected by creditors.²⁵⁹ Despite an IMF technical report providing that Argentina had “limited scope” for sweetening the offer while maintaining debt sustainability,²⁶⁰ the sovereign made two more rounds of revisions, ultimately increasing payouts by nearly ten cents on the dollar.²⁶¹ For creditors, Argentina’s willingness to go well beyond the IMF’s stated constraints cast doubt on the impartiality of the IMF DSA. However, due to the collapse of Argentina’s bond prices shortly after the sweetened deal,²⁶² one could also posit that the initial IMF figures were indeed appropriate, whereas private creditors pushed the sovereign too hard for a higher payout.²⁶³

2. *Comparable Treatment?*

Given the lack of creditor participation in the DSSI, a particularly thorny Common Framework issue is likely to be the application of “comparable treatment,” which essentially prohibits the debtor from giving private investors better terms than bilateral creditors.²⁶⁴

ma.cc/RUW7-SKRZ].

²⁵⁹ See Manuel Leon Hoyos, *Argentina’s Path to Debt Relief from Private Creditors*, YALE SCH. OF MGMT. (Dec. 1, 2020), <https://som.yale.edu/blog/argentina-s-path-to-debt-relief-from-private-creditors> [<https://perma.cc/QA25-4DKD>].

²⁶⁰ See Press Release, Int’l Monetary Fund, *IMF Staff Technical Statement on Argentina*, press release no. 20/228 (June 1, 2020).

²⁶¹ See Agustin Geist et al., *Argentina Strikes Breakthrough Deal with IMF in \$45 Bln Debt Talks*, REUTERS (Jan. 28, 2022, 11:37 AM), <https://www.reuters.com/world/americas/argentina-strikes-breakthrough-deal-with-imf-40-bln-debt-talks-2022-01-28/> [<https://perma.cc/2X5H-P45W>].

²⁶² It could of course also be argued that the post-restructuring rout in Argentina’s bonds was caused by government policy rather than debt sustainability in and of itself. Scott Squires, *Argentina Bond Rout Blows Up the Template for Debt Restructuring*, BLOOMBERG (Oct. 19, 2020, 4:00 AM) <https://www.bloomberg.com/news/articles/2020-10-19/argentina-bond-rout-blows-up-the-template-for-debt-restructuring?sref=OOpRUZ81> [<https://perma.cc/FNA2-UUQY>] (“Investors are giving up on Argentina just six weeks after it pulled off a \$65 billion restructuring. The country’s overseas bonds have plummeted more than 20% since early September, the world’s biggest drop in that span.”).

²⁶³ See Buchheit, *supra* note 91, at 210 (“[S]ome 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).”).

²⁶⁴ Comparable treatment requires that the debtor obtain from “all private creditors and other official bilateral creditors . . . terms at least as favorable” as those provided by the CF Creditor Committee, precluding the debtor from giving other parties better terms. See Salinatri, *Indonesia G20 Presidency Welcomes the Statement from the Second Meeting of the Creditor Committee for Zambia*, G20 INDONESIA 2022 (July 20, 2022), <https://www.g20.org/indonesia-g20-presidency-welcomes-the-statement-from-the-second-meeting-of-the-creditor-committee-for-zambia/> [<https://perma.cc/A7CK-JVVS>]; DIEGO RIVETTI, *ACHIEVING COMPARABILITY OF TREATMENT UNDER THE G20’S COMMON FRAMEWORK 2* (World Bank Group 2022).

Comparability of treatment analysis is rarely simple, especially in circumstances wherein creditors provide different types of relief, which can include principal reductions as well as extensions or other changes to payment terms.²⁶⁵ “The choice between haircuts and stretching the repayment period . . . is a matter of negotiations. And that negotiation will reflect the preference of the particular creditor,” explained Zambia’s Finance Minister in context of the nation’s Common Framework process.²⁶⁶

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.”²⁶⁷ 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.”²⁶⁸ Because of this, some have advocated for adopting a simpler, consistent approach to the comparability analysis.²⁶⁹

The innate pre-existing challenges around comparability determination are compounded by novel issues resulting from 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.²⁷⁰ Historically, such obligations have not been impaired; however, it is unclear whether that approach is viable in circumstances where collateralized debt represents a large portion of total obligations.²⁷¹ Lack of disclosure compounds the uncertainty, resulting in limited consistency across transactions.

The concern underlying comparability reflects an inherent creditor concern, though it plays out in reverse relative to the proverbial race to the courthouse.

²⁶⁵ See DANIEL MUNEVAR, EUROADAD, THE G20 “COMMON FRAMEWORK FOR DEBT TREATMENTS BEYOND THE DSSI”: IS IT BOUND TO FAIL? 4 (2020) (“From a technical perspective, it is difficult for the Paris Club to establish comparability between creditors that choose to re-schedule flows and those that restructure their stocks of debt.”).

²⁶⁶ See Mfula, *supra* note 254.

²⁶⁷ See RIVETTI, *supra* note 264, at 2.

²⁶⁸ See *id.* (citing Matthias Schlegl et al., *The Seniority Structure of Sovereign Debt*, CESIFO (Apr. 2019), <https://ssrn.com/abstract=3387668> [<https://perma.cc/U2UV-PZ5A>]).

²⁶⁹ See *id.*

²⁷⁰ See Lawder, *supra* note 196; Bate Felix, *Exclusive: Congo Republic Seeks Debt Deal with Glencore, Trafigura before IMF Review*, REUTERS (Mar. 10, 2020, 8:14 AM), <https://www.reuters.com/article/us-congorepublic-oil-exclusive-idINKBN20X26G> [<https://perma.cc/SNQ8-PDG9>].

²⁷¹ See Georgieva & Pazarbasioglu, *supra* note 1. 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.

In late January 2021, Chad became the first country to seek Common Framework debt relief.²⁷² Relative to Zambia and other sovereigns seeking restructurings, Chad's debt structure and financials are somewhat simpler, potentially facilitating resolution.²⁷³ The IMF estimates that Chad's total external debts are approximately \$2.8 billion, with about 40 percent owed to Glencore, the commodities trading giant, under an oil-for-cash transaction.²⁷⁴ The syndicated deal, of which Glencore holds about \$347 million, was previously restructured in 2015 and again in 2018.²⁷⁵ Chad has no outstanding Eurobonds.²⁷⁶

Subsequent to Chad's application, a CF Creditor Committee was formed on April 15, 2021, with representatives from the governments of China, France, India, and Saudi Arabia.²⁷⁷ In June, the group executed an MoU with Chad.²⁷⁸ Subsequently, the sovereign approached Glencore to re-negotiate the loan agreement, which was understood to mean restructured on "comparable" terms as the official creditor MoU, though the precise meaning is complex and not wholly certain.²⁷⁹ The resulting slow-moving negotiations prompted the IMF and World Bank to publicly pressure Glencore towards an agreement.²⁸⁰ As of

²⁷² See Andrea Shalal, *Chad Becomes First Country to Ask Debt Overhaul Under G20 Common Framework*, REUTERS (Jan. 27, 2021, 11:12 PM), <https://www.reuters.com/article/us-chad-debt/chad-becomes-first-country-to-ask-for-debt-overhaul-under-g20-common-framework-idUSKBN29X0Q5> [https://perma.cc/9EU9-MZA9].

²⁷³ See *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").

²⁷⁴ *Id.*

²⁷⁵ See Katarina Hoijs, *Glencore is Stalling Chad's Debt Revamp Talks, Premier Says*, BLOOMBERG (Sept. 10, 2021, 3:49 AM), <https://www.bloomberg.com/news/articles/2021-09-10/chad-presses-glencore-to-expedite-talks-on-debt-restructuring?sref=OOpRUZ8I> [https://perma.cc/2ZTR-KY2J].

²⁷⁶ See *supra* Table 2.

²⁷⁷ See *Indonesia Presidency Welcomes the Statement of the Creditor Committee for Chad*, G20 INDONESIA 2022 (Oct. 14, 2022), <https://www.g20.org/indonesia-presidency-welcomes-the-statement-of-the-creditor-committee-for-chad/> [https://perma.cc/3FXV-BK37].

²⁷⁸ *4th Meeting of the Creditor Committee for Chad Under the Common Framework for Debt Treatments Beyond the DSSI*, CLUB DE PARIS (June 11, 2021, 6:27 PM) <https://clubdeparis.org/en/communications/communique-presse/4th-meeting-of-the-creditor-committee-for-chad-under-the-common> [https://perma.cc/EJ6J-86TR].

²⁷⁹ Karin Strohecker & Andrea Shalal, *Glencore Ready to Enter Chad Debt Talks, Paving Way for IMF Program—Sources*, REUTERS (Nov. 11, 2021), <https://www.reuters.com/business/glencore-assurances-chad-pave-way-imf-lending-program-sources-2021-11-11/> [https://perma.cc/BS8V-CG5L]; see also *Meeting of the Creditor*, *supra* note 195.

²⁸⁰ Katarina Hoijs, *IMF Urges Creditors to Finalize Chad Debt Talks by End-March*, BLOOMBERG (Jan. 18, 2022, 7:04 AM), <https://www.bloomberg.com/news/articles/2022-01-18/imf-urges-creditors-to-finalize-chad-debt-treatment-by-march-31?sref=OOpRUZ8I> [https://perma.cc/V4TL-Z45L].

November 2022, a resolution formally appeared to be taking shape.²⁸¹ However, in reality, a surge in oil prices meant that Chad no longer needed debt relief, with the CF restructuring becoming more a moot point than a comprehensive creditor accord.²⁸²

Another issue raised in Zambia's restructuring is the appropriate classification of Chinese state-owned lenders—specifically, whether the entities should be treated as belonging to the official or private sector. The inquiry is complex due to the ownership structure of Chinese state-owned banks.²⁸³ 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.”²⁸⁴ Theoretically, assuming truly “comparable” treatment of obligations, the classification of SoE obligations as between private and bilateral should not matter. In practice, however, historical differences in recovery rates suggest that it is likely to prove highly consequential.

After a substantial delay, the Zambia restructuring ultimately appears to have determined that “all Export-Import Bank of China lending and all other Chinese bank lending that has an export credit agency guarantee will be ‘official bilateral’ debt.”²⁸⁵ The critical question will be whether this treatment sets precedent applicable to other restructurings, or if each will be determined on a case-by-case basis.

An additional set of concerns is the scope of obligations potentially excluded from a Common Framework proceeding, which raises at least three separate 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

²⁸¹ Mahamat Ramadane, *Chad Agrees Debt Plan with Creditors, Including Glencore*, REUTERS (Nov. 11, 2022, 1:42 PM), <https://www.reuters.com/world/africa/chad-agrees-debt-plan-with-creditors-including-glencore-says-minister-2022-11-11/> [<https://perma.cc/75YT-X45A>].

²⁸² *Meeting of the Chad Creditor Committee*, *supra* note 195 (“The creditor committee examined the latest developments on the macroeconomic and financial situation of Chad and noted that no debt relief from official bilateral creditors is currently needed given the surge in oil prices. . .”).

²⁸³ Some have suggested treating SoE loans with sovereign guarantees as part of the official sector. Nye, *supra* note 142 (“[T]he 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.”).

²⁸⁴ See MUNEVAR, *supra* note 265, at 4 (noting that “[u]nder the principle of comparability” private creditors “will have the right to” refuse write-offs without participation from “commercial creditors from China,” and that “[t]his rationale also applies the other way round”).

²⁸⁵ Setser, *supra* note 244; see also Int’l Monetary Fund [IMF], *Zambia: Request for an Arrangement under the Extended Credit Facility—Press Release; Staff Report; Staff Supplement; Staff Statement; and Statement by the Executive Director for Zambia*, IMF Country Report No. 22/292 (Sept. 2022).

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, the appropriate *de minimis* threshold is unclear. For instance, Ethiopia indicated a desire not to restructure its \$1 billion Eurobond, which may be pragmatic given the risk of delaying a \$30 billion transaction, but nonetheless potentially created a risk of perceived creditor inequity.²⁸⁶

The third, also implicated by Zambia’s restructuring, concerns acceptable policy reasons for obligation exclusions. For instance, to avoid causing “issues in Zambia’s banking sector”²⁸⁷—an unambiguously legitimate concern—the IMF’s September 2022 restructuring framework excluded the sovereign’s 11.6 billion USD-equivalent of local currency debt.²⁸⁸ Eurobond creditors have protested, arguing the approach “implied that such debt would effectively . . . have precedence over” obligations they hold, despite the comparable treatment requirement.²⁸⁹

3. *Hold-Out Risk, Intra-Creditor Conflicts*

In stark contrast to corporate bankruptcy, sovereign debt restructuring is persistently characterized by hold-out creditor risk—in other words, parties opportunistically hindering aggregate welfare accretive transactions to extract higher payouts.²⁹⁰ These concerns are likely to feature prominently in Common Framework proceedings that require effectuating on “comparable terms” a bond restructuring pursuant to contractual provisions.

From a Common Framework perspective, it is helpful to distinguish two types of hold-out challenges: (i) wholesale conflict between private sector creditors and the other parties; and (ii) far more likely, intra-creditor conflicts where a sub-set of bondholders seeks to prevent others from consummating a transaction. This distinction is important because, notwithstanding a similar practical net impact, the solutions to these challenges are likely to be quite distinct. The former, less likely scenario, may genuinely reflect legitimate creditor concern regarding an insufficient process or unnecessarily aggressive debtor disposition.²⁹¹

²⁸⁶ Samuel Gebre & Alonso Soto, *Ethiopia in Talks to Restructure \$1 Billion More of Debt*, BLOOMBERG (July 7, 2021, 7:31 AM), <https://www.bloomberg.com/news/articles/2021-07-07/ethiopia-in-negotiations-to-restructure-1-billion-more-of-debt-kqte6iuj#xj4y7vzkg> [<https://perma.cc/BL95-RW6U>].

²⁸⁷ Savage, *supra* note 228.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ See *supra* Section I.B.

²⁹¹ For example, during the recent restructuring of the Argentine Province of Buenos Aires, creditors expressed displeasure regarding insufficient disclosures and unduly limited access

The latter scenario reflects conflicts amongst private creditors, which are common along multiple dimensions, ranging from contractual provisions to tactics. Such conflicts can negate the process-related benefits of bondholder creditor committees, 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.²⁹²

The evolution of sovereign debt contracts has resulted in a complex stock of agreements.²⁹³ 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 restructuring²⁹⁴ and, to a lesser extent, Ecuador's restructuring (which mostly demonstrated how different tactics, particularly litigation aggressiveness, can yield distinct creditor groups).²⁹⁵

In February 2020, after the IMF declared its debt "unsustainable,"²⁹⁶ Argentina began creditor negotiations, a prelude to the ninth sovereign default in the nation's history.²⁹⁷ Coming into the restructuring, Argentina had total private sector debt in excess of \$133 billion, including \$65 billion of foreign-law foreign-currency obligations, denominated primarily in dollars and euros.²⁹⁸

to key documents. Reuters Staff, *Argentina's Largest Province to Restructure \$7 Bln Debt After Long Negotiation*, REUTERS (Aug. 27, 2021), <https://www.reuters.com/article/argentina-bonds-buenosaires/argentina...vince-to-restructure-7-bln-debt-after-long-negotiation-idUSL1N2PX2SC> [<https://perma.cc/QFV2-FL3J>].

²⁹² Park & Samples, *supra* note 30, at 220.

²⁹³ See, e.g., *supra* note 106 and accompanying text; see also Gelpert, *supra* note 6, at 47 (noting, one of "two distinctive features of sovereign debt," as being that "the debt does not go away").

²⁹⁴ Lucy Hale, *A Tale of Two Defaults*, WILSON CTR. (Oct. 30, 2020), <https://www.wilsoncenter.org/blog-post/tale-two-defaults> [<https://perma.cc/9BEA-BCAA>].

²⁹⁵ Kenneth Rapoza, *The Pandemic Blues: Ecuador Second Latin American Nation to Default in 4 Weeks*, FORBES (Apr. 21, 2020, 8:00 AM), <https://www.forbes.com/sites/kenrapoza/2020/04/21/the-pandemic-blues-ecuador-second-latin-american-nation-to-default-in-4-weeks/?sh=3f9f975573b8> [<https://perma.cc/2FFC-3UBH>].

²⁹⁶ Press Release, *IMF Staff Statement on Argentina*, IMF Press Release 20/57 (Feb 19, 2020), <https://www.imf.org/en/News/Articles/2020/02/19/pr2057-argentina-imf-staff-statement-on-argentina> [<https://perma.cc/T7HY-ZF5J>].

²⁹⁷ Argentina technically delayed payment on certain other debts in August 2019. However, the February 2021 default was the first to implicate international restructuring considerations. "On August 28, [2019], the [Argentine] government delayed repayment on over \$8 billion of short-term debt and signaled its intent also to restructure portions of Argentina's medium and long term debt." Elena Duggar, *Argentina Debt Restructurings*, MOODY'S INVS. SERV. PRESENTATION 6–7 (2020).

²⁹⁸ Argentina's \$133.1 billion total private-sector-held debt included \$72.8 billion of foreign-law bonds and \$60.3 billion of bonds issued under local law. ARGENTINA: STAFF TECHNICAL NOTE ON PUBLIC DEBT SUSTAINABILITY, INT'L MONETARY FUND 6 (2020). The majority of Argentina's foreign-law bonds (totaling \$65 billion) was denominated in foreign currencies; those bonds were ultimately subject to the restricting transaction discussed herein. See Tom Arnold & Adam Jourdan, *Argentina Strikes \$65 Billion Debt Deal to Avert*

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 that were harder to restructure;²⁹⁹ and (ii) a 2016 document (so-called “Macri bonds”) that generally incorporated the fourth generation, enhanced CACs, allowing for smoother modification.³⁰⁰

These contractual distinctions meant that it was much easier for creditors to create a “blocking position” in the 2005 Exchange Bonds.³⁰¹ Reflecting this reality, Argentina’s initial offer provided those obligations a generally higher recovery.³⁰²

TABLE 3: SUMMARY OF SELECT COLLECTIVE ACTION CLAUSE PROVISIONS

Available CAC Type	Argentina		Lebanon	Zambia	
	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) ³⁰³		75% aggregate principal			75% aggregate principal
Multiple Series (Dual Limb) ³⁰⁴	85% aggregate principal + 66.67% of each series	66.67% aggregate principal + 50% of each series			66.67% aggregate principal + 50% of each series

Hard Default, REUTERS (Aug. 4, 2020, 12:19 AM), <https://www.reuters.com/article/us-argentina-debt/argentina-strikes-65-billion-debt-deal-to-avert-hard-default-idUSKCN2500RH> [<https://perma.cc/E2KG-988H>].

²⁹⁹ The bonds featured higher-than-standard voting thresholds, allowing for amendment: (i) series-by-series with 75 percent of the vote or (ii) across multiple series, but requiring 85 percent of aggregate principal and 66.67 percent of each series of bonds. Lee C. Buchheit & Mitu Gulati, *The Argentine Collective Action Clause Controversy*, CAP. MKTS. L.J. (forthcoming 2020).

³⁰⁰ See *supra* Part I (describing CAC provisions).

³⁰¹ Buchheit & Gulati, *supra* note 299.

³⁰² *Id.*

³⁰³ Applies if “uniformly applicable” condition is met.

³⁰⁴ 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.³⁰⁵ Unsurprisingly, the groups with the higher-threshold bonds drove a harder bargain, holding out beyond acceptance of the transaction by other holders.³⁰⁶

After jointly rejecting Argentina's initial offer, each of the creditor groups filed distinct, at times incompatible, counter-proposals.³⁰⁷ In subsequent back-and-forth, for instance, an improved offer was accepted in principle by one group, but swiftly rejected by the two others, which filed yet another counter-proposal.³⁰⁸ 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 state assets.³⁰⁹ Though generally smoother than Argentina's, Ecuador's restructuring illustrated this dynamic.³¹⁰

Ecuador had about \$17.4 billion of Eurobond debt, divided across ten series.³¹¹ Nine of the Eurobond series had essentially identical modification pro-

³⁰⁵ The three groups were: (i) the Argentina Creditor Committee, whose holdings were never fully disclosed; (ii) the Ad Hoc Bondholder Group, with 25 percent of the "Marci" Bonds and 15 percent of the Exchange Bonds (and thus at least one blocking position); and (iii) the Ad Hoc Group of Argentina Exchange Bondholders, with 16 percent of the Exchange Bonds, allowing for a blocking position. See *Joint Statement on Argentina Exchange Offer*, PR NEWswire (May 4, 2020, 8:00 AM), <https://www.prnewswire.com/news-releases/joint-statement-on-argentina-exchange-offer-301051633.html> [<https://perma.cc/2GSP-9RNC>];

Lev E. Breydo & Katherine Wegert, *Following Deadline Extension, Argentina, Creditors Remain Far Apart on \$65B Deal; Contingent Instruments, Interest Only Securities Could Bring Parties Together, Subject to Appropriate Structure*, REORG (May 12, 2020, 1:03 PM) <https://reorg.com/following-deadline-extension-argentina-creditors-remain-far-apart-on-65b-deal/> [<https://perma.cc/QN3U-CVUX>] (detailing creditor groups and transaction timeline).

³⁰⁶ See *Joint Statement on Argentina Exchange Offer*, *supra* note 305.

³⁰⁷ Walter Bianchi et al., *Argentina's Creditors Make Counter Offers as Debt Restructuring Deadline Nears*, REUTERS (May 15, 2020, 2:35 PM), <https://www.reuters.com/article/us-argentina-debt/argentinas-creditors-make-counter-offers-as-debt-restructuring-deadline-nears-idUSKBN22R39V> [<https://perma.cc/2BWN-BU83>].

³⁰⁸ See Ben Bartenstein & Jorgelina Do Rosario, *Argentina Creditors Present New Offer as Differences Remain*, BLOOMBERG (June 15, 2020, 3:35 PM), <https://www.bloomberg.com/news/articles/2020-06-15/argentina-creditors-return-with-new-offer-as-differences-remain?sref=OOpRUZ81> [<https://perma.cc/Z6LW-TDEY>].

³⁰⁹ Martin Guzman & Joseph E. Stiglitz, *How Hedge Funds Held Argentina for Ransom*, N.Y. TIMES (Apr. 1, 2016), <https://www.nytimes.com/2016/04/01/opinion/how-hedge-funds-held-argentina-for-ransom.html> [<https://perma.cc/4WT9-Q3PS>].

³¹⁰ 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.

³¹¹ Reuters Staff, *Ecuador Ploughs on with \$17.4 Billion Debt Revamp with Major Creditor Support*, REUTERS (July 20, 2020, 7:31 AM), <https://www.reuters.com/article/us-ecuador-eurobonds-debtrenegotiation/ecuador-ploughs-on-with-17-4-billion-debt-revamp-with-major-creditor-support-idUSKCN24L1RR> [<https://perma.cc/7NPD-SHF2>].

visions, but one set, maturing in 2024, had higher thresholds.³¹² As a result, the 2024 bondholders formed a separate group that was ultimately able to achieve more favorable restructuring terms.³¹³ 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 percent of the bonds; (ii) a "Steering Committee" with a smaller position, but more aggressive investors; and (iii) a group of just the 2024 bonds.³¹⁴ The hedge fund-heavy Steering Committee proved most aggressive—rejecting otherwise accepted offers and pursuing litigation to block the restructuring—but amassed insufficient bonds to meaningfully hinder the process.³¹⁵

C. *Insufficient Benefits for Debtors*

Ultimately, the Common Framework cannot be successful unless it is sufficiently attractive to debtors; given the limited uptake, this has been a critical area of underperformance. Of seventy-three eligible nations, forty-eight utilized the DSSI, but only three have attempted the Common Framework—despite the IMF finding that over forty low-income nations are at or near financial distress.³¹⁶ Further, the Republic of the Congo, a DSSI-participant, determined to pursue a restructuring outside of the Common Framework, underscoring low expectations.³¹⁷

³¹² See *The Republic of Ecuador Announces Commencement of Consent Solicitation and Invitation to Exchange*, PR NEWSWIRE (July 20, 2020, 11:18 AM), <https://www.prnewswire.com/news-releases/the-republic-of-ecuador-announces-commencement-of-consent-solicitation-and-invitation-to-exchange-301095959.html> [<https://perma.cc/99JW-KHFB>].

³¹³ *Id.*

³¹⁴ See *id.* (outlining the 2024 bond terms); *SDNY Denies Securities Fraud TRO and Upholds Ecuador's Use of Collective Action Clauses in Sovereign Debt Restructuring*, CLEARY GOTTlieb (Nov. 5, 2020), <https://www.clearygottlieb.com/news-and-insights/publication-listing/sdny-denies-securities-fraud-tro-and-upholds-ecuadors-use-of-collective-action-clauses> [<https://perma.cc/AQH5-Q5LR>] [hereinafter *SDNY Denies Securities Fraud TRO*] (outlining the role of the "Steering Committee" as well as those holding 50 percent of the outstanding principal).

³¹⁵ *SDNY Denies Securities Fraud TRO*, *supra* note 314.

³¹⁶ Guillaume Chabert et al., *Restructuring Debt of Poorer Nations Requires More Efficient Coordination*, IMF BLOG (Apr. 7, 2022) <https://www.imf.org/en/Blogs/Articles/2022/04/07/restructuring-debt-of-poorer-nations-requires-more-efficient-coordination> [<https://perma.cc/332Q-PKFX>] (noting "41 DSSI countries at high risk of or in debt distress"); Christina Laskaridis, *When Push Came to Shove: COVID-19 and Debt Crises in Low-Income Countries*, 42 CANADIAN J. DEV. STUD. 200, 202 (2021).

³¹⁷ See *Fitch Affirms Congo at 'CCC'*, FITCH RATINGS (Apr. 1, 2022, 5:01 PM), <https://www.fitchratings.com/research/sovereigns/fitch-affirms-congo-at-ccc-01-04-2022> [<https://perma.cc/BSJ5-AKUM>].

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 the Republic of the Congo and Angola. Third, many nations that may benefit from the Common Framework are not able to utilize it, including those already in default, such as Suriname, Lebanon, Sri Lanka, and Ukraine,³¹⁸ as well as others experiencing significant distress, including Ghana, Pakistan, and Tunisia.³¹⁹

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.”³²⁰ For this reason, some nations, like Kenya, declined to participate even in the DSSI, despite it not requiring private sector involvement.³²¹

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

³¹⁸ Marc Jones, *The Big Default? The Dozen Countries in the Danger Zone*, REUTERS (July 15, 2022, 6:37 PM), <https://www.reuters.com/markets/europe/big-default-dozen-countries-danger-zone-2022-07-15/> [<https://perma.cc/VD5P-YH9C>].

³¹⁹ See Josyana Joshua, *Jay Newman Says Russia Could Lead Sovereign Debt Crisis*, BLOOMBERG (Mar. 17, 2022, 11:24 AM), <https://news.bloomberglaw.com/bankruptcy-law/jay-newman-says-russia-may-lead-sovereign-debt-crisis-correct> [<https://perma.cc/5YEE-VPH4>] (noting “long list of countries that are on the edge” including Pakistan, Egypt, Ghana, Zambia, Lebanon, Venezuela, Sri Lanka, Tunisia, Russia, Ukraine, Gabon, and Cameroon); Maria Elena Vizcaino, *Moody’s Cuts Ghana’s Junk-Rated Debt on Risk of Creditor Losses*, BLOOMBERG <https://www.bloomberg.com/news/articles/2022-11-29/ghana-credit-rating-cut-by-moody-s-on-debt-restructuring-plan> [<https://perma.cc/7F94-5A6F>] (Nov. 30, 2022, 12:19 AM) (“Ghana is expected to ask holders of its international bonds to accept losses of as much as 30% on the principal and forgo some interest payments as it hammers out a debt-sustainability plan to qualify for an IMF loan.”).

³²⁰ Wheatley, *supra* note 3.

³²¹ See *G20 Debt Relief for Developing Countries—Less Simple Than It Appears*, JONES DAY (July 2020), <https://www.jonesday.com/en/insights/2020/07/g20-debt-relief-for-developing-countries> [<https://perma.cc/23BG-JJVG>].

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.³²² 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.³²³ 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.³²⁴

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.³²⁵ Moody’s placed it on negative watch³²⁶ and subsequently downgraded it to Caa1 and then Caa2, right above default.³²⁷

A CF Creditor Committee for Ethiopia was formed on September 16, 2021, co-chaired by China and France,³²⁸ and has held two meetings.³²⁹ However, the

³²² See *Common Framework Access Could Lead to Sovereign Debt Default*, FITCH RATINGS (Feb. 16, 2021, 6:30 AM), <https://www.fitchratings.com/research/sovereigns/common-framework-access-could-lead-to-sovereign-debt-default-16-02-2021> [<https://perma.cc/RDT6-ZLER>].

³²³ *Id.*

³²⁴ *Id.*

³²⁵ Fasika Tadesse et al., *Ethiopia, Creditors Set Up Panel to Revamp \$30 Billion of Debt*, BLOOMBERG (Sept. 17, 2021, 9:32 AM), <https://www.bloomberg.com/news/articles/2021-09-17/ethiopia-creditors-set-up-panel-to-revamp-30-billion-of-debt?sref=OOpRUZ8l> [<https://perma.cc/ASZ3-MDWT>]; *Fitch Downgrades Ethiopia to ‘CCC’*, FITCH RATINGS (Feb. 9, 2021, 9:15 AM), <https://www.fitchratings.com/research/sovereigns/fitch-downgrade-s-ethiopia-to-ccc-09-02-2021> [<https://perma.cc/AZV8-XN3H>] (“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.”).

³²⁶ *Rating Action: Moody’s Places Ethiopia’s B2 Ratings on Review for Downgrade*, MOODY’S INVS. SERV. (Mar. 10, 2021), https://www.moody’s.com/research/Moodys-places-Ethiopia-B2-ratings-on-review-for-downgrade--PR_441947 [<https://perma.cc/34TQ-335S>] (“[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.”).

³²⁷ *Rating Action: Moody’s Downgrades Ethiopia’s Rating to Caa2; Outlook Negative*, MOODY’S INVS. SERV. (Oct. 20, 2021), https://www.moody’s.com/research/Moodys-downgrades-Ethiopia-rating-to-Caa2-outlook-negative--PR_455847 [<https://perma.cc/N6ZC-8M6U>].

³²⁸ *1st Meeting of The Creditor Committee for Ethiopia*, CLUB DE PARIS (Sept. 28, 2021), <https://clubdeparis.org/en/communications/press-release/1st-meeting-of-the-creditor-committee-for-ethiopia-28-09-2021> [<https://perma.cc/WPX7-CEY9>].

³²⁹ See Joshua, *supra* note 319; Andrea Shalal, *Ethiopia Creditors to Discuss Debt Restructuring on Monday*, REUTERS (July 12, 2022, 2:36 AM), <https://www.reuters.com/world/afric>

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 initiative, given the mechanism's guiding principle of comparable treatment for both official and private creditors."³³⁰

That being said, Fitch indicated that a "rating would be upgraded to a level reflecting its post-restructuring fundamentals shortly thereafter," suggesting a default could be short-lived.³³¹ This was precisely the case with Ecuador.³³² Following a broadly successful, non-contentious consent solicitation, Ecuador was briefly downgraded to 'RD',³³³ but upgraded four notches to "B-" less than six months later.³³⁴ After the transaction, Ecuador's financial health improved markedly, and its bonds were some of the best-performing in 2021.³³⁵

Thus, a downgrade is not a death knell for sovereigns; however, it comes with costs and correspondingly must provide clear benefits to the debtor.³³⁶

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.

a/ethiopia-creditors-discuss-debt-restructuring-monday-source-2022-07-12/
[<https://perma.cc/5U23-XGQP>].

³³⁰ *Fitch Affirms Ethiopia at 'CCC'*, FITCH RATINGS (Jan. 27, 2022, 9:20 AM), <https://www.fitchratings.com/research/sovereigns/fitch-affirms-ethiopia-at-ccc-27-01-2022> [<https://perma.cc/L3XN-NSBH>].

³³¹ *Common Framework Access Could Lead to Sovereign Debt Default*, *supra* note 322.

³³² *Fitch Upgrades Ecuador to 'B-'; Outlook Stable*, FITCH RATINGS (Sept. 3, 2020, 12:59 PM), <https://www.fitchratings.com/research/sovereigns/fitch-upgrades-ecuador-to-b-outlook-stable-03-09-2020> [<https://perma.cc/S4NL-RJ59>].

³³³ *Fitch Downgrades Ecuador to 'RD'*, FITCH RATINGS (Apr. 20, 2020, 4:34 PM), <https://www.fitchratings.com/research/sovereigns/fitch-downgrades-ecuador-to-rd-20-04-2020> [<https://perma.cc/LX38-S7CK>].

³³⁴ *Fitch Upgrades Ecuador to 'B-'*, *supra* note 332.

³³⁵ 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/cuador-defaulted-last-year-now-its-bonds-are-the-world-s-best?sref=OOpRUZ8l> [<https://perma.cc/6KN9-CLXW>].

³³⁶ Jill Dauchy, *Ways to Fix the Lender of Last Resort*, FIN. TIMES (Sept. 22, 2022), <https://www.ft.com/content/6890bf1a-b172-4d78-98f6-6562b4a376d9> [<https://perma.cc/2ZE7-6ZF3>] ("Developing countries however are not convinced" regarding the CF as "[t]hey watch in fear the downgrades and years of delay experienced by Chad, Ethiopia, and Zambia. . .").

In 2020, Angola utilized the DSSI to generate significant liquidity relief, estimated to total \$571.5 million.³³⁷ 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 \$6.2 billion in savings over three years.³³⁸ Critically, Angola was able to accomplish this without triggering a default or even downgrade on its outstanding Eurobonds, ensuring continued market access.³³⁹ 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 was subsequently 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.³⁴⁰ In 2021, due to a combination of improved governance and rising oil prices, Angola received its first credit rating upgrade.³⁴¹

Similarly, the Congo, an IDA-eligible nation that utilized the DSSI, declined to participate in the Common Framework.³⁴² As of 2020, the Congo had

³³⁷ *Debt Service Suspension Initiative*, *supra* note 161.

³³⁸ Strohecker & Bavier, *supra* note 131; INT’L MONETARY FUND, IMF COUNTRY REPORT: ANGOLA 9 (2020); LUSA, *supra* note 132 (quoting Executive Secretary of the United Nations Economic Commission for Africa, Vera Songwe, “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 . . . [t]hey were lucky and did it quickly, but no country has yet gone through the process of the framework.”).

³³⁹ LUSA, *supra* note 132; *see* Alonso Soto et al., *IMF Disburses \$488 Million to Angola, Backs Plan to Cut Debt*, BLOOMBERG, <https://www.bloomberg.com/news/articles/2021-01-12/imf-to-disburse-488-million-to-angola-as-it-seeks-to-curb-debt> [<https://perma.cc/B85W-PXLU>] (Jan. 12, 2021, 1:39 AM).

³⁴⁰ Henrique Almeida, *Oil Boom Turns Angolan Kwanza into a World-Beating Currency*, BLOOMBERG (Mar. 15, 2022, 5:21 AM), <https://www.bloomberg.com/news/articles/2022-03-15/oil-boom-turns-angolan-kwanza-into-a-world-beating-currency?sref=OOpRUZ8l> [<https://perma.cc/AX9K-B5HG>].

³⁴¹ Candido Mendes, *Angola Eurobonds Surge as Moody’s Lifts Ratings for First Time*, BLOOMBERG, <https://www.bloomberg.com/news/articles/2021-09-14/angola-gets-first-upgrade-of-sovereign-credit-rating-by-moody-s?sref=OOpRUZ8l> [<https://perma.cc/29M6-LA3N>] (Sept 14, 2021, 2:17 AM) (quoting Moody’s as noting that “[s]tronger 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”).

³⁴² *Debt Service Suspension Initiative*, *supra* note 161; *Fitch Affirms Congo at ‘CCC’*, *supra* note 317; *see* Masood Ahmed & Hannah Brown, *Fix the Common Framework for Debt Before It Is Too Late*, CTR. FOR GLOB. DEV. (Jan 18, 2022), <https://www.cgdev.org/blog/fix-common-framework-debt-it-too-late#:~:text=Despite%20its%20name%2C%20the%20Common,able%20to%20complete%20the%20process> [<https://perma.cc/A7WC-ZSLC>].

total debts of about \$11 billion, with \$7 billion in foreign currency.³⁴³ Of those obligations, 12.16 percent are to multilateral creditors, 42.2 percent are bilateral—mostly to China—and 45.64 percent are private sector, the largest of which is oil-backed debt to commodity trading firms Glencore and Trafigura.³⁴⁴

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.³⁴⁵ However, the IMF noted that the Congo’s debt is formally “in distress” due to ongoing private creditor negotiations.³⁴⁶ In March 2021, the Congo restructured its obligations with Trafigura, however negotiations with Glencore remain ongoing.³⁴⁷

The Congo has not publicly stated why it determined not to pursue a Common Framework restructuring, nor has it ruled out the option.³⁴⁸ However, the decision may reflect the structure of its obligations, with China and the oil-trading firms being by far its largest creditors.³⁴⁹ Given the Congo’s limited Paris Club exposure and more complex collateralized private sector credit, it may have concluded that 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 appear suboptimally suited for it, many *ineligible* sovereigns could significantly benefit from it. This is in large part because Common Framework eligibility is based on IDA borrowing criteria, which are solely defined based on per capita income.³⁵⁰ While GNI represents a logical criterion for determining eligibility for

³⁴³ INT’L MONETARY FUND, REPUBLIC OF CONGO: STAFF REPORT FOR THE 2021 ARTICLE IV CONSULTATION 29 (2021) [hereinafter IMF COUNTRY REPORT: REPUBLIC OF CONGO].

³⁴⁴ *Id.*; see Reuters Staff, *supra* note 197.

³⁴⁵ See IMF COUNTRY REPORT: REPUBLIC OF CONGO, *supra* note 343, at 1 (“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.’”); Reuters Staff, *supra* note 197.

³⁴⁶ IMF COUNTRY REPORT: REPUBLIC OF CONGO, *supra* note 343, at 1.

³⁴⁷ Reuters Staff, *Congo Republic Seeks Glencore Loan Deal Within a Year, Says Oil Minister*, REUTERS (Nov. 9, 2021, 8:12 AM), <https://www.reuters.com/article/africa-energy-congorepublic/congo-republic-seeks-glencore-loan-deal-within-a-year-says-oil-minister-idUSL8N2S06E2> [<https://perma.cc/X4HQ-G4U7>].

³⁴⁸ 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.” *Fitch Affirms Congo at ‘CCC,’ supra* note 317.

³⁴⁹ IMF COUNTRY REPORT: REPUBLIC OF CONGO, *supra* note 343, at 4, 22–23.

³⁵⁰ *How Does the World Bank Classify Countries?*, *supra* note 150; *Common Framework Access Could Lead to Sovereign Debt Default*, *supra* note 322.

concessionary borrowing programs, debt restructuring implicates different considerations, including the sovereign's overall debt levels, market conditions and macro-political stability.³⁵¹ As a result, high-debt, middle-income nations that may benefit from the Common Framework are not able to utilize it—including those already in default, such as Suriname, Lebanon, Sri Lanka, and Ukraine³⁵²—as well as others experiencing significant distress, including Ghana, Pakistan, and Tunisia.³⁵³

Lebanon, historically a high-debt but comfortably middle-income nation, aptly illustrates the implications.³⁵⁴ In 2020, following its first-ever sovereign debt default, the Lebanese Republic began a horrifying downward spiral; the economy has shrunk nearly 60 percent and the currency lost 95 percent of its value, pushing 80 percent of the population into poverty.³⁵⁵ Nonetheless, Lebanon remains ineligible for the Common Framework.³⁵⁶ Similarly, resolution of Sri Lanka's \$50 billion default is complicated by lender mistrust and coordination challenges that the Common Framework can help ameliorate. Yet, "[a]s a middle-income country . . . [it] has less recourse to global initiatives designed to help poorer nations," leaving "a lot" of the process "outside of Sri Lanka's control."³⁵⁷

³⁵¹ Common Framework eligibility is limited 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. *See How Does the World Bank Classify Countries?*, *supra* note 150; *Common Framework Access Could Lead to Sovereign Debt Default*, *supra* note 322.

³⁵² Benjamin Parkin & Jonathan Wheatley, *Sri Lanka Debt Talks with China a Test of Creditor Appetite for Bailout*, *FIN. TIMES* (Oct. 6, 2022), <https://www.ft.com/content/92eebc7d-6710-49d2-81a7-a421f86a840c> [<https://perma.cc/6DXE-6SZA>]; *see World Bank Country and Lending Groups*, *supra* note 154.

³⁵³ Joshua, *supra* note 319 (noting "long list of countries that are on the edge" including Pakistan, Egypt, Ghana, Zambia, Lebanon, Venezuela, Sri Lanka, Tunisia, Russia, Ukraine, Gabon, and Cameroon); *IMF: Ghana Talks Constructive, More Work Needed on Debt Analysis*, *REUTERS* (Oct. 8, 2022, 1:47 AM), <https://www.reuters.com/world/africa/imf-reaffirms-commitment-support-ghana-after-visit-2022-10-07/> [<https://perma.cc/TEW6-WCZ8>]; *World Bank Country and Lending Groups*, *supra* note 154.

³⁵⁴ Heba Saleh, *High Debt, High Deficit: Lebanon's Economic Woes Fueling Protests*, *FIN. TIMES* (Oct. 30, 2019), <https://www.ft.com/content/c15c88de-fa35-11e9-98fd-4d6c20050229> [<https://perma.cc/MTY3-FW8L>]; Sami Baff, *WB: After Being an Upper-Middle Income Country for 25 Years, Lebanon is Now a Lower-Middle Income Country With a GNI Per-Capita of \$3,450 in 2021*, *BLOMINVEST BANK* (July 6, 2022), <https://blog.blominvestbank.com/44410/wb-after-being-an-upper-middle-income-country-for-25-years-lebanon-is-now-a-lower-middle-income-country-with-a-gni-per-capita-of-3450-in-2021/> [<https://perma.cc/A9SY-XV4Z>].

³⁵⁵ *Factbox: Just How Bad is Lebanon's Economic Crisis?*, *REUTERS* (Sept. 14, 2022, 5:28 AM), <https://www.reuters.com/world/middle-east/just-how-bad-is-lebanons-economic-crisis-2022-09-14/> [<https://perma.cc/D3Z2-V4CZ>].

³⁵⁶ *See World Bank Country and Lending Groups*, *supra* note 154.

³⁵⁷ Parkin & Wheatley, *supra* note 352.

While pandemic restructurings predating the Common Framework, such as Ecuador and Argentina, illustrated that access 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?

“[T]he G20’s effort to create a new system for debt renegotiation—the Common Framework for Debt Treatment—appears to have failed[,]”³⁵⁸ exacerbating the “risk of another lost decade for developing countries,”³⁵⁹ with prospectively immense public health and economic consequences. Despite the immense stakes and Common Framework’s widely recognized shortcomings, the G-20 has been unable to make meaningful progress.³⁶⁰

While the Common Framework has underperformed, it remains the “only game in town” and represents a viable starting point to improve upon³⁶¹ with thoughtful “small steps, evolution and incrementalism,” which scholars have recognized may be “all that can reasonably be expected” given the constraints of policy making.³⁶² Thus, while a truly optimal solution may prove illusive, a number of realistic³⁶³ and accretive suggestions can help facilitate resolution of sovereign distress coming out of the Covid-19 pandemic. To put it differently, perfection should not become the enemy of the good—particularly when the stakes are so immensely high.

A. *Infrastructure Through a “Coordinating Forum”*

Despite a significant literature lamenting the implications of lacking a dedicated sovereign debt restructuring forum,³⁶⁴ the contemporary consensus ap-

³⁵⁸ Rhodes & Lipsky, *supra* note 2.

³⁵⁹ Wheatley, *supra* note 3 (quoting Rebeca Grynspan, Secretary General of the United Nations Conference on Trade and Development).

³⁶⁰ Rappoport, *supra* note 212 (“But at the conclusion of the Group of 20 meeting in November, it appeared that little progress had been made. In a joint declaration, the leaders expressed their concern about the ‘deteriorating debt situation’ in some vulnerable middle-income countries. However, they offered few concrete solutions.”).

³⁶¹ Mark Sobel, *Sovereign Debt Architecture is Messy and Here to Stay*, FIN. TIMES (Aug. 16, 2022), <https://www.ft.com/content/b7133f4e-797f-4c25-b70b-346fa8870478> [<https://perma.cc/5CYA-AG9G>].

³⁶² *Id.*

³⁶³ Guillaume Chabert, Deputy Director, Strategy, Policy and Review Department of the IMF, remarked that “fix[es]” to the Common Framework “should be realistic” in light of constraints. Institute of International Economic Law, *supra* note 221.

³⁶⁴ See *supra* Section I.B.

pears to be that a permanent structure—such as the IMF’s proposed SDRM—lacks political palatability, notwithstanding potential benefits.³⁶⁵ However, by addressing the identified shortcomings of the Common Framework, it may be possible to recreate many of the otherwise-elusive benefits within a more readily viable vehicle. Indeed, a number of scholars and commentators have identified the need for additional tools to facilitate restructuring on the other side of Covid-19.³⁶⁶ Building off and synthesizing across those broadly compatible proposals, this Article proposes establishment of a time-bound structure—termed a “Coordinating Forum”—to support implementation of the Common Framework.

The contemplated structure would have four interrelated guideposts, with a general emphasis towards simplicity.³⁶⁷

First, and consistent with proposals raised by scholars and commentators, the Coordinating Forum would be distinct from a court of law, and even restructuring architecture in the traditional sense.³⁶⁸ Instead, the purpose would be closer to a technical forum: quasi-institutional shared infrastructure to facilitate information flows, multi-disciplinary technical development and cross-constituency coordination.

At present, the Common Framework lacks formal means of connecting the official and private sectors, in respect of both negotiations as well as information sharing and analytical collaboration.³⁶⁹ Through such a venue, parties could, for instance, develop consolidated, jointly used datasets, financial models, and legal documentation—critical components for ensuring consistent provisions incorporating best practices, while “cleaning up” long-standing idiosyncrasies in the stock of sovereign debt instruments.³⁷⁰ The technocratically-

³⁶⁵ See *supra* Section I.B.

³⁶⁶ See Anna Gelpern et al., *Debt Standstills Can Help Vulnerable Governments Manage the COVID-19 Crisis*, PIIE (Apr. 7, 2020, 10:45 AM), <https://www.piie.com/blogs/realtime-economic-issues-watch/debt-standstills-can-help-vulnerable-governments-manage-covid> [<https://perma.cc/MA6M-X26M>] (“[T]he 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. 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.”); see also GRP. OF THIRTY, *SOVEREIGN DEBT AND FINANCING FOR RECOVERY AFTER THE COVID-19 SHOCK: NEXT STEPS TO BUILD A BETTER ARCHITECTURE 23* (2021) (recommending “[a] standing consultative mechanism [that] can help build trust and promote consistency across Common Framework debt treatments”).

³⁶⁷ See, e.g., Mooney, *supra* note 67, at 62.

³⁶⁸ See GRP. OF THIRTY, *supra* note 366, at 21.

³⁶⁹ See Institute of International Law, *supra* note 221 (observing that “a standing forum where we can have technical discussion” was currently missing from the CF).

³⁷⁰ See *supra* Sections I.A.1–2, I.C.

oriented, informal mechanism would also be consistent with the historical practice of the Paris and London Clubs, as well as certain prior precedents.³⁷¹ The incremental value-add here would be the establishment of neutral shared infrastructure through which the official and private sectors could coordinate.

Second, the Coordinating Forum should be housed under neutral institutional auspices. An innate challenge may be some trade-off between expertise and perceived impartiality, as entities with the deepest technical prowess, including the IMF (and to a lesser extent, the World Bank), also suffer drawbacks of perceived and potential conflicts of interest.³⁷² This is particularly acute due to the organizations' vested interests as lenders, compounded by the IFI's preferred creditor status, and because of the inherently political dimensions involved.³⁷³

Echoing this tension, in a 2003 article discussing the potential SDRM structure, Professors Bolton and Skeel observed that “[t]he most obvious choice as overseer of a new SDRM is the IMF itself,” due to its uniquely vast experience.³⁷⁴ Yet, Professors Bolton and Skeel nonetheless concluded that the IMF would “ultimately [be] an ineffective administrator of the restructuring process” due to: (i) potential conflicts of interest with its role as a lender of last resort; and (ii) risks of politicized influence impacting decision-making.³⁷⁵

These considerations remain equally applicable today, making an alternative institutional home preferable. 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 among relevant constituencies but without financial exposure and associated perceived conflicts.³⁷⁶

Third, at least as a starting point, the initiative may be most viable with a time-bound sunset structure—for instance, a period of six years, with extension options. A temporary structure has inherent suboptimalities, including the po-

³⁷¹ See Gelpern, *supra* note 6, at 48.

³⁷² See Section III.B.1 (discussing Argentina restructuring and creditor tensions regarding IMF DSA analyses).

³⁷³ In a somewhat related concern, Professor Gelpern recommended that “[b]ecause 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 Gelpern, *supra* note 6, at 87.

³⁷⁴ Patrick Bolton & David A. Skeel, Jr., *Inside the Black Box: How Should a Sovereign Bankruptcy Framework Be Structured?*, 53 EMORY L.J. 763, 809 (2004).

³⁷⁵ *Id.* at 810.

³⁷⁶ Odette Lienau, *The Time Has Come for Disaggregated Sovereign Bankruptcy*, 37 EMORY BANKR. DEVS. J. 101, 103 (2021) (noting in respect of the UNCTAD mechanism that “[i]nstead 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”).

tential for perceived illegitimacy. Yet, it also has unique practical advantages, including ease-of-use and political palatability by not requiring the relevant constituencies to make a permanent commitment. The IMF, for instance, has been reluctant to “recognize the CF as a representative standing forum,” instead preferring to “closely monitor [its] evolution.”³⁷⁷ Here, impermanence may make the analysis lower-stakes and thus simpler. Subsequently, if the Coordinating Forum performs, it can always be 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 seldom have a seat at the table.³⁷⁸ Because the decisions made in respect of sovereign obligations can have multi-generational consequences, it is only fair that those most impacted have visibility into how the decisions are being made. As one relevant example, the Puerto Rico Oversight Board was required to maintain an office on the island and held many of its publicly accessible meetings in Puerto Rico, showing the relevant constituencies much-deserved respect and consideration.³⁷⁹

B. Enhance Access, Process & Debtor Incentives

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. In this respect, key dimensions include: (i) providing more concrete benefits to debtors; (ii) increasing access; and (iii) enhancing transparency.

1. Clear Upfront Benefits

To help address nations’ logical misgivings about participation, the Common Framework should provide debtors with concrete upfront benefits. Though an imperfect parallel, a foundational debtor benefit under Chapter 11 of the Bankruptcy Code is the automatic stay against creditor actions, effective upon the bankruptcy petition.³⁸⁰ The automatic stay provides an immediate breathing

³⁷⁷ IMF Executive Board Completes Review of the Fund’s Policies on Sovereign Arrears and Related Perimeter Issues, INT’L MONETARY FUND (May 18, 2022) <https://www.imf.org/en/News/Articles/2022/05/17/pr22156-imf-completes-review-of-the-fund-policies-on-sovereign-arrears-and-related-perimeter-issues> [<https://perma.cc/4JCH-LFBJ>].

³⁷⁸ This is, sadly, particularly pronounced for less democratic nations. See Matthew DiGuseppe & Patrick E. Shea, *The Devil’s Haircut: Investor-State Disputes over Debt Restructuring*, 63 J. CONFLICT RESOL. 1889, 1893 (2019).

³⁷⁹ See Clayton P. Gillette & David A. Skeel, Jr., *A Two-Step Plan for Puerto Rico* (Fac. Scholarship Pa. L. Working Paper, No 1621, 2016) (providing board composition with “[t]hree of five voting members from Puerto Rico”); see also Mooney, *supra* note 67, at 64 (noting the viability of a role for a court within the sovereign subject to a proceeding).

³⁸⁰ See 11 U.S.C. § 362 (detailing the automatic stay statutory provisions); see also *Chapter 11—Bankruptcy Basics*, U.S. CTS., <https://www.uscourts.gov/services-forms/bankruptcy/ban>

spell to help the debtor reorganize, while giving creditors comfort that others will not jump the line ahead of them.

Recognizing this value-enhancing mechanism, IMF Managing Director Kristalina Georgieva has recommenced including a “comprehensive and sustained debt service payment standstill for the duration of the negotiation” under the Common Framework.³⁸¹ At present, simply applying for relief under the Common Framework has costs, including a swift downgrade and potential deterioration in market access, long before any relief materializes.³⁸²

A standstill would be valuable to both debtors and creditors by allowing the parties to focus on restructuring negotiations—which is indeed how Chapter 11 of the Bankruptcy Code operates.³⁸³ Ecuador’s 2020 restructuring provides one example of a successful model.³⁸⁴ There, a six-month standstill helped facilitate Ecuador’s restructuring by providing the parties an undisturbed negotiating period.³⁸⁵ Ecuador paid creditors a relatively nominal consent payment for the standstill, which was subsequently netted against the sovereign’s other obligations.³⁸⁶ Thus, creditors received a show of good faith on a cost-neutral basis to the debtor.³⁸⁷

Such a structure could be adopted here by leveraging relatively limited amounts of IMF capital, consistent with a proposal raised by the Fund itself.³⁸⁸ 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.”³⁸⁹ It continues, adding that such instruments could “include IFI financing of cash or

krupcy-basics/chapter-11-bankruptcy-basics [https://perma.cc/DN9A-QB35].

³⁸¹ See Georgieva & Pazarbasioglu, *supra* note 1.

³⁸² See *supra* Section III.C.1.

³⁸³ A standstill is only applicable in respect of parties to the agreement, making it more limited than the automatic stay that applies to all parties.

³⁸⁴ Gideon Long, *Ecuador Basks in Glow of Debt-Restructuring Success*, FIN. TIMES (Sept. 5, 2020), <https://www.ft.com/content/1dd975c9-e3a1-4fcc-b049-f29dbd59f6fa> [https://perma.cc/ZH7Q-R4QW].

³⁸⁵ See *id.*; Jo Bruni, *Ecuador Gets Bondholder Consent for Suspension of Debt Service Until August*, LATINFINANCE (Apr. 20, 2020), <https://www.latinfinance.com/daily-briefs/2020/4/20/ecuador-gets-bondholder-consent-for-suspension-of-debt-service-until-august> [https://perma.cc/NC3X-S7M7].

³⁸⁶ See IMF SOVEREIGN DEBT ARCHITECTURE, *supra* note 99, at 20–21.

³⁸⁷ See IMF, *Ecuador: Request for an Extended Arrangement Under the Extended Fund Facility*, at 24–25 (Sept. 20, 2020).

³⁸⁸ The IMF contemplates a not dissimilar approach, noting that

[s]hould 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, *supra* note 99, at 3.

³⁸⁹ *Id.*

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.”³⁹⁰ 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.

In addition, though operationally more complex,³⁹¹ World Bank-proposed legislation to prevent asset seizure actions in respect of Common Framework debtors—which mimics another statutory benefit of Chapter 11—would also be highly beneficial for sovereigns and help encourage participation.³⁹²

2. *Expand Access to Middle-Income Nations*

Access to the Common Framework should also be expanded to middle-income nations, as urged by many, including the IMF and the Group of Thirty, a preeminent global consultative organization.³⁹³ 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 is at the center of the Venn diagram between Common Framework eligibility and circumstances situated to benefit from it. Many eligible nations are ill-suited for the process, especially given the costs, while other better-positioned countries 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 of access to include all IBRD-eligible³⁹⁴ nations, which should encompass the majority of relevant countries. At the same time, a relatively permissive application option could be added for

³⁹⁰ *Id.*

³⁹¹ As the World Bank points out, “France adopted a law in 2016 that restricts the ability of French courts to authorize seizure of foreign State assets to satisfy certain debts of an ODA recipient.” BLANCA XIMENA TALERO, WORLD BANK GRP., POTENTIAL STATUTORY OPTIONS TO ENCOURAGE PRIVATE SECTOR CREDITOR PARTICIPATION IN THE COMMON FRAMEWORK 9 (2022), <https://documents1.worldbank.org/curated/en/099802006132239956/pdf/IDU0766c0f2d0f5d0040fe09c9a0bf7fb0e2d858.pdf> [<https://perma.cc/H8FW-Q78G>].

³⁹² *Id.* at 7; *see infra* Section IV.C.1.

³⁹³ *See* Georgieva & Pazarbasioglu, *supra* note 1 (noting “the Common Framework should be expanded to other highly-indebted countries that can benefit from creditor coordination”); Tran, *supra* note 227 (“[T]he G20 should extend the Common Framework to middle-income emerging countries in debt distress.”). *See* GRP. OF THIRTY, *supra* note 366, at 23–25; *see also* <https://www.group30.org/about>.

³⁹⁴ *See supra* Section II.A.1.

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 vantage point may be that wider applicability could help the Common Framework develop scale, precedent, and consistency reflective of quasi-institutional infrastructure network and scale effects.³⁹⁵ This value creation will be enhanced by and also complement improved disclosure requirements.

3. *Transparency & Disclosure*

Transparency and uniform disclosure are essential for any process of debt adjustment. Without a comprehensive understanding regarding debtor assets as well as the full universe of claims, it is impossible to equitably determine debt sustainability or creditor recoveries.

To that end, Common Framework 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 contract terms, a statutory solution is likely feasible in many, if not most, instances because the vast majority of sovereign debt is governed by New York or UK law.³⁹⁶ Such safe harbors are likely necessary to ensure that debtors feel unambiguously comfortable disclosing the full portfolio of their obligations without fear of potential consequence or adverse impact.

In addition, Common Framework transparency would significantly benefit from required disclosure of transaction terms and creditor treatment. In US Chapter 11, for instance, case confirmation disclosures detail the precise treatment of classes of obligations as well as voting totals.³⁹⁷ Though this level of disclosure is not necessarily the norm in sovereign restructuring, it would be highly constructive for purposes of ensuring comparable treatment and providing parties' confidence regarding the fairness of transaction terms.

C. *Hold-Out Risk & "Comparable Treatment"*

Hold-out creditor considerations are likely to feature prominently in many Common Framework restructurings—particularly with respect to larger sovereigns with more complex debt contracts. This is because Common Framework transactions require an accord with private sector creditors on comparable terms to bilateral lenders, which, as a practical matter, necessitates a bond re-

³⁹⁵ See GRP. OF THIRTY, *supra* note 366, at 23–25.

³⁹⁶ TALERO, *supra* note 391, at 6.

³⁹⁷ See 11 U.S.C. § 1125.

structuring operable through contractual provisions.³⁹⁸ As a result, this implicates traditional private creditor incentive challenges, as well as certain recalcitrant creditors' predisposition towards value extraction.³⁹⁹

This Section discusses the issues from two dimensions: (i) contractual and statutory approaches to encourage private creditor participation on comparable terms; and (ii) integrative solutions towards achieving the "comparability" standards through ESG-linked instruments.

1. *Contractual & Legislative Mechanisms*

There are, broadly, two approaches to alleviate hold-out creditor concerns in sovereign debt restructuring: "contractual (voluntary) approaches and statutory (legal and therefore mandatory) approaches."⁴⁰⁰

In a recent article, prominent scholars have suggested a contractual approach through so-called "Most Favored Creditor" ("MFC") clauses, which can be included in restructuring documentation.⁴⁰¹ MFC provisions essentially state that if the sovereign debtor subsequently provides a richer offer to another creditor than the MFC beneficiary receives, the debtor must "reopen the majority's deal and make the sweeter terms available to the creditors that had accepted the original restructuring."⁴⁰² This type of provision can help increase creditor comfort with a transaction by retrospectively ensuring comparable treatment, and thus reducing the risks from holding out for a better offer.

Scholars and policymakers, including the World Bank, have also proposed legislative action to encourage private-sector participation in the Common Framework, while reducing incentives to hold out.⁴⁰³ The four sets of proposals include legislation: (i) "codify[ing] a duty on creditors to cooperate in the context of sovereign debt restructuring"; (ii) limiting recoveries for hold-out creditors;⁴⁰⁴ (iii) immunizing sovereign assets from seizure following "good faith" initiation of a Common Framework restructuring;⁴⁰⁵ and (iv) retrofitting collective action clauses into existing debt instruments.⁴⁰⁶ Notably, none of the suggested legislative strategies implicates requiring creditors to accept a transac-

³⁹⁸ TALERO, *supra* note 391, at 3.

³⁹⁹ See *supra* Section I.B.

⁴⁰⁰ TALERO, *supra* note 391, at 3.

⁴⁰¹ Lee Buchheit & Mitu Gulati, *Enforcing Comparable Treatment in Sovereign Debt Workouts*, 2022-67 U. VA. SCH. L.: PUB. L. & THEORY PAPER SERIES 1, 5, 11-13 (2022) (providing draft provision language).

⁴⁰² *Id.* at 5.

⁴⁰³ TALERO, *supra* note 391, at 3.

⁴⁰⁴ Operationally, this type of legislation complements MFC clauses by reducing incentives for creditors to hold out in the first place, while also providing comfort to the majority participating creditors.

⁴⁰⁵ TALERO, *supra* note 391, at 3.

⁴⁰⁶ *Id.*

tion; instead, the proposals focus on reducing incentives for parties to hold out to extract value.⁴⁰⁷

Relative to the statutory approach of adding MFC clauses to restructuring documentation, legislative solutions are likely to prove more difficult due to the operation of political processes in multiple jurisdictions. However, such collaboration is far from impossible. For instance, the United States, United Kingdom, European Union, and other major economies rapidly imposed “unprecedented” sanctions against Russia in response to its invasion of Ukraine.⁴⁰⁸ Though representing distinct circumstances, the speed and comprehensiveness of the actions suggest that broad-based multi-lateral solutions remain possible.

2. Innovative “Comparability” Solutions

Given the challenges likely inherent to the “comparability of treatment” requirement, innovative and 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.⁴⁰⁹

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 ef-

⁴⁰⁷ *Id.* at 6.

⁴⁰⁸ See generally Breydo, *supra* note 64.

⁴⁰⁹ To provide a highly simplified, illustrative example, let us presume that a nation’s Paris Club creditors have accepted what amounts to seventy cents on the dollar, but private creditors are unwilling to accept anything less than seventy-five cents, which would violate comparable treatment. Under an ESG-swap approach, the private creditors could receive seventy cents in cash, and five cents-equivalent through an environmental benefit undertaken by the sovereign, non-monetary value nonetheless valuable to them and palatable for Paris Club creditors to forego.

forts.⁴¹⁰ ESG-linked solutions have been suggested in Zambia and Suriname's ongoing restructurings as well.⁴¹¹

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.⁴¹² 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 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.⁴¹³ 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 constitu-

⁴¹⁰ See Patrick Bolton et al., *Environmental Protection and Sovereign Debt Restructuring*, 2022–35 UNIV. VA. SCH. L.: PUB. L. & THEORY PAPER SERIES 1, 2–3 (2022) (describing Belize transaction and related considerations).

⁴¹¹ See IFF, *PRINCIPLES FOR STABLE CAPITAL FLOWS AND FAIR DEBT RESTRUCTURING* 7 (2021).

⁴¹² For instance, a contingent instrument economically worth five cents might be valued by creditors at only two cents, due to perceived monitoring issues or instrument complexity. See GRP. OF THIRTY, *supra* note 366, at 25–26; IMF SOVEREIGN DEBT ARCHITECTURE, *supra* note 99, at 11–12, 39–40, 47; Park & Samples, *supra* note 74, at 243, 256, 285.

⁴¹³ Brad W. Setser, *The State of Argentina's Debt Restructuring*, COUNCIL FOREIGN RELS. (June 24, 2020, 3:21 AM), <https://www.cfr.org/blog/state-argentinias-debt-restructuring> [<https://perma.cc/YK6T-9C57>]; Ben Bartensetin et al., *Argentina Mulls Export Sweetener to Bridge Gap with Creditors*, BNN BLOOMBERG (June 9, 2020) <https://www.bnnbloomberg.ca/argentina-mulls-export-sweetener-to-bridge-gap-with-creditors-1.1447979> [<https://perma.cc/KNB4-2RPY>].

encies, and insufficient tools for resolving distress.⁴¹⁴ The situation has grown far more dire, with sixty percent of low-income countries now at risk of insolvency.⁴¹⁵

At the same time, the historical sovereign debt restructuring architecture has grown increasingly ill-suited for contemporary challenges. Meanwhile, the Common Framework—the G-20’s newly-created mechanism for resolving sovereign distress—“appears to have failed.”⁴¹⁶ 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 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, including, perhaps most pertinently, Lebanon, Sri Lanka, and Ukraine. Finally, “comparability of treatment”—which requires private creditor burden sharing—must be unambiguously enforced. It should also 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 simply could not be more significant.

⁴¹⁴ JEREMY BULOW ET. AL., FIN. & DEV., *THE DEBT PANDEMIC: NEW STEPS ARE NEEDED TO IMPROVE SOVEREIGN DEBT WORKOUTS* 12–13 (2020).

⁴¹⁵ Ulrich Volz, *The Debt and Climate Crises are Escalating—It Is Time to Tackle Both*, BROOKINGS (July 8, 2022), <https://www.brookings.edu/blog/future-development/2022/07/08/the-debt-and-climate-crises-are-escalating-it-is-time-to-tackle-both/> [https://perma.cc/85YP-JYZX].

⁴¹⁶ Rhodes & Lipsky, *supra* note 2.

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