Emory Bankruptcy Developments Journal

Volume 37
Issue 3 *Developments Issue*

6-28-2021

The Time Has Come for Disaggregated Sovereign Bankruptcy

Odette Lienau

THE TIME HAS COME FOR DISAGGREGATED SOVEREIGN BANKRUPTCY†

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INTRODUCTION

With expanding global vaccinations and the potential end of the COVID-19 pandemic in sight, who among us has not succumbed to daydreams of post-crisis 'normal' life? Still—and setting aside for now the certain obstacles on any road to public and economic health—we should not be too sanguine about the degree to which the eventual recovery will be even, including across countries. By now, the images of economic dislocation resulting from the pandemic, including empty tourist beaches, deserted town centers, and closed manufacturing plants, have become commonplace. In certain regions and countries, this dislocation and its after-effects may prove long-lasting, putting the world at risk for a post-pandemic sovereign debt crisis.

In this Essay, I provide an overview of some of the key developments that have emerged in the sovereign debt space in the wake of the COVID-19 pandemic and argue that we should use the energy generated in this moment to move toward what might be called 'disaggregated sovereign bankruptcy,' in part by establishing institutions that could more effectively and efficiently address future crises as they arise. I first note the country financial difficulties generated by the current situation and emphasize the ways in which national responses may have long-term financial impacts that make states more vulnerable to debt distress, particularly in the developing world. I also delineate how any restructuring efforts that might result from such distress would have to contend with longstanding problems in the global architecture relevant to sovereign debt. These difficulties have hardly disappeared and may even have become more complex in recent years.

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† The penultimate version of this Essay formed part of the basis for written testimony for a Congressional hearing on Chinese Lending and the International Debt Architecture, held by the House Committee on Financial Services Subcommittee on National Security, International Development and Monetary Policy on May 18, 2021. A portion of the research initially was conducted as part of a consultancy with the UN Conference on Trade and Development (UNCTAD) on the possibility of establishing a Global Debt Authority. Such an organization, mentioned in the text, remains under consideration and is and slated for possible international discussion in the future. My thanks to the editors of the *Emory Bankruptcy Developments Journal* for inviting my contribution to this special issue on recent developments, and to the participants of the Journal's March 2021 Workshop for helpful feedback.

* Professor of Law and Associate Dean for Faculty Research and Intellectual Life, Cornell Law School.

I then mention several proposals that have been put forward to address the pandemic-related financial crisis, formulated by scholars and policymakers to deal with problems already present or likely to emerge.[1] These ideas should, if fully implemented, help to address countries' financial distress in the short-to-medium term. However, the general reaction to such proposals[2] by private creditor groups and others has made the existing gaps in the international financial architecture even more apparent. If anything, recent crisis efforts and creditor responses[3] suggest that—in addition to short-term, emergency-focused proposals—the need for a more rational global debt restructuring platform remains. As such, the fact of the ongoing and fast-moving public health and economic situation does not mean that we should exclusively focus on emergency-level solutions. Indeed, it remains imperative to harness the crisis energy to move in the opposite direction—toward putting in place longer-term institutions that will be ready for the *next* crisis and, perhaps, make that next crisis less likely or less intense.

Finally, I lay out more fully that the time has come for 'disaggregated sovereign bankruptcy'—which can be understood as a framework by which multiple processes at varying levels simultaneously support or instantiate a shared set of sovereign debt resolution principles and commitments. Although numerous actors have called for a full-blown multilateral treaty-based restructuring regime, most famously the International Monetary Fund (IMF) in the early 2000s,[4] such proposals have thus far met with resistance. Improvements in market-based, contractually grounded solutions have taken some of the pressure off, but still leave many problems un- or under-addressed. Although the narrative of voluntary, market-based advancements *versus* 'involuntary' (or perhaps less voluntary) international statutory options offers a neatly binary conceptual package, it is well past time to abandon such overly simplistic framing. Improvements in the contractual realm, in the multilateral

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[1] *See COVID 19: Debt Service Suspension Initiative*, WORLD BANK (Mar. 16, 2021), https://www.worldbank.org/en/topic/debt/brief/covid-19-debt-service-suspension-initiative (explaining that, in response to the economic crisis surrounding the COVID-19 pandemic, "the World Bank and the International Monetary Fund urged G20 countries to establish the Debt Service Suspension Initiative [DSSI]" for the purpose of "helping countries concentrate their resources on fighting the pandemic and safeguarding the lives and livelihoods of millions of the most vulnerable people"); G20, *Common Framework for Debt Treatments Beyond the DSSI*, PARIS CLUB (Nov. 2020).

[2] *See, e.g.*, Inst. for Int'l Fin., *Terms of Reference for Potential Private Sector Participation in the G20/Paris Club Debt Suspension Initiative* (May 28, 2020), https://www.iif.com/Portals/0/Files/content/Regulatory/Voluntary%20Private%20Sector%20Terms%20of%20Reference%20for%20DSSI_vf.pdf.

[3] *See COVID 19: Debt Service Suspension Initiative*, WORLD BANK (Mar. 16, 2021), https://www.worldbank.org/en/topic/debt/brief/covid-19-debt-service-suspension-initiative; Inst. for Int'l Fin., *supra* note 2.

[4] ANNE O. KRUEGER, A NEW APPROACH TO SOVEREIGN DEBT RESTRUCTURING 31 (2002), https://www.imf.org/external/pubs/ft/exrp/sdrm/eng/sdrm.pdf.

arena, and at the level of domestic legislation should be conceived of as complementary rather than competitive. Or, if these arenas may sometimes compete, we should understand this as the type of healthy competition that ultimately results in better outcomes; there is no need to champion one approach over another.

To be clear, the explicit embrace of a more disaggregated framework for implementing debt resolution principles need not be *disorganized*. As such, I also argue in favor of establishing an international body purpose-built to recommend, coordinate, and facilitate steady, incremental progress in the architecture for dealing with sovereign debt across multiple vectors. In this, it endorses an idea floated by the United Nations Conference on Trade and Development (UNCTAD) in the first half of 2020, and still under development, and also echoes earlier calls for a relatively modest but still internationally relevant forum.[5] Instead of a full-blown multilateral body with adjudicative functions, a more pragmatically achievable organization could be proposed and implemented, perhaps even by a small group of states and supporters, in order to serve as a focal point for ongoing activities designed to improve how the global community collectively deals with debt in the short, medium, and long term. Although any such organization may not be able to deal with the immediate financial fallout of the COVID-19 pandemic, advocates of more rational debt restructuring should not waste the sense of urgency present in the current crisis. We need to take steps now to adopt an infrastructure that would make future debt crises less severe and perhaps less likely—even when the spotlights are directed elsewhere.

I. FINANCIAL VULNERABILITY, COUNTRY RESPONSES, AND SOVEREIGN DEBT DISTRESS

Although the economic fallout of the COVID-19 pandemic has been well documented, several elements are especially important in thinking through its potential ramifications for international debtor-creditor relations. To begin with, factors that have led to decreased revenue and foreign exchange may have a lingering impact in the sovereign debt space. The drop in key export commodity prices for many countries has had a significant blow, along with the fall in global trade generally.[6] The near freeze in the international tourism industry dried up a

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[5] In a somewhat similar vein, though more circumscribed, a recent G30 Report called for a consultative mechanism attached to the G20's Common Framework. G30, SOVEREIGN DEBT AND FINANCING FOR RECOVERY AFTER THE COVID-19 SHOCK: NEXT STEPS TO BUILD A BETTER ARCHITECTURE 3, 23 (2021).

[6] *See, e.g.*, Constantino Hevia & Andy Neumeyer, *A Perfect Storm: COVID-19 in Emerging Economies*, *in* COVID-19 IN DEVELOPING ECONOMIES 25, 25, 31 (Simeon Djankov & Ugo Panizza eds., 2020) (arguing that

key source of foreign exchange in certain regions.[7] And, for some countries, the significant decline in remittance flows from overseas workers, resulting from economic stagnation in remittance source countries, has constituted a significant hardship as well.[8] Given that many countries continue to denominate their external debt in foreign currency over which they have no control, these factors put together have meant that their capacity to service such debt has plummeted.

In addition, government expenditures have tended to rise steeply as a result of the pandemic, exacerbating the problems caused by the increased costs of international debt servicing, particularly in terms of certain local currencies.[9] The healthcare costs involved in addressing the crisis have been significant, especially where preventative measures proved insufficient or failed to gain wide adherence.[10] Expenditures on unemployment have increased as many people struggled with pandemic-driven economic dislocation and turned to the state for assistance.[11] In countries with a significant reliance on global trade for key commodities, food security and related issues emerged as a real concern.[12] The World Bank estimated that 150 million people globally had been placed at risk of extreme poverty as a result of the pandemic, with global extreme poverty expected to rise for the first time in twenty years.[13]

"developing countries will be harder hit by the pandemic than advanced economies").

7 *See* Simeon Djankov & Ugo Panizza, *Developing Economies After COVID-19: An Introduction*, *in* COVID-19 IN DEVELOPING ECONOMIES 8, 8, 9 (2020) (stating that, throughout the COVID-19 pandemic, developing countries are facing "large negative economic shocks" linked, in part, to collapses in their respective tourist industries).

8 *See* Hevia & Neumeyer, *supra* note 6, at 25, 31 (discussing the negative economic impacts of COVID-19 in countries with emerging economies and arguing that a COVID-induced increase in unemployment in countries with advanced economies "will reduce immigrant remittances to their home countries").

9 *See* Djankov & Panizza, *supra* note 7, at 8, 20 (discussing how "local currency bonds issued by emerging market countries have been hit particularly hard by the Covid-19 pandemic" as government expenditures and debts continue to rise).

10 *See* Sarah M. Bartsch et al., *The Potential Health Care Costs and Resource Use Associated with COVID-19 in the United States*, 39 HEALTH AFFS. 927, 934 (2020) (discussing the causes and effects of health care spending in the United States during the COVID-19 pandemic).

11 *See* David Laborde, Will Martin & Rob Vos, *Poverty and Food Insecurity Could Grow Dramatically as COVID-19 Spreads*, IFPRI BLOG: RESEARCH POST (Apr. 16, 2020), https://www.ifpri.org/blog/poverty-and-food-insecurity-could-grow-dramatically-covid-19-spreads (explaining how mandatory lockdowns and business closures caused unemployment to skyrocket around the world during the COVID-19 pandemic).

12 *Id.*

13 Press Release, World Bank, COVID-19 to Add as Many as 150 Million Extreme Poor by 2021 (Oct. 7, 2020), (available at https://www.worldbank.org/en/news/press-release/2020/10/07/covid-19-to-add-as-many-as-150-million-extreme-poor-by-2021#:~:text=The%20COVID%2D19%20pandemic%20is,severity%20of%20the%20economic%20contraction).

Countries rightfully took measures to address this risk, and in some cases have turned to new debt as a cushion, leading to historically high public debt levels.[14] Particularly given low interest rates and increased liquidity, private entities have also partaken in the liquidity buffet, further fueling the massive rise in overall global debt levels.[15] Although such private entity debt does not directly impact sovereign state balance sheets, at least for now, in certain industries and for certain countries such debt may still end up as sovereign obligations if states are faced with the risk of struggling financial, infrastructure, or other systemic sectors down the line. In short, it is entirely understandable that countries and private actors alike have sought to mitigate the effects of the pandemic in any way possible. However, the aggregated impact of these national responses and private decisions may have long-term financial ramifications that make countries more vulnerable to debt distress.

It is important to point out that countries' (and individuals') exposure to pandemic-related challenges has been incredibly uneven, with World Bank President David Malpass warning of an "inequality pandemic" coming on the heels of the public health crisis.[16] States faced the crisis from different starting points, including in terms of basic economic strength and healthcare capacity. Furthermore, countries had different external borrowing costs and levels of reliance on international transactions to begin with.[17] This meant, and continues to mean, that the long-term economic consequences of the COVID-19 pandemic, including the possibility of debt crises, will inevitably vary considerably across countries. Particularly for some, the risk of sovereign debt distress resulting from COVID-19 is real, and in certain situations already present, and it may prove long-lasting.[18]

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14 *See* John Letzing, *Countries Are Piling on Record Amounts of Debt Amid COVID-19. Here's What That Means*, WORLD ECON. FORUM (Nov. 5, 2020), https://www.weforum.org/agenda/2020/11/covid-19-has-countries-borrowing-money-just-about-as-quickly-as-they-can-print-it/.

15 *See* Liz Capo McCormick et al., *The Covid-19 Pandemic Has Added $19.5 Trillion to Global Debt: Here Are Reasons to Be Grateful—and Worried*, BLOOMBERG, https://www.bloomberg.com/graphics/2021-coronavirus-global-debt/ (using data and charts to demonstrate how an increase in private debt that occurred in 2020 contributed to an overall rise in global debt amidst the COVID-19 pandemic).

16 *See* David Malpass, President, World Bank Grp., Speech at Frankfurt School of Finance and Management: Reversing the Inequality Pandemic (Oct. 5, 2020) (transcript available at https://www.worldbank.org/en/news/speech/2020/10/05/reversing-the-inequality-pandemic-speech-by-world-bank-group-president-david-malpass).

17 *See* Hevia & Neumeyer, *supra* note 6, at 25, 31 (discussing the varying financial circumstances facing different countries before and during the COVID-19 pandemic).

18 *See generally* Ben Parker, *The Debt Crisis Looming for Poor Countries*, THE NEW HUMANITARIAN (Oct. 8, 2020), https://www.thenewhumanitarian.org/analysis/2020/10/08/pandemic-debt-crisis-looms ("The World Bank and the IMF list Mozambique as one of eight countries in 'debt distress', while 28 others were considered at 'high risk' as of June.")

II. THE COMPOUNDING PROBLEMS OF LONG-TERM TRENDS AND RESTRUCTURING INSUFFICIENCIES

What kind of financial architecture is in place for dealing with debt crises when they appear and especially when they linger? While I discuss below the shorter-term international emergency measures taken and proposed in response to the pandemic, the background prognosis for longer-running crises is not especially encouraging. In particular, a brief review of the key challenges and recent trends underscores why debt crises and restructuring episodes may prove tenacious, especially once the headlines and emergency funds have moved on.

To begin with, the broad range of creditors, lending instruments, and local and international forums implicated in the sovereign arena has long fragmented this realm of debtor-creditor relations. Although official sector negotiations and private sector restructurings generally follow well-trodden pathways, with principles of comparability of treatment linking the two areas, issues of inequitable creditor outcomes and inconsistent legal interpretations remain. And recent trends have only exacerbated this fragmentation, particularly given the expanded range of creditors and financial instruments now implicated in sovereign debt. Whereas in the 1990s and through the early 2000s, sovereign bonds were by far the dominant private instrument, other forms of commercial lending have become more common, as have loans from hybrid public-private investors such as sovereign wealth funds and state-owned enterprises.[19] This fragmentation is further exacerbated by the steep increase since the Global Financial Crisis in developing countries' private indebtedness, which constitutes another important vulnerability and complication.[20] In addition, there has been a rise in collateralized lending,[21] in which creditors have recourse to specific assets in the event of nonpayment. Those assets thus may be removed from the general pool available to repay creditors in any broader restructuring. Even among bilateral and semi-official creditors, a number of non-Paris Club creditor countries, especially China,[22] have become dominant, particularly in certain regions. This has made it even more challenging to achieve a comprehensive

[19] For an overview of recent trends, *see, e.g.*, International Monetary Fund, *The Evolution of Public Debt Vulnerabilities in Lower Income Economies* 1, 7–17 (2020), https://www.imf.org/en/Publications/Policy-Papers/Issues/2020/02/05/The-Evolution-of-Public-Debt-Vulnerabilities-In-Lower-Income-Economies-49018.

[20] U.N. Conference on Trade and Development, *Report on Financing a Global Green New Deal*, U.N. Doc. UNCTAD/TDR/2019 74–83 (Sept. 25, 2019).

[21] *See, e.g.*, International Monetary Fund, *Collateralized Transactions: Key Considerations for Public Lenders and Borrowers* 1, 4 (2020), https://www.imf.org/en/Publications/Policy-Papers/Issues/2020/02/19/Collateralized-Transactions-Key-Considerations-for-Public-Lenders-and-Borrowers-49063.

[22] For a recent and thorough look at certain aspects of Chinese lending practices, *see* ANNA GELPERN ET AL., HOW CHINA LENDS: A RARE LOOK INTO 100 DEBT CONTRACTS WITH FOREIGN GOVERNMENTS (2021).

restructuring agreement that includes all creditors and is likely to provide sufficient and long-lasting relief consistent with sustainable and equitable development. Overall, these shifts have resulted in a complex context for any post-pandemic debt restructuring to come.

Indeed, and perhaps unsurprisingly, the past debt restructurings that have emerged from this framework tend to be "too little, too late"—providing countries with tardy and insufficient relief that undermines their return to economic health. Sovereign borrower states often delay the decision to restructure due to a range of factors that may include lack of information, electoral concerns, and worries about financial contagion. Creditors' reluctance to face the possibility of losses, and the difficulty of dealing with collective action complications, mean that incentive problems exist on both sides. Creditors and international actors may also express moral hazard concerns in explaining resistance, and certain creditors have asserted that voluntary restructuring conflicts with their obligations to shareholders, investors, or regulators.[23] And, once a decision to restructure is made, insufficiently deep restructurings can result from overly optimistic growth forecasts or concerns about reputation. Although debt restructurings are almost inevitably difficult and politically tense, any perceptions that they are also non-transparent, inequitable, and illegitimate can intensify civil strife and thus make them even more disruptive. Such second-order disruption can exacerbate the distress already generated by the restructuring itself.[24]

Although progress toward more comprehensive and equitable restructuring has been made through both contractual developments and, in some cases, domestic legislative action, such progress remains highly incomplete. The International Capital Markets Association (ICMA) developed a model clause in 2014 that offers a menu of alternative voting procedures, including a "single limb" option under which a single aggregated vote can be taken across all applicable bonds.[25] Although the use of such clauses has become dominant (though not universal) in United Kingdom and New York law bonds, there has been no uptake in other geographical regions.[26] These other regions are

[23] *See, e.g.*, Inst. for Int'l Fin., *supra* note 2.

[24] For more on the challenge and potential benefit of legitimate restructurings, and on how 'legitimacy' might be understood in the sovereign debt context, *see* Odette Lienau, *The Challenge of Legitimacy in Sovereign Debt Restructuring*, 57 HARV. INT'L L. J. 151, 154–55 (2016).

[25] In addition, the model clause offers a clarification that *pari passu* language does not provide holdout creditors with ratable payment, which was at issue in the long-running Argentina litigation under New York Law. Natalie A. Turchi, Note, *Restructuring a Sovereign Bond Pari Passu Work-Around: Can Holdout Creditors Ever Have Equal Treatment?*, 83 FORDHAM L. REV. 2171, 2208 (2015).

[26] International Monetary Fund, *Fourth Progress Report on Inclusion of Enhanced Contractual*

admittedly currently far less significant in terms of bond issuances, but they do include financial centers likely to become more prominent over time. And although the outstanding global debt stock without these enhanced Collective Action Clauses (CACs) should decline over time, it remains substantial.[27]

In addition, part of the risk with contract-based innovations is that they may be undone in subsequent rounds of negotiation. Although the enhanced CACs seem well established, the August 2020 restructuring process for Argentina's bonds included a creditor proposal to leave out the enhanced CACs in the future restructured bonds.[28] In short, although contractually based progress certainly helps, it is hardly foolproof—particularly when coverage is incomplete, and when it is not backed up by complementary initiatives supporting collective action. In terms of statutory efforts, several jurisdictions, most notably the United Kingdom and Belgium, have passed domestic legislation designed to address holdout creditors and protect market infrastructure (such as payment systems) from collection efforts. However, this approach is hardly widespread. Overall, the background architecture available to deal with any post-pandemic sovereign debt crisis that might linger does not look especially promising.

III. THE SHORT-TERM FOCUS OF COVID-19 SOVEREIGN DEBT CRISIS DISCUSSIONS

In light of this unpromising background, what proposals have been taken up at the international level thus far? The pandemic-related stresses that countries face, in terms of increased expenditures and drops in revenue and debt-servicing capacity, are well understood. Unsurprisingly and appropriately, key measures have tended to focus heavily on dealing with the immediate emergency rather than on efforts to prevent and ease the cycle of sovereign debt crises more generally. These international initiatives have relieved some of the immediate

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Provisions in International Sovereign Bond Contracts 1, 4–5 (Mar. 6, 2019), https://www.imf.org/en/Publications/Policy-Papers/Issues/2019/03/21/Fourth-Progress-Report-on-Inclusion-of-Enhanced-Contractual-Provisions-in-International-46671.

[27] *Id.* at 7.

[28] *See, e.g.*, Joseph Stiglitz, Robert Howse & Anne-Marie Slaughter, *Sovereign Creditors Must Not Rewrite the Rules During the Pandemic*, PROJECT SYNDICATE (July 9, 2020), https://www.project-syndicate.org/commentary/argentina-sovereign-debt-rules-creditors-by-joseph-e-stiglitz-et-al-2020-07?barrier=accesspaylog#:~:text=Sovereign%20Creditors%20Must%20Not%20Rewrite%20the%20Rules%20During%20the%20Pandemic,-Jul%209%2C%202020&text=In%20the%20circumstances%20caused%20by,face%20risks%20of%20sovereign%20default (arguing that "[i]f Argentina acceded to the demands of a group of hold-out creditors, it would create a disastrous precedent that would set back by more than a decade the development of the international legal architecture for sovereign debt."); *see* Lee Buchheit, Leland Goss & Brad Setser, *Virtual Panel on Sovereign Debt Restructuring*, YOUTUBE (Sept. 1, 2020), https://www.youtube.com/watch?v=w88s4aJmK_c (discussing CAC use in the recent restructurings of Ecuador and Argentina).

pressure, and others would be helpful if taken up, but they remain insufficient for the long run.

The core crisis response has centered around the G20 Debt Service Suspension Initiative (DSSI), first proposed and adopted in April 2020 and currently extended until December 2021 and expanded through the G20's November 2020 announcement of the Common Framework for Debt Treatments Beyond the DSSI (Common Framework).[29] The basic DSSI approach allowed a range of Lower Income Countries (LICs) to request suspension of debt payments to bilateral official creditors (i.e. creditor countries).[30] This did not restructure debt, but rather temporarily suspended payment, with interest accruing; it also did not include suspension of payments to private creditors or to official multilateral creditors like the IMF and World Bank.[31] The Common Framework allows for restructuring in more extreme situations, but still applies only to the same limited set of countries—which is much narrower than the range of countries likely to face debt distress.[32] It does mandate an IMF Program and requires participating countries to request comparability of treatment from private creditors, although exceptions may be possible.[33]

To further ease the stress on countries, the G20 economies have also recently agreed to a new allocation of IMF Special Drawing Rights (SDRs)—a key IMF mechanism for injecting liquidity into the global economy.[34] This could alleviate some of the pressure for struggling economies, and could also pave the way for the adoption of additional proposals to address countries' longer-run debt burdens, such as voluntary debt buybacks and debt swaps, perhaps through the establishment of new central credit facilities.[35] That said, the current structure of

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[29] G20, *supra* note 1; *see* FITCH RATINGS, THE G20 COMMON FRAMEWORK AND PRIVATE-SECTOR RESTRUCTURING (2021).

[30] Daniel Munevar, *The G20 "Common Framework for Debt Treatments beyond the DSSI": Is It Bound to Fail? Part 1*, EURODAD (Oct. 22, 2020), https://www.eurodad.org/the_g20_common_framework_for_debt_treatments_beyond_the_dssi_is_it_bound_to_fail.

[31] *Id.*

[32] G20, *supra* note 1.

[33] G20, *supra* note 1; *see* FITCH RATINGS, *supra* note 29.

[34] *See Big Economies Agree to Boost IMF Funding, Georgieva Says*, REUTERS (Mar. 3, 2021), https://www.reuters.com/article/africa-imf/update-2-big-economies-agree-to-boost-imf-funding-georgieva-says-idUSL5N2L056W. The last allocation of SDRs happened in 2009 in response to the Global Financial Crisis. For those seeking more general background, the IMF semi-regularly updates an SDR Q&A. *Questions and Answers on Special Drawing Rights*, IMF (Feb. 26, 2021), https://www.imf.org/en/About/FAQ/special-drawing-right.

[35] *See, e.g.*, Patrick Bolton et al., *How to Prevent a Sovereign Debt Disaster: A Relief Plan for Emerging Markets*, FOREIGN AFF. (June 4, 2020), https://www.foreignaffairs.com/articles/world/2020-06-04/how-prevent-sovereign-debt-disaster (recommending that debtor interest payments be routed to a central credit facility in which creditors could receive a stake; also discussed and elaborated in related publications); Matthew

SDR allocations means that they may not be sufficient or sufficiently targeted, given that they are distributed according to member country IMF voting shares and as such could go primarily to wealthier countries absent further steps.[36] Ultimately, although these initiatives deserve support, liquidity injections, temporary debt suspensions, and only tentative efforts at restructuring may not be enough to handle the scale of debt distress that countries face.

The last year has also highlighted the degree to which even urgent circumstances and emergency measures are unable to overcome the longstanding problems of the sovereign debt arena. For one thing, the highly reluctant (or nonexistent) participation of private creditors means that countries will likely receive less restructuring than they need. Toward the beginning of the pandemic, private sector creditors were "called upon" to participate in debt suspensions in line with the DSSI, but declined to respond to the call despite the exigent pandemic situation.[37] The Institute for International Finance (IIF), a key international private creditor industry group, issued an unencouraging statement in May 2020 indicating that any private sector participation should be entirely voluntary, net present value neutral, and arranged on a creditor-by-creditor (or at least debt contract-by-debt contract) basis.[38] A September 2020 letter further emphasized commitment to market solutions, sanctity of contracts, resistance to top-down approaches, and the risks of losing private market access.[39] This stance

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Fisher & Adnan Mazarei, *A Possible IMF Pandemic Support Facility for Emerging-Market Countries*, PETERSON INST. FOR INT'L ECON. 1, 1 (July 2020), https://www.piie.com/sites/default/files/documents/pb20-11.pdf (advocating the establishment of a specialized IMF Pandemic Support Facility); Hamid Rashid & Joseph Stiglitz, *Averting Catastrophic Debt Crisis in Developing Countries*, CTR. ECON. POL'Y RSCH. 1, 3 (2020), https://cepr.org/active/publications/policy_insights/viewpi.php?pino=104 (recommending a multilateral buyback facility that could be managed through the IMF's New Arrangements to Borrow function).

36 *See, e.g.*, Hannah Wanjie Ryder & Gyude Moore, *When Special Drawing Rights Aren't So Special*, PROJECT SYNDICATE (Mar. 1, 2021), https://www.project-syndicate.org/commentary/how-sdrs-can-help-developing-countries-by-hannah-ryder-1-and-gyude-moore-2021-03. In her March 3, 2021 address to the G20, IMF Managing Director Kristalina Georgieva suggested ways to redirect the liquidity more to countries in need, and the ultimate IMF proposal for the allocation will presumably include some of these elements. *Big Economies Agree to Boost IMF Funding, Georgieva Says*, REUTERS (Mar. 3, 2021), https://www.reuters.com/article/africa-imf/update-2-big-economies-agree-to-boost-imf-funding-georgieva-says-idUSL5N2L056W. The final allocation would then have to be approved by major states, most notably the United States, though Treasury Secretary Janet Yellen and other key officials have signaled their support. Andrea Shalal & David Lawder, *Yellen Backs New Allocation of IMF's SDR Currency to Help Poor Nations*, REUTERS (Feb. 25, 2021), https://www.reuters.com/article/us-g20-usa/yellen-backs-new-allocation-of-imfs-sdr-currency-to-help-poor-nations-idUSKBN2AP1U0.

37 Andrea Shalal, *Pandemic Debt Relief Needs Private-Sector Involvement: IIF*, REUTERS (Apr. 9, 2020), https://www.reuters.com/article/us-health-coronavirus-debt-iif/pandemic-debt-relief-needs-private-sector-involvement-iif-idUSKCN21R2L6.

38 Inst. for Int'l Fin., *supra* note 2.

39 Letter from Timothy Adams, IIF President and CEO, to Mohammed Al-Jadaan, Minister of Fin., Kingdom of Saudi Arabia (Sept. 22, 2020) (on file with author).

means that public sector forbearance could indirectly support the ongoing repayment of non-participating private sector loans, and also multilateral loans, in another instance of sovereign debt's well-known free-rider problem, although the Common Framework's comparability of treatment requirement should help.[40] Such a dynamic may make official sector or state-affiliated creditors—particularly those from regions outside the home base of most private investors—more reluctant to participate in relief efforts themselves. Indeed, the relative reticence of non-Paris Club official creditors and semi-official entity affiliates in these discussions is discouraging. These and similar collective action problems could well undermine the ultimate scale of the relief, rendering it far less ameliorative than the current situation warrants.[41]

Setting aside the lukewarm reaction by some key actors to even these modest proposals, they are a start, and other circulating ideas deserve further cultivation and extension. Unfortunately, one drawback of the thinking and writing inspired by any emergency is that the intensive discussion sometimes lasts only as long as the crisis itself. If past emergency experiences are any indication, not all of the worthy measures proposed will be taken up. The international policy and scholarly community may put aside these ideas once the current moment has passed, shelving them indefinitely on working paper websites or online article repositories.

IV. EYES ON THE PRIZE: TOWARD DISAGGREGATED SOVEREIGN BANKRUPTCY

Although the attention paid to immediate crisis alleviation is entirely understandable, it would be short-sighted to focus exclusively on emergency solutions. We can see that the problems of creditor free-riding and insufficient relief remain, even in a situation widely acknowledged to be urgent. Recent circumstances have also highlighted the increasing complexity of the sovereign debt area, relative to previous decades—the multiplicity of debt instruments, the varied institutional forms of investors, the geographical spread of creditors, and the lack of transparency in all the above. The well-known statement that one should "never waste a crisis" applies with full force to the current moment. Before the energy and attention dissipate, it makes sense to set the foundations

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[40] Munevar, *supra* note 30.

[41] For civil society group Eurodad's assessment of the first iteration of the DSSI, *see* IOLANDA FRESNILLO, THE G20 DEBT SERVICE SUSPENSION INITIATIVE: DRAINING OUT THE TITANIC WITH A BUCKET? 1, 2–23 (2020). Eurodad and other civil society groups have held a similarly dim view of the 'Common Framework' extension. *See* Julia Ravenscroft, *Reaction to G20 Common Framework for Debt Treatments: Designed By and For Creditors*, EURODAD (Nov. 13, 2020), https://www.eurodad.org/reaction_to_g20_common_framework_for_debt_treatments_designed_by_and_for_creditors.

to deal more proactively with the next international debt crisis, if not avert it altogether. In particular, the time has come for a commitment to what I call ‘disaggregated sovereign bankruptcy’—a framework by which multiple processes at varying levels simultaneously support or instantiate a shared set of sovereign debt resolution principles and commitments.

One threshold question that might arise here is: why “disaggregated”? Would it not be better to recommit to a more centralized and maximalist restructuring framework, perhaps revitalizing proposals from an earlier era, at least to the extent that the willpower exists for such an endeavor? Or maybe more can be done with market-based solutions, given sufficient global attention? Perhaps. But one of the complications in the sovereign debt arena—as in so many areas of policymaking—is that the key problems, actors, and plausible solutions change over time. Such complexity and fluidity can make proposals that once seemed appropriate appear outdated farther down the line. They also suggest that the occasionally binary nature of discussions in sovereign debt policy-making—market-based advancements *versus* statutory options—should be set aside. Under the circumstances of complexity, fluidity, and uncertainty, which do not appear likely to change in the foreseeable future, it is hard to know which debt instruments or actors will be implicated and thus which approach will be needed at any given moment. In this world, disaggregation should perhaps be understood not as a defect or a compromised second-best but rather as a *virtue*.

If this is the case, what are the ‘multiple processes at varying levels’ and ‘principles and commitments’ that underpin this vision of disaggregated sovereign bankruptcy? To begin with, the basic principles and commitments in this arena should not be very controversial; there is no call to reinvent the wheel here. We need to improve the effectiveness, efficiency, and legitimacy of the sovereign debt market and of debt restructuring events. Supporting these overarching ideas, key sub-goals may include the promotion of preventive restructuring; encouraging comprehensive and equitable creditor participation; supporting realistic debt sustainability analysis; enabling standstills on litigation where appropriate; enhancing the transparency of sovereign debt obligations and restructurings; and improving markers and perceptions of sovereign debt legitimacy, among others.[42] To an important degree, the ‘multiple processes at

[42] These cross-cutting goals, and this document more generally, are in line with the 2015 UNGA Resolution establishing basic principles for sovereign debt restructuring as well as the April 2015 UNCTAD ‘Roadmap’ for Sovereign Debt Workouts. G.A. Res. 69/319, U.N. Doc. A/69/319 (Sept. 10, 2015); U.N. Conference on Trade and Development, Sovereign Debt Workouts: Going Forward 1, 3–5 (Apr. 28, 2015), https://unctad.org/system/files/official-document/gdsddf2015misc1_en.pdf. For more on what the elusive

varying levels' also already exist, at least in part. The tools for instantiating core commitments might include contractual or market-based mechanisms, national or provincial legislation, international legal guidelines and principles, and measures that could be implemented by other international bodies, such as through UN Security Council Resolutions or IMF measures, or eventually perhaps a stand-alone statutory mechanism.

What could still exist more fully is a commitment to knitting these principles and processes together, particularly at a global scale, and to explicitly conceiving of them as complementary and deserving of simultaneous attention and support. Instead of deciding whether to press forward with market-based measures, alterations in domestic law, *or* international guidelines or semi-adjudicatory procedures, it may well be the case that greater progress will be made across all these tracks when they are pursued in parallel. To highlight one example worth remembering, it appears that, until the early 2000s, New York–based market actors were wary of incorporating even the most basic first-generation CACs into New York law-governed bonds, despite their longstanding and widespread use in United Kingdom–law bonds.[43] However, the possibility of a more muscular treaty-based mechanism for dealing with collective action problems, raised with the presentation of the IMF's Sovereign Debt Restructuring Mechanism (SDRM) proposal,[44] corresponded to renewed declarations of fealty to market-based solutions and a recommitment to updated contractual clauses. In this case, a perception of competition may have proved a virtuous instigation rather than a problem.

A more explicit and public shared commitment to 'disaggregated bankruptcy' principles and processes could also have the benefit of making each of these steps appear less solitary and less radical, and thus might make them more likely. Statutorily-based domestic restructuring frameworks, such as for business entities, have become widespread internationally—and, indeed, at least some portion of the investors concerned about a more comprehensive (and less voluntary) restructuring system for sovereign debt nonetheless actively participate in domestic bankruptcy claims trading. Still, it can be difficult to act alone or as a first mover in the international arena. National or sub-national legislatures may not want to go out on a limb in embracing legislative innovations, and practitioners could find comfort in making changes as part of a

concept of 'legitimacy' might mean in the sovereign debt context, *see* Lienau, *supra* note 24, at 151–214.

43 Mark Gugiatti & Anthony Richards, The Use of Collective Action Clauses in New York Law Bonds of Sovereign Borrowers 1, 1 (July 11, 2003) (unpublished manuscript) (on file with author).

44 KRUEGER, *supra* note 4, at 31.

broader community of actors moving in the same direction. Naming and sharing a collective project—even a project spread across multiple levels and processes—could help to spur on and facilitate that progressive movement.

V. COORDINATED DISAGGREGATION: THE BENEFITS OF AN INSTITUTIONAL HOME

Disaggregated sovereign bankruptcy, as I have termed it, could conceivably emerge from the natural patterns of international relations, perhaps catalyzed by a change of outlook and discourse. However, any such emergence would likely be painfully slow, less organized than ideal, and far from guaranteed. Instead, I advocate for establishing an internationally oriented body to recommend, coordinate, and facilitate steady, incremental progress in the architecture for dealing with sovereign debt. Although any such institution obviously could not contend with the immediate financial fallout of the pandemic, it would nonetheless be a valuable outcome of the current moment.

This approach is closest in spirit to past recommendations for a semi-structured international framework—one that aims to improve coordination and strengthen shared principles and practices but still draws from institutional mechanisms already in existence. It corresponds to the possibility of a Global Debt Authority floated by the United Nations Conference on Trade and Development (UNCTAD) in the first half of 2020.[45] This prospect, still under development, echoes other calls for a relatively modest but still internationally relevant forum.[46] To clarify, this coordinating authority would not be a full-blown multilateral organization with adjudicative functions along the lines of the IMF's earlier SDRM proposal.[47] Instead, a more modest institution could be established, perhaps even by a smaller number of states and supporters, to serve as a focal point for ongoing activities designed to improve how the global community collectively deals with debt in the short/emergency term, medium

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[45] Alonso Soto, *New Global Body to Help with Debt Relief*, BLOOMBERG (Apr. 22, 2020), https://www.bloomberg.com/news/articles/2020-04-22/un-to-call-for-new-global-body-to-help-with-debt-relief.

[46] One earlier proposal called for an even less formalized "Sovereign Debt Forum" more focused on research and prevention efforts and on bringing together creditors and debtors at an early stage, structured as a private, incorporated, non-profit organization. RICHARD GITLIN & BRETT HOUSE, A BLUEPRINT FOR A SOVEREIGN DEBT FORUM 7 (2014). An interdisciplinary, academically based research hub of the same name has been recently launched, which could serve as a partner in certain of the GDA's activities. An earlier UNCTAD Roadmap and Guide from 2015 also recommended, in broad strokes, an independent "Debt Workout Institution" along these lines that can be understood as a precursor to the proposal currently under development. The Roadmap suggested that a higher degree of legitimacy would result from a more coordinated multilateral establishment of any such body. U.N. Conference on Trade and Development, *supra* note 42, at 62–63.

[47] KRUEGER, *supra* note 4, at 31.

term, and long term. This authority would work toward operationalizing the substantive goals noted above in particular situations, pushing forward and coordinating developments at the contractual level, domestic legislative level, and international level—either in establishing soft-law guidelines or in the development of more enforceable hard-law multilateral or minilateral legislation.

As part of this larger mission, it could serve as an idea generator and home for orphaned proposals—worthy ideas formulated during a crisis (such as the present one) but then set aside as the international community shifts its focus to other problems in the news cycle. While higher-level attention is directed elsewhere, a dedicated debt institution could establish work streams to combine and then refine proposals in the same topic family—for example around domestic legislation to address collective action problems, support for debt transparency, protection of financial market infrastructure, or emergency standstills. If the authority were working on nationally-based but coordinated emergency standstill legislation, it might formulate and negotiate appropriate and shared triggers for emergency measures. It could formally endorse model laws, establish relationships with those actors that might be in a position to implement them, and have both the substance and the processes at the ready for when the moment is right. Furthermore, as part of its ongoing and incremental work, it could revisit and update past proposals and recommend their further consideration or adoption when appropriate.

As should be clear from the foregoing, part of this body's work would be to identify, cultivate, and coordinate the cross-cutting tools, actors, and networks that might best achieve substantive goals. Such actors and alliances could include national/provincial/supranational legislator groups; international and national associations centered around insolvency professionals and judges; creditor groups such as the IIF and ICMA; bond trustee institutions; market utilities such as payment clearing systems; UNCITRAL and other bodies active in legislative coordination; civil society organizations; and subject matter experts. Many others would, of course, be relevant depending on the goals, tools, and processes under consideration. To be sure, certain of these networks exist to some degree already, through fairly regular academic, policy, and interdisciplinary conferences. Still, they could be further formalized and extended, particularly to include actors and groupings important for progress in these arenas but not already deeply attentive to and involved in sovereign debt matters. Similarly, other international organizations undertake certain of these activities at various times, such as the IMF, the World Bank, and UNCTAD, or even private creditor groups like the IIF. However, they can be limited by their broader missions, attentiveness to other issues, and concomitant political constraints. In some instances, they also may be considered insufficiently neutral due to their financial interests, affiliations, and positions in global economic and political relations.

Indeed, one striking feature of the sovereign debt arena is the absence of a natural institutional home for important debt-relevant proposals. An example of this is the occasional homelessness of initiatives that are widely acknowledged to be valuable, such as a truly global 'sovereign debt registry' to make core information more transparent and widely accessible. The IMF would have been a natural location but declined, seemingly on the basis of political delicacies—and, indeed, its goals going forward could tie even more deeply into changing sensitivities engendered by the shifting balance of global economic power. A private creditor organization would be less than ideal, and indeed the IIF's own debt transparency principles leave many key indicators out.[48] An academic institution is unlikely to carry sufficient weight, and of course the commitment of any academic institution shifts with the make-up and interests of particular faculty members.[49] The Organization for Economic Cooperation and Development (OECD) has launched an initiative to develop a data platform, which could be promising but may prove insufficient, particularly given that it builds upon and does not purport to extend the IIF approach.[50] As such, a purpose-built international debt authority could serve as an informational hub or repository for accessible, comprehensive, and comprehensible sovereign debt-related information. This could include developing and maintaining databases for, for example, debt restructuring agreements, debt sustainability analyses, and of course a central sovereign debt registry, perhaps in conjunction with the OECD. Other valuable initiatives and proposals that may emerge down the line deserve a swifter and more secure positive response.

CONCLUSION

While the ongoing economic crisis caused by the COVID-19 pandemic has

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[48] *See* INST. FOR INT'L FIN., VOLUNTARY PRINCIPLES FOR DEBT TRANSPARENCY 1, 2–5 (2019), https://www.iif.com/Portals/0/Files/Principles%20for%20Debt%20Transparency.pdf. For an overview of shortcomings, *see* U.N. CONF. ON TRADE AND DEV., UNCTAD COMMENT ON IIF DRAFT VOLUNTARY PRINCIPLES FOR DEBT TRANSPARENCY 1, 5–11 (2019) (on file with author).

[49] The Euro-Mediterranean Economists Association has just launched a debt transparency platform advocating for a global sovereign debt registry. It is at an early stage and would likely benefit from broader support and perhaps a more explicit connection to other initiatives. DEBT TRANSPARENCY PLATFORM, https://dtransparency.org/ (last visited Mar. 28, 2021).

[50] *OECD Debt Transparency Initiative*, OECD, https://www.oecd.org/daf/fin/financial-markets/oecd-debt-transparency-initiative.htm (last visited April 24, 2021).

generated important proposals for addressing countries' financial distress, it has also made even more apparent the existing gaps in the international financial architecture. In addition, it has highlighted the extent to which the international community pays closest attention to the sovereign debt infrastructure in situations of crisis—well past the ideal time to develop and implement necessary improvements. In this Essay, I have suggested that, as part of the discussion of how to deal with the pandemic's financial fallout, we should explicitly adopt what might be called disaggregated sovereign bankruptcy. Such an approach would not favor one mechanism over another and indeed would explicitly embrace the potentially complementary rather than competitive nature of progress along different tracks. It makes particular sense given that a single adjudicative mechanism remains politically unattainable and may not even be appropriate given the complexity of the current international debt market.

To support disaggregated bankruptcy, the international community should ideally establish a corollary institution. A global authority along these lines could act as a base and catalyst for developing and implementing incremental improvements to the sovereign debt arena across a range of levels and mechanisms, guided by a shared set of principles and commitments. Ideally, debtors, creditors, and the international community writ large would eventually have a regularly updated menu of prepared options ready to be put into action whenever needed—even as we hope that the time of need never comes.