Sovereign Debt as Subordination to *Global Finance*

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Abstract

Sovereign debt is generated by a global financial and debt architecture that subordinates Global South countries for profit. The recurrent debt crisis that Global South countries experience from time to time is not an aberration but a systemic feature of the global financial and debt architecture. Similarly, the ad hoc, temporary, and non-binding 'soft' law approaches designed to address the chronic indebtedness of Global South countries are not incidental but are integral features of a global financial and debt architecture dominated by the interests of private capital.

This report traces how countries of the Global South have sought to counter their subordination within the global financial and debt architecture. For example, we trace Mohammed Bedjaoui's vision and, in particular, his work as an International Law Commission (ILC) Rapporteur on state succession. We also trace United Nations Conference on Trade and Development (UNCTAD) proposals on sovereign debt justice in the 19th and 20th centuries.

The report contrasts the radical approach represented in Bedjaoui's work with two alternatives. First, we contrast the 'soft' law proposals to address the Global South's indebtedness through 'soft' law principles. Second, we address ad hoc, temporary, and contract-based approaches favored by the Bretton Woods institutions and private creditors. In tracing these options for addressing the Global South's subordination in the global financial and debt architecture, our goal is to show how Global North states, together with the Bretton Woods institutions and owners of capital, have, over the years, sought to deradicalize or defeat any efforts to transform the global debt and financial architecture.

Introduction

Sovereign indebtedness is a characteristic feature of Global South states. These countries accrue sovereign debt in foreign currencies. In the more recent past, the biggest portion of this debt has been commercial debt. Bonds are a good example of commercial debt, which are overwhelmingly governed by English or New York law, and dispute settlement mechanisms are located in those jurisdictions as well.[1] Sovereign defaults arise from the inability to repay these debts. It is this inability or the likely inability to repay loans and/or return the value of subscribed bonds at maturity that is termed a crisis of sovereign debt.[2] Under international law, a state cannot be considered insolvent by virtue of being unable to pay its debts.[3] From their very formation, Global South countries in Africa, Asia, and Latin America inherited colonial debt, and they faced low prices of raw materials. Colonial economic arrangements designed the economies of these countries to specialize in commodity production.[4]

This situation meant that their levels of indebtedness left some countries crippled at birth.[5] In addition, international financial supervisory mechanisms, principally through the International Monetary Fund (IMF) and World Bank Group (WBG), and starting even earlier with the League of Nations, were used and continue to be used to discipline and plunder these nations.[6] Therefore, the current debt crisis is embedded within a larger picture of the legacy of colonialism and its continuities. International law has been central in creating and then sustaining this system of wealth extraction from the Global South. The situation worsened through the neoliberal globalization of the 1980s and early 1990s, which was designed as a counterrevolution to the New International Economic Order (NIEO). In the 1980s and 1990s, the two principal Bretton Woods institutions, the IMF and WBG, set up a list of policy prescriptions inspired by the tripartite, neoliberal ideology of liberalization, deregulation, and privatization, which worsened the already precarious position of Global South countries. These policy prescriptions, variously referred to under the label of the 'Washington Consensus' conditionalities or fiscal consolidation, revealed the already emergent views that the international monetary and financial architecture generally, and the global debt architecture specifically, were a continuation of a firmly established colonial legacy.

For sovereign debt crises specifically, the IMF prescribes conditionalities designed as neutral objectives to nudge states to reduce their expensive lifestyles, considered indulgent and expensive, to obtain multilateral concessional debt and external surpluses (export revenues) to continue servicing their debt.[7]

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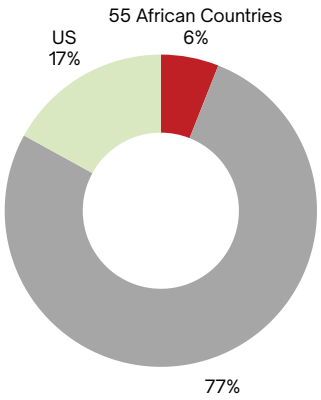
1. Yan Liu, Collective Action Clauses in International Sovereign Bonds, in Current Developments in Monetary and Financial Law, vol. 3, at 157 (2005).
2. Alessandro Romagnoli, The Emergence of the 'Sovereign Debt Crisis' in 1970s MENA Economies, 58 MIDDLE Eastern Stud. 712 (2002).
3. Nouriel Roubini, Debt Sustainability: How to Assess Whether a Country Is Insolvent (2001), https://pages.stern.nyu.edu/~nroubini/papers/debtsustainability.pdf; see also Anna Gelpern & Brad Setser, Domestic and External Debt: The Doomed Quest for Equal Treatment, 35 Geo.J. Int'L 795 (2004).
4. Mohamed Bedjaoui, Problèmes Récents de Succession d'États dans les États Nouveaux, 130 Recueil des COURS de l'Académie de DROIT Int'L 451 (1970).
5. See Grégoire Mallard, We Owe You Nothing: Decolonization and Sovereign Debt Obligations in International Public Law, inSovereign Debt Diplomacies: Rethinking Sovereign Debt from Colonial Empires to Hegemony 190 (Pierre Penet & Juan Flores Zendejas eds., 2021).
6. See Jamie Martin, The Meddlers: Sovereignty, Empire, And The Birth Of Global Economic Governance (2022).
7. Ndongo Samba Sylla, Preface, in Imperialism and the Political Economy of Global South's Debt xvii (Ndogo Samba Sylla ed., 2023).



IMF governance perpetuates systemic inequities in the global financial system.

The IMF's institutional setup evidently displays this colonial foundation and design. Africa's fifty-five countries, for example, are acutely underrepresented in the IMF's governance structures, where they have a meagre 6.01% of voting rights. Yet, the IMF sits at the helm of the global debt and financial architecture as arguably the first port of call for insolvent countries anticipating or encountering sovereign debt crises. The IMF's governance system, established by its Articles of Agreement, is also based on a weighted voting system. This means that the United States, with over 17% of the voting share, has an effective veto over any fundamental reforms of the system because 85% of the total voting power is required for any change in the voting structure. This, in turn, means the US Treasury and government have disproportionate influence over IMF affairs, including the organization's role in the sovereign debt crisis.[8] With this background, it is not surprising that the existing international monetary and financial architecture on sovereign debt has not adequately and systematically addressed the questions that arise in cases where a sovereign is unable to service its debts when they fall due. Unlike many domestic legal systems that govern individuals and corporate entities, international law has not yet developed an orderly, predictable, and secure rules system on how to handle sovereign debt defaults.[9] Put simply, there is no international law regime on sovereign insolvency. With each sovereign debt crisis, informal and ad hoc mechanisms have been employed to address the crisis and possibly grant the sovereign a fresh start. Existing stakeholders, institutions, and commentators have thus, since the mid-20th century, implemented and offered many different proposals on how sovereign debt issues, especially sovereign debt restructuring, can be addressed in an orderly, predictable, and secure manner. We argue that only the radical proposals, such as those of the UN Conference on Trade and Development (UNCTAD), inspired by the Global South's aspirations, offer a viable, comprehensive, fair, just, sustainable, reparative, transparent, and stable external debt restructuring system.

Under such a system, lender and borrower countries would share the economic risks associated with the sovereign debt crisis. This system would predictably constitute binding agreements on renegotiation, moratoriums, rescheduling, forgiveness, and cancelation of colonial and odious debt. In other words, such a system would not merely result in debt relief or debt restructuring as a means of addressing recurrent debt crises.[10] It would go further in addressing the systemic and structural reasons underpinning the sovereign debt crises of Global South countries. The report proceeds as follows. Part 1 presents the first set of responses that Global South countries have advanced, which are critical of the current global debt and financial architecture. We characterize these proposals as radical since they propose radical departures from the current global debt and financial architecture. The second set of responses are 'soft' law approaches. Part 2 then proceeds to the intermediate approaches that lie somewhere between the radical approaches presented in Part 1 and the ad hoc approaches outlined in Part 3. These intermediate approaches are represented by UNCTAD's and the UN General Assembly's 'soft' law approaches, including the Basic Principles on Sovereign Debt Restructuring Processes and other norm-building initiatives designed to nudge the global financial and debt architecture to conform with human rights norms and related standards.

Finally, in Part 3, we provide an overview of the status quo mechanisms. These mechanisms are pursued in an ad hoc and de facto manner. They are creditor-centric mechanisms that maintain the current governance structure of sovereign debt processes in a state of uncertainty and unpredictability and, more importantly, disproportionately favor private creditor interests. Examples of this third approach include contract-based mechanisms such as contractual clauses championed by the IMF, G20, and Global North countries.

8. See James Thuo Gathii, Introduction, in How to Reform the Global Debt and Financial Architecture xi–xxii (James Thuo Gathii ed., 2023).

9. See Martin Guzman, José Antonio Ocampo & Joseph E. Stigliz, Introduction, in Too Little, Too Late: The Quest to Resolve Sovereign Debt Crises xvii (Martin Guzman, José Antonio Ocampo & Joseph E. Stigliz eds., 2016).

10. See Mallard, We Owe You Nothing, supra note 5, at 189–212.

PART 1

Radical and Pro-Global South

Sovereign Debt Model

01. Mohammed Bedjaoui's Radical Vision for Sovereign Debt Governance

In the mid-20th century, external indebtedness was addressed as a legacy of colonial rule, especially under the broad topic of state succession relating to the then-newly independent nations.[11] The events of the earlier parts of the 20th century—that is, the post-World War I dismantling of the three long-lasting empires: the German Second Reich (through the Treaty of Versailles, 1919), the Austro-Hungarian Empire (through the Treaties of Saint-Germain and Trianon, 1920), and the Ottoman Empire (through the Treaty of Lausanne, 1923)—had presented difficult legal issues on state succession.

These issues were handled in an ad hoc manner, primarily based on political compromise.[12] Since then, the international law rules relating to sovereign debt have largely remained the same, notwithstanding the adoption of self-determination as a universal norm in the mid-20th century. The issue then was how to deal with debt incurred by former colonial empires for successor sovereigns—in this case, the mandatory powers under the League of Nations' mandate system. This instance of faux 'decolonization'[13] was not the only instance of state succession. Other examples of the emergence of Antony Anghie, Imperialism, Sovereignty and International Law (2005). The other two subtopics were succession concerning rights and duties resulting from sources other than treaties, and succession in respect to membership in international organizations.[14]

Manfred Lachs was first nominated as the Special Rapporteur on the Succession of States in respect of rights and duties resulting from sources other than treaties, but after he was elected to serve on the International Court of Justice (ICJ), Mohammed Bedjaoui was nominated to be the Special Rapporteur.[15] Mohammed Bedjaoui, the towering Algerian jurist, judge, diplomat, and politician, who was celebrated as one of the leading voices of TWAIL I,[16] found himself, as a member of the ILC, at the center of debates on the issue of colonial sovereign debt.

He wrote twelve reports in "which he gradually derived principles that should guide the establishment of more equitable international economic relations."[17] His views on the rules relating to succession with regard to colonial debt were radical at the time and remain radical to date. For example, in his first report, in a classical TWAIL register, he argued that decolonization dissolves the relationship previously based on domination, which involves a change in the new country's political, economic, and social aims. This change "constitutes a hiatus, a break in continuity, especially since in many cases independence is achieved after a long period of very tense relations with the colonial power."[18]

11. G.A. Res. 1686 (XVI) (Dec. 18, 1961).

12. GrÉgoire Mallard, Gift Exchange: The Transnational History of a Political Idea 176 (2019) (citing Alexander Sack, Les Effets des Transformations des États sur leurs dettes Publiques et autres Obligations FinanciÈres: TraitÉ JURIDIQUE et Financier (1927)).

13 Antony Anghie, Imperialism, Sovereignty and International Law (2005).

14 Int'l L. Comm'n, Rep. on the Work of its Nineteenth Session, U.N. Doc. A/CN.4/199, at 368, http://legal.un.org/docs/?path=../ilc/documentation/english/reports/a_cn4_199.pdf&lang=EF.

15. Id.

16. Antony Anghie & B.S. Chimni, Third World Approaches to International Law and Individual Responsibility in Internal Conflicts, 2 Chinese J. Int'l L. 77, 78–79 (2003).

17. Grégoire Mallard, Gift Exchange: The Transnational History of a Political Idea 176 (2019).

18. Int'l L. Comm'n, First Rep. on Succession of States in respect of Rights and Duties Resulting from Sources other than Treaties by Mr. Mohammed Bedjaoui, Special Rapporteur, U.N. Doc. A/CN.4/204, at 101, https://legal.un.org/ilc/documentation/english/a_cn4_204.pdf.

From this thesis of a radical break between a colonial past and a post-colonial future, he argued that traditional rules—such as those relating to unjustified enrichment, the principle of respect for rights acquired by individuals in good faith, and the principle that public property cannot be transferred without valuable consideration—were inapplicable to situations arising from decolonization.[19] Furthermore, Bedjaoui formulated a rule on the non-transferability of external sovereign debt to independent states from their former colonizers.[20] Such a loan procured by colonial authorities benefited a newly independent state only if it fulfilled the following three conditions:[21]

it was intended for the dependent territory	it was in fact allocated to the territory	it benefited the territory

Despite this formulation, Bedjaoui argued that even loans granted to colonies for development projects, such as railroads, hospitals, and other infrastructure, viewed in their colonial context, should still be canceled. Such infrastructure, he contended, primarily benefited the colonial administration, especially settler colonies and, ultimately, the colonial power's metropolitan economy.[22] For Bedjaoui, the then-newly decolonized states were actually the creditor countries, while the former colonial states were the debtor countries.[23] His argument was a very TWAIL one. Colonial economies were extractive, exploitative, and consciously designed for the economic benefit of the metropolitan power. The industrial development of the metropole depended on the funneling of profits from the colonies whose economies were deliberately cut off from industrial development. Thus, colonial governments had 'contracted debt' for their own benefit. Bedjaoui therefore argued that former colonial powers should offer reparations as part of the general decolonization package.[24]

In his view, "if the debtor state was the metropolis, private individuals who sought compensation should turn to their own state rather than to the new independent state."[25] From this perspective, the proposals of nationalization without compensation would thus be viewed as reparatory. In this manner, Bedjaoui reversed the identities of creditor and debtor states. Bedjaoui released his last report on May 20, 1980. In 1981, the UN General Assembly (UNGA) convened an international conference of plenipotentiaries to consider the ILC's proposed draft articles on succession of states in respect to state property, archives, and debts, and whether to embody them in an international convention.[26] On April 7, 1983, after a long debate pitting Eastern bloc countries and the Group of 77 (G77) on one side and Western states on the other, the conference adopted the Vienna Convention on Succession of States in respect of State Property, Archives and Debts (1983 Convention).[27]

This multilateral treaty has not yet entered into force because it still has not garnered fifteen instruments of ratification or accession. The treaty concerning sovereign debt was limited to state debts. It excluded state-incurred debts to private creditors.[28] Bedjaoui had hoped that the exclusion of private creditor debt would convince Global North states not to wholly reject[29] Article 38 of the 1983 Convention, which provides that "when the successor State is a newly independent State, no State debt of the predecessor State shall pass to the newly independent State, unless an agreement between them provides otherwise." While Bedjaoui's advocacy for binding rules that would preclude colonial-era debts from burdening post-colonial countries was compelling, it was ultimately defeated. Its defeat effectively protected creditors' prerogatives against those of sovereign borrowers. Global North and private institutional creditors have also defeated similar efforts to see debt irregularly procured under unjust conditions through such doctrines as odious debt.

19. Id.
20. Documents of the Twenty-Ninth Session (excluding the report of the Commission to the General Assembly), [1977] Y.B. Int'l L. Comm'n, Vol. II, Part 1, at 103, U.N. Doc. A/CN.4/SER.A/1977/Add.1 (Part 1), https://legal.un.org/ilc/publications/yearbooks/english/ilc_1977_v2_p1.pdf.
21. Id.
22. Id.
23. Bedjaoui, supra note 4, at 556.
24. Mallard, Gift Exchange, supra note 17, at 190.
25. Id. (citing Bedjaoui, supra note 4, at 556).
26. Mallard, We Owe You Nothing, supra note 5, at 198.
27. Vienna Convention on the Succession of States in respect of State Property, Archives and Debts, Apr. 8, 1983, 22 I.L.M. 306 (1983), U.N. Doc. A/CONF.117/14 (1983).
28. Id., arts. 32–33.
29. Mallard, We Owe You Nothing, supra note 5, at 198.

Yet, perhaps the reverse will be true when global capital's interests coincide with those of the Global North countries that have constructed the current global debt and financial architecture. As James Gathii has noted elsewhere, the London Debt Agreement of 1953 effectively canceled Germany's external debts.[30] This cancellation has been cited as a key factor accounting for Germany's post-World War II economic success. Cancellation of sovereign debt was also pursued in 2003 when the Paris Club agreed to an 80% reduction of Iraq's external debt, which included bilateral debt of over US$42 billion, non-Paris Club bilateral debt of over US$67 billion, commercial debt of US$20 billion, and multilateral debt of half a billion dollars. This cancellation also came with the shielding of Iraq oil-related assets from creditor attachment, garnishment, or execution under UN Security Council Resolution 1483 of May 22, 2003. Then-US President George W. Bush also signed an executive order that immunized other Iraqi assets, starting on the same day.

Paragraph 16 of the aforementioned UN Security Council Resolution 1483 may be of particular interest. Specifically, it called "upon the international financial institutions to assist the people of Iraq in the reconstruction and development of their economy and to facilitate assistance by the broader donor community," as well as creditors. The Iraq example has its quirks. The debt write-offs occurred after the US/UK illegal invasion of Iraq in 2003 as the United States sought to remake the Iraqi economy along the lines of its free-market fundamentalism. The German write-off after World War II also happened after Germany's military defeat. In short, efforts to address some of the systemic flaws of the global debt and financial architecture are not always accompanied by unalloyed success. Indeed, the system is highly entrenched and difficult to overhaul.

30. See Gathii, supra note 8.

PART 2

Reforming Global South Indebtedness

through the Persuasive Power of 'Soft' Law

In this part of the report, we trace approaches to addressing the Global South's indebtedness through 'soft' law principles. These approaches include a range of technical solutions, such as recommendations and guidelines on how to reform the Global South countries' chronic indebtedness. Along with debt restructuring, relief, and cancellation/forgiveness, these approaches also include such proposals as building institutional forms to better coordinate debt restructurings, utilizing funding mechanisms, and seeking modest debt cancellations. UNCTAD has engaged in such proposals, including backing UNGA resolutions to advance the interests of Global South countries within the current global debt and financial architecture.

Unlike Mohamed Bedjaoui's radical solutions involving legally binding proposals, the approaches we cover in this section primarily trace the problem of Global South sovereign indebtedness exclusively to the domestic level rather than to both the international and domestic levels. These solutions have largely abandoned tracing the Global South's indebtedness to external factors, such as debt inherited at independence, debt contracted from rich creditors in the Global North, and debt contracted with China or other new creditors. They do, however, share a similarity with Bedjaoui's more radical proposals for binding legal reform: they don't cover private creditors' conduct. Yet, unlike Bedjaoui's proposals, the reformist proposals we cover here seek to work within the current global debt and financial architecture rather than outside of it.

01. UNCTAD's Proposals on the Reform of the International Financial Architecture

UNCTAD is a specialized agency of the United Nations established in 1964 to foster equitable principles for the integration of developing countries in the global economy.[31] The agency was initially created as a conference to discuss measures to reduce the trade disequilibrium at a global level that existed between developing and developed countries as part of the NIEO.[32] During this period, it served as one of the main focal points of international economic dialogue between North and South countries. UNCTAD could either have attributed the Global South's indebtedness to national-level explanations or external factors relatThese factors encompass a larger set of structural conditions of the global economy, such as unequal trade patterns and the neoliberal economic prescriptions the Bretton Woods institutions perpetuate on Global South nations.

As a problem traced to the national level, the discussion mainly focuses on internal factors, such as corruption, poor governance, reckless spending, and low taxation levels. In its early years, UNCTAD made the case that the Global South's indebtedness could be traced to the global debt and financial architecture. For this reason, UNCTAD earned its delineation as "a bastion of critical thinking, promoting systemic remedies on a variety of policy issues involving monetary policy, tariffs, support to industrialization, etc."[34]ed in large part to the global debt and financial architecture.[33] As a problem traced to the global debt and financial architecture, the sovereign debt crisis would be traceable to broader, structural, and contextual issues, including how commercial and official creditors offshore the risks of their lending to Global South countries.

31. John Toye, Assessing the G77: 50 Years After UNCTAD and 40 Years After the NIEO, 35 Third World Q. 1759,1761 (2014); UNCTAD, UNCTAD at 50: A Short History, UNCTAD/OSG/2014/1, United Nations, 19 (2014).

32. Toye, supra note 31, at 1765–67.

33. Quentin Deforge & Benjamin Lemoine, The Global South Debt Revolution That Wasn't: UNCTAD from Technocratic Activism to Technical Assistance, in Sovereign Debt Diplomacies: Rethinking Sovereign Debt from Colonial Empires to Hegemony 233 (Pierre Penet & Juan Flores Zendejas eds., 2021).

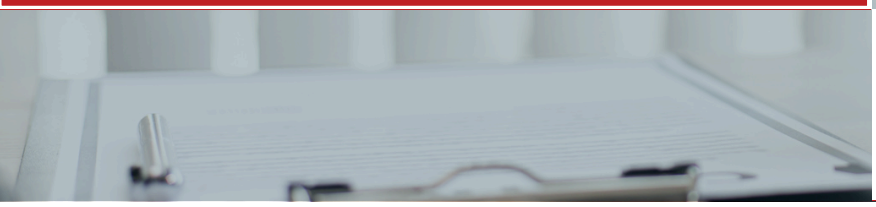
34. Id. at 235.

Since then, however, UNCTAD has merely been reduced to a facilitative, coordinative, and technical institution. As a think tank whose funding has been greatly reduced by Global North countries, the agency has lost its role as a radical think tank for the Global South. We will later refer to this as the 'defanging of UNCTAD.'

The first Secretary General of UNCTAD, Raul Prebisch, argued that the benefits of technical progress had been distributed unequally between the center and the periphery, which was why trade asymmetries existed between developed and developing nations.[35] From this perspective, overindebtedness, the incapacity to pay debts, and financial vulnerabilities were considered a consequence of the disequilibrium between developed and developing countries.[36] In this regard, UNCTAD's work reflected attempts to combat these asymmetries through the construction of coordinated alternatives within the international economic and financial architecture.[37] During the first UNCTAD conference in 1964 (UNCTAD I), delegates debated the issue of debt servicing as a central concern for developing countries. Participants made recommendations for addressing these issues, which can be summarized as follows: [38]

01 UN sponsorship of debt rescheduling, moratoriums, and/or consolidation with extended maturity periods to enhance the development possibilities in poor countries.

02 Reversal of harsher terms for international lending, including the reduction of interest rates, which should not exceed 3% per annum, the provision of development aid that includes a combination of grants and loans, and the provision of loans with longer grace and amortization periods by the IMF, International Bank for Reconstruction and Development (IBRD), and the International Finance Corporation (IFC).



03 Expansion of concessional lending by the developed capitalist economies.

Before UNCTAD II was held in 1968 in New Delhi, India, a ministerial meeting of the G77 had adopted the Charter of Algiers. The Charter of Algiers promoted a program of action requiring that "suitable measures should be adopted for alleviating the debt-servicing burdens of developing countries by consolidating their external debts into long-term obligations at low rates of interest. In case of imminent difficulties, speedy arrangements should be made for refinancing and rescheduling loans on 'soft' terms and conditions."[39]

35. Joseph Love, Raul Prebisch and the Origins of the Doctrine of Unequal Exchange, 15 Latin AM. Rsch. Rev. 45 (1980); Jonas Roma & John Hall, Raul Prebisch and the Evolving Uses of 'Centre-Periphery in Economic Analysis, 2 Rev. of Evolutionary Pol. Econ. 315 (2021).

36. Love, supra note 35, at 236.

37. Id.

38. UNCTAD, Proceedings of the United Nations Conference on Trade and Development Geneva, 23 March–16 June 1964, vol. 1 (1964), pp. 194–99, https://unctad.org/system/files/official-document/econf46d141vol1_en.pdf.

39. First Ministerial Meeting of the Group of 77: Charter of Algiers (1967), Programme of Action, part C.3. https://www.g77.org/doc/algier~1.htm.

During UNCTAD II, delegates mainly painted the developing countries' stark situation on external debt service and reiterated the UNCTAD recommendations that had not been achieved due to the developed countries' continuous inaction in addressing these issues.[40] At UNCTAD meetings held in the 1970s (especially UNCTAD III in 1972), developing countries were calling for guidelines for debt relief and changes in the area of monetary and financial arrangements.[41] Since developing countries considered debt a structural problem, they were adamant that institutional reforms were required as well as fora to discuss debt relief as a way to address structural inequalities between developed and developing nations.[42] It was during this period that the issue of debt relief for poorer countries emerged more forcefully, and there was a direct call for the creation of a multilateral agency within UNCTAD's machinery that entailed examining individual countries' external debt problems.[43]

02. The 'Defanging of UNCTAD' and Continuing Proposals on Sovereign Debt Mechanisms

UNCTAD's projects for structural reform of the international financial architecture, and the underlying approach of tracing the debt problem to the global debt and financial architecture's debt framework, were contested by Western countries that were opposed to debt restructuring, relief, and cancellation/forgiveness.[44] Western nations, such as the United States, promoted a case-by-case approach in which each country would be responsible for managing its balance of payments and negotiating debt relief with its creditors (basically, the Paris and London Clubs).[45]

This Global North approach was part of the larger pattern of tracing the sovereign indebtedness problem exclusively to the national level. To manage debt under this approach, appropriate and proper internal management, project evaluation, collection of data, and surveillance of private debt were considered essential.

These management approaches are part and parcel of the conditionalities that the Bretton Woods institutions imposed on Global South countries, which justified broad incursions into developing countries' domestic policies. Global South countries have long complained about these massive incursions into their economies. To pacify the G77 nations, UNCTAD passed Resolution 165 S-IX in March 1975, granting it access to the Paris Club meetings as an observer at the request of a debtor country.[46]

Granting observer status to UNCTAD was justified to enable it to act as an adviser to developing countries during Paris Club negotiations while fortifying the Paris Club's instrumentality in the restructuring process.[47] This, however, dissipated any hope that developing countries would make transformative changes through UNCTAD.

40. UNCTAD, Proceedings of the United Nations Conference on Trade and Development Geneva, 1 February–29 March 1968, vol. 1 (1968), pp. 19, 40, 425, https://unctad.org/system/files/official-document/td97vol1_en.pdf; Lex Reiffel, Restructuring Sovereign Debt: The Case for ad hoc Machinery 136 (2003).

41. Gamani Corea, UNCTAD and the New International Economic Order, 53 Int'l Aff. 179 (Apr. 1977).

42. Id. at 237.

43. UNCTAD, Proceedings of the United Nations Conference on Trade and Development Geneva, 13 April–21 May 1972, vol. 1 (1973), Resolution 59 (III), at 89–90, https://unctad.org/system/files/official-document/td180vol1_en.pdf,.

44. Corea, supra note 41, at 237.

45. R.M.U. Suleiman, North-South Dialogue: Constraints and Prospects, 1 Strategic Stud. 83 (1977); Robert Rothstein, Is the North-South Dialogue Worth Saving?, 6 Third World Q. 169 (1984).

46. Deforge & Lemoine, supra note 33, at 241.

47. Id.

Accordingly, in the 1980s, UNCTAD began to train its personnel on 'technical assistance.' However, one difficulty that UNCTAD officials faced was a lack of information on external debt, particularly that of developing countries. To remedy this, in 1981, UNCTAD launched a computer-based debt management system, the Debt Management and Financial Analysis System (DMFAS).[48] DMFAS was aimed at assisting countries in creating administrative, institutional, and legal structures for effective debt management.[49] UNCTAD attempted to use the DMFAS to regain some of its political influence, but since UNCTAD was financially dependent on Global North countries for its funding, these Western countries opposed the use of the DMFAS.

Thus, UNCTAD's efforts to regain some political clout and relevance were short-lived.[50] While UNCTAD had the expertise to conduct debt sustainability analysis through the DMFAS, there were two difficulties. First, the Global North viewed the DMFAS as a political intervention that had to be defeated. Second, the Global North states regarded the DMFAS as giving UNCTAD a platform to continue to trace sovereign debt challenges to the global debt and financial architecture rather than to the Global South's internal problems. Subsequently, the IMF and World Bank developed their own debt sustainability models.

These models primarily traced the problems of indebtedness to the national level.[51] UNCTAD gradually became a technical agency with its mandate limited to providing expert assistance and supporting developing countries during their negotiations with the Paris Club within the framework that the Global North had devised. Developed countries argued that UNCTAD's macroeconomic work was duplicating the ongoing work of the IMF and World Bank and was therefore a waste of resources.[52] UNCTAD's mandate to produce expertise at the macro level was effectively transferred to the IMF and World Bank. As noted above, these Bretton Woods institutions, unlike UNCTAD, traced the problems of indebtedness to national-level explanations.[53]

Further, the Bretton Woods institutions treated the sovereign debt problem as a technical rather than a political issue. In 2021, the DMFAS had been in operation for forty years.[5] Initially, it promised a transformative change to the overindebtedness of developing countries, but ultimately, UNCTAD became a technical body that seldom pursues radical proposals.[55]

03. The 'Defanging of UNCTAD' and Continuing Proposals on Sovereign Debt Mechanisms

UNCTAD's turn to focus on purely technical work did not completely remove the agency from addressing structural questions related to the global debt and financial architecture. UNCTAD did not completely capitulate to the Bretton Woods institutions on international sovereign debt questions even though some leading Global North states and private creditors continue to have this intention.

48. UNCTAD, DMFAS History, DMFAS, https://unctad.org/dmfas/DMFAS_History (last visited Dec. 22, 2024).
49. Deforge & Lemoine, supra note 33, at 243.
50. Id. at 245.
51. Id.
52. Toye, supra note 31, at 1771.
53. Deforge & Lemoine, supra note 33, at 244.
54. UNCTAD, DMFAS History, supra note 48.
55. Deforge & Lemoine, supra note 33, at 244.

Between 2003 and 2015, UNCTAD, along with leading Global South states like Argentina, strongly favored 'soft' law principles and proposals. The premise here was that these principles and proposals would ultimately crystalize into a binding multilateral legal framework on sovereign debt governance. Expectedly, the Global North, led by the United States, has been at the forefront in ensuring that such a framework never succeeds. This part of the battle was first fought within UNCTAD, with financial support from the Norwegian government, through the formulation of the UNCTAD Principles on Promoting Responsible Sovereign Lending and Borrowing. Later, Argentina took the process to the UNGA, with the outcome being two UNGA resolutions. UNGA Resolution 68/304 focused on establishing a Multilateral Legal Framework for Sovereign Debt Restructuring Processes, and UNGA Resolution 69/319 concentrated on establishing the UN Basic Principles on Sovereign Debt Restructuring Processes.

Argentina's big win with UNGA Resolutions 68/304 and 69/319 gave the Global North and private creditors an argument in favor of not supporting a legally binding, full-scale sovereign debt restructuring. UNCTAD did not completely give up, introducing another attempt to create a Sovereign Debt Workout Mechanism (SDWM). This attempt ended with a Roadmap and Guide for Sovereign Debt Workouts in 2015, which only contains 'soft' law principles, the Sovereign Debt Workout Principles (SDWP), and a recommendation for a Sovereign Debt Workout Institution (SDWI).

UNCTAD Principles on Promoting Responsible Sovereign Lending and Borrowing

In 2006, UNCTAD began early work for establishing principles that would regulate sovereign debt restructuring.[56] In the wake of the 2008 financial crisis, UNCTAD's work on the principles intensified.[57] In 2009, with political and financial support from the government of Norway, UNCTAD earnestly continued with its initiative to formulate principles on responsible sovereign lending and borrowing.[58] The principles identified fundamental 'soft' law concepts or norms of international law and their applicability to sovereign debt crisis prevention.[59] The principles aim to promote more responsible behavior and provide economic benefits to both sovereign borrowers and their lenders.[60] According to the principles, both lenders and sovereign borrowers have a responsibility to ensure debt sustainability. The principles were designed to fill a glaring normative gap on what constitutes responsible lending and borrowing, what contributes to changing behaviors through principles of transparency and accountability, and what ultimately reduces the prevalence of debt crises.[61] UNCTAD restated them in January 2012 through the Principles on Promoting Responsible Sovereign Lending and Borrowing.[62]

The non-binding nature of the principles reflects the general preference for non-legally binding norms for global finance.[63] The Principles on Promoting Responsible Sovereign Lending and Borrowing include the following: agency (recognizing that government officials borrow on behalf of their citizens and should thus protect public interest); the sovereign borrower's responsibility to continue normal debt servicing unless disrupted by exceptional events; responsible credit decision-making through a realistic assessment of the borrower's capacity to service the debt; the vital responsibility of disclosure and that publication of financing arrangements be universally available, freely accessible, accurate, and complete; the lender's responsibility to check that the sovereign borrower is making informed decisions through the provision of accurate and reliable information; the sovereign borrower's obligation to weigh costs and benefits when seeking sovereign loans and to only seek one if it would permit additional public or private investment;

56. Id. at 248.

57. Michael Waibel, Out of Thin Air? Tracing the Origins of the UNCTAD Principles in Customary International Law, in Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing 88 (Carlos Espósito, Yuefen Li & Juan Pablo Bohoslavsky eds., 2013).

58. Carlos Espósito, Yuefen Li & Juan Pablo Bohoslavsky, Introduction: The Search for Common Principles, in Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing 3 (Carlos Espósito, Yuefen Li & Juan Pablo Bohoslavsky eds., 2013).

59. UNCTAD, Sovereign Debt Workouts: Going Forward, Roadmap and Guide, Apr. 2015, at p. 3, https://unctad.org/topic/debt-and-finance/Sovereign-Lending-and-Borrowing.

60. UNCTAD, Principles of Promoting Responsible Sovereign Lending and Borrowing (2015), UNCTAD/GDS/DDF/2012/Misc.1, Jan. 10, 2015, https://unctad.org/system/files/official-document/gdsddf2012misc1_en.pdf.

61. Espósito, Li & Bohoslavsky, supra note 58.

62. Id.

63. Waibel, supra note 57.

the lender's responsibility to check whether the sovereign borrower has authority to borrow and whether the resulting credit arrangements are valid and enforceable under relevant laws; the lender's responsibility to perform an ex ante investigation and post-disbursement monitoring to check the financial, operational, civil, social, cultural, and environmental implications of its lending; cooperation with UN-sanctioned governmental regimes; and the assurance of speedy, orderly, and consensus-based debt restructuring.[64]

Sovereign Debt Workout Principles and Institution

In 2013, UNCTAD established an ad hoc Working Group on a Debt Workout Mechanism composed of stakeholders and independent experts.[65] The group was composed of world-renowned experts in law and economics, private investors, and NGOs. Senior representatives from the IMF, World Bank, and Paris Club participated as observers.[66] UNCTAD also held Consultative Regional Meetings to obtain national and regional feedback from UN Member States. UNCTAD aimed at identifying agreed principles to guide sovereign debt restructuring. In 2015, UNCTAD published the Roadmap and Guide on Sovereign Debt Workouts, detailing principles to guide debt restructuring.[67] The Sovereign Debt Workout Principles (SDWP), as they came to be known, were the outcome of the working group's efforts. These principles included legitimacy, impartiality, transparency, good faith, and sustainability.[68] UNCTAD's SDWP are partly counterparts to the UN Principles on Sovereign Debt Restructuring adopted in UN Resolution 69/319.

Since UN Resolution 69/319 was arguably watered down in UN Resolution 70/190, UNCTAD'S SDWP do not address the sovereignty and development aspects emphasized in the Argentina-sponsored Resolution 69/319. However, the SDWP have not been embraced[69] even though the SDWP appear to be less controversial and crafted in more general terms than the UNGA's sovereign debt restructuring efforts. This UNGA 70/190 resolution arguably undermines UNCTAD's long-standing effort to create a multilateral, legal, and binding instrument to host a sovereign debt restructuring mechanism capable of meeting debtor-country needs. This difficulty arises because the resistance from Global South countries has effectively relegated UNCTAD to a role apart from serving as a central platform for constructing debt management policies. Along with the SDWP, UNCTAD recommended that an SDWI be considered at the multilateral level and as a possible alternative to the Paris Club.[70] The Paris Club was founded by core Global North creditor governments in 1956. It is a key pro-creditor institutional player in the existing informal network of sovereign debt governances.[71]

Hosted at the French Treasury (Direction Générale du Trésor) in Paris, it currently (as of June 2024) has twenty-two 'permanent member' states, all of which, except for the Russian Federation and Brazil, are members of the OECD.[72] UNCTAD proposed that its SDWI should be established with a mandate to support individual debtor states seeking a workout mainly through the facilitation of inclusive dialogue with the entirety of their creditors.[73] The DWI's mandate would range from very informal technical tasks to more formal binding measures.[74]

64. UNCTAD, supra note 60, Principles 1–15.
65. Id.
66. Id.
67. UNCTAD, Sovereign Debt Workouts, supra note 59.
68. Id. at 15–24.
69. Aidan McConnell, A Different Kind of Restructuring: Forty Years of Debate and the Prospect of a Formal International Sovereign Debt Regime (2016) (Honors Thesis Seminar, Univ. of Pa.), 90–91, https://repository.upenn.edu/handle/20.500.14332/8602.
70. UNCTAD, Sovereign Debt Workouts, supra note 59.
71. Odette Lienau, The Challenge of Legitimacy in Sovereign Debt Restructuring, 57 Harv. Int'L L.J. 178 (2016); see also Pamela Blackmon, The Political Economy of Trade Finance: Export Credit Agencies, the Paris Club and the IMF 5 (2017); Jerome Roos, Why Not Default? The Political Economy of Sovereign Debt 304 (2019).
72. Who Are We?, Paris Club, https://clubdeparis.org/en/communications/page/who-are-we (last visited Dec. 22, 2024); Members & Partners, OECD, https://www.oecd.org/en/about/members-partners.html (last visited Dec. 22, 2024). The twenty-two members of the Paris Club are Australia, Austria, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Ireland, Israel, Italy, Japan, Korea, the Netherlands, Norway, the Russian Federation, Spain, Sweden, Switzerland, and the United Kingdom.
73. UNCTAD, Sovereign Debt Workouts, supra note 59, at 5.
74. Id. at 62.

Furthermore, the DWI would also provide technical and logistical support for sovereign debt works. This would include a public repository for the complete records of past workouts, as well as an inventory for best practices, rules, and regulations on debt sustainability and for creditor aggregation.

The DWI would also commission debt sustainability analyses, assist in the establishment and implementation of a procedure for the conclusion of debt workouts, and maintain a list of abusive creditors while hosting a mechanism for review of those listed. With regard to an institutional framework, UNCTAD proposed that the DWI would only need a small permanent staff to lead the selection of experts, facilitators, arbitrators, and mediators in the event of a debt crisis, in line with prior agreed-upon criteria.[75] The DWI would also cooperate with existing fora and institutions in similar versions to the aforementioned 2001 IMF proposal for a Sovereign Debt Restructuring Mechanism (SDRM).[76]

To date, none of these UNCTAD-proposed institutional mechanisms have come to fruition. UNCTAD's efforts at constructing 'soft' law principles for the management of the Global South countries' sovereign debt challenges, while laudable, are at best half measures to what is a more systemic and fundamental problem of the global debt and financial architecture.

75. Id.

76. Id.

PART 3

The Status Quo

Global North-Led Ad Hoc Mechanisms Underpinned by a Contractual Approach

The later UNCTAD processes and UNGA resolutions partially recalled the NIEO's radical reform proposals. They, however, remained non-binding 'soft' law mechanisms due to resistance from the guardians of a status quo that remains highly unjust and unfair to sovereign debtors in the Global South. The advent of the COVID-19 pandemic in 2020 caused a global economic meltdown that increased the sovereign debt vulnerabilities of developing countries to unprecedented levels.[77] Using the IMF threshold of a debt-to-GDP ratio of 60%, the number of countries facing high debt levels increased from twenty-two countries in 2011 to fifty-nine in 2022.[78] This rise in the number of indebted countries was mainly due to the growing amount of development financing needs that were greatly exacerbated by the COVID-19 pandemic, the high cost-of-living crisis, and climate change.[79] The sovereign debt governance initiatives during the pandemic were primarily ad hoc mechanisms.

For their part, the IMF, World Bank, and private creditors supported contract-based solutions, such as collective action clauses (CACs). This part of the report examines two key examples of these ad hoc mechanisms favored by the IMF and private creditors: 1) contract-based solutions; and 2) ad hoc responses, especially after the COVID-19 pandemic, which were designed to address the sovereign debt

01. Contractual Approaches Favored by the IMF and Private Creditors

The IMF and private creditors favor a contractual approach to debt restructuring.[80] This approach is best exemplified by then-IMF Chief Economist Anne Krueger's SDRM proposal. Then-US Under Secretary of the Treasury John Taylor publicly disagreed with Ms. Krueger about the SDRM's desirability.[81] He suggested an alternative that would introduce contractual clauses into bonds that private creditors used to lend money to borrower governments.[82] Following the United States' opposition, the proposal for an SDRM was defeated. Since then, a variety of new clauses, especially in debt contracts, came to define how to deal particularly with bondholders when a Global South country faces a debt crisis.[83]

The new clauses in debt contracts characterize the decentralized, market-oriented contractual approach to sovereign debt restructuring today.[84] The US Treasury's proposal in opposition to the SDRM was that sovereign bonds governed by the laws of the United States, Germany, United Kingdom, Japan, and other creditor nations should include collective action clauses (CACs).[85] A CAC is a clause set in a bond's terms and conditions that grants majority voting power for purposes of binding all creditors or bondholders to any changes to the bond's terms in cases of debt restructuring.[86]

77. IMF, Caught by a Cresting Debt Wave (June 2020), https://www.imf.org/en/Publications/fandd/issues/2020/06/COVID.19-and-debt-in-developing-economies-kose#:~:text=Caught%20by%20a%20Cresting%20Debt%20Wave&text=The%20COVID.%2D19%20pandemic%20is,economies%20at%20a%20bad%20moment.

78. UN Global Crisis Response Group, A World of Debt: A Growing Burden to Global Prosperity (July 2023), at 6, https://unctad.org/system/files/official-document/osgttinf2024d1_en.pdf.

79. Id.

80. IMF, The International Architecture for Resolving Sovereign Debt involving Private-Sector Creditors, Policy Paper no. 2020/043 (Sept. 23, 2020), at 7.

81. John B. Taylor, Sovereign Debt Restructuring: A US Perspective, Remarks at the Institute for International Economics Conference on "Sovereign Debt Workouts: Hopes and Hazards," Inst. for Int'l Econ., Washington, D.C., Apr. 2, 2002.

82. Id.

83. Shalendra D. Sharma, Resolving Sovereign Debt: Collective Action Clauses or the Sovereign Debt Restructuring Mechanism, 38 J. World Trade 627, 630 (2004).

84. Mark Sobel, Strengthening Collective Action Clauses: Catalysing Change-The Back Story, 11 Capital Markets L.J. 4 (2016).

85. See Barry Eichengreen, Restructuring Sovereign Debt, 17 J. Econ. Persp. 75 (2003).

86. Klaus-Albert Bauer, The Euro Area's Collective Action Clause-Some Questions and Answers, in Collective Action Clauses and the Restructuring of Sovereign Debt (Klaus-Albert Bauer, Andreas Cahn & Patrick S. Kenadjian eds., 2013).

CACs are designed to address the free-rider problems that arise when a minority of creditors seeks to take advantage of the agreement of the majority willing to reach a restructuring agreement with the debtor.[87] In 2014, the IMF Executive Board analyzed certain aspects of developments in the contractual frameworks for sovereign debt restructurings.[88] The IMF endorsed key features of enhanced contractual provisions for international sovereign bonds to strengthen the contractual frameworks to address collective action problems, including enhanced CACs.[89] CACs have evolved over the years. The first-generation CACs allowed a majority of bondholders within one bond issuance (single series) to bind the minority to the terms of a restructuring.[90] Second-generation CACs include series-by-series voting procedures and a 'two-limb' aggregated voting mechanism that requires a minimum threshold of support to be achieved both (a) in each series; and (b) across all series being restructured.

The third-generation CACs, also referred to as enhanced CACs, contain a menu of voting procedures: (a) series-by-series voting, (b) two-limb aggregated voting, and (c) single-limb aggregated voting, which allows a majority of creditors across all series to bind the minority to a restructuring. The first uses of enhanced CACs in sovereign debt restructurings have relied on the two-limb voting mechanism; the single-limb voting mechanism remains unused.[91] On December 4, 2018, the finance ministers of the euro area agreed to incorporate updated CACs with a single-limb voting mechanism into all euro area sovereign bonds as of January 1, 2022.[92]

02. Post-Pandemic Ad Hoc Mechanisms

Within mainstream international law circles, the move by the IMF, World Bank, other multilateral financial institutions, and the G20 to offer funding and debt moratoriums to support the COVID-19 pandemic debt crisis is celebrated as a bold move. But in the wider structural story of the injustices inflicted through the continuities of colonial economic governance, such short-term and ad hoc projects are seen as granting another opportunity for the Global North and private creditors to maintain the lack of a sovereign debt restructuring mechanism that was legally binding.

These ad hoc mechanisms only act as stopgap measures that maintain the continued hegemony of the Bretton Woods institutional governance. In this part, we demonstrate how in the post-pandemic period a variety of short-term and ad hoc measures were adopted. These half measures seem to only have exacerbated the sovereign debt crisis and development financing challenges in the developing world in the name of solving the crisis. In this sense, therefore, the COVID-19 pandemic might have been a wasted crisis to create a binding sovereign debt restructuring mechanism that works for sovereign debtors in the Global South.

The G20's Debt Service Suspension Initiative (DSSI) and Common Framework (CF)

On April 15, 2020, the G20's finance officials announced an agreement to provide debt service postponement on sovereign obligations for the poorest members of the IMF and World Bank.[93]

87. Liu, supra note 1, at 158.
88. IMF, International Architecture, supra note 80.
89. Id.
90. Id.
91. Id. at 21.
92. Economic and Financial Committee, Subcommittee on EU Sovereign Debt Markets (ESDM), Collective Action Clauses in the Euro Area, https://europa.eu/efc/efc-sub-committee-eu-sovereign-debt-markets/collective-action-clauses-euro-area_en (last visited Dec. 22, 2024).
93. Suman Bery, Sybrand Brekelmans & Alicia Garcia Herrero, Debt-relief for sub-Saharan Africa: What now?, HKUST IEMS Working Paper no. 2020-76 (July 2020), at 3.

The agreement, which was known as the Debt Service Suspension Initiative (DSSI), was concluded in May 2020.[94] The IMF also set up the Catastrophe Containment and Relief Trust (CCRT) as part of its COVID-19 relief package. The DSSI covered seventy-three International Development Association (IDA) and UN least-developed countries that were, at the time of the initiative, on their debt service to the IMF and World Bank.[95] Of the seventy-three eligible countries, only forty-eight participated in the DSSI. Under the initiative, official bilateral creditors committed to suspending debt service payments due between May 1, 2020, and December 31, 2021.[96] New repayments were due to begin in June 2022. The payments were phased over three years in semiannual installments.[97] The DSSI has had limited success with forty-six of seventy-three eligible countries participating and only with a request of US$5 billion—roughly equal to 10% of external total debt service (TDS) scheduled in 2020 for all seventy-three.[98]

In response to the DSSI's shortcomings, in November 2020, G20 countries launched the Common Framework for Debt Treatments.[99] The Common Framework brought together, on a case-by-case basis, traditional and emerging official bilateral creditors, including China and India, to jointly deliver on deeper debt restructuring for the countries that qualified for the DSSI. Unlike the DSSI, the Common Framework requires debtors to seek comparable debt relief from their private creditors to restore debt sustainability.[100] This condition effectively made the Common Framework unworkable for many sovereigns with some critics compelled to rename it the "Uncommon Framework."[101]

The "Uncommon Framework" thus only considers seventy-three countries eligible for the framework, leaving out several highly vulnerable countries.[102] Private creditors who had the highest composition of debt for countries such as Chad and Zambia refused to participate in this program even in the aftermath of the devasting economic effects of the COVID-19 pandemic. For Chad, this was disastrous since 97% of its debt composition was held by a single creditor, Glencore Energy, in a debt-for-oil arrangement.[103] The acquisition of this debt was shrouded in mystery, and in 2014 when oil prices crashed, Chad plunged into an economic crisis from which it hasn't recovered yet.[104] The Common Framework's continued failures also put into perspective how the Bretton Woods institutions' previous approaches largely failed the Global South. The Multilateral Debt Relief Initiative (MDRI) is the best example of the IMF's schizophrenic behavior, which is best understood in the context of the Heavily Indebted Poor Countries (HIPC) Initiative.[105]

In the early 1980s, the IMF and World Bank offered new loans to debt-ridden Third World countries in return for a commitment to neoliberal policy reforms known as structural adjustment programs (SAPs).[106] This policy of providing new loans to pay off old loans did not stabilize the debt situation and instead made it worse.[107] Consequently, in 1996, the IMF and World Bank began the HIPC Initiative.[108] The HIPC Initiative, rather than addressing the sovereign debt problems, exacerbated them even further.

94. World Bank Group, Debt Service Suspension Initiative, Brief, Mar. 10, 2022, https://www.worldbank.org/en/topic/debt/brief/covId.-19-debt-service-suspension-initiative.

95. Communique, Virtual Meeting of the G20 Finance Ministers and Central Bank Governors, Riyadh, Saudi Arabia, Apr. 15, 2020, G20 Information Centre, http://www.g20.utoronto.ca/2020/2020-g20-finance-0415.html#a2.

96. Id.

97. Id.

98. Lars Jensen, Sovereign Debt Vulnerabilities in Developing Economies: Which Countries Are Vulnerable and How Much Debt Is at Risk?, United Nations Development Programme, UNDP Policy Network (Mar. 2021), at 4.

99. Dennis Essers, Danny Cassimon & Martin Prowse, Debt-for-Climate Swaps in the COVID-19 Era: Killing Two Birds with One Stone?, Analysis and Policy Brief no. 43, University of Antwerp, Institute of Development Policy, (Mar. 2021), at 2.

100. IMF, Questions and Answers on Sovereign Debt Issues, Questions and Answers, Apr. 8. 2021, https://www.imf.org/en/About/FAQ/sovereign-debt.

101. Marc Jones & Uditha Jayasinghe, Sri Lanka Has an IMF Deal, Now It Courts China and India, Reuters (Sept. 6, 2022), https://www.reuters.com/world/asia-pacific/sri-lanka-has-an-imf-deal-now-it-courts-china-india-2022-09-06/.

102. Jensen, supra note 98, at 9.

103. Blick, 'Fools' Bargain: The Secret Payments Behind the Deal that Brought a Country to its Knees, Source Material, Feb. 24, 2024, https://www.source-material.org/glencore-chad-oil-loan-secret-payments/.

104. Id.

105. IMF & IDA, Heavily Indebted Poor Countries (HIPC) Initiative: Perspectives on the Current Framework and Options for Change (Apr. 2, 1999), https://www.imf.org/external/np/hipc/options/options.pdf.

106. Brian C. Stuart, Structural Adjustment and the Role of the IMF, in Structural Adjustment and Macroeconomic Policy Issues 110–28 (V.A. Jafarey ed., 1992).

107. See Asad Ismi, Impoverishing a Continent: The World Bank and the IMF in Africa (2004), https://policyalternatives.ca/sites/default/files/uploads/publications/National_Office_Pubs/africa.pdf.
IMF & IDA, supra note 105.

108. IMF & IDA, supra note 105.

The MDRI, HIPC, enhanced HIPC, DSSI, and Common Framework have all led Global South countries to accrue more unsustainable debt. All these mechanisms continue the Bretton Woods consolidation programs. They are also part of cosmetic-style reforms that do not radically transform the international economic law governance processes but only entrench the inequalities within it.[109] The DSSI/Common Framework has created serious fiscal and financial strains for Zambia, Ghana, and Chad.[110] The linking of IMF lending to demands on the fiscal and monetary policies of debtor countries can be traced to the IMF's founding in 1944.[111] The design for austerity was not a design flaw but a carefully woven mechanism to undermine, control, and influence the domestic policies of debtor countries.[112]

For African countries, this interventionism is not new and is a continuation of the IMF's and World Bank's SAPs of the 1980s.[113] According to Murhula, "The perverse effects of the foreign aid allocation from the 1960s to the early 2000s, mostly as a function of the SAPs since the 1980s, were obviously in direct relation with the sovereign debt crisis in African countries, let alone the persistence of poverty."[114] Western countries' aid and lending conditionalities on neoliberal policies have faced heavy criticism for exacerbating the sovereign debt crisis in Africa, worsening poverty, and undermining democratic governance.[115] The extreme alternative of sovereign debt cancellation is always presented as a sustainable way of resolving the crisis. Yet, the Bretton Woods institutions continually design such programs as the DSSI, HIPC, and enhanced HIPC, which further sink African countries into more debt. Other band-aid measures include the appointment of a third African director of the IMF and the addition of Africa to the G20 to ostensibly grant Africa a stronger voice in the system.

international financial architecture where, for example, the entirety of Africa only has a 6.47% voting weight compared to the United States' 16.5%.[116] Sri Lanka, in southwest Asia, presents another example of how the IMF's imposition of austerity measures continues unabated. In the aftermath of the COVID-19 pandemic, Sri Lanka faced one of the world's worst economic meltdowns after it defaulted on its sovereign debts in 2022. Expectedly, the default and sovereign debt crisis were mainly blamed on national-level governance explanations like overborrowing and corruption. The IMF agreed to offer Sri Lanka a bailout loan of US$2.9 billion in 2023 but only if the country agreed to "cut expenditures, generate a budget surplus, pay off creditors, and make the country a more attractive investment destination."[117]

The IMF conditionalities thus dealt a double blow to Sri Lankans who suffered economic meltdowns before and during the pandemic and now face IMF-imposed austerity after the IMF itself encouraged borrowing to address the country's pandemic-induced economic slowdown. Sri Lanka's government must secure a primary budget surplus of 2.3% of GDP by 2025, with an economy that contracted 9% in 2022. Additionally, Sri Lanka will continue with a cycle of unsustainable debt with its current proposal to offer a macro-linked bond tied to the nation's GDP.[118] This bond, described as 'innovative,' links pay-outs to economic growth and governance reforms, and it is these authors' opinion that this is nothing more than austerity on steroids, which could create further indebtedness and economic suffering for the already impoverished citizens.

109. James T. Gathii & Sergio Puig, The West and the Unraveling of the Economic World Order: Thoughts from a Global South Perspective, in Is the International Legal Order Unraveling? 62–81 (David. L. Sloss ed., 2022).

110. Nona Tamale, Debt Restructuring under the G20 Common Framework: Austerity Again? The Case of Zambia and Chad, in How to Reform the Global Debt and Financial Architecture 154 (James Thuo Gathii ed., 2023).

111. Antony Anghie, Time Present and Time Past: Globalization, International Financial Institutions and the Third World, 32 N.Y J. Int'l Pol. 243–90 (2000); Antony Anghie, International Financial Institutions, in The Politics of International Law 217–37 (Christian Reus-Smit ed., 2009).

112. Id.

113. See Olufunmilayo Arewa, Colonial Hangover in Global Financial Markets: Eurobonds, China, and African Debt, in Imperialism and the Political Economy of Global South's Debt 61–62 (Ndogo Samba Sylla ed., 2023).

114. Toussaint Kafarhire Murhula, United States Foreign Policy Towards HIV/AIDS in Africa: The Role of Pharmaceutical Companies in the Formulation and Implementation of the President's Emergency Plan for AIDS Relief (PEPFAR) 2003–2008 (2016) (Ph.D. thesis, Loyola Univ. Chicago), 232–54.

115. James Thuo Gathii, Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law, 5 Buffalo Hum. Rights L. Rev. 107–74 (1999);Ruth Elizabeth Gordon, Constructing Development, in Development Disrupted: The Global South in the Twenty-First Century (2022); Glen Biglaiser & Ronald J. McGauvran, The Effects of IMF Loan Conditions on Poverty in the Developing World, 25 J. Int'l Rel. Dev. 806–33 (2022).

116. African Sovereign Debt Justice Network (AfSDJN), AfSDJN Statement: IMF Quota Reforms: Is the appointment of a Third Executive Director for sub-Saharan Africa a game changer?, Afronomicslaw.org (Oct. 13, 2013), https://www.afronomicslaw.org/category/african-sovereign-debt-justice-network-afsdjn/afsdjn-statement-imf-quota-reforms.

117. Marwaan Macan-Markar, Sri Lanka enters a New Era of Post-Pandemic Austerity, Nikkei Asia, Aug. 23, 2023, https://asia.nikkei.com/Spotlight/The-Big-Story/Sri-Lanka-enters-a-new-era-of-post-pandemic-austerity.

118. Joseph Cotterill, New Form of Bond Emerges from Sri Lanka's $13 bn Restructuring Talks, Fin. Times (May 4, 2024), https://www.ft.com/content/c53070a7-379d-4d98-a703-f628552b04a7; Thilina Panduwawala & Chayu Damsinghe, The Sri Lanka-linked Future of Macro-Linked Bonds, Fin. Times (May 22, 2024), https://www.ft.com/content/d6c764e1-3676-4179-af18-7b8a3a0400f5?shareType=nongift.

Zambians too face the same IMF squeeze, with the IMF insisting in April 2023 on a 2.3% budget surplus equivalent to 3.2% of GDP by 2025 and bilateral debt relief for Zambia to secure a US$1.3 billion loan.[119] This condition seems quite formidable for Zambia because it is engaged in an arduous and protracted restructuring process.[120] Meanwhile, private and bilateral creditors keep refusing, stalling, and delaying the renegotiation of their loans with these countries that have defaulted and are concurrently facing the IMF austerity sledgehammer.[121]

119. African Sovereign Debt Justice Network (AfSDJN), Eighty Eighth Sovereign Debt News Update: Zambia Seals $6.3 billion Debt Restructuring Deal that Excludes Private Creditors, Afronomicslaw.org (June 25, 2023), https://www.afronomicslaw.org/category/african-sovereign-debt-justice-network-afsdjn/eighty-eighth-sovereign-debt-news-update.

120. African Sovereign Debt Justice Network (AfSDJN), One Hundred and Eleventh Sovereign Debt News Update: Zambia Signs Debt Restructuring Deal with Official Creditors China and India, Afronomicslaw.org (Mar. 6, 2024), https://www.afronomicslaw.org/category/african-sovereign-debt-justice-network-afsdjn/one-hundred-and-eleventh-sovereign-debt-news.

121. African Sovereign Debt Justice Network (AfSDJN), One Hundred and Fourth Sovereign Debt News Update: Zambia Announces that its Debt Restructuring with Eurobond Creditors Cannot Be Implemented at this Time, Afronomicslaw.org (Nov. 24, 2023), https://www.afronomicslaw.org/category/african-sovereign-debt-justice-network-afsdjn/one-hundred-and-fourth-sovereign-debt-news.

Conclusion

The More Things Change,

the More They Remain the Same

Our main argument throughout this report has been that there are three broad approaches in the ongoing search for solutions to the inherently unjust global debt and financial architecture. The first is Mohammed Bedjaoui's radical approach to addressing sovereign debt issues, which is based on the premise that overhauling the global debt and financial architecture is arguably the best way to a viable, comprehensive, fair, just, sustainable, transparent, and stable global sovereign debt system. Under such a system, both lenders and creditors would share the economic risks associated with external sovereign debt defaults. The second is the 'soft' law approach represented by UNCTAD and the UNGA, including the Basic Principles on Sovereign Debt Restructuring Processes and other norm-building initiatives designed to nudge the global financial and debt architecture to conform with human rights norms and related standards. This approach represents an intermediate path between the first radical approach and the third weaker ad hoc and temporary approach.

The third and final approach is the weaker ad hoc, temporary, private, and contract-based route, exemplified in the DSSI and Common Framework. At the moment, the ad hoc, private, and contract-based approach is the status quo. The entry of climate finance amidst the continuing sovereign debt distress, especially for developing countries, has ensured entrenchment of the status quo rather than a fundamental overhaul of an already broken global financial industry.[122] This pressing need exists simultaneously with the continued heavy weight of indebtedness facing these countries. Thus, international environment law instruments, including Agenda 21, and other outcomes of the 1992 UN Conference on Environment and Development (UNCED), including the UN Framework Convention on Climate Change (UNFCCC) and the 2015 Paris Agreement, required that developed states urgently provide financial resources to developed countries to meet their climate obligations.[123]

It is now an inescapable fact that climate change mitigation, adaptation, loss, and damage would require significant financial resources directed to the Global South. Developing countries in the Global South are facing the highest levels of climate vulnerabilities, yet they have contributed minimally to the climate crisis.[124] To address this situation, these countries will need significant financial resources to stem the devastating tide of climate change. Yet, the solutions presented to address climate financial gaps have created a wide-open space where private capital interests thrive in a limitless clamor to commodify environmental protection using technocratic and market-based solutions.[125] Such solutions relegate to the back burner the interests of the poor, vulnerable, and racialized communities that bear the harshest outcomes of climate change while private capital interests continue to profit.[126] Climate finance has therefore become an amplifier of sovereign debt vulnerabilities in the Global South.

Developing countries are borrowing more to avoid or address the devasting impact of climate change and sinking deeper into the sovereign debt crisis. A 2018 study indicated that "for every US[$]10 paid in interest by developing countries, an additional dollar will be spent due to climate vulnerability. This financial burden exacerbates the present-day economic challenges of poorer countries. The magnitude of this burden will at least double over the next decade."[127] The same report found that climate vulnerability has already raised the average cost of debt in developing countries by 117 basis points, translating into US$40 billion in additional interest payments over the past ten years on sovereign debt alone.[128]

122. Transforming Climate Finance in an Era of Sovereign Debt Distress (James T. Gathii, Adebayo Majekolagbe & Nona Tamale eds., 2023), https://www.afronomicslaw.org/sites/default/files/pdf/transforming_climate_finance_aug10.pdf.

123. United Nations Sustainable Development, Agenda 21, 2 (1992); United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107; Paris Agreement, U.N. Doc. FCCC/CP/2015/L.9/Rev/1.

124. Nona Tamale & Adebayo Majekolagbe, Debt, Climate Finance and Vulnerability: A Brief on Debt and Climate Vulnerable Countries in Africa, AFRONOMICSLAW.ORG (Nov. 2022), https://www.afronomicslaw.org/sites/default/files/pdf/A%20Brief%20on%20Debt%20and%20Climate%20Vulnerable%20Countries%20in%20Africa.pdf (showing that Africa is responsible for less than 4% of the global greenhouse gas emissions, yet it is warming more quickly, its glaciers are retreating faster, and its rate of sea-level rise is higher than the global mean).

125. See Maxine Burkett, Root and Branch: Climate Catastrophe, Racial Crises, and the History and Future of Climate Justice, 134 HARV. L. REV. 326, 339 (2021).

126. Carmen Gonzalez, Racial Capitalism, Climate Justice, and Climate Displacement, 11 Oñati SocioLegal Series 108, 114–17 (2021).

127. Bob Buhr et al., Climate Change and the Cost of Capital in Developing Countries: Assessing the Impact of Climate Risks on Sovereign Borrowing Costs, prepared by the Imperial College Business School & SOAS University of London, commissioned by UN Environment (2018), at iv.

128. Id. at 11.

The solutions presented within the climate finance agenda, including key interventions such as debt-for-climate swaps, green and blue bonds,[129] sustainable and sustainability-linked bonds, carbon crediting schemes, or institutional reformism, such as the Bridgetown Initiative 2.0,[130] are mostly false solutions that do not and cannot as designed address the sovereign debt crisis or the climate change vulnerabilities of the targeted countries. In this report, we have argued and provided examples of when the global financial architectural institutions, developed countries, and private capital interest groups act as vanguards against any transformation of a broken sovereign debt governance architecture.

Such a background cannot provide a viable platform from which to launch the ambitious efforts that the false solutions in the climate finance space continue to provide. Only a well-structured and binding sovereign debt and international financial system that meets the following goals can furnish such transformative solutions: First, the system must directly respond to and center on the needs and interests of individuals, communities, and ecosystems that have faced the most devastating effects of the sovereign debt unsustainability and the climate crisis.

Second, the global climate finance and debt management and governance priorities must reflect and align with the inevitability, unpredictability, and devastating magnitude of climate impacts, particularly in developing countries. Third, the meaningful participation of the most vulnerable in the design and implementation of the global climate finance and debt agenda, and the holistic, socio-economic, and ecological well-being of those most impacted by climate change, are key metrics for adjudging the success of a transformative agenda for both sovereign debt governance and addressing climate change.

Fourth, the principle of ecological debt according to which the countries that contributed the most to the climate crisis must bear the most responsibility is a key starting point for addressing the tension between climate finance and sovereign indebtedness for the poorest countries. Fifth, sovereign debt management and restructuring processes must accept the possibility of a reparations agenda linked to colonialism, colonial continuities, and ecological debt. These processes must therefore encompass bold actions, including debt forgiveness, renegotiations, moratoriums, rescheduling, and the cancellation of odious debt, rather than be limited to debt relief or restructuring.

129. See Akinyi Eurallyah, Are Sovereign Sustainability-Linked Bonds Double-Edged Swords? Assessing the Feasibility of Sovereign Sustainability-Linked Bonds for Sustainable Development in Africa, in Transforming Climate Finance in an Era of Sovereign Debt Distress 165 (James T. Gathii, Adebayo Majekolagbe & Nona Tamale eds., 2023).

130. See Samantha Kanoyangwa Chioneso, Fiscal Sustainability and Sovereign Risk: The Feasibility of the Bridgetown Initiative for Africa, in Transforming Climate Finance in an Era of Sovereign Debt Distress 93 (James T. Gathii, Adebayo Majekolagbe & Nona Tamale eds., 2023).