Volume 62, Number 1, Winter 2021

Distrust, Disorder, and the New Governance of Sovereign Debt

Stephen Kim Park* & Tim R Samples**

The unique characteristics of sovereign debt finance provide fertile ground for opportunistic behavior and intractable disputes among states and their creditors. Lacking reliable contractual enforcement mechanisms and formal bankruptcy procedures, the sovereign debt restructuring process is hampered by fragmentation, costly standoffs, and unpredictable outcomes. The result is a non-system of ad hoc, decentralized negotiations and litigation that some fear is perpetually at risk of falling apart. To address these concerns, recent years have seen renewed efforts to fix sovereign debt through soft law, public-private collaboration, and informal governance mechanisms, which this Article collectively refers to as sovereign debt governance. This Article focuses on one of the most prominent proposed reforms in sovereign debt governance: the use of creditor committees to facilitate engagement between a sovereign debtor and its private external creditors. Notwithstanding the uniqueness of sovereign debt in international law and financial regulation, we explain how the debtor-creditor relationship reflects a fundamental governance challenge amidst individual distrust and collective disorder. This challenge suggests that the sovereign debt restructuring process can be improved by reforming the procedural rules and institutional frameworks that govern debtor-creditor engagement. To assess this proposition, we examine the use of creditor committees in the current era of sovereign debt, focusing on factors that influence the conduct of debtors and their creditors vis-à-vis each other. Drawing on our observations, we consider the potential value and limitations of creditor committees in the context of sovereign debt governance.

Introduction

The specter of disorder fundamentally defines the international legal system. According to traditional views of international law, sovereign states enter into international agreements and create international institutions to govern their interactions with each other.[1] By doing so, they create conditions for mutually beneficial cooperation by deterring violations of their agreements.[2] The need to formalize and institutionalize cooperation among

* Associate Professor of Business Law and Satell Fellow in Corporate Social Responsibility, University of Connecticut.

** Associate Professor of Legal Studies, University of Georgia.

Our thanks to Charles Blitzer, Lee Buchheit, Anna Gelpern, Julian Schumacher, and anonymous reviewers, as well as colleagues, friends, and family, for their comments and encouragement. Prior versions of this article were presented at the Interdisciplinary Sovereign Debt Research and Management Conference at Georgetown University Law Center and the Graduate Institute of International and Development Studies in Geneva, the University of Pennsylvania Law School, the Annual Conference of the Academy of Legal Studies in Business, and the Annual Conference of the Southeastern Academy of Legal Studies in Business. All errors and omissions are our own.

1. *See* Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 Yale J. Int'l L. 335, 354 (1989).

2. Emilie M. Hafner-Burton, David G. Victor & Yonatan Lupu, *Political Science Research on International Law: The State of the Field*, 106 Am. J. Int'l L. 47, 62–63 (2012).

autonomous, self-interested state actors drives international regulation in a range of functional areas, including trade, the environment, human rights, and so on.[3] However, the global legal environment is not only confined to bargains between states. International law regulates the conduct of individuals and other nonstate actors in increasingly significant ways.[4] Multinational corporations and other private enterprises exert a particularly strong influence on transnational legal rules and norms, even themselves creating international law.[5]

Within the broad panorama of international law today, the esoteric but enormously important world of sovereign debt finance stands alone in key respects. There is no multilateral institution or treaty system to monitor or enforce commitments between sovereign debtors and their external creditors.[6] Instead, ad hoc, market-based arrangements are the norm. Today, the global sovereign debt market primarily consists of bonds sold in the global capital markets, which are typically re-financed through negotiations between sovereign debtors and their creditors.[7] Reputational sanctions generally hold sovereigns to account with respect to their existing debts,[8] and various contractual innovations introduced in the past couple decades enable sovereigns to restructure their debt in a relatively efficient manner.[9]

However, ineffective coordination and enforcement mechanisms have enabled rogue behavior by opportunistic holdout creditors.[10] Recalcitrant sovereigns have refused to negotiate with creditors, instead making take-it-or-leave-it offers.[11] Judicial unpredictability resulting from novel interpretations of the *pari passu* clause in bond contracts[12] and invocations of investor-state dispute settlement against sovereigns has further clouded legal enforcement.[13] This lack of predictability has arguably made sovereign debt dis-

3. *See* Jeffrey L. Dunoff, *International Law in Perplexing Times*, 25 Md. J. Int'l L. 11, 16–17 (2010) (describing the proliferation and growth of international rules and institutions following World War II).

4. *See generally* Jacob Katz Cogan, *The Regulatory Turn in International Law*, 52 Harv. Int'l L.J. 321 (2011) (examining how international law establishes international duties on individuals and provides for their international enforcement).

5. *See* Julian Arato, *Corporations as Lawmakers*, 56 Harv. Int'l L.J. 229, 244–47 (2015).

6. Steven L. Schwarcz, *Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach*, 85 Cornell L. Rev. 956, 958 (2000).

7. *See* Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 Am. J. Int'l L. 711, 712 (2007).

8. *See generally* Michael Tomz, Reputation and International Cooperation: Sovereign Debt Across Three Centuries (2007).

9. Stephen J. Choi, Mitu Gulati & Eric A. Posner, *The Evolution of Contractual Terms in Sovereign Bonds*, 4 J. Legal Analysis 131, 135 (2012).

10. *See* Stephen Kim Park & Tim R Samples, *Towards Sovereign Equity*, 21 Stan. J.L. Bus. & Fin. 240, 249–55 (2016).

11. *See* Arturo C. Porzecanski, *Dealing with Sovereign Debt: Trends and Implications*, *in* Sovereign Debt at the Crossroads: Challenges and Proposals for Resolving the Third World Debt Crisis 267, 280 (Chris Jochnick & Fraser A. Preston eds., 2006).

12. *See* Lee C. Buchheit & Jeremiah Pam, *The Pari Passu Clause in Sovereign Debt Instruments*, 53 Emory L.J. 869, 877–91 (2004) (tracing the emergence of *pari passu* litigation in sovereign debt).

13. *See* Stephen Kim Park & Tim R Samples, *Tribunalizing Sovereign Debt: Argentina's Experience with Investor-State Dispute Settlement*, 50 Vand. J. Transnat'l L. 1033, 1038–39, 1059–60 (2017).

putes both likelier to occur and more costly to resolve.[14] Protracted debtor-creditor standoffs and costly debt crises—such as Argentina and Greece in the past couple decades alone—have spurred calls for new approaches to regulating sovereign debt finance.[15]

This Article argues that international law offers useful lessons for addressing the unique challenges of sovereign debt. The past several decades have seen the emergence of new forms of international financial regulation based on cross-border coordination between government regulators and extensive use of soft law.[16] Pockets of the global financial system have gone a step further by applying a New Governance model of regulation.[17] New Governance incorporates a decentralized range of public and private actors and softer forms of governmental regulation to facilitate or incentivize certain behavior rather than directly mandating it.[18] Sovereign debt has recently embraced New Governance through new initiatives that depart from reform measures based on institutionalized public regulation (i.e., a statutory quasi-insolvency regime, such as the International Monetary Fund's ("IMF") proposed Sovereign Debt Restructuring Mechanism ("SDRM")) and contract-based private law enforcement.[19] These New Governance-inspired approaches constitute a "third way" to sovereign debt restructuring, which this Article collectively refers to as "sovereign debt governance."[20]

But is sovereign debt governance actually effective as a means to address collective action problems in sovereign debt? More precisely, will these New Governance-inspired frameworks enhance the predictability of the restructuring process ex ante and reduce the costs of a restructuring ex post? To address this question, this Article focuses on creditor committees, a key element of sovereign debt governance. Creditor committees consist of a representative group of creditors who are designated to negotiate the terms of a

---

14. United Nations Conference on Trade and Development, Sovereign Debt Workouts: Going Forward. Roadmap and Guide 3–4, 12–13 (2015), https://unctad.org/en/PublicationsLibrary/gdsddf2015misc1_en.pdf [https://perma.cc/SDW5-Y3HA] [hereinafter UNCTAD Roadmap and Guide].

15. *See* Anna Gelpern, *Sovereign Debt: Now What?*, 41 Yale J. Int'l L. Online 45, 69 (2016) (characterizing restructurings by Argentina, Greece, and Ukraine as "shocks"); *see also* Domenico Lombardi & Skylar Brooks, *Sovereign Debt in Turbulent Times* (Ctr. Int'l Governance Innovation, July 23, 2014), https://www.cigionline.org/articles/sovereign-debt-turbulent-times [https://perma.cc/2TK4-BHYM].

16. *See* Chris Brummer, Soft Law and the Global Financial System: Rule Making in the 21st Century 65–67 (2d ed. 2015).

17. Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 Vand. J. Transnat'l L. 501, 518–19 (2009) (identifying the Equator Principles and the UN-sponsored Principles for Responsible Investment as examples); *see infra* Part I.B.1 (defining New Governance and describing applications thereto in international economic law).

18. Abbott & Snidal, *supra* note 17, at 509; *see also* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 Minn. L. Rev. 342 (2004).

19. *See infra* Part I.C.

20. Anna Gelpern, *Hard, Soft, and Embedded: Implementing Principles on Promoting Responsible Sovereign Lending and Borrowing*, *in* Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing 347, 360–64 (Carlos Espósito et al. eds., 2013).

debt restructuring with the sovereign debtor.[21] Committees establish procedures through which key creditors can communicate and coordinate with each other and collectively agree to a restructuring plan.[22] Certain creditor committees, such as the London Club, figured prominently in efforts to facilitate engagement in sovereign debt restructurings when creditors were almost exclusively commercial banks and debt instruments were primarily syndicated bank loans.[23] Since the late 1990s, however, the use of creditor committees in sovereign debt restructurings has waned, reflecting the greater autonomy and fragmentation of the global sovereign debt market.[24]

This Article analyzes creditor committees in the context of sovereign debt governance from three interrelated perspectives: institutional, empirical, and prescriptive. First, we describe New Governance-inspired frameworks advanced in recent years by the United Nations Conference on Trade and Development ("UNCTAD"),[25] the IMF,[26] and the Institute of International Finance ("IIF"), a leading global industry association.[27] Building on our prior research,[28] we show how these frameworks conceptualize debtor-creditor engagement in different ways as a means to incentivize, compel, or constrain the behavior of sovereign debtors and their external private creditors.

Second, this Article empirically examines sovereign debt restructurings based on hand-collected data and secondary sources specifically gathered and organized for this Article.[29] We examine the formation and operation of creditor committees in eighteen sovereign debt restructurings since 1999.[30] Our analysis focuses on the nature and outcomes of the exchanges: the trajectory of creditor behaviors over time, creditor structures and representation, and the procedural dimensions of negotiation and engagement between debtors and creditors. We consider independent variables—such as creditor structure and debtor-creditor engagement—alongside critical restructuring

21. *See* Lee C. Buchheit, *Use of Creditor Committees in Sovereign Debt Workouts*, 10 Bus. L. Int'l 205, 206–09 (2009).

22. *See id.* at 209–10.

23. *See* Lex Rieffel, Restructuring Sovereign Debt: The Case for Ad Hoc Machinery 95–131 (2003) (providing a detailed account of the London Club); *see also infra* Part II.B.2 (discussing the role of committees in the London Club era).

24. *See* Stephen Kim Park & Tim R Samples, *Puerto Rico's Debt Dilemma and Pathways Toward Sovereign Solvency*, 54 Am. Bus. L.J. 9, 43–48 (2017); *see also infra* Parts II.B.2 and II.B.3 (discussing changes in creditor composition that accompanied the shift from commercial lending to bond financing).

25. *See* United Nations Conference on Trade and Dev., Principles on Promoting Responsible Sovereign Lending and Borrowing 3 (2012), https://unctadxiii.org/en/SessionDocument/gdsddf2012misc1_en.pdf [https://perma.cc/W728-N8DE] [hereinafter UNCTAD Principles].

26. *See* IMF, Sovereign Debt Restructuring—Recent Developments and Implications for the Fund's Legal and Policy Framework 37–38 (2013), https://www.imf.org/external/np/pp/eng/2013/042613.pdf [https://perma.cc/BT9V-2VUY] [hereinafter IMF 2013 Staff Paper].

27. *See* Inst. for Int'l Fin., Principles for Stable Capital Flows and Fair Debt Restructuring, Report on Implementation by the Principles Consultative Group, Annex I: The Principles for Stable Capital Flows and Fair Debt Restructuring (Oct. 2015), https://www.iif.com/portals/0/Files/private/pcg_report_2015-vf.pdf [https://perma.cc/E4A7-NS4Q] [hereinafter IIF Principles].

28. *See* Park & Samples, *supra* note 24, at 43–48.

29. *See infra* Part III.A.1 (explaining the scope of the study).

30. *See infra* Part III.A.2 (explaining key variables of the study).

outcomes, including creditor participation in the exchange and the occurrence of litigation.[31]

Third, drawing on our institutional and empirical analysis, this Article identifies the conditions under which debtor-creditor engagement may be facilitated. In doing so, we scrutinize the objectives and effectiveness of New Governance within the unique legal, political, and economic environments of sovereign debt.

This Article proceeds as follows. Part I describes sovereign debt's unique collective action problems in the context of the New Governance-based approaches that have recently emerged to address them. Part II examines the role of creditor committees in debt restructurings, contrasting their use in sovereign and non-sovereign contexts. Part III presents an empirical analysis of creditor committees to show how they have addressed coordination problems in the current era of sovereign debt restructurings. Drawing on the foregoing analysis, Part IV critically assesses New Governance-based strategies in sovereign debt.

I. Persistent Disorder and the Emergence of Sovereign Debt Governance

The emergence of sovereign debt governance reflects the convergence of two phenomena over the past decade. First, there has been growing concern about the negative consequences of costly, protracted sovereign debt crises arising from structural deficiencies in the restructuring process. Second, there has been growing interest in applying New Governance-based approaches to regulation to the global sovereign debt market.

A. *Collective Action Problems in Sovereign Debt*

1. *The Uniqueness of Sovereign Debt*

Sovereign debt is fundamentally important to the international legal system due to both its size and its unique legal characteristics. The total amount of outstanding sovereign debt in 2016 was over sixty trillion dollars—an amount equivalent to eighty percent of global GDP and a four-fold increase in percentage terms since 1980.[32] Governments that borrow externally (that is, from foreign lenders) can increase their countries' access to resources that might otherwise not be available domestically.[33] However, countries are prone to borrow more than what is socially optimal and may be

31. *See infra* Part III.B–D (analyzing the selected exchanges).

32. Statistics measure data from 1980 to 2016. Jerome E. Roos, Why Not Default?: The Political Economy of Sovereign Debt 2–3 (2019).

33. *See* Yuefen Li & Ugo Panizza, *The Economic Rationale for the UNCTAD Principles*, *in* Sovereign Financing and International Law, *supra* note 20, at 15, 20.

vulnerable to external shocks, such as a financial crisis, an economic recession, or a natural disaster.[34] The COVID-19 pandemic underscores this point, as its economic effects are potentially devastating for vulnerable developing and emerging market countries.[35] As a result, the possibility of sovereign debt gone bad casts a long shadow, affecting the government's ability to ensure the well-being of its citizens[36] and the financial standing of the country's government and even its companies for generations.[37]

Sovereign debt is distinguished from corporate debt by its limited legal enforceability. Sovereigns commonly waive their immunity from suit and, even if they do not, are still subject to jurisdiction in the United States under the commercial activity exception of the Foreign Sovereign Immunities Act ("FSIA").[38] However, sovereigns have a variety of strategies at their disposal to avoid litigation, and investors tend to be skeptical about their ability to enforce judgments.[39] Sovereigns are not subject to national bankruptcy laws or courts,[40] and there is no global court or regulator to monitor and enforce restructurings.[41] Neither is sovereign debt directly subject to international financial regulation, despite their shared basis in consensus and

34. *See id.* at 20–23 (noting the origins of debt crises); *see also* Lee C. Buchheit et al., Revisiting Sovereign Bankruptcy 8–9 (2013), https://www.brookings.edu/~/media/research/files/reports/2013/10/sovereign-bankruptcy/ciepr_2013_revisitingsovereignbankruptcyreport.pdf [https://perma.cc/7VEP-4UKC] (explaining how and why sovereign overborrowing may occur).

35. *See* Patrick Bolton, Mitu Gulati, & Ugo Panizza, *Legal Air Cover*, VOX-EU (Oct. 13, 2020), https://voxeu.org/article/legal-air-cover [https://perma.cc/EY8C-AZXP]; Patrick Bolton et al., *Born Out of Necessity: A Debt Standstill for COVID-19* (CEPR Policy Insight No. 103, 2020), https://cepr.org/active/publications/policy_insights/viewpi.php?pino=103 [https://perma.cc/DV2G-C6U9].

36. *See* Cephas Lumina, *Sovereign Debt and Human Rights: The United Nations Approach*, *in* Making Sovereign Financing and Human Rights Work 251, 252–53 (Juan Pablo Bohoslavsky & Jernej Letnar Cernic eds., 2014) (citing numerous studies about the detrimental social impact of diverting government resources to external debt service).

37. *See* Lee C. Buchheit & G. Mitu Gulati, *Responsible Sovereign Lending and Borrowing*, 73 Law & Contemp. Probs. 63, 80–81 (2010) (observing that "old sins cast long shadows" for successive governments); *see also* Mark L. J. Wright, *Sovereign Debt Restructuring: Problems and Prospects*, 2 Harv. Bus. L. Rev. 153, 158–59 (2012) (noting costs borne by countries due to diminished access to global financial markets).

38. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified in various sections of 28 U.S.C.); Carmine D. Boccuzzi, Jr. et al., *Defences*, *in* Sovereign Debt Management 103, 106 (Rosa M. Lastra & Lee Buchheit eds., 2014); *see* Stephen Kim Park, *Guarding the Guardians: The Case for Regulating State-Owned Financial Entities in Global Finance*, 16 U. Pa. J. Bus. L. 739, 766–67 (2014) (defining the commercial activity exception).

39. *See* W. Mark C. Weidemaier, *Sovereign Immunity and Sovereign Debt*, 2014 U. Ill. L. Rev. 67, 89–101, 106–07 (2014); *see also* Park & Samples, *supra* note 13, at 1038 (noting the ability of sovereigns to assert immunity against attachment of assets or contract out of debt liability). Litigation may nonetheless serve other purposes for creditors in sovereign debt disputes, such as serving as a check on opportunistic defaults by sovereigns and enabling creditors to shape the norms of sovereign conduct. *See* Jill E. Fisch & Caroline M. Gentile, *Vultures or Vanguards?: The Role of Litigation in Sovereign Debt Restructuring*, 53 Emory L.J. 1043, 1101–05 (2004); *see also* Sadie Blanchard, *Courts as Information Intermediaries: A Case Study of Sovereign Debt Disputes*, 2018 BYU L. Rev. 497, 545–49 (2018).

40. Buchheit & Gulati, *supra* note 37, at 72.

41. Park & Samples, *supra* note 13, at 1037.

coordination.[42] A lack of consensus regarding priority of payment to creditors heightens the risk of disputes among creditors.[43] Despite the absence of traditional legal enforcement, sovereigns routinely re-pay their debts.[44] The desire of sovereigns to retain their reputation as borrowers—and conversely the fear of being branded untrustworthy and consequently shunned by lenders—is the dominant explanation.[45] However, reputation as an enforcement mechanism is flawed due to the inconsistent capacity and willingness of creditors to provide market-based discipline.[46]

The current era of sovereign debt is marked by the movement away from bank loans and toward bond-based financing.[47] Since the early 1990s, sovereign debt has predominantly consisted of bonds sold to other governments (that is, official creditors) and external private creditors (for example, financial institutions and individuals).[48] Debtor-creditor engagement was fundamentally altered by this shift. A market predominantly consisting of loans extended by a small number of commercial bank lenders was supplanted by liquid secondary bond markets featuring a fragmented, heterogeneous creditor base.[49] The conflicting and competing interests of bondholders have altered the incentives that shape their behavior in the event of a sovereign default.[50] Typically, a default is followed by a negotiated exchange between a sovereign debtor and its creditors of outstanding bonds for new bonds through a restructuring.[51] Coordination is more difficult and collective action problems are more complex with bondholders than with bank lenders.[52]

42. *See* Park & Samples, *supra* note 10, at 277–78; *see also* David Zaring, The Globalized Governance of Finance 128 (2020) (noting the similarities between international financial regulation and international law).

43. *See* Anna Gelpern, *Building a Better Seating Chart for Sovereign Restructurings*, 53 Emory L.J. 1115, 1120–21 (2004).

44. *See* Roos, *supra* note 32, at 21–23.

45. William W. Bratton & G. Mitu Gulati, *Sovereign Debt Reform and the Best Interest of Creditors*, 57 Vand. L. Rev. 1, 14–15 (2004) (describing the reputation theory of sovereign debt).

46. *See* Blanchard, *supra* note 39, at 519–21 (noting in particular the inability of creditors to monitor the conduct of sovereign borrowers).

47. Anna Gelpern & Mitu Gulati, *Public Symbol in Private Contract: A Case Study*, 84 Wash. U. L. Rev. 1627, 1632–33 (2006); *see also infra* Part II.B.3 (describing the current era of sovereign debt).

48. *See* Gelpern & Gulati *supra* note 47, at 1632–33; *see also* W. Mark C. Weidemaier, *Remarks Made Before the United Nations General Assembly Ad-Hoc Committee on Sovereign Debt Restructuring* 2 (Univ. of N.C. Legal Studies Research Series, Paper No. 2563124, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2563124 [https://perma.cc/ZK3D-7GYX] (reviewing reform efforts in prior eras of sovereign debt finance).

49. Ross P. Buckley, *The Facilitation of the Brady Plan: Emerging Markets Debt Trading From 1989 to 1993*, 21 Fordham Int'l L.J. 1802, 1840–42 (1997) (describing the emergence of secondary bond markets following the Brady Plan). For a discussion of the Brady Plan's impact on sovereign debt markets, see *infra* Part II.B.3.

50. *See* Park & Samples, *supra* note 10, at 251 (noting the divergent economic interests of different types of bondholders); *see also* Fisch & Gentile, *supra* note 39, at 1074–79 (linking the diversity in sovereign bond restructurings to the diversity among investors). A sovereign default occurs when the government is unable or unwilling to re-pay its debt obligations. *See* Roos, *supra* note 32, at 43–45.

51. *See* Roos, *supra* note 32, at 46–48.

52. *See* Sean Hagan, *Designing a Legal Framework to Restructure Sovereign Debt*, 36 Geo. J. Int'l L. 299, 310 (2005) (observing that the atomization and dispersion of the creditors have aggravated creditor

Creditor committees, which figured prominently in prior eras of sovereign debt, have played a limited role in contemporary bond exchanges.[53] Creditors that refuse to participate in sovereign debt restructurings—"holdout creditors," in the parlance of sovereign debt—in hopes of receiving better payment terms play an outsized role in recent sovereign debt disputes.[54]

To address collective action problems in the modern bondholder era, legal reform efforts have broadly embraced two competing paradigms: the implementation of a statutory regime and the incorporation of contractual terms.[55] In the former category are proposals for quasi-insolvency mechanisms—most prominently, the SDRM proposed by then IMF Deputy Managing Director Anne Krueger in November 2001.[56] The failure of the SDRM to gain political traction shifted the focus to contractual alternatives, primarily through the incorporation of collective action clauses ("CACs") with majority modification provisions.[57] CACs are contractual provisions in sovereign bond contracts that permit a specified number of bondholders to agree to a modification of payment terms that is binding on all bondholders.[58] By eliminating the need to obtain unanimous bondholder consent, CACs with supermajority requirements facilitate sovereign debt restructurings by deterring free riding by opportunistic holdout creditors that seek compensation for not participating.[59] Essentially, CACs act as a de facto cramdown mechanism by enabling sovereign debtors to bind the terms of a restructuring on dissenting *qua* holdout creditors.[60] In the absence of a bona

coordination problems); *see also* Yesha Yadav, *Empty Creditors and Sovereign Debt: What Now?*, 9 Cap. Mkts. L.J. 103, 113–14 (2014) (describing the perverse incentives of sovereign creditors that hold credit default swaps).

53. *See infra* Part II.B.3.

54. *See* John A.E. Pottow, *Mitigating the Problem of Vulture Holdout: International Certification Boards for Sovereign-Debt Restructurings*, 49 Tex. Int'l L.J. 221, 223 (2014) (characterizing the holdout problem as "alive and thriving").

55. *See* Park & Samples, *supra* note 13, at 1039.

56. Anne Krueger, First Deputy Managing Dir., IMF, A New Approach to Sovereign Debt Restructuring, Address at National Economists' Club Annual Members' Dinner (Nov. 26, 2001) (transcript available at https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp112601 [https://perma.cc/E2Y6-ZNRF]); *see also* Anne O. Krueger & Sean Hagan, *Sovereign Workouts: An IMF Perspective*, 6 Chi. J. Int'l L. 203 (2005) (advocating for the SDRM).

57. *See* Gelpern & Gulati, *supra* note 47, at 1649–60 (tracing the widespread adoption of CACs to the rejection of the SDRM).

58. Lee C. Buchheit & Elena L. Daly, *Minimizing Holdout Creditors: Sticks*, *in* Sovereign Debt Management, *supra* note 38, at 21. CACs have become standard in sovereign bonds. CACs increasingly include aggregation clauses, which enable a sovereign borrower to amend payment terms across multiple series of bonds. Choi et al., *supra* note 9, at 141. Another contractual strategy, exit consents enable a sovereign borrower to implement modifications to nonpayment terms of the target bonds (e.g., eliminating the obligation to have the bonds listed on a recognized stock exchange, thereby reducing their value) as a condition to participating in an exchange offer to entice participation. *See* Lee C. Buchheit & G. Mitu Gulati, *Exit Consents in Sovereign Bond Exchanges*, 48 UCLA L. Rev. 59, 65–66 (2000).

59. Bratton & Gulati, *supra* note 45, at 21.

60. Park & Samples, *supra* note 10, at 280; *see also* Bratton & Gulati, *supra* note 45, at 36 (approvingly noting the absence of a cram-down mechanism in the SDRM and contrasting it to Chapters 9 and 11 of the U.S. federal bankruptcy code).

fide insolvency regime, CACs have become a powerful tool in the global sovereign debt market.[61]

2. *The Ongoing Search for Collective Action Solutions*

Notwithstanding the widespread implementation of CACs, the shortcomings of the current sovereign debt restructuring regime have generated growing concern.[62] Sovereign debt exchanges have become less cooperative and more prone to disputes.[63] Recent restructurings, such as those of Argentina and Greece—though relatively few in number in historical terms—have been particularly lengthy, contentious, and costly.[64] Institutional constraints shaping debtor and creditor behavior have continued to weaken in the face of bondholder atomization.[65] As a result, sovereign debt restructurings are increasingly susceptible to rogue behavior.[66] Collective action problems between sovereigns and their creditors lead to efficiency losses and disparate treatment of different creditors.[67] Further, the current system has attracted newfound critiques of its legitimacy.[68]

---

61. Contract reforms—in particular, enhanced CACs—have proven influential in new sovereign debt issuances. *See* IMF, Fourth Progress Report on the Inclusion of Enhanced Contractual Provisions in International Sovereign Bond Contracts 3 (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 [https://perma.cc/DF5W-56FR] (reporting that enhanced CACs quickly became "market standard" in sovereign debt issuances); *see also* Antonia E. Stolper & Sean Dougherty, *Collective Action Clauses: How the Argentina Litigation Changed the Sovereign Debt Markets*, 12 Cap. Mkts. L.J. 239, 243 (2017) (describing Argentina's debt saga as a catalyst for contract reform).

62. *See, e.g.*, Anna Gelpern, *Contract Hope and Sovereign Redemption*, 8 Cap. Mkts. L.J. 132, 147 (2013) (noting the costs resulting from "interpretation uncertainty, institutional barriers to contract change, and a well-resourced constituency with every incentive to take advantage of the combination").

63. *See* Julian Schumacher, Christoph Trebesch & Henrik Enderlein, *Sovereign Defaults in Court* 18 (European Cent. Bank Working Paper Series, Paper No. 2135, 2018) (illustrating the substantial increase in creditor litigation since the 1980s); *see also infra* Part III.D (discussing debtor-creditor cooperation in the current era of sovereign debt restructuring).

64. *See* Gelpern, *supra* note 15, at 46, 69–81 (discussing "deadweight losses" in lengthy debt crises and systemic problems in recent restructurings); *see also* Joseph Cotterill, *Sovereign Pari Passu and the Litigators of the Lost Cause*, 9 Cap. Mkts. L.J. 18, 21–23 (2014) (describing the phenomenon of "litigotiation" that features alternating phases of negotiation and litigation).

65. Gelpern, *supra* note 15, at 69 ("The London Club was history; the Paris Club at risk of becoming a side-show. The IMF was 'just one creditor' among many—and far from the biggest—anchoring a regime where other creditors could not be counted upon to cooperate.").

66. *See* Park & Samples, *supra* note 10, at 249–55 (describing governance challenges amid greater fragmentation, rogue behavior, and conflicting incentives in the global sovereign debt market); *see also* Martin Guzman & Joseph E. Stiglitz, *A Soft Law Mechanism for Sovereign Debt Restructuring Based on the UN Principles*, *in* Sovereign Debt and Human Rights 446, 447 (Ilias Bantekas & Cephas Lumina eds., 2018) (noting the "perverse incentives for legal arbitrage").

67. James A. Haley, *Sovereign Debt Restructuring: Bargaining for Resolution* 7–9 (Ctr. for Int'l Governance Innovation, CIGI Paper No. 124, 2017).

68. *See* Odette Lienau, *The Challenge of Legitimacy in Sovereign Debt Restructuring*, 57 Harv. Int'l L.J. 151, 189–90 (2016) (noting the lack of broad representation and variation in procedures in the restructuring process and insufficient attention to fair treatment of creditors and stakeholders); *see also* Armin von Bogdandy & Matthias Goldmann, *Sovereign Debt Restructurings as Exercises of International Public Authority: Towards a Decentralized Sovereign Insolvency Law*, *in* Sovereign Financing and International Law, *supra* note 20, at 39, 58–60 (addressing the issue of inclusive decision-making in the restructuring process).

Debtor-creditor engagement can be contractually facilitated by engagement clauses that obligate the parties to negotiate in good faith through a creditor committee. Consistent with the private law approach embodied by CACs, the International Capital Market Association ("ICMA") published model provisions for sovereign bond contracts that contractually obligate debtor-creditor engagement through creditor committees.[69] Engagement clauses reduce the flexibility of sovereigns to determine—either unilaterally or in conjunction with creditors—when, how, with whom, and on what terms to engage.[70] For this reason, relatively few sovereigns have included engagement clauses in sovereign bond issuances.[71]

A belief that the current sovereign debt system—burdened by decaying norms of conduct and disintegrating governance arrangements—is dangerously unstable has prompted a tectonic shift in sovereign debt over the past five years.[72] Marked by this shift, sovereign debt governance rests on two conceptual foundations: (1) the application of New Governance principles and (2) the promotion of debtor-creditor engagement. Seeking to improve rather than supplant existing contractual practices, the current era of sovereign debt is entering the age of sovereign debt governance, with contested objectives and uncertain consequences. We explore the foundations of sovereign debt governance in the discussion that follows.

B. *Sovereign Debt and New Governance*

1. *New Governance in International Law*

At its core, New Governance is defined as a counterpoint to state-centric, command-and-control regulation.[73] The breadth of theories and practices under the umbrella of New Governance renders elusive any precise and uni-

---

69. Int'l Capital Mkts. Ass'n, ICMA New York and English Law Standard CACs, *Pari Passu* and Creditor Engagement Provisions (2015), https://www.icmagroup.org/assets/documents/Resources/ICMA-Standard-CACs-Pari-Passu-and-Creditor-Engagement-Provisions—-May-2015.pdf [https://perma.cc/A73P-T3VV] [hereinafter ICMA Model Provisions]. Under the ICMA Model Provisions, holders of at least twenty-five percent of the outstanding principal amount of bonds have the right, but not the obligation, to establish a creditor committee. *Id.*

70. *See* Benu Schneider, *Sovereign Debt Restructuring: Further Improvements in the Market-Based Approach*, 13 Cap. Mkts. L.J. 294, 305–06 (2018); *see also* Buchheit, *supra* note 21, at 210–11 (noting the difficulty of changing the terms, process, or membership of a creditor committee or disbanding it once it has been recognized). In addition, the question of committee costs has deterred sovereigns from adopting engagement clauses. The ICMA Model Provisions provide that the issuer shall pay these costs. *See* Yannis Manuelides, *Debtor–Creditor Engagement in Sovereign Restructurings*, 13 Cap. Mkts. L.J. 427, 439 (2018).

71. Clifford Chance, Briefing Note: Creditor Engagement in Sovereign Debt Restructuring 2–3 (2016), https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2016/04/creditor-engagement-in-sovereign-debt-restructuring.pdf [https://perma.cc/4YDD-5Q2L].

72. *See* Gelpern, *supra* note 15, at 58 ("The regime as a whole could hardly claim to be effective, fair, or legitimate in absolute terms, if only because so few saw it as a regime, and because there was no shared standard by which to judge it. It might have delivered serviceable outcomes on occasion, but it was not worth fighting for.").

73. *See* Abbott & Snidal, *supra* note 17, at 508 (noting that New Governance "is often defined merely by contrast to traditional forms of regulation").

versal definition.[74] Nonetheless, three tenets of New Governance can be distilled from the literature, as explained below.

First, New Governance emphasizes broad-based participation by a range of public and private actors in the process of creating, implementing, and enforcing law.[75] Rather than the state serving as the locus of regulatory authority, New Governance is pluralistic and decentralized among these actors.[76] Instead of a fixed—and sometimes adversarial—relationship between the regulator and the private parties that it regulates, New Governance seeks to foster public-private regulatory collaboration and the "co-production" of regulation.[77] When regulators and private parties are uncertain about the nature and scope of the problem and its solution, New Governance provides a forum in which they can work together towards shared goals.[78] However, state authority is rarely absent.[79] Rather, governments often structure New Governance regimes and enforce their rules and norms.[80] In the absence of regulatory capacity to hold private parties accountable, financial regulation scholars argue that New Governance will devolve to a glorified form of self-regulation, with all of the attendant risks and shortcomings.[81]

Second, New Governance employs softer rules and more flexible processes.[82] Soft law is defined as a counterpoint to legally binding, mandatory, and universally applied hard law.[83] The less precise, non-obligatory, and non-delegable a legal rule, the more likely that it constitutes soft

74. *See* Robert C. Bird & Stephen Kim Park, *Turning Corporate Compliance into Competitive Advantage*, 19 U. Pa. J. Bus. L. 285, 317 (2017) (referencing theories of New Governance); *see also* Cristie Ford, *New Governance in the Teeth of Human Frailty: Lessons from Financial Regulation*, 2010 Wis. L. Rev. 441, 444 (2010) (characterizing New Governance as "something of a big tent that captures several discrete but related approaches [to regulation]").

75. *See* Lobel, *supra* note 18, at 373 ("The exercise of normative authority is pluralized.").

76. Abbott & Snidal, *supra* note 17, at 542; *see also* Lobel, *supra* note 18, at 379–81 (referencing competition between different actors advancing different regulatory approaches, methodologies, and practices).

77. Douglas NeJaime, *When New Governance Fails*, 70 Ohio St. L.J. 323, 335 (2009); *see also* Ford, *supra* note 74, at 445 (characterizing the New Governance regulator as a "clearinghouse, catalyst, monitor, prod, and coordinator").

78. *See* Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 Geo. L.J. 53, 82 (2011) (arguing for stakeholder participation in experimentalist regimes); *see also* Cristie L. Ford, *New Governance, Compliance, and Principles-Based Securities Regulation,* 45 Am. Bus. L.J. 1, 28 (2008) (applying New Governance to a principles-based approach to securities regulation).

79. *See* Virginia Harper Ho & Stephen Kim Park, *ESG Disclosure in Comparative Perspective: Optimizing Private Ordering in Public Reporting*, 41 U. Pa. J. Int'l L. 249, 281–87 (2019) (presenting a typology of interactions between public regulation and private governance involving varying levels and modes of governmental power).

80. Abbott & Snidal, *supra* note 17, at 544.

81. *See* Ford, *supra* note 74, at 471–75 (critiquing "[e]xcessively deep faith in the public potential of self-interested private actors"); *see also* Saule T. Omarova, *Wall Street as Community of Fate: Toward Financial Industry Self-Regulation*, 159 U. Pa. L. Rev. 411, 483 (2011) ("The nature of the risk in the financial sector necessitates vigilant government oversight of the industry's self-regulatory process."); Cheng-Yun Tsang, *Balancing the Governance of the Modern Financial Ecosystem: A New Governance Perspective and Implications for Market Discipline*, 40 Hous. J. Int'l L. 531, 584 (2011) (arguing that New Governance regimes must have strong regulatory enforcement in order to succeed).

82. Lobel, *supra* note 18, at 388–89.

83. *See* Abbott & Snidal, *supra* note 17, at 529–30.

law.[84] The flexibility of soft law enables New Governance regimes to create and modify regulatory frameworks in a faster and less costly manner.[85] When the outcomes of regulation are unknown or highly contested, soft law facilitates testing and change.[86] Over time, soft law rules and regimes can harden into hard law ones.[87]

A third tenet of New Governance focuses on the role of learning to improve the means and ends of regulation.[88] By participating in a continuous feedback loop with regulators and other governmental actors, private parties improve their ability to comply with law.[89] On a systemic level, learning enhances the effectiveness of regulation itself by enabling participants in a New Governance regime to analyze and compare experiences and adapt practices, rules, and policy goals accordingly.[90]

Arguably, the rationales for New Governance are most compelling in the global economy due to the limited capacity of individual states to regulate cross-border commerce.[91] In addition to enhancing the effectiveness of international economic regulation, New Governance is appealing as a means to enhance the legitimacy of international regulation by enabling greater participation by non-state actors.[92]

2. *Applying New Governance to Sovereign Debt*

Dissatisfaction with unsustainable sovereign borrowing, costly debt crises, and the political legitimacy of debt restructurings has spurred broad-based institutional reform efforts.[93] From this reformist backdrop, the inclusivity, softness, and experimentalism of New Governance have garnered

---

84. *See* Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance*, 94 MINN. L. REV. 706, 714–15 (2010) (referencing and applying Abbott & Snidal's definition of legalization); *see generally* Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000) (defining and exploring applications of soft law).

85. *See* Ford, *supra* note 74, at 443 (referring to New Governance's revisability).

86. *See* Lobel, *supra* note 18, at 393–94.

87. *See* Roberta S. Karmel & Claire R. Kelly, *The Hardening of Soft Law in Securities Regulation*, 34 BROOK. J. INT'L L. 883, 905–30 (2009) (identifying and examining examples).

88. *See* Lobel, *supra* note 18, at 396 ("While regulation has been an ordering act, governing is a learning process. . .better positioned to accept uncertainty and diversity, advancing iteratively toward workable solutions."); Ford, *supra* note 78, at 31 (noting the value of "learning by doing").

89. *See* Stephen Kim Park & Gerlinde Berger-Walliser, *A Firm-Driven Approach to Global Governance and Sustainability*, 52 AM. BUS. L.J. 255, 289–92 (2015) (proposing corporate-regulatory feedback loops to enhance the visibility, identification, and internalization of harms and benefits to firms); *see also* Gráinne de Búrca, Robert O. Keohane & Charles Sabel, *New Modes of Pluralist Global Governance*, 45 N.Y.U. J. INT'L L. & POL. 723, 739 (2013) (noting the value of deliberation through feedback, reporting, monitoring, and peer review).

90. *See* Ford, *supra* note 78, at 30 (describing regulatory learning).

91. *See* Abbott & Snidal, *supra* note 17, at 538–41.

92. *See* Claire R. Kelly, *Financial Crises and Civil Society*, 11 CHI. J. INT'L L. 505, 537–55 (2011) (arguing for greater participation by civil society to improve the legitimacy of international financial regulation); *see also* Lobel, *supra* note 18, at 466–67 (arguing that New Governance restores the legitimacy of the legal system).

93. Gelpern, *supra* note 15, at 85–86.

support in the form of sovereign debt governance. While the sovereign debt governance regimes that are the focus of this Article are a recent development, the principles underlying them are not. The current system features two well-established informal coordination mechanisms: the Paris Club for official bilateral creditors (that is, other sovereigns)[94] and the London Club for commercial bank creditors.[95] The London Club, in particular, is characterized by its informal, collaborative, and non-institutional nature.[96] Convened by its members on an ad hoc basis, the London Club's bank advisory committees negotiate workouts on behalf of bank lenders.[97] In contrast to international financial institutions such as the IMF and the Bank of International Settlements, the London Club does not have a constitutive document (such as a charter), a secretariat, a physical presence, or even a website.[98] While the London Club's role has receded with the predominance of bonds over bank loans in the global sovereign debt market, its informal modus operandi is evident in debates about sovereign debt governance.[99]

Consistent with the spirit of the London Club, the heart of sovereign debt governance is debtor-creditor engagement. By incentivizing and compelling parties to engage with each other or constraining their ability to avoid engaging, sovereign debt governance draws on New Governance principles to improve the efficiency of sovereign debt restructurings.[100] A failure by a debtor and its creditors to engage with each other—and, likewise, creditors to coordinate with each other—may prolong a debt crisis and increase the uncertainty of a successful resolution.[101]

---

94. The Paris Club is an informal, ad hoc group of twenty-two sovereign states that meets regularly and coordinates restructurings of official debt through norms and procedures. *See Permanent Members*, CLUB DE PARIS, https://www.clubdeparis.org/en/communications/page/permanent-members [https://perma.cc/8QLF-7584] (last visited Nov. 13, 2020). The Paris Club has reached 454 agreements with ninety-two different debtor countries, for an aggregate debt worth approximately $587 billion. *See Key Numbers*, CLUB DE PARIS, https://www.clubdeparis.org/en/communications/page/key-numbers [https://perma.cc/A3NC-QNTN] (last visited Nov. 13, 2020).

95. Despite its name, the London Club is neither based in London nor a standing committee. Rather, it refers to the case-by-case restructuring practices of commercial banks in the 1970s and 1980s. *See infra* Part II.B.2 (describing the London Club era of sovereign debt restructuring).

96. Lienau, *supra* note 68, at 180.

97. *See* FEDERICO STURZENEGGER & JEROMIN ZETTELMEYER, DEBT DEFAULTS AND LESSONS FROM A DECADE OF CRISES 12–14 (2006) (describing the formation of the London Club).

98. Gelpern, *supra* note 20, at 356–57.

99. *See* Lienau, *supra* note 68, at 180 ("[T]he London Club remains relevant for certain debt workouts, and the memory of these restructurings. . .continues to affect current views.").

100. Park & Samples, *supra* note 24, at 43–48; *see also* Michael Waibel, *To Formalize or Not to Formalize: Creditor–Debtor Engagement in Sovereign Debt Restructurings*, 13 CAP. MKTS. L.J. 452, 466 (2018) (noting efficiency gains as a potential advantage of debtor-creditor engagement).

101. *See* Wright, *supra* note 37, at 172–74 (noting the costs resulting from free-riding and holdout creditors); *see also* Schneider, *supra* note 70, at 304 (noting the role of debtor-creditor engagement as a means to reduce restructuring delays and raise participation rates in restructurings).

C. *Sovereign Debt Governance Regimes*

Dissatisfaction with statutory and contractual approaches have spurred interest in sovereign debt governance as an alternate means of promoting debtor-creditor engagement.[102] The intensity of the search for new solutions to sovereign debt's collective action problems is evident in the diversity of reform proposals that draw on New Governance principles.[103] The following discussion focuses on the three most prominent manifestations of sovereign debt governance: the UNCTAD Principles, the IIF Principles, and the IMF Lending into Arrears Policy. By employing different combinations of incentives, imperatives, and constraints, these regimes reflect the diversity of approaches to debtor-creditor engagement.

1. *UNCTAD Principles*

The UNCTAD Principles are a voluntary, non-binding code of conduct for sovereign borrowing and lending launched in 2009 to promote responsible sovereign lending and borrowing practices.[104] This New Governance-inspired initiative disavows legal formalism by articulating commonly accepted principles and practices, rather than creating binding legal obligations per se.[105] The UNCTAD Principles seek to persuade and influence sovereigns, their creditors, and other actors in the global sovereign debt market.[106] However, hard law is not absent from the UNCTAD Principles. To the contrary, its tenets reflect domestic restructuring laws as well as various sources of international law.[107] This is similar to many New Govern-

102. *See* Manuelides, *supra* note 70, at 439, 450 (arguing that debtor-creditor engagement is best addressed through sovereign debt governance regimes, such as the IMF Lending into Arrears Policy, the IIF Principles, and the UNCTAD Principles, rather than contractually).

103. *See, e.g.*, IMF 2013 Staff Paper, *supra* note 26, at 37–41 (identifying and summarizing several proposals, including the IIF Principles).

104. UNCTAD Principles, *supra* note 25, at 3. The UNCTAD Principles are complemented by a roadmap and a guide developed by an ad hoc working group to address restructurings. *See* UNCTAD Roadmap and Guide, *supra* note 14, at 3.

105. The preamble to the UNCTAD Principles states:

> The normative contribution of these Principles lies not in the creation of new rights nor obligations in international law but in identifying, harmonizing and systematizing the basic principles and best practices applied to sovereign lending and borrowing and in elaborating the implications of these standards and practices for lenders and borrowers at the international level. This set of principles should apply without prejudice of other international rules concerning the action of lenders or borrowers.

UNCTAD Principles, *supra* note 25, at 4; *see also* Gelpern, *supra* note 20, at 379 (arguing that formal adoption of the UNCTAD Principles is insufficient for their implementation and may be inimical to their effectiveness).

106. *See* Juan Pablo Bohoslavsky & Carlos Espósito, *Principles Matter: The Legal Status of the Principles on Responsible Sovereign Financing*, *in* Sovereign Financing and International Law, *supra* note 20, at 73, 83.

107. *Id.* at 78–79; *see also* UNCTAD Roadmap and Guide, *supra* note 14, at 15 (noting the varied legal status of the UNCTAD guidelines).

ance regimes, which feature soft law reinforced or benchmarked by hard law.[108]

The inclusive orientation of New Governance is evident in the UNCTAD Principles. The UNCTAD Principles were created with input from academia, finance, civil society, international financial institutions, and governments.[109] The UNCTAD Principles address the needs and demands of stakeholders beyond the government representing the sovereign and its lenders.[110] The convening role of UNCTAD is evident in the creation of the UNCTAD Principles as well as the ad hoc working group subsequently established by UNCTAD to provide guidance on restructurings.[111] The "honest broker" function of the UNCTAD Principles is arguably critical to the durability of sovereign debt governance by helping disparate actors overcome transaction costs and bargaining problems inherent in sovereign debt.[112]

The UNCTAD Principles specifically address debtor-creditor engagement in the context of restructurings. Principle 7 imposes a duty on creditors to enter into good faith negotiations when a sovereign default is imminent.[113] The mirror image is Principle 15, which institutes a duty on sovereigns to undertake a restructuring "promptly, efficiently and fairly" in the event that it "becomes unavoidable."[114] While the UNCTAD Principles are silent on the specific form of this engagement, the elaboration and implementation of its framework have focused on non-discriminatory, comprehensive, and formal procedures, including with respect to creditor committees.[115]

---

108. *See* Abbott & Snidal, *supra* note 17, at 543 (referencing the Voluntary Principles on Security and Human Rights).

109. *See* Carlos Espósito, Yuefen Li & Juan Pablo Bohoslavsky, *Introduction: The Search for Common Principles*, *in* SOVEREIGN FINANCING AND INTERNATIONAL LAW, *supra* note 20, at 3, 6 (describing the drafting and consultation process).

110. *See, e.g.*, UNCTAD PRINCIPLES, *supra* note 25, at 5, 8, 9 (noting the responsibility of government officials to protect the public interest in Principles 1 and 8; the need to conduct due diligence in Principle 2; and the demand for governments to legally ensure sovereign borrowing transactions are transparent to the public in Principle 10); *see also* UNCTAD ROADMAP AND GUIDE, *supra* note 14, at 20 (stating that process legitimacy requires that "a debtor negotiating a debt workout seek to involve all stakeholders").

111. *See* UNCTAD ROADMAP AND GUIDE, *supra* note 14, at 3, 15.

112. *See* Abbott & Snidal, *supra* note 17, at 575 (describing how international organizations can facilitate transnational governance schemes); *see also* Omarova, *supra* note 81, at 453 (observing that "a highly fragmented, heterogeneous, and internally competitive industry structure may present a serious built-in obstacle" to industry-led New Governance regulation).

113. UNCTAD PRINCIPLES, *supra* note 25, at 7 ("In circumstances where a sovereign is manifestly unable to service its debts, all lenders have a duty to behave in good faith and with cooperative spirit to reach a consensual rearrangement of those obligations. Creditors should seek a speedy and orderly resolution to the problem."); *see also* UNCTAD ROADMAP AND GUIDE, *supra* note 14, at 23 (defining good faith as "a duty for both creditors and debtors to enter into negotiations in case of an unsustainable debt burden").

114. UNCTAD PRINCIPLES, *supra* note 25, at 13.

115. *See* UNCTAD ROADMAP AND GUIDE, *supra* note 14, at 47–48 (recommending best practices for creditor coordination to ensure sustainability, good faith, legitimacy, and transparency); *see also id.* at 48–49 (referencing the use of creditor committees by the London Club).

2. *IIF Principles*

The IIF is an industry association whose members include private financial firms, central banks, international financial institutions, and their advisers.[116] The IIF Principles were launched in 2004 as a market-based, flexible, and voluntary alternative to the IMF's SDRM and other statutory proposals.[117] In contrast to the broad stakeholder model of the UNCTAD Principles, the objectives and governance of the IIF Principles reflect the narrower interests of the IIF's members—namely, emerging market sovereign borrowers and their creditors.[118] The IIF Principles are governed by the Group of Trustees and the Principles Consultative Group ("PCG"), with the IIF serving as the secretariat.[119] The PCG, in particular, has been instrumental in the implementation of the IIF Principles through consultations with its members and endorsement of best practices.[120]

Over time, creditor committees have defined debtor-creditor engagement under the IIF Principles. While the IIF Principles call for "timely good faith negotiations . . . [as] the preferred course of action" and leave it to the parties in a given restructuring to determine the format and role of creditor committees "flexibly and on a case-by-case basis," the Addendum to the IIF Principles, published in 2012, is far more prescriptive.[121] The Addendum states that "private creditors should organize themselves in a broadly-based representative creditor committee as early as possible," and "sovereign issuers should interact and engage in negotiations with their private creditors through the representative creditor committee."[122] The IIF Principles are supplemented by the IIF's Best Practice Principles on creditor committees, which set forth the terms for the formation, composition, and procedures of creditor committees.[123] The IIF's Best Practice Principles walk a fine line

116. *See* BY-LAWS OF THE INSTITUTE OF INTERNATIONAL FINANCE, INC., art. III, § 1(a) (2019), https://www.iif.com/Portals/0/Files/general/2019-04-IIF%20Bylaws.pdf?ver=2019-04-12-121551-693 [https://perma.cc/25NC-8J6A] ("Membership in the Institute shall be open to any lending institution, investment bank, merchant bank, investment fund engaged in international financial transactions, or insurance company. . .."); *see also Our Member Institutions*, INST. INT'L FIN., https://www.iif.com/membership/our-member-institutions [https://perma.cc/75JQ-QN3Y] (last visited Nov. 13, 2020) (listing over 400 members from seventy countries, which include the Federal Reserve and the World Bank Group).

117. *See* IIF PRINCIPLES, *supra* note 27, at 31 ("[T]he Principles should be applied flexibly on a case-by-case basis, and are strictly voluntary."); *see also* Raymond Ritter, *Transnational Governance in Global Finance: The Principles for Stable Capital Flows and Fair Debt Restructuring in Emerging Markets*, 11 INT'L STUD. PERSPECTIVES 222, 224–25 (2010).

118. *See* Gelpern, *supra* note 20, at 375; *see also* Ritter, *supra* note 117, at 236 (arguing that implementation of the IIF Principles hinges on mutual benefits to sovereign debtors and private creditors).

119. *See* IIF PRINCIPLES, *supra* note 27, at 6.

120. *See* Ritter, *supra* note 117, at 228–30. The IIF has endorsed ICMA's model contract provisions mentioned above. IIF PRINCIPLES, *supra* note 27, at 8.

121. IIF PRINCIPLES, *supra* note 27, at 33.

122. *Id.* at 38.

123. *See id.* at 49–54.

between hardening the IIF Principles' creditor committee-based approach to debtor-creditor engagement and preserving its market-based orientation.[124]

3. *IMF Lending into Arrears Policy*

The IMF does not act as a committee of creditors.[125] Instead, it wields legal authority in the global sovereign debt market through two indirect means. First, the IMF monitors the economic and financial policies of its borrowing member states.[126] Second, the IMF exerts influence over sovereign debtors and their creditors through policy conditionality, both prior to and after a sovereign default.[127]

Through its lending policies, the IMF exerts broad influence over debtor-creditor engagement in sovereign debt.[128] In particular, the IMF Lending into Arrears Policy shapes the relationship between sovereigns and their private creditors by setting forth the treatment of members that are in default.[129] Specifically, the IMF Lending into Arrears Policy conditions IMF financing to a country in arrears to external lenders and bondholders on whether "the member is making a good faith effort to reach a collaborative agreement with its creditors."[130] The good faith criterion essentially compels a sovereign seeking IMF assistance to engage with its private creditors in a collaborative manner.[131] However, this mandate is qualified by circum-

124. *Compare id.* at 7–12 (The Principles do not require negotiations with a Committee in non-default cases but the question has been raised whether a Committee approach should be preferred in circumstances in which a restructuring is mandated by the Paris Club), *with id.* at 51 ("When considering [a unilateral] approach [that rejects creditor committees], issuers should be aware that refusal to negotiate may result in low participation and expensive lawsuits, and as a result possible constraints on market access.").

125. *See generally* Daniel K. Tarullo, *The Role of the IMF in Sovereign Debt Restructuring*, Chi. J. Int'l L. 287 (2005) (arguing that the IMF is a political institution).

126. Vassilis Paliouras, *The Right to Restructure Sovereign Debt*, 20 J. Int'l Econ. L. 115, 121–22 (2017) (citing the IMF Articles of Agreement). *But see* Blanchard, *supra* note 39, at 522–25 (documenting doubts among market participants about the IMF's capacity to serve as a monitor).

127. Paliouras, *supra* note 126, at 122. The IMF may make its financial and economic assistance to borrowing member states conditional on the implementation of specific measures through the applicable credit agreement or applicable IMF policy. *See* Brummer, *supra* note 16, at 152–54. An array of IMF policies applies in pre-default scenarios. *See* IMF 2013 Staff Paper, *supra* note 26, at 7–10 (referencing the IMF's policies on debt sustainability, exceptional access, and financing assurances).

128. *See* Lee C. Buchheit, *The Role of the Official Sector in Sovereign Debt Workouts*, 6 Chi. J. Int'l L. 333, 341 (2005) (characterizing the multi-faceted role of the IMF in restructurings as akin to a "master of ceremonies").

129. IMF, Fund Policy on Lending into Arrears to Private Creditors 9–15 (2002), https://www.imf.org/external/pubs/ft/privcred/073002.pdf [https://perma.cc/6MEQ-NXUT] [hereinafter IMF Lending into Arrears Policy]. The IMF Lending into Arrears Policy is complemented by a parallel IMF policy that applies to the extension of IMF financing to sovereigns in arrears to official bilateral creditors. *See* Lee Buchheit, Guillaume Chabert, Chanda DeLong & Jeromin Zettelmeyer, *How to Restructure Sovereign Debt: Lessons from Four Decades* 11 (Peterson Inst. for Int'l Econ., Working Paper No. 19-8, May 2019), https://www.piie.com/system/files/documents/wp19-8.pdf [https://perma.cc/HWM3-NTMB].

130. IMF Lending into Arrears Policy, *supra* note 129, at 2, 20.

131. *See id.* at 12–13; *see also* Lee C. Buchheit & Rosa M. Lastra, *Lending into Arrears—A Policy Adrift*, 41 Int'l Law. 939, 946 (2007) (noting the policy's focus on the nature of the engagement with creditors

stances in which creditor demands are inconsistent with the IMF-supported lending program.[132] During its most recent review of the IMF Lending into Arrears Policy, the IMF signaled its willingness to strengthen this imperative to engage by making this criterion more prescriptive.[133] However, the IMF has refrained from mandating creditor committees, reiterating its preference for a case-by-case determination of the appropriate form of debtor-creditor engagement that would satisfy the good faith criterion.[134]

The IMF Lending into Arrears Policy shows the diversity of ways in which sovereign debt governance functions. Notwithstanding the failure of the SDRM, the IMF is able to exploit its unique status in the global financial system to steer debtor-creditor engagement practices.[135] The IMF Lending into Arrears Policy enables the IMF to influence—if not actually regulate—how sovereign debt restructurings are conducted by incentivizing engagement while constraining rogue behavior.[136] The IMF's predilection to balance the competing interests of sovereigns and private creditors is reflected in its deliberate decision not to endorse, incorporate by reference, or otherwise integrate the IIF Principles into its policies.[137]

---

rather than simply a willingness to engage); Park & Samples, *supra* note 24, at 47 (characterizing the IMF Lending into Arrears Policy as an imperative due to this criterion).

132. IMF Lending into Arrears Policy, *supra* note 129, at 20.

133. *See, e.g.*, IMF, The Fund's Lending Framework and Sovereign Debt—Preliminary Considerations 7, 29 (2014), https://www.imf.org/external/np/pp/eng/2014/052214.pdf [https://perma.cc/6HAS-HUL2] ("'Take-it-or-leave-it' offers (i.e., where there is no meaningful consultation with creditors) should be avoided. . ..The modalities of creditor engagement in pre- and post-default cases will be discussed in greater detail in a subsequent staff paper.").

134. *See* IMF, The Fund's Lending Framework and Sovereign Debt—Further Considerations 51 n.3 (2015), https://www.imf.org/external/np/pp/eng/2015/040915.pdf [https://perma.cc/59UW-GU83] (stating that a sovereign is only required to engage with a creditor committee under the IMF Lending into Arrears Policy if warranted by the "complexity of the case" and if the committee has been formed "on a timely basis" and is "sufficiently representative").

135. *See* Abbott & Snidal, *supra* note 17, at 571–72 (noting how international financial institutions, such as the World Bank and the International Finance Corporation, can require support for governance regimes as a condition of financing); *see also* Mitu Gulati & George Triantis, *Contracts Without Law: Sovereign Versus Corporate Debt*, 75 U. Cin. L. Rev. 977, 993–96 (2007) (describing the leadership role of the IMF in sovereign debt restructurings).

136. *See* Alice de Jonge, *Returning to Fundamentals: Principles of International Law Applicable to the Resolution of Sovereign Debt Crises*, 36 Suffolk Transnat'l L. Rev. 1, 33–34 (2013) (describing how the IMF exerts influence over private creditors and defaulting sovereign debtors).

137. *See* IMF 2013 Staff Paper, *supra* note 26, at 39–41 (contrasting the IIF Principles with the IMF's policies and practices and stating its decision not to endorse the IIF Principles); *see also* Sean Hagan, *Sovereign Debtors, Private Creditors, and the IMF*, 8 Law & Bus. Rev. Am. 49, 65–68 (2002) (recounting the IMF's unwillingness to endorse principles proposed by the Council on Foreign Relations in 2000, a predecessor to the IIF Principles with a similar focus on debtor-creditor engagement through creditor committees). *But see* Manuelides, *supra* note 70, at 433–35 (arguing that the IMF has acknowledged the problems posed by inadequate debtor-creditor engagement, notwithstanding its decision not to endorse the IIF Principles).

II. Creditor Committees as a Governance Mechanism

Historically, creditor committees have played a prominent role in facilitating debtor-creditor engagement in sovereign debt restructurings. A committee typically consists of a representative group of creditors—often holding a substantial portion of outstanding debt in question—appointed to negotiate the terms of a debt restructuring with the sovereign debtor. Generally speaking, committees exist to promote the interests of their constituent creditors. In some cases, committees may also promote orderly restructuring by improving procedure (for example, facilitating communication) or influencing creditor behavior (for example, imposing constraints on defection or incentivizing participation).

A. *Creditor Committees and Insolvency Law*

Creditor committees are common in corporate debt restructurings. Even during the earliest era of national bankruptcy law in the United States, following the Bankruptcy Act of 1898, creditor committees played a role in corporate workouts.[138] Since then, they have grown increasingly prominent and important.[139] Today, the United States Bankruptcy Code[140] requires the appointment of a committee of creditors holding unsecured claims in Chapter 11 corporate reorganizations as soon as practicable.[141] Typically, the committee will consist of creditors holding the largest claims of the kind represented by the committee.[142] Committees may also be formed to represent other parties with a stake in the bankruptcy outcome, for instance, to represent equity holders, trade creditors, or employees.[143]

Committees are designed to serve as bankruptcy watchdogs for the stakeholders they represent.[144] Statutory committees formed under the Bank-

---

138. *See* Kenneth N. Klee & K. John Shaffer, *Creditors' Committees Under Chapter 11 of the Bankruptcy Code*, 44 S.C. L. Rev. 995, 998–1001 (1993) (reviewing the emergence and evolution of creditor committees in U.S. bankruptcy law).

139. *Id.* at 998 ("For nearly a century, creditors' committees have maintained an increasingly significant presence in the bankruptcy process.").

140. 11 U.S.C. §§ 101–1330.

141. *Id.* § 1102. The Bankruptcy Reform Act of 1978 included provisions for the mandatory appointment of creditor committees in Chapter 11 cases. Despite the mandatory appointment provision, in practice, creditor committees are not always formed. *See* Klee & Shaffer, *supra* note 138, at 1000–04 (discussing common practices in the appointment—and failures in the appointment—of creditor committees).

142. The default rule is that the seven largest unsecured claims willing to serve will be appointed to the committee. *See* 11 U.S.C. § 1102(b)(1). In practice, the composition of the committee may be adjusted for a variety of reasons or, in some cases, a committee may not be formed at all. *See* Klee & Shaffer, *supra* note 138, at 1003–05.

143. *See* Klee & Shaffer, *supra* note 138, at 1027–30 (identifying various categories of Chapter 11 committees). External constituencies may also be represented through committees. *See, e.g.*, Corinne McCarthy, Comment, *Creditors' Committees: Giving Tort Claimants a Voice in Chapter 11 Bankruptcy Cases*, 31 Emory Bankr. Dev. J. 431 (2015) (arguing in favor of forming committees to represent tort claimants).

144. *In re* AKF Foods, Inc., 36 B.R. 288, 289 (Bankr. E.D.N.Y. 1984) ("The function of a creditors' committee is to act as a watchdog on behalf of the larger body of creditors which it represents.").

ruptcy Code owe fiduciary duties to the class of stakeholders they represent.[145] Generally, creditor committees are responsible for promoting the interests of unsecured creditors, which can entail responsibilities to manage or coordinate restructuring activities.[146] The Bankruptcy Code confers broad authority to creditor committees to pursue these goals.[147] For instance, a committee may investigate the assets, liabilities, and financial condition of the debtor.[148] Committees may also be responsible for negotiating or even proposing a plan of reorganization.[149]

In the contest for control in corporate restructuring, conflict and dissent is inevitable, and creditor committees are no exception. Committees have compelling potential as a vehicle for building consensus, facilitating communication, and solidifying consent in a restructuring process.[150] But tensions and pitfalls also exist. Tradeoffs between the useful roles of committees and the potential for self-interested hijacking were raised even in early eras of bankruptcy.[151] Practical problems abound, including the risk of insider trading and other abuses of information obtained through committees.[152] Committees do not necessarily resolve inter-creditor divisions and representation problems.[153] Accordingly, whether creditor committees have fulfilled their intended role and potential remains the subject of debate.[154]

---

145. *See, e.g.*, *In re* Firstplus Fin., 254 B.R. 888, 894 (Bankr. N.D. Tex. 2000) ("In a Chapter 11 case, an Unsecured Creditors' Committee is appointed by the Office of the United States Trustee and owes a fiduciary duty to act on behalf of all unsecured creditors.").

146. *See* Klee & Shaffer, *supra* note 138, at 997 (articulating the "vital function" of committees as "promoting the interests of unsecured creditors generally").

147. *See, e.g.*, 11 U.S.C. § 1103(c).

148. *Id.* § 1103(c)(2).

149. *See* Klee & Shaffer, *supra* note 138, at 997 (enumerating the primary purposes of committees).

150. *See generally* Daniel J. Bussel, *Coalition Building Through Bankruptcy Creditors' Committees*, 43 UCLA L. Rev. 1547 (1995–1996).

151. *See* SEC, Report on the Study and Investigation of the Work, Activities, Personnel, and Functions of Protective and Reorganization Committees, Part II – Committees and Conflicts of Interest 295 (1937) (reporting on "glaring examples of conflicts of interest" in committee practices); *see also* Michelle M. Harner, *The Search for an Unbiased Fiduciary in Corporate Reorganizations*, 86 Notre Dame L. Rev. 469, 481 (2011) (citing concerns voiced by then-SEC Commissioner William O. Douglas).

152. *See, e.g.*, Thomas C. Pearson, *When Hedge Funds Betray a Creditor Committee's Fiduciary Role: New Twists on Insider Trading in the International Financial Markets*, 28 Rev. Banking & Fin. Law 165 (2008) (summarizing accusations of abuses by Blue River Capital LLC in a creditor committee position during the WorldCom bankruptcy); *see also* Mark J. Krudys, *Insider Trading by Members of Creditor Committees: Actionable!*, 44 DePaul L. Rev. 99, 124–35 (1994) (reviewing early cases on fiduciary breaches by members of creditors' committees).

153. *See, e.g.*, Stephen J. Lubben, *Credit Derivatives and the Future of Chapter 11*, 81 Am. Bankr. L.J. 405, 427–29 (2007) (noting the potential for inter-creditor conflict); *see also* Kurt F. Gwynne, *Intra-Committee Conflicts, Multiple Creditors' Committees, Altering Committee Membership and Other Alternatives for Ensuring Adequate Representation Under Section 1102 of the Bankruptcy Code*, 14 Am. Bankr. Inst. L. Rev. 109, 120–26 (2006) (reviewing bankruptcy cases with competing fiduciary duties and representation issues among committees).

154. Congress intended to make creditor committees the primary agent for negotiations and overseeing the processes. *See* H.R. Rep. No. 95-595, at 401 (1977). For an empirical analysis of the function of Chapter 11 committees, see Michelle M. Harner & Jamie Marincic, *Committee Capture? An Empirical Analysis of the Role of Creditors' Committees in Business Reorganizations*, 64 Vand. L. Rev. 749 (2011).

B. *Creditor Committees in Sovereign Debt Restructurings*

Creditor committees have played informal yet important roles in sovereign debt since the 1800s.[155] In the absence of formal statutory rules and direct regulatory oversight, sovereign debt lacks even the basic restructuring tools of bankruptcy law.[156] Thus, creditor committees in sovereign debt are formed and managed on an ad hoc basis in a largely unregulated environment—and, at times, creditor committees fill significant governance gaps in sovereign debt finance. Peaks in creditor committee activity generally coincide with periods of turmoil in sovereign debt markets. This following discussion analyzes the evolution of creditor committees in three distinct periods: (i) the earliest era of bondholder committees through World War II (the Pax Britannica Era); (ii) bank advisory committees through the late 1990s (the London Club Era); and (iii) bondholder committees following the Brady Plan since 1998 (the Current Era).[157]

The fundamental purpose of creditor committees in sovereign debt has been fairly consistent over time: to coordinate settlements in default and distressed situations.[158] Committees can ease coordination problems among banks or bondholders by appointing a smaller number of advisors to negotiate restructuring terms with sovereign debtors.[159] Committees may serve administrative functions—to channel communication, investigate and verify information, and negotiate transactional documents.[160] Though committees tend to be viewed most favorably among creditor interest groups, there are potential upsides for sovereign debtors too.[161] Committees can fill gaps in

155. *See* Marc Flandreau, *Sovereign States, Bondholders Committees, and the London Stock Exchange in the Nineteenth Century (1827–68): New Facts and Old Fictions*, 29 Oxford Rev. Econ. Pol'y 668, 678–83 (2013) (reviewing the work of London Stock Exchange committees in selected cases from 1833 to 1870).

156. Essential bankruptcy rules such as automatic stays and binding frameworks for priority among creditor claims are unavailable in sovereign restructuring. *See* Patrick Bolton & David A. Skeel, Jr., *Inside the Black Box: How Should a Sovereign Bankruptcy Framework be Structured?*, 53 Emory L.J. 763, 774–76 (2004) (contrasting sovereign restructuring gaps with established bankruptcy rules).

157. *See* Buchheit, *supra* note 21, at 206–09 (outlining creditor committee practices during recent eras of sovereign debt).

158. *Compare* Paulo Mauro & Yishay Yafeh, *The Corporation of Foreign Bondholders* 13 (IMF, Working Paper No. 03/107, 2003), https://www.imf.org/en/Publications/WP/Issues/2016/12/30/The-Corporation-of-Foreign-Bondholders-16540 [https://perma.cc/4VQQ-BF72] (identifying the two primary aims of early committees, such as the Corporation of Foreign Bondholders, as facilitating coordination and the flow of information among creditors), *with* Rory Macmillan, *Towards a Sovereign Debt Work-out System*, 16 Nw. J. Int'l L. & Bus. 57, 64–65 (1995) (identifying similar functions of committees in the modern context).

159. *See* Lee C. Buchheit, *Advisory Committees: What's in a Name?*, 10 Int'l. Fin. L. Rev. 9, 9 (1991) (describing the practice of appointing representative committees of ten to fifteen banks to negotiate a restructuring rather than holding talks with hundreds of creditors).

160. *See id.*

161. *See* Waibel, *supra* note 100, at 453 (referencing initiatives on creditor engagement by ICMA and the IIF); *see also* Buchheit et al., *supra* note 129, at 10 (noting that creditor associations, like ICMA and IIF, generally favor committees).

sovereign debt governance by coordinating collective action among creditors and imposing constraints on rogue behavior and defections.[162]

Committees may provide some stabilizing effects in sovereign debt beyond coordinating collective action in restructurings and constraining defections. Early committees—namely the Corporation of Foreign Bondholders ("CFB") and the Foreign Bondholders Protective Council ("FBPC")—played a role in interpreting sovereign bond contracts in a way that was consistent over time.[163] While those interpretations were favorable to the creditor interests they represented, they also provided a measure of predictability and stability.[164] These standing committees likely helped to mitigate holdout problems by forging restructuring deals in which participating creditors got paid while holdouts did not.[165] In terms of contract interpretation, committees may have been more stable and predictable than national court systems attempting to address debtor-creditor conflicts on an ad hoc basis.[166]

1. *The Pax Britannica Era*

Creditor committees have a lengthy history in sovereign debt restructuring. Formed in 1868 and based in London, the CFB was the earliest and most prominent standing creditors' committee.[167] The emergence of the CFB—also known as the British Council—reflects the United Kingdom's history as the preeminent financial hub of the nineteenth century.[168] The United Kingdom's trade dominance and economic clout at that time gave the CFB special leverage in restructuring negotiations while representing British creditors.[169] Though existing as a non-profit organization indepen-

162. *See supra* notes 65–67 (discussing rogue behaviors and collective action); *see also* Anna Gelpern, *About Government Debt . . . Who Knows?*, 13 Cap. Mkts. L.J. 321 (2018) (observing intra-creditor discipline imposed by London Club committees). For instance, committees likely helped marginalize rogue holdout behaviors in the Greek debt restructuring. *See* Sebastian Grund, *The Legal Consequences of Sovereign Insolvency – A Review of Creditor Litigation in Germany Following the Greek Debt Restructuring*, 24 Maastricht J. Eur. & Comp. L. 399, 403 n. 21 (2017).

163. *See infra* notes 178– 84 and accompanying text (tracing the origins of the CFB and the FBPC).

164. *See* W. Mark C. Weidemaier, *Sovereign Debt After* NML v. Argentina, 8 Cap. Mkts. L.J. 123, 127–28 (2013) (suggesting that the CFB and FBPC may have offered some stability for sovereign debt restructuring by interpreting bond contracts in a consistent manner over time).

165. *See id.*

166. Unpredictable contract interpretation by courts has contributed to instability in the global sovereign debt market. *See* Pottow, *supra* note 54, at 229 ("Judges are nevertheless asked to make important policy decisions in one-off interventions that occur every few years, a task to which they are poorly suited."); *see also* Gelpern, *supra* note 62, at 133 (explaining why sovereign debt litigation is prone to making bad law).

167. *See* Mauro & Yafeh, *supra* note 158, at 13–15 (explaining the origins and early history of the CFB). Prior to the formation of the CFB, defaults were addressed by ad hoc committees formed by the London Stock Exchange. *See supra* note 155 and accompanying text.

168. Carlos Marichal, A Century of Debt Crises in Latin America 10 (1989) ("Other financial centers such as Amsterdam, Berlin, and Paris also saw considerable activity with respect to emerging countries' bonds, but none matched the London market's size and liquidity.").

169. *See* Trish Kelly, *Ability and Willingness to Pay in the Age of Pax Britannica, 1890–1914*, 35 Explorations Econ. Hist. 31, 41 (1998) (finding that trade relations with Britain help to explain sovereign

dent of the government, the CFB enjoyed close relations with the government and periodically sought the benefit of diplomatic interventions.[170] Although the CFB was by far the most visible and prominent, creditors' associations from other European countries also played a role in some sovereign debt workouts during this era.[171]

The U.S. counterpart to the CFB—the FBPC, which was based in New York—was formed in 1933.[172] As the United States grew more assertive as a global power in the 1800s, there is evidence that the CFB held less sway in Central America.[173] Both the CPB and the FBPC—quasi-official entities established by governments but operating independently on behalf of private creditors—were important in the Pax Britannica era of sovereign debt.

The role of creditor committees in the decades before World War I offers points of comparison with today's sovereign debt landscape. While there are also important differences, the parallels are significant.[174] As in the current era, bonds were the predominant financial instrument from 1870 to 1913.[175] In addition to the prevalence of bonds, which often involve numerous and disparate creditors, the pre-war era was also a period of extensive global financial integration.[176] Emerging market borrowers issued vast sums of debt in external markets—mostly in London—during this period.[177] After borrowing booms, there were episodes of crisis and restructuring. The pri-

debtors' willingness to pay their debts during this period); *see also* Flandreau, *supra* note 155, at 674–75 (discussing market access as a "weapon" of leverage for British bondholders).

170. *See* Mauro & Yafeh, *supra* note 158, at 20–21 (describing the CFB's relationship with the British government); *see also* James H. Ronald, *National Organizations for the Protection of Holders of Foreign Bonds*, 3 GEO. WASH. L. REV. 411, 424 (1935) (characterizing support from the British government as "sympathetic though not aggressive").

171. *See, e.g.*, WILLIAM H. WYNNE, STATE INSOLVENCY AND FOREIGN BONDHOLDERS 371–77 (1983) (recounting a settlement between the Portuguese government and bondholder committees from Belgium, France, Germany, the Netherlands, and the United Kingdom); Ronald, *supra* note 170, at 426–36 (reviewing the proliferation of creditors' committees in various European states).

172. Whereas the London-based CFB was formed in 1868, in the United States, the FBPC was formed in 1933. *See* Barry Eichengreen & Richard Portes, *Debt and Default in the 1930s: Causes and Consequences*, 30 EUROPEAN ECON. REV. 599, 621–22 (1986) (discussing the origin of the CFB and contrasting committee practices in the U.K. and the U.S.); *see also* FOREIGN BONDHOLDERS PROTECTIVE COUNCIL, INC., REPORT 1955 THROUGH 1957, xv–xxi (1958) (explaining the purpose of the FBPC and illustrating debt adjustment plans it recommended between 1933 and 1957).

173. *See* Mauro & Yafeh, *supra* note 158, at 12 (describing the effect of the Monroe Doctrine on repayment tendencies to British creditors by Latin American countries).

174. There are a number of parallels between the current environment for sovereign debt and the environment between 1870 and 1913. *See* Mauro & Yafeh, *supra* note 158, at 6–9 (comparing that era to the present); *see also* PAULO MAURO ET AL., EMERGING MARKETS AND FINANCIAL GLOBALIZATION 10–24 (2006) (comparing London's market for sovereign debt in 1870-1913 with today's global market).

175. *See* MAURO ET AL., *supra* note 174, at 24–26 (comparing the characteristics of sovereign bonds today with the 1870-1913 era).

176. *See id.* at 2–3 (describing the extent of economic globalization).

177. *See id.* at 10 (observing that other financial centers such as Amsterdam, Berlin, and Paris were highly active but did not match the size and liquidity of London).

mary crisis and restructuring peaks in the nineteenth century occurred in the 1820s, 1870s, and 1890s.[178]

Creditor committees proliferated following the global shocks of the Great Depression, which sparked widespread distress and defaults among sovereign borrowers, even those with relatively advanced economies, such as Australia, Belgium, Italy, New Zealand, and the United Kingdom.[179] Starting in 1933, as a share of world income, the percentage of countries in default climbed dramatically.[180] By 1947, countries representing nearly forty percent of global GDP were either in default or undergoing restructuring.[181] Creditor organization from 1930 to 1945 was defined primarily by committees from the United Kingdom and the United States. At that time, absolute sovereign immunity meant that judicial means for enforcing debt obligations were virtually nonexistent.[182] Within that legal and regulatory vacuum, creditor committees formed, purportedly, to promote the interests of creditor groups and to negotiate recoveries with foreign governments.[183]

---

178. Federico Sturzenegger & Jeromin Zettelmeyer, *Haircuts: Estimating Investor Losses in Sovereign Debt Restructurings, 1998-2005* at 6 (IMF, Working Paper No. 05/137, 2005), https://www.imf.org/external/pubs/ft/wp/2005/wp05137.pdf [https://perma.cc/SM2Z-6XWF]. The Baring Crisis in the 1890s has been called the most famous sovereign debt crisis of the nineteenth century. *See* Kris James Mitchener & Marc D. Weidenmier, *The Baring Crisis and the Great Latin American Meltdown of the 1890s*, 68 J. Econ. Hist. 462 (2008) (recounting the story of the Baring House bailout). This early sovereign debt crisis featured two aspects—contagion risks and "too big to fail" rescues—later seen as conundrums in modern financial regulation. *See, e.g.*, Jeremy C. Kress, *Solving Banking's "Too Big to Manage" Problem*, 104 Minn. L. Rev. 171, 173–76 (2019) (comparing "too big to manage" and "too big to fail" problems in financial regulation).

179. *See* Carmen M. Reinhart & Kenneth S. Rogoff, *Financial and Sovereign Debt Crises: Some Lessons Learned and Those Forgotten* 12–15 (IMF, Working Paper No. 13/266, 2013), https://www.imf.org/external/pubs/ft/wp/2013/wp13266.pdf [https://perma.cc/U6BB-PQXB] (illustrating defaults and restructurings during this era); *see also* Barry Eichengreen & Richard Portes, *The Interwar Debt Crisis and Its Aftermath*, 5 World Bank Res. Observer 69, 75 (1990) (listing sovereign borrowers that defaulted during selected years from 1929 to 1935).

180. Carmen M. Reinhart & Kenneth S. Rogoff, This Time is Different: Eight Centuries of Financial Folly 72 (2009).

181. *Id.* at 72–73.

182. *See* SEC, Report on the Study and Investigation of the Work, Activities, Personnel, and Functions of Protective and Reorganization Committees, Part V – Protective Committees and Agencies for Holders of Defaulted Foreign Government Bonds 10 (1937) (noting the "complete absence of feasible legal remedies available to the bondholders"). Absolute sovereign immunity—the prevailing theory of immunity at that time—provided that sovereigns could not be sued in foreign courts without their consent, regardless of the nature of the actions giving rise to the claim. *See* Permanent Mission of India to the U.N. v. City of N.Y., 551 U.S. 193, 199 (2007) (citing Letter from Jack B. Tate, Legal Adviser, Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), *reprinted in* 26 Dep't St. Bull. 984 (1952)) (discussing the history of absolute sovereign immunity). With limited options for recovery, creditors turned to negotiations and at times lobbied their home governments to apply diplomatic pressures, or even military force, to debtor states. *See* Buchheit, *supra* note 128, at 335–36 (citing instances of creditor government indifference to bondholder lobbying as well as episodes of forceful physical interventions).

183. *See* Buchheit, *supra* note 21, at 206 (describing the formation and characteristics of independent committees and permanent protective committees).

2. *The London Club Era*

Following World War II, sovereign debt markets entered an extended period of relative quiet. A prolonged lull in issuances persisted until the 1970s when emerging market lending resurfaced, then grew dramatically.[184] In contrast with other eras of sovereign debt, this era featured syndicates of commercial banks as the primary creditors, and loans, rather than bonds, as the primary financial instrument.[185] Because syndicated loans were issued in much larger denominations than bonds and were far less liquid as assets, secondary markets for sovereign debt became insignificant during the London Club era.[186] Just years into the syndicated lending era, Mexico's debt moratorium announcement in August 1982 signaled the beginning of a severe and widespread emerging market debt crisis.[187] According to some measures, the 1980s debt crisis is among the largest and most widespread in history, surpassed only by peaks of distress during the Napoleonic Wars and World War II.[188]

Shortly after announcing the payment moratorium, Mexico invited thirteen international banks with significant credit exposure to form a bank advisory committee, which represented creditors in the issuance of new emergency debt and the renegotiation of the existing debt.[189] At that time, Mexico had over 500 known commercial bank creditors.[190] Thus, consolidating efforts with a small group of thirteen creditors significantly reduced the complexity and potentially the coordination costs of restructuring negotia-

---

184. *See* Elisabeth de Fontenay et al., *The Sovereign Debt Listing Puzzle*, 71 OXFORD ECON. PAPERS 472, 477–78 (illustrating the number of sovereign debt listings in foreign markets from 1945 to 2015); *see also* Ralph Reisner, *Default by Foreign Sovereign Debtors: An Introductory Perspective*, 1982 U. ILL. L. REV. 1, 1–2 (noting the extraordinary increase in international activity, including lending, by United States banks during the 1970s).

185. In a syndicated lending arrangement, commercial banks provide credit to a sovereign debtor as a group, distributing risk across multiple creditors under a single loan agreement. For instance, a $100 million-dollar syndicated loan could have twenty creditor banks with varying levels of exposure. *See* Lee C. Buchheit & Ralph Reisner, *The Effect of the Sovereign Debt Restructuring Process on Inter-Creditor Relationships*, 1988 U. ILL. L. REV. 493, 500.

186. *See* Udaibir S. Das, Michael G. Papaioannou & Christoph Trebesch, *Sovereign Debt Restructurings 1950-2010: Concepts, Literature Survey, Data, and Stylized Facts* 17 (IMF, Working Paper No. 12/203, 2012) https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Sovereign-Debt-Restructurings-1950-2010-Literature-Survey-Data-and-Stylized-Facts-26190 [https://perma.cc/FXL6-UCBP] ("[M]ost lending took place via syndicated loans and there was barely any trading on secondary markets.").

187. *See* Alan Riding, *New Debt Plans Set by Mexico*, N.Y. TIMES, Sept. 7, 1982, at D2 (noting that the moratorium reflected a deep debt crisis with $80 billion in external debt, the largest foreign debt burden in the developing world). Brazil, Argentina, Bolivia, Venezuela, and many more soon issued similar announcements. The 1980s debt crisis lasted over fifteen years, sweeping dozens of countries—including sixteen in Latin America alone—into distress and default. *See* Punam Chuhan & Federico Sturzenegger, *Default Episodes in the 1980s and 1990s: What Have We Learned?*, *in* MANAGING ECONOMIC VOLATILITY AND CRISES, 471, 503–06 (Joshua Aizenman & Brian Pinto eds., 2011) (documenting sovereign defaults on debt to private creditors from 1975 to 2002).

188. *See* REINHART & ROGOFF, *supra* note 180, at 73 (comparing the dimensions of the 1980s debt crisis with episodes of crisis following the Napoleonic Wars and World War II).

189. *Id.*

190. *See* Buchheit & Reisner, *supra* note 185, at 505–06.

tions. Perhaps not surprisingly, the committee approach proved more feasible than efforts to communicate and negotiate with hundreds of lenders at once. By contrast, Brazil's attempt at such a meeting with all its creditors in 1982 illustrated the difficulty of large-scale coordination and consequently was not widely emulated.[191] Although the number of creditors in a syndicated lending arrangement (up to several hundred banks) is often much smaller than in a bond financing situation (up to hundreds of thousands of bondholders), coordinating hundreds of creditors at once was already a major challenge.[192]

The bank committees formed in England were typically called steering committees, whereas the American system referred to them as advisory committees.[193] As the 1980s debt crisis unfolded, the practice of forming bank committees to restructure syndicated loans became known as the London Club.[194] In the London Club arrangements, the debtor-committee relationship was ad hoc in nature, lacking a formal set of governing rules.[195] Typically, committees consisted of ten to fourteen members selected from the banks with the largest credit exposures.[196] Occasionally more members were added, depending on the priorities of the debtor and the needs of a particular restructuring.[197] Debtors often sought a degree of regional representation (that is, balancing the committee's geographic footprint with banks from various creditor countries) in appointing their committees.[198]

Advisory committees worked fairly well in responding to the 1980s debt crisis, achieving high levels of participation and producing relatively low levels of litigation.[199] Despite the absence of formal rules shaping behavior, certain key factors made commercial banks more cooperative as sovereign creditors. Commercial banks were repeat players with business relationships with sovereign clients, which created incentives to participate in restructur-

---

191. *See* Buchheit, *supra* note 159, at 9.

192. James B. Hurlock, *Advising Sovereign Clients on the Renegotiation of their External Indebtedness*, 23 Colum. J. Transnat'l L. 29, 39 (1984) (observing that the difficulty of negotiating with hundreds of banks contributed to the practice of appointing steering committees).

193. *See* Buchheit, *supra* note 159, at 9.

194. *See supra* notes 95–99 and accompanying text (describing the formation and characteristics of the London Club).

195. Alfred Mudge, *Sovereign Debt Restructure: A Perspective of Counsel to Agent Banks, Bank Advisory Groups and Servicing Banks*, 23 Colum. J. Transnat'l L. 59, 64 (1984) ("The formation and role of a bank advisory group is informal and without legal recognition, either as a matter of contract or as a matter of law.").

196. *See* Buchheit & Reisner, *supra* note 185, at 506 (identifying tendencies in the appointment of steering or advisory committees).

197. *See* Buchheit, *supra* note 159, at 10.

198. *See* Charles Lipson, *Bankers' Dilemmas: Private Cooperation in Rescheduling Sovereign Debts*, *in* Cooperation Under Anarchy 200, 207 (Kenneth A. Oye ed., 1986) (identifying the motives for securing regional representation); *see also* Buchheit, *supra* note 159, at 9 (referencing the role of geographic representation in the appointment of committee members).

199. *See* Schumacher, Trebesch & Enderlein, *supra* note 63, at 18 (illustrating low levels of litigation throughout the 1980s followed by a sustained increase beginning in the 1990s); *see also* Bainbridge, *infra* note 292, at 3 (observing that the 1980s debt crisis "produced remarkably little litigation").

ing deals. In addition to lending relationships, commercial banks might hold deposits for a sovereign debtor's state-owned enterprises and agencies.[200] These same banks might hope to open branches and develop other financial services in that sovereign's domestic markets.[201] Furthermore, banks proved relatively responsive to the constraints of regulatory pressures and peer accountability.[202] Finally, and of great practical importance, the members of a lending syndicate were fairly easy to identify and track down.[203] The combination of these factors helped facilitate consensus and settlements during the syndicated lending era.[204]

Yet intra-creditor disputes and holdout problems were problematic even during this relatively harmonious era for sovereign debt restructuring.[205] Unanimity requirements, in particular, created serious governance problems later in the syndicated lending era.[206] Included in almost all the restructuring agreements forged during the 1982–89 period, unanimous consent requirements were helpful to entice participation by wary creditors, but proved obstructive when debt had to be renegotiated.[207] In effect, one bank out of 800 could derail a restructuring deal. Even though commercial banks constituted a relatively heterogeneous creditor group, conflicting incentives among them complicated restructuring outcomes.[208] In addition to the coordination and logistical challenges, the sheer number of banks in a restructuring exacerbated these governance problems.[209] The transition to bond

200. *See* Fisch & Gentile, *supra* note 39, at 1077–78; (explaining how the business models of various creditors shape their incentives to participate in restructuring).

201. *See* Rieffel, *supra* note 23, at 106–07, 111 (identifying ongoing diverse business banks had outside of the loans as the driving motivation for participation in exchanges).

202. *See* Lipson, *supra* note 198, at 210–11 (explaining how peer pressure created incentives and imperatives that encouraged cooperation among repeat player banks); *see also* Lee C. Buchheit, *Making Amends for Amendments*, 10 Int'l Fin. L. Rev. 11, 12 (1991) (describing reactions among leading banks to maverick bank holdouts); Macmillan, *supra* note 158, at 68 (referring to the force of peer pressure exerted by larger banks).

203. The liquidity of secondary bond markets, especially with bearer instruments, can make locating and communicating with bondholders difficult or, in some cases, nearly impossible. *See* Macmillan, *supra* note 158, at 67. There was some secondary trading of loans among banks through interbank swaps, but that activity was limited in comparison with bond trading. *See* Fisch & Gentile, *supra* note 39, at 1068–69.

204. *See* Gelpern, *supra* note 15, at 52–53 (observing that shared incentives and constraints facilitated collective action among similarly situated creditors).

205. *See* Das, Papaioannou & Trebesch, *supra* note 186, at 17.

206. Unanimity requirements in bond contracts have also proven defective in the governance of a restructuring process. *See, e.g.*, Stephen J. Choi & G. Mitu Gulati, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds*, 53 Emory L.J. 930, 932 (describing unanimous action clauses as a restructuring roadblock that burdened both debtor countries and their bondholders).

207. *See* Buchheit, *supra* note 202, at 11.

208. *See* Kathleen M.H. Wallman, *The Politics of Default: Politically Motivated Sovereign Debt Default and Repudiation*, 20 Tex. Int'l L.J. 475, 480 (1985) (explaining how divergent interests within a lending syndicate may complicate coordination).

209. There were often hundreds of commercial banks involved in a renegotiation. There were 530 banks in a restructuring with Mexico (1982–83), 750 banks in a restructuring with Brazil (1982–83), and over 1,000 banks in another restructuring with Mexico (1986). *See* Robert Kenneth MacCallum, *Sovereign Debt Restructuring: The Rights and Duties of Commercial Banks* Inter Sese, 1987 Colum. Bus. L. Rev. 425, 432 (1987).

financing, with far more heterogeneous and numerous creditors, would further compound these challenges.

3. *The Current Era*

Creditor structures in sovereign debt underwent a seismic shift with the Brady Plan.[210] As sovereign debt markets went from syndicated lending to bond financing, sovereign creditors transformed from relatively small groups of commercial banks to widely dispersed and numerous bondholders.[211] In the pre-Brady era, a typical lending syndicate might have included dozens of large banks or several hundred banks in a larger, more complex restructuring.[212] In the post-Brady bond era, an exchange can easily include tens or hundreds of thousands of bondholders. Argentina's 2001 crisis provides a dramatic example of debt dispersion and creditor fragmentation: over a half-million creditors held 150 debt instruments that were denominated in six currencies and subject to the laws of eight countries.[213] Ukraine's restructuring in 2000 is estimated to have involved around one hundred thousand bondholders.[214]

The identities and incentives of sovereign creditors also transformed under the Brady Plan, shifting from relatively homogenous commercial banks to a wide and divergent variety of bondholders.[215] Commercial banks tended to be long-term, repeat players with incentives to maintain good relations with sovereign borrowers and each other.[216] Banks were generally more responsive to the constraints of regulatory influence and peer pressure.[217] Bank committees further constrained defections by reinforcing peer dynamics and imposing costs on anti-social behavior.[218] Finally, the norms and standing practices established through various restructurings by the

---

210. The Brady Plan, named for U.S. Secretary of the Treasury Nicholas Brady and launched in 1989, promoted the conversion of bank loans into sovereign bonds after the 1980s sovereign debt crisis. *See* Fisch & Gentile, *supra* note 39, at 1067.

211. *See* W. Mark C. Weidemaier & Mitu Gulati, *A People's History of Collective Action Clauses*, 54 VA. J. INT'L L. 52, 56 (2013); *see also* Park & Samples, *supra* note 10, at 250–52.

212. *See* STURZENEGGER & ZETTELMEYER, *supra* note 97, at 12.

213. Creditor fragmentation complicated Argentina's debt crisis at the restructuring, dispute, and settlement phases. *See* Juan J. Cruces & Tim R Samples, *Settling Sovereign Debt's "Trial of the Century*,*"* 31 EMORY INT'L L. REV. 5, 15–18 (2016) (analyzing creditor behavior across Argentina's 150 defaulted bonds in the 2005 and 2010 exchanges).

214. *See* Das, Papaioannou & Trebesch, *supra* note 186, at 21.

215. *See* Park & Samples, *supra* note 10, at 251.

216. *See* Gelpern, *supra* note 15, at 51–52, 57 (referencing the tight cohort of officials, banks, and law firms that handled numerous restructurings); *see also* Fisch & Gentile, *supra* note 39, at 1077–87 (explaining incentives of repeat player creditors with standing inter-creditor relationships and business ties to debtors).

217. *See*, *e.g.*, Weidemaier & Gulati, *supra* note 211, at 56 ("Bondholders, by contrast, are widely dispersed, may have divergent interests, and are less subject to regulatory pressure."); *see also* Jeromin Zettelmeyer, Christoph Trebesch & Mitu Gulati, *The Greek Debt Restructuring: An Autopsy*, 75 ECON. POL'Y 513, 516–17 (2014) (discussing the influence of regulators, peers, and committees on creditor behavior).

218. Banks that were tempted to "go rogue" faced adverse consequences for their defections. *See supra* note 213 and accompanying text.

London Club's advisory committees created additional constraints on creditor behavior.[219] Bondholders today, however, are less responsive to the incentives and constraints that fostered cooperation during the syndicated lending era. With diverging interests and a wide variety of identities, sovereign creditors today are far less homogenous than the commercial banks that ruled the syndicated lending era. Even the act of locating and communicating with bondholders can be a daunting challenge.[220]

Sovereign debt restructuring quickly became less collaborative and more unilateral in comparison with the Brady Plan restructurings.[221] Debt exchanges in the late 1990s and early 2000s were in some cases so unilateral that they resembled "new securities offerings" more than the product of coordinated engagement with creditors.[222] In the early years of the current era, creditor committees played—at most—a minor role in sovereign debt restructuring. Compared with their leading role in bond restructurings a century earlier and in commercial bank negotiations a decade earlier, committees were conspicuously absent in early bond exchanges.[223] In several of these exchanges, creditors failed to form committees, and even when they did, debtors refused to recognize them.[224] As a result, sovereign debt exchanges in the current era proved susceptible to rogue behavior, posing problems for governance and legitimacy.[225]

III. Empirical Analysis of Sovereign Restructurings and Coordination Mechanisms

The emergence of sovereign debt governance underscores the need to examine whether its focus on debtor-creditor engagement is warranted. The UNCTAD Principles, the IIF Principles, and the IMF Lending in Arrears Policy all reference creditor committees, albeit in notably different ways and with varying degrees of prescriptiveness.[226] These nascent governance regimes envision creditor committees as a blueprint for debtor-creditor engagement through New Governance principles.[227] This suggests the following question: Are creditor committees a missing ingredient in sover-

219. *See* Gelpern, *supra* note 15, at 51–54 (describing imperative and constraint effects of intra-group discipline amongst similarly situated creditors).

220. *See* Das, Papaioannou & Trebesch, *supra* note 186, at 22 (noting the logistical challenges of finding and communicating with creditors); *see also supra* note 210 and accompanying text (observing that post-Brady exchanges often involve many thousands of bondholders).

221. *See* Rieffel, *supra* note 23, at 197, 212–13.

222. *See* Gelpern, *supra* note 15, at 49.

223. *See infra* Part III.B (drawing observations about creditor representation and engagement from bond restructurings in the current era).

224. *See* Park & Samples, *supra* note 24, at 41.

225. *See supra* notes 65–67 (discussing rogue behaviors and collective action); *see also* Tim R Samples, *Rogue Trends in Sovereign Debt: Argentina, Vulture Funds, and Pari Passu Under New York Law*, 35 Nw. J. Int'l L. & Bus. 49, 81–82 (2014) (identifying trends in rogue behavior in sovereign debt).

226. *See supra* Part I.C.

227. The guidance arising from the UNCTAD Principles is telling:

eign debt today? Given the centrality of debtor-creditor engagement to sovereign debt governance, the answer to this question goes a long way towards assessing the value of New Governance in the context of sovereign debt.

Debt exchanges in the current era of sovereign debt provide empirical evidence about how committees may—or may not—produce better restructuring outcomes. Accordingly, this Part analyzes all known sovereign restructurings involving foreign law bonds from 1999 until 2019 and offers observations about the operation and impact of creditor committees based on our analysis of the selected variables and metrics.[228] In doing so, our dataset shows the evolving role and impact of committees in the current era of sovereign debt. While anecdotal evidence and the dataset allow us to make broad observations about the role of committees and sovereign debt governance, we refrain from drawing ambitious conclusions about causal relationships in light of data limitations. Sovereign debt data—where available—is often incomplete.[229] Furthermore, with eighteen exchanges, the sample size is limited.

A. *Characteristics of Dataset*

The data were hand collected and organized from a variety of sources, including published economics research,[230] publications by multilateral institutions and ratings agencies,[231] unpublished data provided by industry observers,[232] news articles from the business press, internet searches, and informal, unstructured consultations with market participants. A summarized version of the dataset created for this Article is included as a table in Annex 1.

> The current relevance of the London Club is primarily that of a model for workout institutions, *especially creditor committees*, which has yet to be adapted to a large scale.

UNCTAD Roadmap and Guide, *supra* note 14, at 48 (emphasis added).

228. Some restructurings include both domestic and foreign debt. Our dataset includes all debt restructurings involving foreign law bonds. *See* Anna Gelpern, *Domestic Bonds, Credit Derivatives, and the Next Transformation of Sovereign Debt*, 83 Chi.-Kent L. Rev. 147, 150–51 (2008) (addressing the definition of domestic debt).

229. *See generally* Gelpern, *supra* note 162 (noting the insufficiencies in publicly available information about sovereign debt).

230. *See* Juan J. Cruces & Christoph Trebesch, *Sovereign Defaults: The Price of Haircuts*, 5 Am. Econ. J.: Macroeconomics 85 (2013); *see also* Julian Schumacher, Christoph Trebesch & Henrik Enderlein, *What Explains Sovereign Debt Litigation?*, 58 J.L. & Econ. 585 (2019).

231. *See* Das, Papaioannou & Trebesch, *supra* note 186; Tamon Asonuma et al., *Sovereign Debt Restructuring in Grenada: Causes, Processes, Outcomes, and Lessons Learned* (IMF, Working Paper No.17/171, 2017), https://www.imf.org/en/Publications/WP/Issues/2017/07/24/Sovereign-Debt-Restructurings-in-Grenada-Causes-Processes-Outcomes-and-Lessons-Learned-45101 [https://perma.cc/4FBA-SM5X]; *see also* Sturzenegger & Zettelmeyer, *supra* note 178; Chuck Fang, Julian Schumacher & Cristoph Trebesch, *Restructuring Sovereign Bonds: Holdouts, Haircuts and the Effectiveness of CACs* (European Cent. Bank Working Paper Series, Paper No. 2366, 2020); Elena Duggar, Moody's, Sovereign Debt Restructurings: Historical Evidence and Implications (2014); Moody's, Sovereign Defaults Series (2013).

232. Charles Blitzer, Table on Sovereign Bond Restructurings and Creditor Engagement – 2002–2016 (2016) (on file with authors).

1. *Scope*

This Article's dataset includes eighteen sovereign debt restructurings involving foreign law bonds and creditors from 1999 until 2019.[233] We limit the scope of our dataset to exchanges during the current era of bond restructuring, which began in the late 1990s. While the figures in our tables also exclude certain bonds that function as de facto loans, such as the $3 billion in bonds held by Russia in Ukraine's 2015 debt crisis,[234] we do acknowledge the role of official creditors as potential facilitators—or obstacles—to orderly restructuring.[235]

The dataset excludes exchanges that are essentially domestic.[236] Some sovereign restructurings are purely (or essentially) domestic in terms of governing law, currency, and the nationality of creditors. Most of the exchanges in our dataset involve both foreign bonds and foreign creditors.[237] We make some exceptions for restructurings of domestic law debt if foreign bondholders play an important role in the creditor structure.[238] From a governance perspective, there are fundamental differences between domestic and foreign bond restructurings for a sovereign borrower. Sovereign prerogatives, including the power to alter local laws that govern domestic bonds, make restructuring domestic and foreign law debt fundamentally different.[239]

233. Two more—Puerto Rico and Venezuela—were ongoing as of publication of this Article. In both cases, creditor organization is already underway. *See, e.g.*, Park & Samples, *supra* note 24, at 49–52 (analyzing the role of creditor committees in efforts to restructure the debt of the Puerto Rico Electric Power Authority); *see also Venezuela Creditors Urge U.S. Government to Remove Bond Restrictions*, REUTERS (Nov. 4, 2019, 1:03 PM), https://www.reuters.com/article/us-venezuela-politics-debt/venezuela-creditors-urge-u-s-government-to-remove-bond-restrictions-idUSKBN1XE1YO [https://perma.cc/9XAF-YV93] (reporting on activities of the Venezuela Creditors Committee). Because these two restructurings are ongoing and lack crucial data for some variables, we exclude them from this Article's analysis.

234. We exclude Russia's debt from the volume and participation and, accordingly, exclude the disputes brought by Russia against Ukraine to enforce those debts. *See* Anna Gelpern, *Russia's Contract Arbitrage*, 9 CAP. MKTS. L.J. 308, 308–09 (2014) (explaining Russia's uniquely problematic role as a holdout creditor); *see also* Fang, Schumacher & Trebesch, *supra* note 231, at 9 (drawing distinctions between bonds and various "loan-like bonds").

235. Official creditors in the Greek restructuring helped facilitate the exchange by pressuring other creditors to participate. Zettelmeyer, Trebesch & Gulati, *supra* note 217, at 536. However, debtor-creditor dynamics among members strained governance within the European Union. *See* Jale Tosun, Anna Wetzel & Galina Zapryanova, *The EU in Crisis: Advancing the Debate*, 36 J. EUROPEAN INTEGRATION 195, 196 (2014) (discussing political pressures and social unrest associated with fiscal transfers and austerity measures).

236. Accordingly, we exclude Nicaragua (2003 and 2008), Jamaica (2010 and 2013), and Cyprus (2013).

237. Determining the identity of creditors is difficult for Dominica (2004) because reliable data specific to the bonds involved in that exchange are scarce. *See* Fang, Schumacher & Trebesch, *supra* note 231, at 10. For data on that exchange, which involved both loans and bonds, we rely on the IMF working paper by Das, Papaioannou, and Trebesch. *See* Das, Papaioannou & Trebesch, *supra* note 186, at 37.

238. *See, e.g.*, Uruguay (2003), Grenada (2005), Saint Kitts and Nevis (2012), and Greece (2012).

239. Greece, for instance, changed domestic laws to install a collective action mechanism that made the exchange offer compulsory if creditors holding two-thirds of outstanding local bonds accepted the exchange offer. Such a change was not possible for Greece's foreign law bonds. *See* Zettelmeyer, Trebesch & Gulati, *supra* note 217, at 517; *see also* Grund, *supra* note 162, at 404.

Likewise, dealing with foreign creditors involves a different set of imperatives and constraints than managing purely domestic creditors.

2. *Variables*

We collected information on the following key independent variables: *year of exchange, volume, haircut, participation, creditor structure, creditor representation, negotiations, jurisdiction, preemptive or post-default, and creditor litigation*. *Year of exchange*, *volume*, *haircut*, *participation*, and *creditor litigation* are fairly straightforward variables. As for the year of the exchange, it is rare to have multiple exchanges for the same set of defaulted bonds.[240] We use the launch date of the restructuring offer to determine the *year of the exchange*. The *volume of the exchange* is the face value amount of the exchange in U.S. dollars. The *haircut* is the extent of creditor losses.[241] *Participation* refers to the percentage of bondholders that accepted the exchange offer and opted to participate in the restructuring. *Creditor litigation* is a binary variable reflecting the existence or lack of creditor lawsuits.[242]

A majority of the restructurings in the dataset involve purely foreign bond exchanges.[243] Accordingly, many of the bonds considered are issued under the jurisdiction of New York or English law and denominated in U.S. Dollars or Euros.[244] Because many sovereigns have a mixed allocation of local and foreign issuances, we focused our data collection and analysis on the foreign debt where possible. Finally, whether or not bonds were in default before the restructuring is often a straightforward inquiry. However, in some cases, defaults are either partial or selective, affecting some issuances

240. Argentina (2005 and 2010) is a prominent exception to this tendency. *See* Gelpern, *supra* note 62, at 137–38 (reviewing events surrounding Argentina's default and subsequent restructurings).

241. *See* Fang, Schumacher & Trebesch, *supra* note 231, at 11–12 (explaining approaches to calculating haircuts); *see also* Cruces & Trebesch, *supra* note 230, at 88–90 (same).

242. Within the creditor litigation variable, we also consider investor-state arbitration actions, which presents similar results as a restructuring outcome. *See, e.g.*, Park & Samples, *supra* note 13, at 1058–62 (examining the use of investor-state arbitration as an enforcement tool in sovereign debt); *see also* Sebastian Grund, *Restructuring Government Debt Under Local Law: The Greek Experience and Implications for Investor Protection in Europe*, 12 Cap. Mkts. L.J. 253, 260–62 (2017) (discussing claims brought by Greek creditors in international investment arbitration tribunals).

243. *See* Fang, Schumacher & Trebesch, *supra* note 231, at 15 (illustrating the percentage share of foreign bonds by exchange in selected sovereign restructurings).

244. Whereas wealthy countries can often satisfy financing needs in domestic markets, emerging market countries often turn to international markets for financing. Most emerging market sovereign bonds issued internationally are governed by New York (sixty-six percent) and English law (twenty-eight percent). By contrast, between 2003 and 2010, over eighty percent of public bonds issued in EU countries were subject to domestic law. *See* Das, Papaioannou & Trebesch, *supra* note 186, at 42 (illustrating bond issuances from emerging markets and EU countries by governing law as of 2009).

and not others.[245] And in other cases, the occurrence of default—whether or not a default has actually occurred—is a contested issue.[246]

Though difficult at times to identify and quantify, *creditor structure*, *creditor representation*, and *creditor engagement* are critical to evaluating conditions for coordination and governance in a sovereign debt restructuring. *Creditor structure* refers to the number of bondholders, their composition, and the degree to which they are concentrated or fragmented.[247] While we determine creditor structure in binary terms, as fragmented or concentrated, we do note exchanges with highly fragmented or highly concentrated structures, as illustrated in Table 2. *Creditor representation* considers whether bondholders were organized into a committee or a bondholder group. Taking into account the representativeness of committees involved in an exchange, we determine creditor representation in binary terms. Where possible, we evaluated information about the domestic or foreign status and identity of the creditors. We also considered the representativeness (that is, how much outstanding debt the committee represented relative to total outstanding debt) of the creditor committees and whether or not the committee was recognized by the sovereign debtor.[248] Finally, *the creditor engagement* variable indicates the extent of negotiations and consultations between the committee and the debtor.[249] We categorize the extent of those negotiations and consultations between the committee and the debtor on a spectrum of engagement: almost none, limited, or extensive.

B. Chronological Analysis: Creditors over Time

The role of creditor committees in the current era's bond exchanges has been uneven. From 1999 to 2005, committees were virtually a non-factor. Since that lull, however, creditor committees have reclaimed a role in the governance of sovereign debt restructuring. When bondholder committees are formed, they are usually the product of ad hoc initiatives by private creditors, such as the bondholder committees in Grenada (2015)[250] or a broad coalition of creditors such as the Global Committee of Argentine Bondholders ("GCAB") in Argentina (2005).[251] Engagement with creditors

245. *See generally* Cristina Arellano, Xavier Mateos-Planas & José-Víctor Ríos-Rull, *Partial Default*, Fed. Reserve Bank of Minneapolis Staff Report 589 (2019), https://doi.org/10.21034/sr.589 (analyzing partial defaults in sovereign debt); Aitor Erce & Enrico Mallucci, *Selective Sovereign Defaults*, Bd. of Governors of the Fed. Reserve Sys. Int'l Fin. Discussion Papers 1239 (2018), https://doi.org/10.17016/IFDP.2018.1239 (examining selective defaults in sovereign debt).

246. *See, e.g.*, Dominica (2004) and Argentina (2014).

247. *See* Das, Papaioannou & Trebesch, *supra* note 186, at 21 (characterizing bondholder structure).

248. *See id.* at 22 (characterizing the representativeness of bondholder groups).

249. *See id.* (characterizing bondholder communication and negotiation).

250. *See, e.g.*, Asonuma et al., *supra* note 231, at 22 (describing the formation and composition of a steering committee of six large bondholders and an ad hoc committee).

251. Though Argentina's debt crisis spawned numerous creditor organizations, from the GCAB to lobby groups, we consider Argentina (2005) a "no" on the involvement of a representative creditor committee because those groups were not recognized and did not play a meaningful role in negotiating

is also uneven across restructurings. While some sovereign debtors have engaged proactively and meaningfully with creditors, others have dismissed them and taken more unilateral paths to restructuring.[252] The GCAB, for instance, claimed to represent over half of Argentina's outstanding private bonds, but was never formally recognized by the Argentine government.[253]

The earliest exchange in the dataset is Pakistan (1999), the first Eurobond restructuring in history.[254] Ecuador (2000) was the first collateralized Brady bond restructuring.[255] Neither exchange involved a recognized creditor committee. In Ecuador's restructuring, a group of minority bondholders formed the Ecuador Creditors Advisory Group, which exerted influence on the restructuring negotiations but was not recognized by Ecuador.[256] At other times, committees were never formed or had little to no decisive impact on the restructuring.[257] Still other times, unrecognized committees managed to impact the outcomes of the process through external influence.[258] These divergent scenarios underscore the need to consider creditor representation and creditor engagement as separate variables.

With respect to creditor committees, we observe essentially two periods within the current era of sovereign debt restructuring. In the first eight exchanges of the current era, creditor committees played virtually no role in sovereign debt restructuring. That trend reversed dramatically in 2005. Beginning with Grenada (2005), committees have played a role in ten of twelve exchanges. This trend is even more notable considering that those six exchanges also involved a meaningful degree of creditor engagement.[259] Creditor committees in the eighteen exchanges in our dataset are shown below in Table 1.

---

the terms of the exchange. *See* Fisch & Gentile, *supra* note 39, at 1107 (referring to the GCAB as a "supercommittee" of creditors).

252. Ecuador (2000) and Argentina (2005) were particularly unilateral exchanges.

253. Das, Papaioannou & Trebesch, *supra* note 186, at 22.

254. Sturzenegger & Zettelmeyer, *supra* note 231, at 25.

255. *Ecuador to Default on Debt Backed by U.S.*, N.Y. Times, Sept. 27, 1999, at A9.

256. This case illustrates the complexity in determining whether a committee was involved in a particular restructuring. Sometimes committees are clearly involved, recognized by the sovereign debtor and integrated in the workout process. We did not qualify this advisory group as an involved creditor committee because it lacked recognition, but we acknowledge that the group impacted the restructuring process. *See, e.g.*, Heather Scoffield, *The Man Who Toppled Ecuador's Economy*, Globe & Mail (Jan. 19, 2000), https://www.theglobeandmail.com/report-on-business/the-man-who-toppled-ecuadors-economy/article25453588 [https://perma.cc/BWU9-HJG8] (profiling Gramercy Advisors and discussing the hedge fund's role in the Ecuador Creditors Advisory group).

257. Generally, committees without significant holdings of outstanding debt will have less influence and, therefore, less impact on the restructuring process. In Dominican Republic (2005) and Seychelles (2009), bondholder groups were formed but represented a minority of outstanding debt. Das, Papaioannou & Trebesch, *supra* note 186, at n. 16.

258. Ecuador (2000) is one such case. *See supra* note 253 and accompanying text.

259. *See infra* Part III.D (analyzing engagement with creditors in the selected exchanges). While it is possible that the ongoing Puerto Rico and Venezuela debt restructurings will include significant committee-based debtor-creditor engagement, the extent of engagement remains to be seen.

TABLE 1. CREDITOR COMMITTEES IN SELECTED RESTRUCTURINGS, 1999-2019

Debtor	*Year*	*Volume (millions USD)*	*Participation (%)*	*Creditor Representation*	*Litigation*
Pakistan	1999	610	99	No	Yes
Ecuador	2000	6,090	96	No	Yes
Ukraine	2000	1,540	98	No	No
Moldova	2002	40	100	No	No
Uruguay	2003	5,560	91	No	No
Dominica	2004	144	72	No	Yes
Argentina	2005	77,210	76	No	Yes
Dominican Rep.	2005	1,100	94	No	No
Grenada	2005	230	93	Yes	Yes
Belize	2006	350	97	Yes	No
Ecuador	2009	3,210	92	No	No
Seychelles	2009	300	100	No	No
Côte d'Ivoire	2010	2,300	99	Yes	No
Greece	2012	276,520	97	Yes	Yes
Saint Kitts and Nevis	2012	200	100	Yes	No
Belize	2013	550	100	Yes	No
Grenada	2015	262	100	Yes	Yes
Ukraine	2015	15,000	100	Yes	No

Sources: Das et al. (2013), Schumacher et al. (2015), Fang et al. (2020)

C. *Creditor-Side Analysis: Structure and Representation*

We examine two primary creditor-side variables: *creditor structure* and *creditor representation*. *Creditor structure* describes the relative concentration or dispersion of the creditor base in a particular exchange. For some exchanges, we also consider the identity of creditors (for example, as retail investors or as institutional creditors) and the number of different bonds involved in the exchange as factors in determining creditor structure.[260] For each exchange, where possible, we characterize the creditor structure as highly concentrated, concentrated, fragmented, or highly fragmented. The more outstanding debt held by a single creditor or a small group of creditors, the more concentrated the exchange. Exchanges with highly concentrated or highly fragmented creditor structures are marked with an asterisk in Table 2 below.

Creditor representation describes whether a creditor committee represents the creditor base and becomes involved in the restructuring. Committees are considered representative when their membership includes creditors holding

260. *See supra* notes 227–228 and *infra* notes 281–284 (discussing the role of creditor identity in shaping incentives and imperatives in restructuring scenarios).

a significant portion of the outstanding debt to be restructured. A committee need not have a large number of members to represent a significant portion of the outstanding debt.[261] Committees are considered involved in a restructuring when they are officially recognized by the sovereign debtor and play a meaningful role in restructuring negotiations. For each exchange, where possible, we characterize the existence of creditor representation in binary terms (that is, yes or no). As with other descriptive determinations about sovereign debt restructuring, in the absence of precise data, qualitative judgments are made as to the extent of representation.[262]

A shift towards more numerous and dispersed creditor structures is a key difference between the syndicated loan restructurings of the London Club era and the bond exchanges of the current era.[263] Whereas a relatively fragmented syndicated loan exchange involved hundreds of banks, a debt crisis today often involves tens or hundreds of thousands of bondholders.[264] However, even within the current era, creditor structure can vary dramatically from one exchange to another. The Argentina exchange in 2005 involved an extremely dispersed and fragmented creditor base, while Moldova (2002) was extremely concentrated, with just one creditor holding seventy-eight percent of the country's outstanding Eurobonds.[265] Furthermore, Argentina (2005) involved approximately 150 bonds, while Moldova (2002) involved one.[266] Table 2 illustrates creditor-side variables for exchanges in the dataset.

261. The committees in Grenada (2005) and Belize (2007) included just a handful of financial institutions, seven and thirteen, respectively. However, these committees represented over half of the outstanding private debt in each case. Das, Papaioannou & Trebesch, *supra* note 186, at 22.

262. *See*, *e.g.*, *supra* notes 258 and accompanying text (referencing approaches to categorizing characteristics of sovereign debt exchanges employed by Das, Papaioannou, and Trebesch).

263. *See supra* Part II.B (identifying the consequences of increasingly numerous and fragmented creditor structures in the global sovereign debt market).

264. *Compare supra* notes 203 and 220 and accompanying text (referencing creditor structures in syndicated loan exchanges) *with supra* notes 234 and 251 and accompanying text (citing creditor dynamics in the Argentina (2005) and Ukraine (2000) exchanges).

265. The creditor structures in the Ecuador (2000), Granada (2005), and Belize (2006) exchanges were also somewhat concentrated, though less concentrated than Moldova (2002). Das, Papaioannou & Trebesch, *supra* note 186, at 21.

266. Fang, Schumacher & Trebesch, *supra* note 231, at 17.

TABLE 2. CREDITOR-SIDE VARIABLES IN SELECTED RESTRUCTURINGS, 1999–2019

Debtor	*Year*	*Number of Bonds*	*Creditor Structure*	*Creditor Representation*	*Participation (%)*
Pakistan	1999	3	Fragmented	No	99
Ecuador	2000	6	Concentrated	No	96
Ukraine	2000	4	Fragmented*	No	98
Moldova	2002	1	Concentrated*	No	100
Uruguay	2003	65	Fragmented	No	91
Dominica	2004	2	Fragmented	No	72
Argentina	2005	145	Fragmented*	No	76
Dominican Rep.	2005	2	n/a	No	94
Grenada	2005	16	Concentrated	Yes	93
Belize	2006	7	Concentrated	Yes	97
Ecuador	2009	2	n/a	No	92
Seychelles	2009	2	Fragmented	No	100
Côte d'Ivoire	2010	6	Concentrated	Yes	99
Greece	2012	117	Fragmented	Yes	97
Saint Kitts and Nevis	2012	12	Concentrated	Yes	100
Belize	2013	1	Concentrated	Yes	100
Grenada	2015	2	Concentrated	Yes	100
Ukraine	2015	13	Concentrated*	Yes	100

* Highly concentrated or highly fragmented creditor structure.
Sources: Cruces & Trebesch (2010), Das et al. (2013), Fang et al. (2020)

We observe that representative creditor committees form frequently within concentrated creditor structures. Committees were involved in all of the exchanges with concentrated creditor structures except for two early cases, Ecuador (2000) and Moldova (2002). It is worth noting that those two exchanges occurred during a lull in committee activity at the beginning of the sample period.[267] And Moldova (2002) was an exceptional case in which creditor structure was so concentrated and unipolar that there was practically no need for organization. The largest creditor held seventy-eight percent of the single bond involved in the exchange, which exceeded the collective action threshold needed to approve the restructuring terms.[268] Thus, creditor coordination was effectively irrelevant.

267. *See supra* notes 258–260 and accompanying text.
268. That creditor, TCW Asset Management, held enough bonds to exceed the threshold required under the CACs in the exchange bonds. As a result, only one creditor's approval was needed to restructure the bonds. Sturzenegger & Zettelmeyer, *supra* note 231, at 209–10.

Anecdotal observations of the exchanges with the most fragmented creditor structures are mixed.[269] Other than Greece, none of the exchanges with fragmented creditor structures involved a recognized and representative creditor committee. Highly fragmented exchanges also had some of the lowest participation rates in the dataset. One exception to this tendency is Ukraine (2000), which reached a ninety-eight percent participation rate—above average for a sovereign debt exchange—despite a highly fragmented creditor structure.[270] Other highly fragmented exchanges fell well below average participation rates: Uruguay (2003), Dominica (2004), and Argentina (2005) were among the lowest in the sample with ninety-two percent, seventy-two percent, and seventy-six percent, respectively. The other exchange with low participation was Ecuador (2009) at ninety-one percent, which was a buy-back and a rather atypical restructuring.[271]

Highly fragmented or dispersed creditor structures create practical hurdles to restructuring—from simply locating creditors to coordinating a consensus among them.[272] While it is entirely possible that creditor structures influenced the outcomes of these exchanges, it is worth recalling that these exchanges occurred in the early years of the current era, when exchanges tended to be more unilateral. During those years, participation rates were lower and creditor representation was almost nonexistent. As a practical matter, it is intuitive that organization becomes more difficult within a highly fragmented group of creditors.[273] Yet the most fragmented creditor structures are perhaps those most in need of organization.[274]

Though more difficult to account for, we posit that the particular identity of creditors in an exchange can shape their behavior and influence restructuring outcomes. The particular heterogeneity or homogeneity of creditors within a restructuring—or even within a certain bond—can also impact participation incentives. The identity of creditors seems particularly relevant to incentives surrounding decisions to participate versus holding out and

269. Ukraine (2000), Uruguay (2003), Dominica (2004), and Argentina (2005) had among the most fragmented creditor structures in the dataset.

270. *See, e.g.*, Elena Duggar, Moody's, The Role of Holdout Creditors and CACs in Sovereign Debt Restructurings 9 (2013) (calculating an average participation rate of 95 percent across 34 selected exchanges).

271. *See* Gelpern, *supra* note 234, at 317–18 (explaining the exceptional nature of Ecuador's buy-back offer).

272. Das, Papaioannou & Trebesch, *supra* note 186, at 22.

273. A highly concentrated creditor structure is a double-edged sword. While alleviating the coordination and communications problems that plague fragmented exchanges, a small handful of creditors essentially hold veto powers in the restructuring. *See, e.g.*, Anna Gelpern, *Ukraine's Bond Restructuring: Surgery, Conspiracy, and Campaign*, Peterson Inst. for Int'l Econ. (Apr. 17, 2015, 6:00 PM), https://www.piie.com/blogs/realtime-economic-issues-watch/ukraines-bond-restructuring-surgery-conspiracy-and-campaign [https://perma.cc/77EK-QW9S] (referring to the "mixed blessing" of a highly concentrated bond structure).

274. *See* Ahdieh, *infra* note 294, at 248–49 (arguing that groups may fill governance gaps in the global sovereign debt market by serving as nodes of negotiation and overcoming barriers to mutually beneficial collective action).

litigating.[275] For instance, specialists in debt litigation (for example, a distressed debt hedge fund) are likely to have very different investment strategies and incentives than other institutional investors (for example, a pension fund).[276] In particular, distressed debt hedge funds—often labeled as "vulture" funds—have recalibrated creditor-side incentives and debtor-side imperatives by lobbying for favorable changes in substantive law and innovating litigation and enforcement strategies.[277] Finally, some exchanges involve a significant number of retail investors, who tend to have their own divergent incentives and tendencies.[278]

D. *Procedural Analysis: Negotiations and Outcomes*

Our analysis of debtor-creditor engagement acknowledges the various forms that engagement can take. The spectrum of engagement ranges from adopting a unilateral strategy (for example, Argentina (2005)) to engaging in extensive dialogue with a formally recognized creditor committee (for example, Ukraine (2015)). In the middle of the spectrum are options such as consultations and roadshows, which essentially function as a pitch for a restructuring offer and may offer some opportunities for feedback. Informal consultations—either through advisors or directly with creditors—can help determine the viability of the terms in a potential offer.[279] Like consultations, roadshows offer another communications channel in which officials present restructuring proposals and have opportunities to receive investor feedback.[280] A common denominator across these engagement options is that they provide mechanisms for communication and dialogue.

While committees perform functions that can facilitate a restructuring, engagement can bring constraints for the sovereign debtor. Even the softer forms of debtor-creditor engagement in sovereign debt governance regimes can involve risks and constraints. For instance, to formally recognize a creditor committee is often understood as the debtor conveying an implicit right of prior approval to the committee.[281] In exchange, the debtor may expect

275. *See* Schumacher, Trebesch & Enderlein, *supra* note 63, at 21 ("Since the year 2000, 65% of all cases were initiated by distressed debt funds.").

276. Buchheit et al., *supra* note 34, at 4–5 (identifying the primary creditors in the global sovereign debt market and variations in their investment behavior).

277. *See* Schumacher, Trebesch & Enderlein, *supra* note 63, at 11–12 (discussing the lobbying and litigation strategies of distressed debt hedge funds); *see also* Robert C. Bird, *The Many Futures of Legal Strategy*, 47 Am. Bus. L.J. 575 (2010) (arguing that legal strategy can serve as a source of competitive advantage to firms).

278. *See* Das, Papaioannou & Trebesch, *supra* note 186, at 22–23 (pointing out communication challenges and exchange preferences associated with retail investors); *see also* Gelpern, *supra* note 273 (noting communication and coordination challenges associated with a fragmented creditor base).

279. *See* Buchheit et al., *supra* note 34, at 9–10 (contrasting the informal consultation approach with more formal engagement with a committee).

280. Das, Papaioannou & Trebesch, *supra* note 186, at 22.

281. In this context, the commitment to negotiate with a committee implicitly means that an exchange offer will not be made without the prior approval of the committee. Buchheit et al., *supra* note 34, at 9.

the committee to facilitate coordination and encourage participation in an approved offer. However, if negotiations are slow or unsatisfactory, proceeding without the committee would be difficult and risky.[282] Undoing a commitment with a committee could destabilize the sovereign's debt restructuring plans.

Taking into account the various options available to a sovereign debtor, we characterize creditor engagement on a spectrum: almost none, limited, or extensive. We characterize the lowest level of engagement as "almost none," which includes essentially unilateral exchanges without meaningful dialogue with creditors.[283] We do not consider interactions, like roadshows, to be meaningful engagement unless constructive negotiations occur. Even the most unilateral exchanges often include some contact and communication with creditors through consultations and roadshows.[284] We characterize the next level of engagement with creditors as "limited," which includes restructuring approaches with numerous contacts and meaningful dialogue with creditors.[285] Finally, we characterize as "extensive" those exchanges that involve extensive negotiations with bondholders through either a recognized committee or less formal means.[286] These categories underscore what we consider an important point: formally recognizing a committee is not the only form of constructive engagement with creditors.

282. *Id.*

283. *See, e.g.*, *supra* note 152 (defining take-it-or-leave-it offers as exchanges without meaningful engagement).

284. Leading up to Argentina's exchange in 2005, officials held roadshows across the Europe, the United States, and Japan. IMF, Country Report No. 05/236, Argentina: 2005 Article IV Consultation–Staff Report; Staff Supplement; Public Information Notice on the Executive Board Discussion; and Statement by the Executive Director for Argentina 14 (2005).

285. Thus, limited engagement with creditors would not include negotiations with a formally recognized committee or truly extensive but informal negotiations with bondholders. Dominican Republic (2005) involved frequent contact and meetings with bondholders, but did not include extensive negotiations or a recognized creditor committee. *See, e.g.*, Das, Papaioannou & Trebesch, *supra* note 186, at 24.

286. Moldova (2002) is a special case that illustrates a scenario in which a committee was not necessary for extensive engagement. *See supra* notes 270 and 273 and accompanying text.

TABLE 3. NEGOTIATIONS AND OUTCOMES, 1999–2019

Debtor	*Year*	*Creditor Representation*	*Creditor Engagement*	*Haircut (%)*	*Participation (%)*
Pakistan	1999	No	Limited	33	99
Ecuador	2000	No	Limited	35	96
Ukraine	2000	No	Extensive	37	98
Moldova	2002	No	Extensive	41	100
Uruguay	2003	No	Extensive	14	91
Dominica	2004	No	Limited	68	72
Argentina	2005	No	Almost none	75	76
Dominican Rep.	2005	No	Limited	1	94
Grenada	2005	Yes	Extensive	38	93
Belize	2006	Yes	Extensive	16	97
Ecuador	2009	No	Almost none	58	92
Seychelles	2009	No	Extensive	71	100
Côte d'Ivoire	2010	Yes	Limited	22	99
Greece	2012	Yes	Extensive	55	97
Saint Kitts and Nevis	2012	Yes	Extensive	44	100
Belize	2013	Yes	Extensive	40	100
Grenada	2015	Yes	Extensive	43	100
Ukraine	2015	Yes	Extensive	14	100

Sources: Cruces & Trebesch (2010), Das et al. (2013), Fang et al. (2020)

We note anecdotal evidence that sovereign debt restructurings have been trending away from the unilateral approach common at the outset of the current era. In parallel with increasing creditor representation over the period of the dataset, we also observe an uptick in engagement with creditors. During the second half of the dataset period, extensive engagement with a representative creditor committee took place in all five of the most recent exchanges, including the two largest restructurings in recent years.[287] Engagement with committees increasingly looks more like a norm rather than an exception. However, there is also evidence to support the view that constructive debtor-creditor engagement—even extensive engagement—is possible even in the absence of a formally recognized committee. For instance, the Seychelles (2009) exchange illustrates that an advisory approach can perform functions traditionally fulfilled by a creditor committee. In that exchange, Seychelles' advisors facilitated the restructuring by assisting with the locating of and communication with creditors.[288]

287. *See* Greece (2012) and Ukraine (2015) in Annex 1.

288. *See* IMF, COUNTRY REPORT NO. 08/365, SEYCHELLES: 2008 ARTICLE IV CONSULTATION AND REQUEST FOR A STAND-BY ARRANGEMENT—STAFF REPORT; STAFF SUPPLEMENT; PUBLIC INFORMATION NOTICE AND PRESS RELEASE ON THE EXECUTIVE BOARD DISCUSSION; AND STATEMENT BY THE EXECUTIVE DIRECTOR FOR SEYCHELLES 5, 15–16, 44 (2008).

We observe that Argentina (2005) and Ecuador (2009)—exchanges with almost no creditor engagement—had low rates of participation. That tendency is consistent with the notion that engaging with representative committees helps to avert debt litigation.[289] However, those two exchanges also had high haircuts, which are strong predictors of participation rates.[290] Rather than acting as a causal driver of participation, engagement might be better understood as a proxy for restructuring styles (that is, unilateral and adversarial versus multilateral and collaborative). In other words, the correlation between deeper haircuts and very low engagement may be part and parcel of a more unilateral and adversarial restructuring style. Meanwhile, in exchanges with extensive engagement with creditors, participation is generally high but haircuts are low, which could lend support to the idea that engaging with a committee grants leverage to creditors.[291]

IV. A Critical Perspective on Sovereign Debt Governance

Drawing on the analysis of creditor committees in Parts II and III, we make two broader observations about sovereign debt governance. First, debtor-creditor engagement in the form of creditor committees constitutes an implicit compromise made by sovereigns in the face of rogue behavior. Second, the use of creditor committees to date suggests that the question of institutionalization in sovereign debt still looms large. The following discussion elaborates on each of these claims.

A. *The Appeal of Sovereign Engagement*

The global sovereign debt market exhibits the characteristics of a trust dilemma in which parties must assure each other they will cooperate in order for both parties to reach the best outcome.[292] To overcome the trust dilemma, parties must find ways to communicate their respective expectations.[293] Treaty-based regimes serve this purpose in international law writ large.[294] In the absence of treaty-based regimes, sovereigns and their creditors can coordinate with each other through the identification and perpetua-

289. *See* Schumacher, Trebesch & Enderlein, *supra* note 230, at 593, 613 (referencing the view that engaging with a creditor committee helps prevent sovereign debt litigation but finding no significant correlation with litigation risk).

290. *See, e.g.*, Fang, Schumacher & Trebesch, *supra* note 231, at 5–6 (showing the relationship between haircut size and participation rates).

291. Buchheit et al., *supra* note 34, at 9.

292. In game theory, the trust dilemma is also known as the assurance or stag hunt game. Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Equity, and Law*, 82 S. Cal. L. Rev. 209, 220–22 (2009); *see also* Stephen Bainbridge, *Comity and Sovereign Debt Litigation: A Bankruptcy Analogy*, 10 Md. J. Int'l L. & Trade 1 (1986) (applying game theory to sovereign debt litigation).

293. Robert B. Ahdieh, *The Role of Groups in Norm Transformation: A Dramatic Sketch, in Three Parts*, 6 Chi. J. Int'l L. 231, 250 (2005).

294. *See* McAdams, *supra* note 292, at 237–38; Abbott, *supra* note 1, at 368–71 (each citing examples from other areas of international law).

tion of intra-group norms.[295] Debt restructurings in the current era suggest that creditor committees may facilitate this process.

Notwithstanding the fact that sovereign debtors have the legal prerogative not to engage with creditors, unilateral exchanges are becoming the exception, which may indicate that sovereigns are responding to motivating factors in the governance environment.[296] By establishing collaborative signals and communication channels, engagement can ease the trust dilemma with instrumental counter-parties such as private creditors and the IMF.[297] Even without the binding force of enforceable law, proactive engagement communicates the expectation that established restructuring norms will be observed.[298] The act of publicly and deliberately engaging with creditors may even constitute a form of precommitment to good faith negotiation.[299]

In addition, engagement with creditors may exhibit a sovereign's willingness to lower the restructuring ceiling (that is, to accept less debt relief) in order to raise the floor (that is, to avoid prolonged defaults and litigation risks).[300] Consistent with research that shows a substantial correlation between high haircuts and litigation,[301] anecdotal evidence may support the notion that engagement signals a sovereign's willingness to compromise. We observe that a sovereign willing to recognize and engage with a creditor committee is also likely to seek compromise in restructuring talks. Indeed, accepting the constraints of engagement can have costs: lighter haircuts offer less debt relief and multilateral engagement means less autonomy.[302] But collaborative approaches may also help a sovereign avoid worst case restructuring scenarios.[303]

B. The Role of Institutions in Sovereign Debt Governance

The New Governance-inspired informality of sovereign debt governance arguably represents a step towards ridding sovereign debt of its cardinal sin: the fallacy of legal formalism. To state this case in the bluntest terms, the

295. Ahdieh, *supra* note 293, at 247–63.

296. *See supra* Part III.D (demonstrating the trend away from more unilateral, adversarial exchanges towards greater engagement).

297. *See supra* notes 68–71 and accompanying text (explaining the role of norms in overcoming trust dilemmas in sovereign debt).

298. *See* Ahdieh, *supra* note 293, at 258 (arguing that groups may facilitate credible commitments to agreements made by individual members).

299. *See* Park & Samples, *supra* note 10, at 281 (defining precommitment as an observable action that ensures that at some later time, the actor will perform an act that it would not have otherwise performed). The London Club, for instance, has been described as a precommitment device. *See id.* at 282.

300. *See* Park & Samples, *supra* note 24, at 43–48 (exploring factors that shape debtor and creditor engagement in sovereign debt restructuring).

301. *See, e.g.*, Schumacher, Trebesch & Enderlein, *supra* note 230, at 617 (describing factors, including higher haircuts, that make sovereign debt litigation more likely).

302. *See infra* Part III.D (observing that exchanges with extensive engagement tended to produce lower haircuts than more unilateral exchanges).

303. *See id.* (observing that exchanges with the lowest participation had almost no engagement or limited engagement).

alternative to the open and collaborative accountability of sovereign debt governance is not hard law but rather no law at all.[304] Rather than supplanting sovereign debt's public international law origins or the contract-based private law system that predominates today, sovereign debt governance complements them through legal ordering of a hybrid, multi-level nature.[305] According to its proponents, the informal, non-mandatory nature of sovereign debt governance is an inherent strength, rather than simply a concession to the political challenges of international lawmaking.[306]

This Article's analysis of creditor committees arguably exposes the thinness of this reasoning. To determine whether sovereign debt governance constitutes an improvement of the status quo, one must consider the value of debtor-creditor engagement to ameliorating the instability, uncertainty, and illegitimacy concerns that have prompted reform efforts. Creditor committees constitute the most widely recognized manifestation of debtor-creditor engagement, as reflected in the UNCTAD Principles, the IIF Principles, and the IMF Lending into Arrears Policy. However, the restructurings analyzed in Part III indicate the persistence of state practice that focuses on the individual circumstances of each restructuring (in particular the objectives of the sovereign as well as the incentives and constraints facing external private creditors) rather than the emergence of new legal norms.[307]

This raises the question of how much institutionalization is necessary in order to achieve optimal debtor-creditor engagement. The shortcomings of New Governance-influenced approaches in international financial regulation pose a cautionary note. As became evident during the global financial crisis of 2008, informal, soft law-based networks can fail at even their core function of regulatory coordination.[308] More pointedly, self-interested market actors in times of crisis may subvert New Governance by refusing to communicate with each other and incorporate what they have learned previously.[309] In the context of sovereign debt, the ability of New Governance-based regulation to regulate the ultimate "high politics" of a national debt crisis may be limited indeed.[310] While sovereigns may agree to accept debtor-creditor engagement as a matter of principle, the capacity of sover-

---

304. *See* Gelpern, *supra* note 20, at 353 (observing that "sovereign debt is not just a zone where treaties, custom, and adjudication are rare—it appears to be a law-free zone.").

305. *See* UNCTAD Roadmap and Guide, *supra* note 14, at 14 (observing that the inadequacies of the contractual approach as a predicate for the UNCTAD Principles).

306. *See* Juan Pablo Bohoslavsky et al., *Emerging Customary International Law in Sovereign Debt Governance?*, 9 Cap. Mkts. L.J. 55, 60–61 (2014).

307. *See infra* Part III.D (identifying varying levels of creditor engagement).

308. Michael S. Barr, *Who's In Charge of Global Finance?*, 45 Geo. J. Int'l L. 971, 980–87 (2014); *see also* Edward F. Greene & Joshua L. Boehm, *The Limits of Name-and-Shame in International Financial Regulation*, 97 Cornell L. Rev. 1083 (2012) (advocating for a treaty-based system for the supervision and resolution of global systemically important financial institutions).

309. *See* Ford, *supra* note 74, at 473–74.

310. *See* David Zaring, *International Institutional Performance in Crisis*, 10 Chi. J. Int'l L. 475, 495–99 (2010) (noting the failure of international networks to function during the high politics of the 2008 financial crisis).

eign debt governance regimes to serve as effective precommitment mechanisms is contestable. This Article's finding of a positive correlation between creditor engagement and participation rate, coupled with our finding of a negative correlation between creditor engagement and haircuts (that is, the less that a sovereign engages with its creditors, the higher the haircut imposed on creditors), suggests that a sovereign may be willing to "play hardball" and refuse to meaningfully engage under financially or politically exigent circumstances.[311] The procedural guidance to incentivize engagement in sovereign debt governance may become substantive *dis*incentives if opportunistic sovereigns or creditors perceive such guidance to be an impediment to their immediate goals.

To overcome persistent distrust between defaulting sovereigns and their private creditors, debtor-creditor engagement must be more durable and inclusive. As critical as the substantive forms of engagement are, the procedural framework for adjusting and revising those forms is equally important. Among proponents of sovereign debt governance, the prevailing sentiment has been to shy away from institutionalizing its principles and practices.[312] To improve inter-creditor coordination, Anna Gelpern proposes the development of a best practices document for the appointment and operation of creditor committees.[313] More important than the substantive terms of this document is the process by which it is developed and revised over time.[314] Coordination between sovereign debt governance regimes, such as the UNCTAD Principles and the IIF Principles, would facilitate the process of learning and trust-building. Rather than institutionalizing debtor-creditor engagement "from above" through new international bodies, inter-regime coordination would accommodate horizontal governance arrangements.

In addition, the participatory role of non-market stakeholders also warrants closer attention. The adverse economic, social, and political impacts on a debtor country during and following a restructuring are largely borne by its citizens.[315] One way to acknowledge their interests is to give them decisionmaking powers in the restructuring process.[316] While the direct participation of individuals and civil society representatives in creditor committees

---

311. *See infra* Part III.D.

312. *See, e.g.*, Richard Gitlin & Brett House, *The Sovereign Debt Forum: Expanding our Tool Kit for Handling Sovereign Crises* 4 (Ctr. Int'l Governance Innov., Pol'y Brief, No. 28, Aug. 2013), https://www.cigionline.org/sites/default/files/cigi_pb_28.pdf [https://perma.cc/KS9K-MGHZ] (proposing a Sovereign Debt Forum ("SDF") that is non-statutory, non-institutional, and created by "informal consensus among stakeholders").

313. Gelpern, *supra* note 15, at 87.

314. de Búrca, Keohane, & Sabel, *supra* note 89, at 739 (noting the importance of continuous feedback, reporting, and monitoring and established practices for revising rules and practices).

315. *See* Daniel D. Bradlow, *Can Parallel Lines Ever Meet? The Strange Case of the International Standards on Sovereign Debt and Business and Human Rights*, YALE J. INT'L L. ONLINE 201, 202–03 (2016) (discussing adverse impacts for the human rights of citizens in countries undergoing a debt crisis).

316. *See* Richard B. Stewart, *Remedying the Problem of Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness*, 108 AM. J. INT'L L. 211, 236–41 (2014) (noting the appeal and challenges of granting decisional authority to marginalized interests in global governance regimes).

may be logistically infeasible, sovereigns may be given the right to set the terms of creditor committees and other forms of debtor-creditor engagement in order to reflect the interests of non-creditor stakeholders.[317]

Conclusion

Sovereign debt governance acts as a prism, casting light and shadows on a mysterious but indisputably important corner of the international financial system. On the one hand, norms that incentivize good faith negotiation in debt restructurings seem woefully weak and inchoate in the face of rogue behavior by sovereigns and creditors. Creditor committees appear to be a salve to an ailment that is ever changing. When political conditions enable them to form and operate, they appear to work, but alternatively, when conditions are relatively unfavorable, there does not appear to be any legal means to compel parties to engage or work towards shared goals. This pessimistic perspective suggests that debtor-creditor engagement as envisioned by sovereign debt governance is much ado about very little.

Yet on the other hand, this Article demonstrates the value of solutions that aspire to work "tolerably well," for lack of better alternatives.[318] Sovereign debt crises are costly, both in absolute and relative terms. While the empirical results do not demonstrate a causal relationship between debtor-creditor engagement and restructuring outcomes, neither do they categorically rule out any positive effect. Extrapolating from the informal, inclusive, and experimental foundations of New Governance, debtor-creditor engagement in the form of creditor committees may improve the sustainability, predictability, and fairness of sovereign debt if it facilitates iterative changes in the behavior of sovereigns and creditors alike. This process will take time—for many observers, too much time—to show evidence of behavioral changes on which this Article's findings will enable future research.

In a broader context, sovereign debt governance is important as a signpost for the ongoing evolution of international law, particularly in the context of the global economy. No longer can states reasonably hope to monopolize the means of regulating cross-border commerce. Facing pressures from within (that is, their own citizens and constituents) and without (that is, multinational corporations and transnational civil society), governments must grapple with the emergence of global governance regimes in which they play a leading—but not exclusive—role. Through the New Governance levers employed by these regimes, states can find new ways to engage and coordinate with the non-state actors with which they do business.

---

317. *See* Bogdandy & Goldmann, *supra* note 68, at 58.

318. *See* Buchheit, *supra* note 1, at 9 (observing that the London Club era bank advisory committees worked "tolerably well" given the circumstances).

Annex

Debtor	*Year*	*Number of Bonds*	*Creditor Structure*	*Creditor Representation*	*Creditor Engagement*	*Preemptive or Post-default*	*Haircut (%)*	*Participation (%)*	*Litigation*
Pakistan	1999	3	Fragmented	No	Limited	Preemptive	33	99	Yes
Ecuador	2000	6	Concentrated	No	Limited	Post-default	35	96	Yes
Ukraine	2000	4	Fragmented*	No	Extensive	Post-default	37	98	No
Moldova	2002	1	Concentrated*	No	Extensive	Preemptive	41	100	No
Uruguay	2003	65	Fragmented	No	Extensive	Preemptive	14	91	No
Dominica	2004	2	Fragmented	No	Limited	Post-default	68	72	Yes
Argentina	2005	145	Fragmented*	No	Almost none	Post-default	75	76	Yes
Dominican Rep.	2005	2	n/a	No	Limited	Preemptive	1	94	No
Grenada	2005	16	Concentrated	Yes	Extensive	Post-default	38	93	Yes
Belize	2006	7	Concentrated	Yes	Extensive	Preemptive	16	97	No
Ecuador	2009	2	n/a	No	Almost none	Post-default	58	92	No
Seychelles	2009	2	Fragmented	No	Extensive	Post-default	71	100	No
Côte d'Ivoire	2010	6	Concentrated	Yes	Limited	Post-default	22	99	No
Greece	2012	117	Fragmented	Yes	Extensive	Preemptive	55	97	Yes
Saint Kitts and Nevis	2012	12	Concentrated	Yes	Extensive	Preemptive	44	100	No
Belize	2013	1	Concentrated	Yes	Extensive	Post-default	40	100	No
Grenada	2015	2	Concentrated	Yes	Extensive	Post-default	43	100	Yes
Ukraine	2015	13	Concentrated*	Yes	Extensive	Preemptive	14	100	No

* Highly concentrated or highly fragmented creditor structure.

Sources: Sturzenegger & Zettelmeyer (2005), Cruces & Trebesch (2010), Das et al. (2013), Moody's (2013), Charles Blitzer (2016); Fang et al. (2020)