Book Symposium Introduction: Sovereign Debt Restructuring: The Role and Limits of Public International Law

By:

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I am delighted to introduce the book symposium on my new monograph titled Sovereign Debt Restructuring: The Role and Limits of Public International Law . Unfortunately, the time could not be riper to discuss the role played by international law in sovereign debt restructuring. In fact, as a consequence of the ongoing economic recession caused by the COVID-19 pandemic, the world is facing a new systemic sovereign debt crisis. Many developing countries, which were already struggling with an unsustainable debt, had to increase spending in health care and social security while facing rising unemployment, falling commodity prices and capital outflows, and are now on the verge of default.

Last April, the G20 and the Paris Club launched the Debt Service Suspension Initiative (DSSI). Under the DSSI, IDA-countries plus those classified LDCs by the UN (i.e. IDA-countries plus Angola) are eligible to receive debt service suspension on their official bilateral debt. The DSSI potentially covers 73 countries, of which more than 40 have already requested to participate. The G20 initiative, however, presents many shortcomings and will only defer the debt problem of eligible countries. Moreover, the private sector reception of the initiative has been rather lukewarm, with the IIF agreeing on a voluntary participation of private creditors but not on terms comparable to those agreed by bilateral creditors.

With the DSSI providing developing countries at least some breathing space, the discussion on how to achieve long-lasting solutions that are at the same time orderly and prompt, fair and equitable, comprehensive and sustainable, and not 'too-little, too-late' is more important than ever. Although sovereign defaults are a structural phenomenon typical of the global economy (since the 1960, 147 governments have defaulted on their obligations), no international sovereign debt restructuring mechanism similar to domestic bankruptcy laws has ever been established and this is considered by many experts one of the most serious gaps in the international financial architecture.

The idea of adapting bankruptcy law principles and proceedings to sovereigns can be traced back to the 18th century when, in his 1776 *Inquiry into the Nature and Causes of the Wealth of Nations*, Adam Smith wrote: "When it becomes necessary for a State to declare itself bankrupt, in the same manner as when it becomes necessary for an individual to do so, a fair, open, and avowed bankruptcy is always the measure which is both least dishonourable to the debtor and least hurtful to the creditor". Since then, the debate on how to address this systemic deficiency has continued unabated and several important studies on sovereign debt restructuring have been published with a historical, legal, economic or interdisciplinary perspective.

Finding a coherent global solution is made particularly difficult by the multitude of stakeholders, the many sets of applicable laws and by the fact that each category of debt instrument (sovereign bonds, syndicated bank loans and official bilateral debt) has a dedicated restructuring mechanism. Creditor

coordination problems, concerns over the legitimacy and impartiality of debt restructuring processes and their economic costs and social implications add layers of complexity to a highly fragmented scenario.

To overcome the inefficiency, unpredictability and inconsistency of the current legal framework, two major strategies have been identified: one based upon public international law (the so-called ‘statutory approach’) and one based on private domestic law (the so-called ‘contractual approach’). The first entails the establishment of a permanent international debt workout mechanism to resolve sovereign debt disputes in an independent and impartial manner, coordinating all creditors of a country in distress. The second promotes the adoption of strengthened contractual clauses to facilitate the restructuring of bonded debt and it was mainly conceived to avert the threat of official intervention and prevent the establishment of a sovereign debt restructuring mechanism.

Initially conceived as alternatives, these strategies are actually complementary and sequential. Although the contractual approach is insufficient to tackle the inherent complexity of debt problems (as in the case of pre-defaults), it unquestionably represents a major step forward. While acknowledging that in the current scenario the market-based contractual approach is prevailing, the book presented here aims at establishing what is the role played – and what are the limits encountered – by public international law in sovereign debt restructuring. The research focuses on the State and non-State actors involved, describing the evolution of the relevant rules and institutions.

Chapter one defines key concepts and provides a brief overview of the main restructuring vehicles that have been developed over time to restructure the many categories of sovereign debt. Chapter two focusses on the most important rules of public international law applicable to sovereign indebtedness, tracing a distinction between those that are relevant for debtor States (namely, State succession in respect of debts, the odious debt doctrine, sovereign immunity and economic necessity) and for creditor States (diplomatic protection and the conclusion of treaties specifically aimed at providing debt relief to a country). Chapter three describes the composition and functioning of the main debt restructuring vehicles (i.e. the Paris and London Clubs), also presenting the pros and cons of convening bondholders’ committees.

Chapter four analyses in detail the law and practice of the two international organisations that are mostly involved in sovereign debt issues: the International Monetary Fund and the United Nations. Chapter five examines the increasing role played by non-State actors – in particular, the Institute of International Finance (IIF), the International Capital Market Association (ICMA) and the International Swaps and Derivatives Association (ISDA) – in the field of sovereign debt restructuring. In fact, by relying on their standard-setting and self-regulatory powers, these financial industry associations are filling in some of the gaps deriving from the absence of a comprehensive framework for sovereign debt restructurings.

I am thankful to Afronomicslaw.org for hosting this book symposium and to Prof. Kevin Gallagher (Boston University, Frederick S. Pardee School of Global Studies), Dr. Luca Pasquet (Utrecht University School of Law) and Dr. Gustavo Prieto (Visiting Scholar at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg) for having accepted to contribute to this hot topic debate.

Contributors

Kevin P. Gallagher: Closing the Gap for Fairness and Prosperity: Annamaria Viterbo's Sovereign Debt Restructuring: The Role and Limits of Public international Law

Gustavo Prieto: Book Review: Annamaria Viterbo, Sovereign Debt Restructuring: The Role and Limits of Public International Law

Luca Pasquet: Some Considerations on State Immunity and Sovereign Debt

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