From Treaty Commitment to Market Recognition: Protecting the Preferred Creditor Status of African Multilateral Financial Institutions

By:

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Introduction

When a country can no longer pay all its debts, the order in which creditors are paid, and who is asked to take losses, becomes the central question. Multilateral lenders such as the IMF and the World Bank have long been treated as “preferred creditors”: they continue to be paid and are left out of restructurings, so that they can keep lending when countries most need them. African multilateral financial institutions (AMFIs), such as the African Export-Import Bank (Afreximbank) and the Eastern and Southern African Trade and Development Bank (TDB), claim the same protection. In recent restructurings

that claim has been openly contested.

The contest came to a head in Ghana, Malawi and Zambia. As those countries sought to restructure their debts, other creditors pointed to features of AMFI lending, such as pricing and loan terms, to argue that these institutions should be treated like commercial lenders and share in the losses. The AMFIs relied on the protections their member states had given them by treaty. The resulting dispute over how to classify these institutions delayed the restructurings themselves. Since then, an inference has gained ground: because other creditors do not accept AMFI preferred status, that status does not really exist.

This essay argues that the debate starts in the wrong place. The first question is not whether other creditors are willing to recognise AMFIs as preferred, but what the borrowing states themselves have committed to under the treaties establishing these institutions. On that view, AMFI loans to their member states should continue to be serviced and should be excluded from restructuring, and AMFIs should resist a lesser form of protection that accepts compulsory payment deferrals or losses. Market recognition matters, but it should follow from binding commitments honoured in practice; it does not decide whether those commitments exist. (For earlier discussion of why AMFIs matter to Africa's financial architecture, see Akinkugbe.)

What Preferred Creditor Status Protects

Preferred creditor status (PCS) concerns how a creditor is treated when a sovereign cannot meet all its obligations, notably priority in payment and exclusion from restructuring. The IMF explains its own status on two bases: creditors and debtors accept that leaving the Fund out of restructurings serves the international community as a whole, and its Articles limit the restructuring of its claims. The point is not simply that the lender should recover its money. States created a shared source of finance, and PCS protects its capacity to support current and future borrowing members.

Three dimensions of PCS help clarify the debate. They describe how protection is established, honoured and recognised, not separate tiers of entitlement:

• **Legal PCS:** the rights and obligations in the relevant treaties, domestic legislation and loan agreements. What has this borrower legally committed to?

• **Operational PCS:** what the borrower actually does in distress, particularly whether it keeps paying and excludes the institution from restructuring.

• **Market PCS:** whether investors, rating agencies and other creditors expect that treatment to continue, and price accordingly.

The IMF itself shows how these interact. It relies on legal limits in its Articles and on other creditors' voluntary willingness to exclude it, while acknowledging that unsecured creditors have not legally subordinated their claims to its own. Legal and market protection need not come from the same source to reinforce one another.

The core point of this section follows. The Ghana and Zambia experience showed that market recognition of AMFI preferred status is uncertain. It does not show that no legal obligation exists. Those are different dimensions of PCS, and the gap between them is closed by states consistently honouring their commitments, not by AMFIs waiting for other creditors' approval.

Treaty Commitments Must Be the Starting Point for Assessing AMFI Claims

This section makes two arguments. First, provisions in AMFI founding treaties that protect institutional assets from moratoria apply when a state uses its sovereign powers to suspend or restructure AMFI claims. Second, provisions guaranteeing AMFIs treatment no less favourable than other financial institutions may give a further basis for objecting when an AMFI is restructured while comparable institutions are spared.

The starting rule is well established: under the Vienna Convention on the Law of Treaties, treaties in force bind their parties and must be performed in good faith, and a state cannot ordinarily rely on its domestic law to excuse non-performance. In July 2024, the African Union's Ministers of Finance and Central Bank Governors urged member states to uphold their treaty obligations to AMFIs, including PCS. Yet much of the commentary since has not engaged with the treaty texts themselves.

Take the Afreximbank treaty. Article IX(1) of its Establishment Agreement requires participating states, to the extent necessary for the Bank's purpose

and functions, to refrain from restrictions likely to hinder its functioning or impair its operations. Article IX(2) frees the Bank's property, assets, operations and activities from "moratoria and other legislative, executive, administrative, fiscal and monetary restrictions of any nature". Comparable language appears in Article VII, Section 6 of the IBRD Articles of Agreement. AMFIs are therefore not asking for anything exceptional; they rely on established multilateral treaty practice.

The obvious objection is that these provisions protect assets from state regulation; they do not expressly rank a loan above other debts. A state that simply misses a payment is a defaulting borrower, and the loan contract governs the consequences. That is correct as far as it goes. The treaty question arises when the state goes further and uses public authority against the creditor: a decree suspending payments to a class of creditors, a moratorium adopted as policy, or restructuring legislation that brings the institution's claims into a restructuring without its consent. There the state is acting as sovereign, not merely as borrower, and Article IX(2) addresses that conduct. For a lending institution, its loan receivables are the very assets through which it carries out its mandate.

In my view, the applicable rules of interpretation support this reading. Article 31 of the Vienna Convention requires a treaty to be read according to the ordinary meaning of its words, in context and in light of its object and purpose, and Article XVII(1) of the Afreximbank Agreement directs that the Agreement be interpreted in light of its primary purpose of enabling the Bank to discharge its functions fully and efficiently. Read that way, asset protection cannot sensibly fall away at the moment repayment comes under pressure, since that is the only moment it has any real work to do.

The second argument rests on comparative treatment. Article XV(1) of the Afreximbank Agreement entitles the Bank to the "fiscal exemptions, financial facilities, privileges and concessions" granted to international organisations, banking establishments and financial institutions. This raises a real question: if a state excludes another multilateral institution from its restructuring, is that exclusion a privilege or concession that must also be extended to Afreximbank? The argument requires careful proof that the comparator and the benefit fall within the provision; pointing to an IMF exclusion is not enough on its own. But

it usefully directs attention to the state's own undertaking.

Neither argument assumes that all AMFI charters are identical. Together they mean that any proposed restructuring must address the specific obligations a borrower owes before treating an AMFI's claims as available for losses.

Other Creditors Cannot Release the Borrower from Its Obligations

A common response is that bondholders and other official creditors never agreed to AMFI preference. That may be so. Under Article 34 of the Vienna Convention, a treaty creates no obligations or rights for a third state without its consent, and private creditors are not parties at all. But that limits the treaty's reach over others; it does not release the borrowing state, which is bound. The borrowing state also remains bound by the loan agreements it signed with the AMFI, which continue to govern repayment unless the AMFI itself agrees to vary them; an agreement among other creditors cannot rewrite those contracts. Whether other creditors accept an AMFI's preference and whether the borrower's proposed conduct complies with its own commitments are separate questions, and the second comes first.

Sovereigns do not, of course, negotiate in isolation. Humphrey's account of the Afreximbank and TDB disputes shows how creditor demands, loan characteristics and arguments over institutional classification shaped the Ghana, Malawi and Zambia restructurings. Bargaining pressure, however, is not legal justification. Where an AMFI is treated adversely, the right question is whether the state complied with its obligations, not whether those obligations ever existed.

Nor do AMFIs need to prove a universal rule of customary law. Iversen finds no such rule conferring preferred status on particular creditors, while showing that preferential treatment is regularly sought through agreements between creditors and debtors. A specific treaty commitment given by the borrowing state provides a firmer basis than trying to prove a hierarchy binding every creditor.

The practical lesson is timing: AMFI protections should be raised when the scope of a restructuring is being designed, before the institution is classified as an ordinary commercial creditor and that assumption shapes every later

decision.

Multilateral Character Cannot Be Reduced to Loan Pricing

Critics point to features that, they argue, make some Southern-led lenders look commercial. Humphrey identifies higher interest rates, shorter maturities, collateral and commercial shareholders, citing Afreximbank maturities of seven to ten years for Ghana against thirty or forty years for World Bank concessional lending, and a 2023 loan to Zimbabwe priced at 10.2 per cent.

These features deserve scrutiny, but they describe the instruments an institution uses, not its legal character. Market-based pricing does not answer whether a treaty-created institution is performing a public mandate. As Akinkugbe argues, AMFI rates reflect the costs and risks of lending where financing gaps are greatest, and their PCS is not to be determined merely by recognition from other creditors. Private shareholding likewise calls for analysis of governance and control, not automatic disqualification.

The point is that AMFIs need not prove they are identical to the World Bank. They are entitled to insist that differences be assessed for their legal and functional relevance, rather than used as shorthand for denying protection.

Debt Sustainability Is a Reason to Preserve the Institution

The strongest objection is burden-sharing. If AMFIs are excluded, other creditors must give more relief, and multilateral exposure is large: multilateral development banks hold about 48 per cent of low-income countries' external debt, and 80 per cent or more in some cases. That figure shows who could absorb losses. It does not show who is legally obliged to, or whether imposing losses on a multilateral lender actually helps the debtor.

The rationale for the IMF's own exclusion is that protecting a shared lender benefits borrowers and the wider creditor community. That reasoning deserves to be weighed on its merits when an African multilateral performs a comparable function. A sound restructuring assessment should consider not just the immediate relief from cutting an AMFI claim, but the cost of weakening an institution the debtor will need for its recovery. That assessment must rest on evidence; the point here is only that it belongs in the analysis.

AMFIs can and should contribute to recovery, through new financing, guarantees or other support within their mandates. That is different from compulsory haircuts on protected claims. Responsible lending, transparency and sound risk management strengthen the case for protection; they are not reasons to treat an AMFI as an ordinary creditor whenever a member falls into distress.

Making Protection Effective

If the legal case holds, the task is to turn it into predictable conduct. Four measures would help.

Establish the legal position before distress. Each AMFI should maintain a concise record of its relevant treaty provisions, their entry into force for each borrowing state, domestic implementation and applicable loan terms. Where existing language leaves room for dispute, member states can clarify it, ideally through an express commitment to continued servicing and exclusion from compulsory moratoria and principal or interest reductions.

Build protection into debt-management decisions. Borrowing states should include AMFI obligations in their debt-management procedures and in the mandates of their restructuring advisers, so that the legal position is addressed before an AMFI claim is placed within a restructuring, not argued over after payments stop.

Build a record that markets can assess. Institutions and member states should document continued payments during distress and past exclusions from restructuring. Consistent, documented practice also matters legally, since Article 31(3)(b) of the Vienna Convention makes subsequent practice establishing the parties' agreement relevant to interpretation, although isolated examples prove less than a consistent pattern. For investors and rating agencies, such a record links commitments to conduct and gives them a reasoned basis for recognition.

Preserve routes to enforcement. A protection is only as strong as the means of enforcing it, and an institution such as Afreximbank has two. The first is under the treaty. Article XVII of the Afreximbank Agreement provides that any dispute over the interpretation or application of the Agreement is decided

by the Bank’s General Meeting of Shareholders, whose decision is final and binding; arbitration is available only in specified circumstances, such as a dispute with a state that has ceased to be a shareholder. If a member state suspended payments or forced the Bank into a restructuring in breach of the Agreement, this is the forum in which the Bank could challenge that conduct. The second route is under the loan agreement itself. Each loan sets out its own governing law and dispute forum for claims of non-payment, and these must be assessed separately, loan by loan. Both routes should be kept open. The aim is not to invite litigation, but to prevent disputes through clear commitments while ensuring that a remedy exists if those commitments are not honoured.

Conclusion: Recognition Should Follow Commitment

Protecting the preferred creditor status of AMFIs does not depend on proving an automatic, worldwide priority. Nor should it mean accepting a diluted status under which AMFIs share in compulsory losses. The starting point is what member states have committed to in the treaties that established these institutions. Read carefully, those commitments support continued payment and exclusion from restructuring; where they leave room for doubt, states can make them explicit.

The move from treaty commitment to market recognition is therefore not a bargain in which AMFIs give up protection in exchange for acceptance by other creditors. It is a process of making existing protection effective, through clear undertakings, consistent conduct by member states, a verifiable record of that conduct and workable remedies when commitments are not honoured. Done well, this will ensure that the institutions African states created for their shared benefit can support those states when they need them most.

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