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Sovereign Debt Speculation: A Necessary Restraint Justified by a Concern for Debt Sustainability

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Sovereign Debt Speculation: A Necessary Restraint Justified by a Concern for Debt Sustainability

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The actions of funds speculating in sovereign debt, frequently nicknamed "vulture funds", are often roundly criticized. These funds purchase distressed debts on the secondary market at reduced prices and then seek payment in court at face value plus interest and fees. Although their actions are legally justified, so-called "vulture funds" are vilified due to the negative impact of their activities on sovereign debtors and their population. While there is a strong demand for regulating sovereign debt speculation, various solutions already exist but are, in many ways, insufficient. This article argues for the adoption of a tailored regulation of the speculative phenomenon by the United States. The article explains that sovereign debt sustainability is the only standard that can ensure the balance between the rights of creditors and the proper functioning of debtor states. This argument justifies the regulation of speculative activities as well as the magnitude that this regulation should take.

Introduction

1. A telling example – Funds speculating in sovereign debts, often called "vulture funds", are regularly criticized. These funds purchase distressed sovereign debts at low prices, often owed by African or South American states. The speculative funds then attempt, often by taking legal action before national judges, to obtain payment of these debts at their face value plus significant costs, interest, and penalties.[1]

NML Capital Ltd. v. the Argentine Republic is undoubtedly the most striking case regarding speculation in sovereign debt.[2,3] Encountering severe financial difficulties at the beginning of the century, the South American country tried to solve its problems by restructuring its debt in 2005 and 2010. While Argentina managed to exchange more than 90% of its debt for others at a

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[1] Human Rights Council of the United Nations, REPORT OF THE INDEPENDENT EXPERT ON THE EFFECTS OF FOREIGN DEBT AND OTHER RELATED INTERNATIONAL FINANCIAL OBLIGATIONS OF STATES ON THE FULL ENJOYMENT OF ALL HUMAN RIGHTS, PARTICULARLY ECONOMIC, SOCIAL AND CULTURAL RIGHTS, 5 (A/HRC/14/21, April 29, 2020).

[2] Speculation in sovereign debt as we know it today was born during the South American crisis of the 1980s. The dispute between Elliott Associates and the Republic of Peru is often presented as a pioneer. However, it is not an isolated case, we can still mention *Donegal International Ltd. v. the Republic of Zambia*, *FG Hemisphere Associates LLC v. the Democratic Republic of Congo*, or *Kensington International Ltd. v. the Republic of Congo*.

[3] While the conflict between NML Capital Ltd. and the Argentine Republic was undeniably the most notable, the Argentinian debt crisis gave rise to numerous other claims (see Gregory Makoff and Mark Weidemaier, *Mass Sovereign Debt Litigation: A Computer-Assisted Analysis of the Argentina Bond Litigation in the U.S. Federal Courts 2002 – 2016*, 56 U.C. DAVIS LAW REVIEW 1233 (2023)).

significant discount, some creditors refused. Among them was NML Capital Ltd., a secondary creditor that had acquired its debt at a discount when the republic was already in financial distress. This speculative fund sued the country to pay the face value of its debt. After years of legal battles before national courts worldwide, the South American country reached an agreement with its recalcitrant creditor in 2016, paying NML Capital Ltd. off and providing this fund with a substantial return[4].

2. A hot topic – State indebtedness is quantitatively important for the world economy. There is a fear that sovereign debts will cause problems in the future,[5] and the consequences of the coronavirus pandemic amplify this fear. Indeed, the pandemic has forced many states to borrow to finance measures to contain the disease and the problems it has caused as much as it has reduced their revenue.[6]

Difficulties surrounding sovereign debts, often in their bond form, may give rise to litigation brought by creditors before national judges. As it can be noted from the statistics, lawsuits against states and seizures of their assets have become increasingly common means of dispute resolution.[7] In a 2021 benchmark study, Julian Schumacher *et al.* noted that funds

[4] The importance of the difficulties posed by the so-called "vulture funds" can be illustrated by the indication of the authorities of Argentina in a recent report to the International Monetary Fund that the country was still in the process of resolving external arrears to these funds (MEMORANDUM OF ECONOMIC AND FINANCIAL POLICIES UPDATE, <www.imf.org/-/media/Files/Publications/CR/2022/English/1ARGEA2022003.ashx> (September 25, 2022)).

[5] See Deborah Brautigam, *The Developing World's Coming Debt Crisis*, FOREIGN AFFAIRS, <https://www.foreignaffairs.com/china/developing-worlds-coming-debt-crisis> (February 20, 2023). See also Lars Jensen, *Avoiding 'Too Little Too Late' on International Debt Relief*, DEVELOPMENT FUTURES SERIES WORKING PAPERS, <www.undp.org/publications/dfs-avoiding-too-little-too-late-international-debt-relief>, 18 (2022).

[6] Department of Economic and Social Affairs of the United Nations, COVID-19 AND SOVEREIGN DEBT, <www.un.org/development/desa/dpad/publication/un-desa-policy-brief-72-covid-19-and-sovereign-debt/> (May 14, 2020): "[c]ountries are faced with additional spending needs to finance the immediate health response, provide support to households and firms, and invest in the recovery once the pandemic is under control" ; "[a]t the same time, revenues are collapsing, particularly for commodity exporters and tourism and other services-dependent countries."

[7] Human Rights Council of the United Nations, ACTIVITIES OF VULTURE FUNDS AND THEIR IMPACT ON HUMAN RIGHTS – FINAL REPORT OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE, 8 (A/HRC/41/51, May 7, 2019).

investing in distressed debt had become the most likely to engage in litigation.[8]

3. An attempt to reinvigorate – Although a protective attitude towards creditors' rights is often adopted in the United States, the country was one of the first to try to adopt a piece of legislation addressing sovereign debt speculation. The most notable U.S. contribution to date is the bill to prevent speculation and profiteering in the defaulted debt of certain poor countries, and for other purposes, introduced in the House of Representatives in 2009 by Maxine Waters *et al*.[9] The 111 H.R. 2932 bill sought to enact legislation entitled "Stop Very Unscrupulous Loan Transfers from Underprivileged countries to Rich, Exploitive Funds Act" or "Stop VULTURE Funds Act."[10] It envisaged a novel mechanism to protect a range of debtors from the actions of "vulture creditors" engaged in "sovereign debt profiteering."

As the U.S. attempt was unsuccessful,[11] this article argues for the resumption of parliamentary work to enact a regulation aimed at moderating speculation in sovereign debt. In some respects, this kind of speculation raises a political issue with two opposing visions: on the one hand, that of a distressed sovereign state having to face up to speculative funds, and, on the other hand, the liberal vision which assimilates the debtor state to a private company having to honor its debts.[12] This dichotomy is generally reflected in the tension that can be found between the moral argument of the economic well-being of states and their population and the legal argument of the unwavering application

[8] Julian Schumacher, Christoph Trebesch, and Henrik Enderlein, *Sovereign Defaults in Court*, 131 JOURNAL OF INTERNATIONAL ECONOMICS, 2 (2021).

[9] A similar bill was introduced in 2008 (110 H.R. 6796). It should be noted that while nine Democratic lawmakers supported the first bill, the second was supported by thirty Democrats and one Republican. Given the similarity of the bills, it is only referred to the most recent one in this paper.

[10] See section 1.

[11] To our knowledge, only the United Kingdom, Belgium, and France have adopted legislation aimed at limiting the action of so-called "vulture" funds (See International Monetary Fund, THE INTERNATIONAL ARCHITECTURE FOR RESOLVING SOVEREIGN DEBT INVOLVING PRIVATE-SECTOR CREDITORS – RECENT DEVELOPMENTS, CHALLENGES, AND REFORM OPTIONS, 27 (September 23, 2020)). On these national legislations, but also on the recent New York bills, see *infra* n° 23-25.

[12] Caroline Kleiner, *Les affaires relatives à la dette souveraine argentine – Un contentieux collectif et transnational en quête de règles et de tribunal*, ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 751, 752 (2015).

of the rule of law.[13] Charlotte Rault notes the ambivalence of the sovereign debt bonds which can be positioned between private contract and sovereignty.[14]

4. Plan – Before addressing the relevance of regulation limiting speculation and profiteering in sovereign debt, this article begins by analyzing them (**Part I**). Once the phenomenon and the problems it poses have been identified, we argue for a tailored regulation of speculative funds' activities (**Part II**). After explaining the rationale for such regulation, it is then necessary to specify the standard by which it should be construed (**Part III**).

Part I: The phenomenon to be regulated

5. A necessary description – In order to fully understand the phenomenon of so-called "vulture funds", it is crucial to begin by analyzing the development of speculative activities (**chapter 1**). Then, we will study the economic model of these funds (**chapter 2**). Finally, it is relevant to address the criticisms and merits of these activities (**chapter 3**). This description of the phenomenon is useful in order to demonstrate the relevance of regulating speculative activities and justify its measure. It should be noted that the task is not an easy one since there is a kind of dissonance between the arguments. Lee Buchheit stresses an "awkward situation" due to the fact that "[o]n the one side are

[13] John Muse-Fisher, *Starving the Vultures: NML Capital v. Republic of Argentina and Solutions to the Problem of Distressed-Debt Funds*, 102 CALIFORNIA LAW REVIEW 1671, 1672 (2014). Hayk Kupelyants suggests approaching the issue from the perspective of fairness following the conceptions of "distributive fairness" and "procedural fairness" (Hayk Kupelyants, SOVEREIGN DEFAULTS BEFORE DOMESTIC COURTS, 24 (2018)). According to him, "[f]rom a distributive viewpoint, it might seem unfair to some that creditors enrich at the expense of seriously indebted countries", whereas, "from the viewpoint of procedural fairness, the compensation of creditors who acquired their debt in a legal and procedurally valid manner is beyond doubt" (Hayk Kupelyants, SOVEREIGN DEFAULTS BEFORE DOMESTIC COURTS, 24 (2018)).

[14] Charlotte Julie Rault, THE LEGAL FRAMEWORK OF SOVEREIGN DEBT MANAGEMENT, 139 (2017).

the sovereign debtors who can, with a degree of justification, portray themselves as the victims of a gang of opportunistic, mercenary, and self-righteous creditors looking to exploit the sovereign's vulnerability to legal remedies", while "[o]n the other side are lenders who can, with a degree of justification, portray themselves as the avenging angels that bring discipline and accountability to feckless, corrupt or incompetent government administrators."[15]

Chapter 1: The development of speculative activities

6. Some financial opportunities – While funds speculating in sovereign debt were most visible at the beginning of the century with the Argentinian problems, the activities of these funds began in the 1980s with the opening of the sovereign debt market to individual creditors and the creation of a secondary market.[16] The secondary market for sovereign debt enables creditors wishing to dispose of their claims against states to do so by selling them to other creditors.[17] Speculators saw it as a windfall. They undertook to buy back the debts at a discount to their face value and then sought full payment in court. As Natasha Harrison and Fiona Huntriss note, speculative funds emerged as sophisticated litigators, viewing litigation as an asset, which can create value and mitigate risk.[18] Thus, what some would call "debt serial litigators" appeared.[19]

[15] Lee C. Buchheit, *Sovereign Debt in the Light of Eternity*, in Lee C. Buchheit and Rosa M. Lastra (ed.), SOVEREIGN DEBT MANAGEMENT, 466 (2014).
[16] The phenomenon is much older than that, according to Matthias Storme, who points to the existence of American speculators as early as 1780, such as Abigail Smith, the wife of John Adams, who bought depreciated government bonds and profited from the resumption of interest payments on these assets (Matthias E. Storme, *Cherry-Picking Vultures and Other Speculations*, 22 EUROPEAN REVIEW OF PRIVATE LAW 813 (2014)).
[17] Hayk Kupelyants, SOVEREIGN DEFAULTS BEFORE DOMESTIC COURTS, 1 (2018).
[18] Natasha Harrison and Fiona Huntriss, *Hedge funds and litigation: a brave new world*, 10 CAPITAL MARKETS LAW JOURNAL 135, 135 (2015).
[19] Pablo J. López and Cecilia Nahón, *The Growth of Debt and the Debt of Growth: Lessons from the Case of Argentina*, 44 JOURNAL OF LAW AND SOCIETY 99, 113 (2017).

7. A lack of protection – The cardinal idea of the reasoning of funds speculating in sovereign debt is that their debtors cannot go bankrupt, so they will always end up paying their debts.[20] Moreover, it is impossible for a sovereign state in financial distress to resort to any insolvency procedure. The absence of a state bankruptcy mechanism contributes to the infatuation for speculation in sovereign debt, since there is no authority or procedure to control the practices in the sovereign debt market and, therefore, to address the legal strategies of "vulture funds."[21]

In the absence of rules, the difficulties associated with sovereign debt must only be resolved by the application of contracts. The speculative creditors then only have to claim the application of the agreed terms since all the rights and obligations of the previous creditor are transferred to them when they buy debt on the secondary market.[22] Hence, as the United States District Court for the Southern District of New York once mentioned, "[u]nlike bankruptcy courts, which have significant power to reallocate debtors' assets to satisfy creditor claims, the court in this case is limited to enforcing the terms of the specific contracts before it."[23]

While the champerty rule once served as a barrier to vulture funds activities by prohibiting a party from acquiring a debt for the sole purpose of suing,[24] the modification of the New York rule in 2004 weakened this defense and opened new

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[20] Dominique Carreau and Caroline Kleiner, *Dettes d'État*, RÉPERTOIRE DE DROIT INTERNATIONAL, n° 19 (2019).

[21] Régis Vabres, *Les fonds vautours : quels enjeux ?*, 3 REVUE INTERNATIONALE DES SERVICES FINANCIERS 3, 4 (2014).

[22] James Bai, *Stop Them Circling: Addressing Vulture Funds in Australian Law*, 35 SYDNEY LAW REVIEW 703, 711 (2013). As Key Nakajima explains, "holdout litigation as such is nothing but an enforcement of the contractual terms that were duly agreed upon by the bondholders and the debtor sovereign", so that "[a]s a matter of principle, all the terms of contract shall be performed, unless otherwise indicated by the proper law of the contract" (Key Nakajima, THE INTERNATIONAL LAW OF SOVEREIGN DEBT DISPUTE SETTLEMENT, 13 (2022)).

[23] United States District Court for the Southern District of New York, *NML Capital Ltd. v. Republic of Argentina*, 2009 U.S. Dist. LEXIS 21530 (March 18, 2009).

[24] As Jonathan Blackman and Rahul Mukhi point out, this defense had a natural application to the claims brought by speculative funds since their strategy anticipated litigation following the purchase of nonperforming debts (Jonathan Blackman and Rahul Mukhi, *The Evolution of Modern Sovereign Debt Litigation: Vultures, Alter Egos, and Other Legal Fauna*, 73 LAW AND CONTEMPORARY PROBLEMS 47, 54 (2010)).

opportunities for speculative funds.[25] The rule was revised to provide that it no longer applies to debts exceeding five hundred thousand U.S. dollars.[26] Thus, regarding the large amounts typically pursued by speculative funds, the champerty defense is virtually impracticable for debtor states that are subject to the actions of these funds under New York law.[27] Moreover, the defense is not easily mobilized since it is up to the attacked state to demonstrate the speculative intent of the secondary creditor.[28]

8. The justiciability of sovereign debt – The reduction in the scope of the immune defense available to states when they are sued has also contributed to the development of speculative activities. Although the doors of the courts were long closed to creditors because of the absolute immunity enjoyed by states, they opened up as it was held that the sovereign state financing itself on the markets should be considered an "ordinary operator, sanctionable and seizable by the judge."[29]

In *Republic of Argentina v. Weltover, Inc.*, the U.S. Supreme Court decided that the issuance of the Bonods (*i.e.*, Argentinian bonds) was a "commercial activity" under the F.S.I.A. The Court also stated that when a foreign government acts not as a regulator of a market but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the

[25] United Nations Conference on Trade and Development, TRADE AND DEVELOPMENT REPORT 2015, 138-139, <https://unctad.org/system/files/official-document/tdr2015_en.pdf> (2015). See *infra* n° 25 the New York bill n° S5623 to amend the champerty rule.

[26] One of the reasons for this change was that "[m]arkets have developed for the purchase and sale of claims including claims that are in default" and that "[t]he ability to collect on these claims without fear of champerty litigation is essential to the fluidity of commerce in New York" (New York State Assembly, AN ACT TO AMEND THE JUDICIARY LAW, IN RELATION TO THE PURCHASE OF CLAIMS FOR VALUABLE CONSIDERATION, memorandum in support of legislation, bill n° 7244C).

[27] Martin Guzman, *An analysis of Argentina's 2001 default resolution*, 110 CIGI PAPERS, 12 (2016).

[28] Horatia Muir Watt, *Le retrait litigieux et le fonds vautour,* REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 862, 865 (2018). On the difficulty of this demonstration, see United States District Court for the Southern District of New York, *CIBC Bank & Trust Co. v. Banco Cent. do Brasil,* 886 F. supp. 1105 (May 9, 1995) and United States Court of Appeals for the Second Circuit, *Elliott Associates LP v. Banco de la Nacion*, 194 F.3d 363 (October, 20, 1999).

[29] Caroline Lequesne-Roth, *Restructurer,* GESTION ET FINANCES PUBLIQUES 32, 33 (2018) – Our translation.

meaning of the F.S.I.A.[30] Julian Schumacher *et al.* write about this critical decision that it "gave a definitive blow to the defense of sovereign immunity" and "paved the way for US-based creditor litigation."[31] As Joshua Burress notes, "*Weltover* essentially foreclosed the possibility of invoking *jurisdictional* immunity as a defense where a foreign state issues bonds on the U.S. market, defaults, and is subsequently sued by its creditors in U.S. courts."[32]

The frequent inclusion of immunity waiver clauses in debt contracts reinforces in some way the justiciability of sovereign debt. States tend to accept these waivers in order to facilitate their access to capital. Indeed, their creditors will be reassured if they know that they have easy means of legal action against their sovereign debtor.[33]

Chapter 2: The business model of speculative funds

9. A long, complex, and expensive but lucrative niche litigation – It can be asserted that sovereign debt litigation is a high-risk, high-return strategy[34] since legal actions that speculative funds take are often long, complex, and costly. Through their actions, the funds speculating in sovereign debt seek to obtain significant gains resulting from the difference between the acquisition price of the securities bought on the secondary market and the nominal value of these securities. They also often claim significant costs, interest, and penalties. This modus operandi can be very lucrative, as noted by the Human Rights Council Advisory Committee of the United Nations,

[30] Supreme Court of the United States, *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (June 12, 1992).
[31] Jonathan Schumacher, Christoph Trebesch, and Henrik Enderlein, *What Explains Sovereign Debt Litigation?*, 58 JOURNAL OF LAW AND ECONOMICS 585, 601 (2015).
[32] Joshua Burress, *Sovereign Disobedience: The Role of U.S. Courts in Curtailing the Proliferation of Sovereign Default*, 25 INDIANA INTERNATIONAL AND COMPARATIVE LAW REVIEW 269, 276 (2015).
[33] Benjamin Chabot and Veronica Santarosa, *Don't cry for Argentina (or other Sovereign borrowers): lessons from a previous era of sovereign debt contract enforcement*, 12 CAPITAL MARKETS LAW JOURNAL 9, 14 (2017).
[34] Julian Schumacher, Christoph Trebesch, and Henrik Enderlein, *Sovereign Defaults in Court*, 131 JOURNAL OF INTERNATIONAL ECONOMICS, 10 (2021).

which reported cases with annualized returns ranging from 50 per cent to 333 per cent.[35] This Committee had already explained that vulture funds have achieved, on average, recovery rates of some 3 to 20 times their investment.[36]

10. The purchase of distressed debts – Sovereign states whose debt is targeted for speculation are generally states in a difficult financial situation. Thus, it is often the poorest states in the world, mainly in Africa and South America, that have to face the attacks of speculative funds.[37] Although the debts of very poor states are usually the ones pursued, the activities of vulture funds are mainly guided by the status of the debt. Their business model is that of acquiring and pursuing debts on which the debtor state has defaulted or is close to.[38] The problematic status of these debts reduces the acquisition price on the secondary market, making the expected profit substantial.[39] Both the low probability of full payment of the securities by the debtor state and the significant costs to pursue such payment have an impact on the debt value.[40]

Typically, the securities purchased in the secondary market by speculative funds are owed by a government. The primary creditors want to get rid of them since they doubt that they will get reimbursed by the debtor state. While debts are generally purchased, they may also be acquired in other ways. The 111

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[35] Human Rights Council of the United Nations, ACTIVITIES OF VULTURE FUNDS AND THEIR IMPACT ON HUMAN RIGHTS – FINAL REPORT OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE, 3-4 (A/HRC/41/51, May 7, 2019). See Julian Schumacher, Christoph Trebesch, and Henrik Enderlein, *Sovereign Defaults in Court*, 131 JOURNAL OF INTERNATIONAL ECONOMICS, 37-38 (2021) for specific examples.

[36] Human Rights Council of the United Nations, REPORT OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE ON THE ACTIVITIES OF VULTURE FUNDS AND THE IMPACT ON HUMAN RIGHTS, 5 (A/HRC/33/54, July 20, 2016).

[37] In its 2019 report, the Human Rights Council Advisory Committee pointed out that Africa has been by far the most harassed region, with an average of eight cases filed every year (Human Rights Council of the United Nations, ACTIVITIES OF VULTURE FUNDS AND THEIR IMPACT ON HUMAN RIGHTS – FINAL REPORT OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE, 8 (A/HRC/41/51, May 7, 2019)).

[38] James Bai, *Stop Them Circling: Addressing Vulture Funds in Australian Law*, 35 SYDNEY LAW REVIEW 703, 706 (2013).

[39] John Muse-Fisher, *Starving the Vultures: NML Capital v. Republic of Argentina and Solutions to the Problem of Distressed-Debt Funds*, 102 CALIFORNIA LAW REVIEW 1671, 1689 (2014).

[40] Tim R. Samples, *Rogue Trends in Sovereign Debt: Argentina, Vulture Funds, and Pari Passu Under New York Law*, 35 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW AND BUSINESS 49, 60 (2014).

H.R. 2932 bill, in its section 2(7), provides that vulture funds acquire either by purchase, assignment, or some other form of transaction, the obligations of impoverished nations. Vulture funds do not only acquire distressed obligations. They sometimes invest in actual court judgments against states.[41] Regarding the difficulties of legal proceedings against sovereign debtors, some creditors may not want to try to enforce them.

11. Aggressiveness and commitment – States encountering difficulties in servicing their debt often try to renegotiate them with their creditors. They may ask for a new rate, extended periods, or a haircut on the principal.[42] Vulture funds refuse to take part in debt restructurings. Their strategy is precisely to claim the nominal value of the debts and, more generally, the application of their original terms, even if these debts have been bought at a reduced price on the secondary market. As Mauro Megliani explains, the funds can operate in such a way since "they hold credits bearing the original terms of the loan", and, therefore, "they are entitled to claim in full the nominal capital plus accrued interest."[43]

Frequently confronted with the refusal of governments to service debts on the terms demanded, vulture funds refuse to negotiate a solution and often engage in legal proceedings. They claim before national judges that sovereign debtors are condemned to honor their debts on their original terms and then try to seize their assets. Taking advantage of the heterogeneity of the law, the modus operandi of speculative funds consists in claiming the payment before the jurisdictions most inclined to agree with them on the merits of their action, and then pursuing the enforcement of the decisions in jurisdictions where recognition and enforcement are possible without much scrutiny.[44]

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[41] *FG Hemisphere Assocs. v. Democratic Republic of Congo* can be given as an example.

[42] Matías Vernengo, *Argentina, Vulture Funds, and the American Justice System*, 57 CHALLENGES 46, 52 (2014).

[43] Mauro Megliani, *For the Orphan, the Widow, the Poor: How to Curb Enforcing by Vulture Funds against the Highly Indebted Poor Countries*, 31 LEIDEN JOURNAL OF INTERNATIONAL LAW 363, 364-365 (2018).

[44] Horatia Muir Watt, *L'immunité souveraine et les fonds "vautour"*, REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE 789, 791 (2012) and Horatia Muir Watt, *Private International Law Beyond the Schism*, 2 TRANSNATIONAL LEGAL THEORY 347, 372 (2011).

Even if the lawsuits are not always successful, they may lead the debtor state to prefer to settle the amounts claimed in order to free itself from the pressure. This is all the more true since, as Julian Schumacher *et al.* note, "[t]he court documents show that these litigating creditors rarely wait for the satisfaction of their claims in court" and "[i]nstead, they attempt to pressure the defaulting government into an out of court settlement at profitable terms."[45] Vulture funds are aware of the importance of putting pressure on their debtor, which is likely to lead the debtor state to accept an agreement that is favorable to them.[46]

The pressure exerted is all the more effective because it is usually cleverly built.[47] In contrast to the debtor states being sued, which often lack the expertise and funding to defend themselves, speculative funds are sophisticated investors with access to significant resources.[48] There were even cases in which the sovereign debtors simply did not defend themselves.[49]

12. The opacity – A large number of funds speculating in sovereign debt are integrated in tax havens where banking secrecy is maintained.[50] In addition to this secrecy, they can benefit from low taxation or even tax exemption; a lack of cooperation with the tax, customs, and judicial authorities of

[45] Julian Schumacher, Christoph Trebesch, and Henrik Enderlein, *Sovereign Defaults in Court*, 131 JOURNAL OF INTERNATIONAL ECONOMICS, 2 (2021).
[46] Patrick Wautelet explains that "the greatest part of the victories enjoyed by private creditors may […] not directly result from a court judgment, but from a settlement reached with the sovereign debtor" (Patrick Wautelet, *Vulture funds, creditors and sovereign debtors: how to find a balance?*, in Matthias Audit (dir.), INSOLVABILITE DES ETATS ET DETTES SOUVERAINES, 148 (2011)).
[47] On the pressure exerted during the Argentine dispute, see Alfredo Fernando Calcagno, *Managing Public Debt Crisis in Argentina – Between Sovereignty and Subordination*, in Juan Pablo Bohoslavsky and Kunibert Raffer (ed.), SOVEREIGN DEBT CRISIS – WHAT HAVE WE LEARNT?, 23 (2017).
[48] Devi Sookun, STOP VULTURE FUND LAWSUITS: A HANDBOOK, 73 (2011).
[49] See United States Court of Appeals for the District of Columbia Circuit, *FG Hemisphere Assocs. v. Democratic Republic of Congo*, 447 F.3d 835 (May 19, 2006), where, after default decisions were rendered against the country, the Court heard its arguments in favor of its justification of "excusable neglect."
[50] Human Rights Council of the United States, REPORT OF THE INDEPENDENT EXPERT ON THE EFFECTS OF FOREIGN DEBT AND OTHER RELATED INTERNATIONAL FINANCIAL OBLIGATIONS OF STATES ON THE FULL ENJOYMENT OF ALL HUMAN RIGHTS, PARTICULARLY ECONOMIC, SOCIAL AND CULTURAL RIGHTS, 7 (A/HRC/14/21, April 29, 2010). Hamsah Investments Ltd. and Wall Capital Ltd., both opposed to the Republic of Liberia, were based in the British Virgin Islands and in the Cayman Islands, respectively.

other countries; ineffective or non-existent financial regulations; and regulations favorable to the establishment of front companies with no actual activity on the territory.[51] The 111 H.R. 2932 bill pinpoints this reality of action through offshore entities incorporated in foreign states, even if they are owned and operated by U.S. citizens or operating important financial activities in the United States, whose objective is to avoid the application of U.S. regulations and taxation to their activities.[52] There are cases where speculative funds have an ephemeral existence with companies being only created for the acquisition and pursuit of a specific claim and disappearing as soon as the fund obtains the payment.[53] The Human Rights Council of the United Nations also noted that some vulture funds are owned by large financial institutions such as hedge funds and that in other cases their ownership is obscure.[54]

The opacity of speculative funds also extends to their negotiations with primary creditors from whom they buy distressed debts owed by states. They can operate in the secondary market without disclosing information about the creditors and their transactions, so that debts can be traded between investors without the debtor state being necessarily informed or even aware of the operations.[55] Moreover, vulture funds tend to keep secret the prices paid to purchase the debts on the secondary market.[56]

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[51] Human Rights Council of the United Nations, ACTIVITIES OF VULTURE FUNDS AND THEIR IMPACT ON HUMAN RIGHTS – FINAL REPORT OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE, 4 (A/HRC/41/51, May 7, 2019).

[52] Section 2(11). See also U.S. bill 110 H.R. 6796.

[53] Horatia Muir Watt, *L'immunité souveraine et les fonds "vautour"*, REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE 789, 792 (2012). Donegal International Ltd. can be given as an example. The British High Court of Justice pointed out that "Donegal's only asset is the claim against Zambia, they were acquired so that the debt could be assigned to them and it appears that they have never done any other significant business" (High Court of Justice, Queen's Bench Division, Commercial Court, *Donegal International Limited v. Republic of Zambia and Anr.*, [2007] EWHC 197 (Comm.), para. 25 (February 15, 2007)).

[54] Human Rights Council of the United Nations, REPORT OF THE INDEPENDENT EXPERT ON THE EFFECTS OF FOREIGN DEBT AND OTHER RELATED INTERNATIONAL FINANCIAL OBLIGATIONS OF STATES ON THE FULL ENJOYMENT OF ALL HUMAN RIGHTS, PARTICULARLY ECONOMIC, SOCIAL AND CULTURAL RIGHTS, 6 (A/HRC/14/21, April 29, 2020).

[55] Human Rights Council of the United Nations, ACTIVITIES OF VULTURE FUNDS AND THEIR IMPACT ON HUMAN RIGHTS – FINAL REPORT OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE, 3 (A/HRC/41/51, May 7, 2019).

[56] French National Assembly, PROPOSITION DE LOI VISANT A LUTTER CONTRE L'ACTION DES FONDS FINANCIERS DITS "FONDS VAUTOURS", 3,

Chapter 3: The main conflicting arguments

13. Reproaches and merits – Since their emergence, the activities of funds investing and speculating in sovereign debt have been roundly criticized. As the nickname "vulture funds" suggests, their detractors point out the immorality of their behavior and the negative consequences of their actions. While the criticism of immoral profit is the most frequently voiced, speculative funds are also criticized for disrupting the proper functioning of the states they attack. Moreover, the risk they pose to restructurings is also often pointed out.

Although the scientific literature dealing with the phenomenon of speculative funds is often critical, their activities have some beneficial effects that cannot be ignored. The merits of funds derive, on the one hand, from the liquidity of capital and the reduction of its costs they allow, and on the other hand, from the monitoring mission they fulfill.

14. An immoral profit – The words of Gordon Brown, former Prime Minister of the United Kingdom, are often quoted to illustrate the criticism against vulture funds profit: "We particularly condemn the perversity where vulture funds purchase debt at a reduced price and make a profit from suing the debtor country to recover the full amount owed – a morally outrageous outcome."[57] In the same vein, the British High Court of Justice, hearing a claim by Donegal International Ltd. against the Republic of Zambia, stated that it "arouse[s] strong feelings."[58]

The most common criticism of speculative activities in distressed sovereign debt is that they are immoral. Some

<https://www2.assemblee-nationale.fr/documents/notice/13/propositions/pion0131/(index)/propositions-loi/(archives)/index-proposition> (August 2007).

[57] Gordon Brown, *Speech by the Chancellor of the Exchequer at the United Nations General Assembly Special Session on children*, FINANCING A WORLD FIT FOR CHILDREN, <https://webarchive.nationalarchives.gov.uk/20100407194022/http://www.hm-treasury.gov.uk/speech_chex_100502.htm> (May 10, 2002).

[58] High Court of Justice, Queen's Bench Division, Commercial Court, *Donegal International Limited v. Republic of Zambia and Anr.*, [2007] EWHC 197 (Comm.), para. 2 (February 15, 2007).

detractors point to the moral argument of the injustice of attacking poor countries, making their situation even more difficult.[59] The disproportion between their claims and their initial investment exacerbates the reproach. Vulture funds are mainly criticized because they deprive the attacked states of valuable resources.[60] Indeed, sovereign debtors' resources are potentially reduced by the claims of these funds, when the sued amounts are essential to the well-being of their population.[61] In addition to the diversion of useful amounts, the broader consequences induced by the activities of vulture funds are likely to complicate access to necessary financial resources. Indeed, as Cephas Lumina explains, "[t]he lack of access to international capital markets, the freezing of sovereign assets, and the limited trade and investment opportunities occasioned by vulture fund activities all have adverse effects on governments' capacity to mobilize the financial resources needed to create the conditions for the realization of human rights."[62]

The criticism of the immorality of vulture funds is also directed at the profit they seek to make from sovereign debt relief. Tracking reduction and cancellation processes, the funds purchase securities owed by states whose debts are likely to be relieved and then try to profit from the financial betterment that will logically follow.[63] In doing so, these funds can earn huge profits at the expense of both the debtor states and their impoverished population and the creditors who grant the relief

[59] See, among others, Sally Keeble's speech in House of Commons, DEBT RELIEF (DEVELOPING COUNTRIES) BILL, second reading, vol. 506, column 559,
<https://publications.parliament.uk/pa/cm200910/cmhansrd/cm100226/debtext/100226-0001.htm> (February 26, 2010).

[60] Astrid Iversen, INTERCREDITOR EQUITY IN SOVEREIGN DEBT RESTRUCTURING, 121 (2023).

[61] In its 2019 report, the Human Rights Council Advisory Committee noted that the payment of vulture fund claims by poor countries with unsustainable debt levels has a direct negative impact on their capacity to fulfill their human rights obligations, especially with regard to economic, social and cultural rights, such as the rights to water and sanitation, food, health, adequate housing and education (Human Rights Council of the United Nations, ACTIVITIES OF VULTURE FUNDS AND THEIR IMPACT ON HUMAN RIGHTS – FINAL REPORT OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE, 20 (A/HRC/41/51, May 7, 2019)).

[62] Cephas Lumina, *Curbing "Vulture Fund" Litigation*, in Ilias Bantekas and Cephas Lumina (ed.), SOVEREIGN DEBT AND HUMAN RIGHTS, 506 (2018).

[63] John Muse-Fisher, *Starving the Vultures: NML Capital v. Republic of Argentina and Solutions to the Problem of Distressed-Debt Funds*, 102 CALIFORNIA LAW REVIEW 1671, 1673-1674 (2014).

measures.[64] Moreover, vulture funds sometimes try to get paid out of amounts granted by other states for development goals[65].

Finally, it should be noted that the immorality of vulture funds activities stems from the questionable practices they may use to achieve their goal. Thus, for example, if we look at the decision rendered by the British High Court of Justice in the dispute between Donegal International Ltd. and the Republic of Zambia, the Court notes various criticizable practices consisting of witnesses who were "deliberately evasive and even dishonest" funds that "were deliberately withholding documents because they contradicted the case that they were seeking to advance" or evidence that was "vague and inconsistent."[66]

15. The disruption of the proper functioning of the states – The activities of vulture funds are often criticized as disregarding the sovereignty of the debtor states and undermining some of their prerogatives. For example, some consider that these funds interfere with the country's monetary policy by seeking to dictate the payment terms of a state's debt.[67] Also, when the state is under pressure from speculators and has no choice but to adopt policies that allow it to service its debt, this could be considered an infringement of its sovereignty.[68]

Speculative funds limit access to capital for the debtor states that are their targets. Indeed it is complicated for them to access new capital without first honoring outstanding debts. As Faisal

[64] U.S. bill 111 H.R. 2932 to prevent speculation and profiteering in the defaulted debt of certain poor countries, and for other purposes, section 2(6) and section 2(9). See also U.S. bill 110 H.R. 6796.

[65] In *Kensington International Ltd. v. the Republic of Congo*, the creditor took legal action to enforce a judgment and targeted, in particular, development aid funds granted by Belgium. Following this dispute, Belgium enacted in April 2008 an act to prevent the seizure or transfer of public funds intended for international cooperation.

[66] High Court of Justice, Queen's Bench Division, Commercial Court, *Donegal International Limited v. Republic of Zambia and Anr.*, [2007] EWHC 197 (Comm.), para. 51, 64, and 127 (February 15, 2007).

[67] Mallory Barr, *The Litigation Tango of La Casa Rosada and the Vultures: The Political Realities of Sovereign Debt, Vulture Funds, and the Foreign Sovereign Immunities Act*, 14 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 567, 575 (2016).

[68] See Sabine Michalowski, *Sovereign Debt and Social Rights − Legal Reflections on a Difficult Relationship*, 8 HUMAN RIGHTS LAW REVIEW 35, 39 (2008): "the dependency in which [the debt burden] puts the debtor countries might result in a factual loss of sovereignty over their economic and social policies, and in the imposition of policies with potentially negative consequences for the protection of social rights."

Ahmed *et al.* point out, "[s]uccessful lawsuits made it extremely difficult for a defaulting country to issue new credit without paying off old creditors, thereby imposing the kind of credit boycott that short-memoried markets had been unable to impose on their own."[69] This criticism of speculative activities is directly related to the importance of reputation for governments wishing to borrow money in the capital markets.[70]

The attacks of vulture funds are sometimes directed toward the economic activities of the states.[71] The debtor state may try to defend against these attacks by protecting some of its assets with maneuvers that will complicate the fluidity of its affairs.[72] There are also cases where speculative funds attack or threaten partners working with the state debtor.[73] These attacks impede the smooth running of business and trade relationships and lead to unfortunate consequences for sovereign economies, with investments disappearing.[74] The negative consequences of the activities of speculative funds are not only experienced by the debtor states as they cannot play their role as credible trading partners, and the whole system is affected.[75]

Debtor states under attack are not the only ones in an unenviable position. States whose national courts are seized by the speculative funds to judge their cases can suffer altered

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[69] Faisal Z. Ahmed, Laura Alfaro and Noel Naurer, *Lawsuits and Empire: on the Enforcement of Sovereign Debt in Latin America*, 73 LAW AND CONTEMPORARY PROBLEMS 39, 43 (2010).

[70] Benjamin Chabot and Veronica Santarosa explain that "[r]epaying a loan today is valuable […] because it establishes a reputation for repayment which is rewarded with capital market access in the future" (Benjamin Chabot and Veronica Santarosa, *Don't cry for Argentina (or other Sovereign borrowers): lessons from a previous era of sovereign debt contract enforcement*, 12 CAPITAL MARKETS LAW JOURNAL 9, 16 (2017)).

[71] This was the case, for example, during the Congolese conflict, with oil exports from the Republic of Congo blocked for years (United Nations Conference on Trade and Development, SOVEREIGN DEBT RESTRUCTURINGS: LESSONS LEARNED FROM LEGISLATIVE STEPS TAKEN BY CERTAIN COUNTRIES AND OTHER APPROPRIATE ACTION TO REDUCE THE VULNERABILITY OF SOVEREIGNS TO HOLDOUT CREDITORS, 19, <https://www.un.org/en/ga/second/71/se2610bn.pdf > (October 26, 2016)).

[72] *Ibid*.

[73] See, for instance, United States Court of Appeals for the Fifth Circuit, *Af-Cap, Inc., v. The Republic of Congo et al.*, 462 F.3d 417 (August 23, 2006). In this case, the creditor sought to garnish royalties owed to the debtor state for oil exploitation.

[74] James Bai, *Stop Them Circling: Addressing Vulture Funds in Australian Law*, 35 SYDNEY LAW REVIEW 703, 714 (2013).

[75] Elizabeth Broomfield, *Subduing the Vultures: Assessing Government Caps on Recovery in Sovereign Debt Litigation*, 2010 COLUMBIA BUSINESS LAW REVIEW 473, 477 (2010).

relationships with sovereign debtors. This negative consequence was echoed in the U.S. anti-vulture funds bill, where representatives noted that "[i]n pursuit of their collection activities, vulture creditors have engaged in litigation in the courts of the United States, which has, and continues to have, a negative effect on the foreign relations of the United States, and hinders trade between the United States and the poor countries whose defaulted debts have been acquired by vulture creditors."[76] Attacks by vulture funds on bilateral development funds can also disrupt the good relations between the providers of these funds and their recipients. During the parliamentary process of the French anti-speculation law, it was noted that by seizing financial flows between developing states and their economic partners, speculators could affect bilateral relations between France and these states.[77]

16. A risk for restructurings – The attitude of vulture funds is criticized as disregarding the principle of equality among creditors. If the non-cooperative strategies are controversial from a moral point of view, they are also perceived as unfair by creditors who have agreed to unfavorable terms for restructurings.[78] Indeed, speculative funds seek to force states to pay off the debts they hold while other creditors have agreed to restructure them. When sovereign debt has not been restructured, the actions of the speculators reduce the available means. Speculation may thus encourage competition between creditors in the implementation of enforcement measures on the assets of debtor states.[79]

The inequality between creditors is likely to complicate restructurings. Vulture funds' refusal to participate in the efforts

[76] U.S. bill 111 H.R. 2932 to prevent speculation and profiteering in the defaulted debt of certain poor countries, and for other purposes, section 2(10). See also U.S. bill 110 H.R. 6796. Disruptive activities are exemplified: "attempting to levy against the embassies of foreign states, seeking to have foreign states held in contempt of court, issuing subpoenas to visiting foreign dignitaries, and accusing foreign governments of violating the Racketeer Influenced and Corrupt Organizations Act."

[77] See the presentation of the amendment n° 1405 (Rect), <https://www.assemblee-nationale.fr/14/amendements/3785/AN/1405.asp> (June 2, 2016).

[78] Georgios Pavlidis, *Vulture litigation in the context of sovereign debt: global or local solutions?*, 12 LAW AND FINANCIAL MARKETS REVIEW 93, 94 (2018).

[79] Maria Rosaria Mauro, *Sovereign Default and Litigation: NML Capital v. Argentina*, 24 ITALIAN YEARBOOK OF INTERNATIONAL LAW 249, 266 (2014).

expected from all creditors and their claim for full payment may thus dissuade other creditors. These "normal" creditors may thus be reluctant to restructurings.[80] Moreover, these creditors may fear that speculative funds will get something in priority to their claims leaving distressed debtors with no other resources to pay them.[81]

In addition to the fact that they do not want to receive worse treatment, the uncertainty brought by speculation may affect the willingness of other creditors to participate in restructurings. Faced with the complexity of the restructurings generated by the activities of vulture funds, "normal" creditors are less inclined to negotiate. Moreover, some creditors may be better off as a result of the actions of speculative funds. Robert Kolb explains that "[i]f the vulture can prevail in its efforts against the sovereign debtor, those other independent holdouts will likely be able to secure the same terms the vulture wins through its efforts" and that "[i]f the vulture succeeds through its expenditure of time, money, and effort, these independent holdouts capture similar benefits without bearing any litigation expense."[82]

In a worst-case scenario for distressed states, the positions of speculative funds allow them to make a restructuring legally impossible. Indeed, they could hold a sufficient number of shares to give them a blocking position, especially in the presence of collective action clauses.[83]

17. Liquidity, cost of capital, and stability – Vulture funds foster sovereign debt liquidity through the role they endorse in the secondary market. This market is essential since it allows

[80] Ellen Ginsberg Simon and Q. Monty Crawford, *The Impact of Republic of Argentina v. NML Capital, Ltd.: Why the Supreme Court's Ruling against Argentina Avoided a Host of Unintended, Negative Consequences*, 30 MARYLAND JOURNAL OF INTERNATIONAL LAW 55, 67 (2015).
[81] Elizabeth Broomfield, *Subduing the Vultures: Assessing Government Caps on Recovery in Sovereign Debt Litigation*, 2010 COLUMBIA BUSINESS LAW REVIEW 473, 475-476 (2010). As Mallory Barr once stated, "[t]he more successful vulture funds are in litigation, the less incentive creditors have to participate in restructuring negotiations" (Mallory Barr, *The Litigation Tango of La Casa Rosada and the Vultures: The Political Realities of Sovereign Debt, Vulture Funds, and the Foreign Sovereign Immunities Act*, 14 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 567, 594 (2016)).
[82] Robert W. Kolb, *The Virtue of Vultures: Distressed Debt Investors in the Sovereign Debt Market*, THE JOURNAL OF SOCIAL, POLITICAL AND ECONOMIC STUDIES 368, 397 (2015).
[83] Regarding these clauses, see *infra* n° 23.

primary creditors to sell their securities.[84] This possibility of exit makes state financing less risky and, therefore, contributes to the proper functioning of sovereign debt markets[85]. As Elizabeth Broomfield once stated, "[a] properly functioning, liquid market depends upon investors who are prepared to accept greater risk for the greater reward afforded by a discounted purchase of a debt instrument."[86] Thus, any inefficiency in the secondary market dampens activities in the primary market and, at the same time, complicate debt issuance.[87]

Speculation would improve the contractual terms offered to debtor states when issuing debt. This argument derives from the liquidity that speculative funds allow. Indeed, the situation of debtors is strengthened by the existence of a secondary market for sovereign debt, which facilitates their issuance. This market allows creditors to always ensure a financial return regardless of whether or not a default occurs.[88] Risk reduction allows debtor states to initially finance themselves on better terms. It is generally argued that the beneficial effect is realized regarding the cost of capital, which is reduced.[89] In addition to this

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[84] See *NML Capital Ltd.*'s argument before the Belgian Constitutional Court (decision n° 61/2018, 6, <https://www.const-court.be/public/f/2018/2018-061f.pdf> (May 31, 2018)). Some even argue that speculative activities increase the value of securities. Robert Kolb believes that "by accumulating bonds, the vulture consolidates a number of bonds from a variety of small and some large investors. In doing so, it increases the demand for the defaulted bonds and thereby helps those investors salvage more value from their holdings than would otherwise be possible" (Robert W. Kolb, *The Virtue of Vultures: Distressed Debt Investors in the Sovereign Debt Market*, THE JOURNAL OF SOCIAL, POLITICAL AND ECONOMIC STUDIES 368, 396-397 (2015)).

[85] Key Nakajima, THE INTERNATIONAL LAW OF SOVEREIGN DEBT DISPUTE SETTLEMENT, 15 (2022).

[86] Elizabeth Broomfield, *Subduing the Vultures: Assessing Government Caps on Recovery in Sovereign Debt Litigation*, 2010 COLUMBIA BUSINESS LAW REVIEW 473, 510 (2010).

[87] See the Institute of International Finance's position during the parliamentary process of the Belgian anti-speculation law (PROPOSITION DE LOI RELATIVE À LA LUTTE CONTRE LES ACTIVITÉS DES FONDS VAUTOURS, RAPPORT FAIT AU NOM DE LA COMMISSION DES FINANCES ET DU BUDGET, doc. n° 54 1057/003, 40, <https://www.lachambre.be/FLWB/PDF/54/1057/54K1057003.pdf> (May 2015)).

[88] As James Bai explains, speculative funds "assist both sides of a debt relationship: initial/primary creditors guarantee themselves a return on debts regardless of risk or default, and debtors appear less risky as a result, making overall capital-raising easier" (James Bai, *Stop Them Circling: Addressing Vulture Funds in Australian Law*, 35 SYDNEY LAW REVIEW 703, 707 (2013)).

[89] The United States Court of Appeals for the Second Circuit pointed out the cost of capital reduction. During the dispute between Elliott Associates and

reduction, it appears that lenders tend to concede better interest rates and longer debt maturities if they expect to be able to sell their securities on the secondary market.[90]

Since they are willing to buy risky assets that creditors want to get rid of during difficult times, vulture funds play a catalytic role during crises. As governments need capital to recover after crises, these funds will help stabilize the situation by purchasing distressed debts.[91] With the stabilization of prices and the confidence of investors restored, capital will be available to allow previously weakened economies to recover.[92]

18. The monitoring – Since speculative funds are not subject to any form of pressure, they have, in principle, no difficulty in taking a hard stance with a debtor state that is defaulting on its debt or is about to do so, a stance that other creditors would not want to take.[93] Vulture funds are often free from any form of concessions that other creditors, who maintain an ongoing relationship with the debtor state, may have to make. Thus, these funds can play a role in monitoring debtor states and their behavior before and after crises occur.

States sometimes take on more debt than they can repay or do not manage their debt with rigor and prudence. The belief that they can always take advantage of a debt restructuring if they can no longer pay their debts could explain this attitude.[94] Also,

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the Republic of Peru, the Court, reversing the district court's decision, noted that "[w]hile the district court's rule might benefit the Debtors in the short run, the long term effect would be to cause significant harm to Peru and other developing nations and their institutions seeking to borrow capital in New York." The Court explained that the restriction on the sale of sovereign debt would increase the risk of lending to developing nations and, as a result, "[t]he additional risk would naturally be reflected in higher borrowing costs to such nations", and even "[i]t could even make loans to some of them unobtainable in New York" (United States Court of Appeals for the Second Circuit, *Elliott Associates LP v. Banco de la Nacion*, 194 F.3d 363, 380 (October 20, 1999)).

[90] H.M. Treasury, ENSURING EFFECTIVE DEBT RELIEF FOR POOR COUNTRIES: A CONSULTATION ON LEGISLATION, 15, <https://data.parliament.uk/DepositedPapers/Files/DEP2009-2123/DEP2009-2123.pdf> (2009).

[91] Michael Pettis, THE VOLATILITY MACHINE: EMERGING ECONOMIES AND THE THREAT OF FINANCIAL COLLAPSE, 166 (2001).

[92] *Ibid*.

[93] David Bosco, *The Debt Frenzy*, 161 FOREIGN POLICY 36, 42 (2007).

[94] Steven Schwarcz talks about the "moral hazard", which he defines as the greater tendency of some people protected from the consequences of risky behavior to adopt it (Steven L. Schwarcz, *"Idiot's Guide" to Sovereign Debt Restructuring*, 53 EMORY LAW JOURNAL 1189, 1194 (2004)).

states could be tempted to manipulate information in order to benefit from better interest rates.[95]

Vulture funds, through their vigilance, exert a "valuable monitoring function" as they lead to transparency on the part of the debtor states as to the way they use their resources.[96] This role will discipline the debtor states, which will be more concerned about their sound management.[97] Moreover, the presence of speculative funds on the markets and the fear that they will try to invest in their debt is likely to push governments to strive for debt sustainability.[98]

It is essentially when debtor states default on their debt that the monitoring is exercised. The speculative funds will make sure that defaults are neither opportunistic nor abusive.[99] Without the threat of litigation, a debtor state could opportunistically choose to default on its debt on the assumption that a restructuring will improve the terms. Thus, if the prices of securities representing sovereign debt reduce following a default, a government could be tempted to default and buy them back at a reduced price.[100]

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[95] Stephen Kim Park and Tim R. Samples, *Towards Sovereign Equity*, 21 STANFORD JOURNAL OF LAW, BUSINESS, AND FINANCE 240, 273 (2016): "[w]ith respect to moral hazard, governments may be tempted to manipulate GDP data in order to reduce interest payments."

[96] John A. E. Pottow, *Mitigating the Problem of Vulture Holdout: International Certification Boards for Sovereign-Debt Restructurings*, 49 TEXAS INTERNATIONAL LAW JOURNAL 221, 232 (2014).

[97] Julian Schumacher, Christoph Trebesch, and Henrik Enderlein, *Sovereign Defaults in Court*, 131 JOURNAL OF INTERNATIONAL ECONOMICS, 34 (2021). There is a logical limit to this monitoring function exerted by vulture funds. Indeed, a good state's management cannot be reduced to economic considerations alone, which are undoubtedly the ones funds take into consideration (John Muse-Fisher, *Starving the Vultures: NML Capital v. Republic of Argentina and Solutions to the Problem of Distressed-Debt Funds*, 102 CALIFORNIA LAW REVIEW 1671, 1684 (2014)). See also below the criticism of sustainability analyses that do not take human rights into account.

[98] Robert Kolb notes that "[t]he sovereign borrower that knows it may face an attack by vultures in the event of default will also tend to avoid over-borrowing, so sovereigns will be more likely to borrow only what they need and can reasonably expect to repay" (Robert W. Kolb, *The Virtue of Vultures: Distressed Debt Investors in the Sovereign Debt Market*, THE JOURNAL OF SOCIAL, POLITICAL AND ECONOMIC STUDIES 368, 400 (2015)).

[99] Natalie Turchi, *Restructuring a Sovereign Bond Pari Passu Work-Around: Can Holdout Creditors Ever Have Equal Treatment?*, 83 FORDHAM LAW REVIEW 2171, 2188 (2015).

[100] Philip J. Power, *Sovereign debt: The rise of the secondary market and its implication for future restructurings*, 64 FORDHAM LAW REVIEW 2701, 2718 (1996).

In addition to vigilance against opportunism, speculative funds make sure that the terms of restructurings are not abusive. Indeed, the debtor state could propose to its creditors unfair terms with respect to its actual financial capacity.

The monitoring conducted by speculative funds is useful, given the negative impacts that rogue states and corrupted officials can have on markets. Arturo Porzecanski stresses "the realistic possibility that rogue sovereign debtors, rather than rogue private creditors, are the ones that pose the greatest threat to the integrity and efficiency of the international financial architecture."[101] As the management of difficulties depends on the goodwill of debtor states due to their sovereignty, vulture funds threats are likely to lead them to diligence. The willingness and determination of investors to pursue their rights contribute to the proper functioning of the sovereign debt markets. As Robert Cohen explains, "[t]he threat of enforcing the terms of the contract, including the promise of equal treatment, gives private creditors some leverage against a sovereign state that is cocooned in immunity, supported or pressured by international organizations, and capable of engaging in strategic defaults or promoting one-sided exchange offers."[102]

The importance of the monitoring argument must be put into perspective since the speculative funds carry out the surveillance in their own interests only. Indeed, the monitoring function is conducted with the sole objective of forcing debtor states to pay their debt.[103]

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[101] Arturo C. Porzecanski, *From Rogue Creditors to Rogue Debtors: Implications of Argentina's Default*, 6 CHICAGO JOURNAL OF INTERNATIONAL LAW 311, 331 (2005).

[102] Robert A. Cohen, *"Sometimes a Cigar is Just a Cigar": the Simple Story of Pari Passu*, 40 HOFSTRA LAW REVIEW 11, 13 (2011). With regard to monitoring corruption, see in particular Odette Lienau, *Sovereign Debt, Private Wealth, and Market Failure*, 60 VIRGINIA JOURNAL OF INTERNATIONAL LAW 299, 322 et seq. (2020).

[103] Fanny Giansetto, *Les fonds dits "vautours" et la dette souveraine – Un nouvel enjeu de la régulation financière*, 6 CAHIERS DE DROIT DE L'ENTREPRISE 50, 50 (2012).

Part II: A tailored regulation

19. A job to be done – After underlining the multiple calls for the regulation of speculative activities, particularly through the adoption of a solution aimed directly at them (**chapter 1**), we will briefly review the direct and indirect responses that have been made so far to the phenomenon, as well as the U.S. projects (**chapter 2**). Given the incompleteness and imperfection of these responses, we will justify the appropriateness of developing a sui generis solution (**chapter 3**). We will argue for the adoption by the U.S. Congress of a piece of legislation dealing with the speculation and profiteering in sovereign debts. Adopting such legislation is all the more justified since U.S. jurisdictions and laws are often mobilized. As the United Nations Conference on Trade and Development once stated, "[t]he enactment of national legislation is particularly needed in jurisdictions that govern international bonds or where payments are processed."[104]

Chapter 1: An important demand

20. An express and repeated request from the United Nations – Having stated their concerns about speculative activities in sovereign debt and their adverse effects, various United Nations bodies have been calling for many years for the phenomenon to be addressed.

In its 2014 resolution on the effects of foreign debt and other related international financial obligations of states on the full enjoyment of all human rights, particularly economic, social and cultural rights and, in particular, the activities of so-called "vulture funds", the U.N. Human Rights Council called upon states to "consider implementing legal frameworks to curtail

[104] United Nations Conference on Trade and Development, SOVEREIGN DEBT RESTRUCTURINGS: LESSONS LEARNED FROM LEGISLATIVE STEPS TAKEN BY CERTAIN COUNTRIES AND OTHER APPROPRIATE ACTION TO REDUCE THE VULNERABILITY OF SOVEREIGNS TO HOLDOUT CREDITORS, 21, <https://www.un.org/en/ga/second/71/se2610bn.pdf > (October 26, 2016).

predatory vulture fund activities within their jurisdictions."[105,106] The Council condemned these activities for the direct negative effect that the debt repayment to vulture funds, under predatory conditions, has on the capacity of states to fulfill their human rights obligations.[107] The U.N. body affirmed more broadly that the activities of vulture funds highlight some of the problems of the global financial system and demonstrate the unfairness of the system as it exists, which directly affects the enjoyment of human rights in debtor states.[108]

The United Nations Conference on Trade and Development indicated in its 2015 Roadmap and Guide on Sovereign Debt Workouts that "States, especially the main jurisdictions which host the issuance of sovereign bonds or whose law is governing other sovereign debt instruments, should consider adopting legislation that bars litigation by uncooperative creditors to the extent that their claims exceed what they would have received had they participated in a workout."[109] In the same vein, the Conference further underlined that "[a] growing consensus has emerged on the need to tackle the activities of vulture funds."[110]

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[105] United Nations Human Rights Council, EFFECTS OF FOREIGN DEBT AND OTHER RELATED INTERNATIONAL FINANCIAL OBLIGATIONS OF STATES ON THE FULL ENJOYMENT OF ALL HUMAN RIGHTS, PARTICULARLY ECONOMIC, SOCIAL AND CULTURAL RIGHTS: THE ACTIVITIES OF VULTURE FUNDS, 3 (A/HRC/RES/27/30, September 26, 2014). It should be noted that some countries, including the United States and the United Kingdom, voted against this resolution.

[106] More than "consider" and "curtail", in its 2012 resolution, the Council called upon states "to *take measures* to *combat* those funds." (United Nations Human Rights Council, THE EFFECTS OF FOREIGN DEBT AND OTHER RELATED INTERNATIONAL FINANCIAL OBLIGATIONS OF STATES ON THE FULL ENJOYMENT OF ALL HUMAN RIGHTS, PARTICULARLY ECONOMIC, SOCIAL AND CULTURAL RIGHTS, 4 (A/HRC/RES/20/10, July 5, 2012) – we emphasize).

[107] United Nations Human Rights Council, EFFECTS OF FOREIGN DEBT AND OTHER RELATED INTERNATIONAL FINANCIAL OBLIGATIONS OF STATES ON THE FULL ENJOYMENT OF ALL HUMAN RIGHTS, PARTICULARLY ECONOMIC, SOCIAL AND CULTURAL RIGHTS: THE ACTIVITIES OF VULTURE FUNDS, 3 (A/HRC/RES/27/30, September 26, 2014).

[108] United Nations Human Rights Council, EFFECTS OF FOREIGN DEBT AND OTHER RELATED INTERNATIONAL FINANCIAL OBLIGATIONS OF STATES ON THE FULL ENJOYMENT OF ALL HUMAN RIGHTS, PARTICULARLY ECONOMIC, SOCIAL AND CULTURAL RIGHTS: THE ACTIVITIES OF VULTURE FUNDS, 3 (A/HRC/RES/27/30, September 26, 2014).

[109] United Nations Conference on Trade and Development, ROADMAP AND GUIDE ON SOVEREIGN DEBT WORKOUTS, 60, <https://unctad.org/system/files/official-document/gdsddf2015misc1_en.pdf> (April 2015).

[110] United Nations Conference on Trade and Development, SOVEREIGN DEBT RESTRUCTURINGS: LESSONS LEARNED FROM LEGISLATIVE STEPS TAKEN BY CERTAIN COUNTRIES AND OTHER APPROPRIATE ACTION TO REDUCE THE

In 2015, the United Nations General Assembly endorsed the Addis Ababa Action Agenda of the Third International Conference on Financing for Development. Participants, after indicating that they were "concerned by the ability of non-cooperative minority bondholders to disrupt the will of the large majority of bondholders who accept a restructuring of a debt-crisis country's obligations", encouraged "all Governments to take action, as appropriate."[111] In the same year, in its important resolution on the basic principles of sovereign debt restructuring processes, the General Assembly referred to funds speculating in sovereign debts and intended that their activities be addressed.[112] Thus, the first fundamental principle is that "[a] Sovereign State has the right, in the exercise of its discretion, to design its macroeconomic policy, including restructuring its sovereign debt, which should not be frustrated or impeded by any abusive measures."

In 2019, the United Nations Human Rights Council Advisory Committee underlined the growing consensus on the need to curb the activities of vulture funds that had emerged over the past ten years.[113] In its final report on the activities of vulture funds and their impact on human rights, the Committee held that, on the national level, "States should undertake concrete steps aimed at regulating the disruptive litigation of vulture funds concerning sovereign debt." The Human Rights Council Advisory Committee recommended that Member States enact legislation aimed at curtailing the predatory activities of vulture funds within their jurisdictions.[114]

VULNERABILITY OF SOVEREIGNS TO HOLDOUT CREDITORS, 21, <https://www.un.org/en/ga/second/71/se2610bn.pdf > (October 26, 2016).

[111] General Assembly of the United Nations, ADDIS ABABA ACTION AGENDA OF THE THIRD INTERNATIONAL CONFERENCE ON FINANCING FOR DEVELOPMENT (ADDIS ABABA ACTION AGENDA), 32-33 (A/RES/69/313, August 17, 2015).

[112] General Assembly of the United Nations, BASIC PRINCIPLES ON SOVEREIGN DEBT RESTRUCTURING PROCESSES (A/RES/69/319, September 10, 2015).

[113] Human Rights Council of the United Nations, ACTIVITIES OF VULTURE FUNDS AND THEIR IMPACT ON HUMAN RIGHTS – FINAL REPORT OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE, 12 (A/HRC/41/51, May 7, 2019).

[114] Human Rights Council of the United Nations, ACTIVITIES OF VULTURE FUNDS AND THEIR IMPACT ON HUMAN RIGHTS – FINAL REPORT OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE, 18 and 20 (A/HRC/41/51, May 7, 2019).

21. A solution considered by the International Monetary Fund – In the broader scheme of addressing the problems posed by private creditors, the International Monetary Fund believes that the solution to the problems posed by speculative funds might lie in the adoption of legislation limiting their activities. According to the Fund, "[t]he desirability of wider application of targeted statutory tools of the kind already in place in a few countries to complement the contractual approach (*i.e.*, "anti-vulture funds" legislation) could be further explored to limit holdout creditor recovery in specified circumstances." However, it noted that "they should be carefully designed to limit the impact on creditors' rights and avoid undermining the secondary market."[115]

22. A demand from the civil society – The mobilization of civil society has often been important during litigation brought by vulture funds before national judges, but also when national parliaments have undertaken to regulate their activities.[116] At the same time, speculative activities are criticized by a large part of the legal and economic doctrine asking for regulation.[117] There is also a demand in the media for regulation through the adoption of tailored legislation. Noting six defaults in 2020 and the importance of sovereign debt reductions, The Economist magazine argues that "if private creditors resist doing their share

[115] International Monetary Fund, THE INTERNATIONAL ARCHITECTURE FOR RESOLVING SOVEREIGN DEBT INVOLVING PRIVATE-SECTOR CREDITORS – RECENT DEVELOPMENTS, CHALLENGES, AND REFORM OPTIONS, 47 (September 23, 2020). Kristalina Georgieva, the managing director of the IMF, stated in a press briefing in 2022 that « [w]e also are pressing for some of the changes, legal changes that need to happen in [New?] York, in London, to close loopholes for vulture funds and others to prevent debt resolution » (<www.imf.org/en/News/Articles/2022/04/21/tr220421-transcript-of-the-imfc-press-briefing> (April 21, 2022)).

[116] See, for instance, the interventions of the non-profit associations *CADTM*, *CNCD-11.11.11*, and *Koepel van de Vlaamse Noord-Zuidbeweging - 11.11.11* during the action for annulment lodged by NML Capital Ltd. against the Belgian law fighting against the activities of vulture funds (Belgian Constitutional Court, decision n° 61/2018, <https://www.const-court.be/public/f/2018/2018-061f.pdf> (May 31, 2018)).

[117] See, for instance, Jeremy Bulow, Carmen Reinhart, Kenneth Rogoff, and Christoph Trebesch, *The Debt Pandemic – New steps are needed to improve sovereign debt workouts*, FINANCE & DEVELOPMENT 12, 15-16 (2020). These authors, using the Belgian and British anti-vulture funds law as examples, explain that "[l]egal steps in jurisdictions that govern international bonds […] or where payments are processed can contribute to more orderly restructuring by promoting a more level playing field between sovereign debtors and creditors."

and pursue full payment in the courts, G20 governments should pass additional legislation to cap the gains that vulture funds can obtain from litigation."[118]

Chapter 2: The solutions already proposed

23. Some indirect and direct solutions – Two main approaches are generally put forward to enable debtor states to overcome problems when trying to restructure their distressed debt. The difficulties often arise from the recalcitrant attitude of certain creditors, among them vulture funds. While not focusing primarly on these funds, the statutory and contractual approaches offer indirect solutions to the problems these funds may pose. With the statutory approach, a global conciliation process, arbitrated by an impartial third party taking into account all the interests involved, is envisioned. At the end of the process, the results are binding on the debtor state and its creditors.[119] The main idea of this approach is to put in place a collective mechanism to deal with sovereign debt problems. Since no such mechanism currently exists and it does not appear that one will exist soon,[120] the contract formalizing the debt is sometimes seen as another solution for crisis management.[121] The contractual approach aims to resolve sovereign debt problems by adapting contractual terms. This approach generally consists in inserting collective action clauses in debt contracts in order to allow a majority of creditors to decide that restructurings should be

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[118] *Many countries need debt relief*, THE ECONOMIST, <www.economist.com/leaders/2020/11/21/many-countries-need-debt-relief> (November 21, 2020).

[119] Caroline Lequesne-Roth, *Restructurer*, GESTION ET FINANCES PUBLIQUES 32, 35 (2018).

[120] Jerome Roos, WHY NOT DEFAULT? THE POLITICAL ECONOMY OF SOVEREIGN DEBT, 306 (2019). Regarding the current impossibility of an international consensus on a binding global mechanism, academics have formulated proposals in line with the statutory approach. John Pottow suggests, for instance, the establishment of "a Board of Certification for sovereign-debt restructuring proposals". The idea is to give this board the power to stamp restructurings proposed by states as complying with certain standards (John A. E. Pottow, *Mitigating the Problem of Vulture Holdout: International Certification Boards for Sovereign-Debt Restructurings*, 49 TEXAS INTERNATIONAL LAW JOURNAL 221, 236 (2014)).

[121] See, among others, Régis Bismuth, *L'émergence d'un "ordre public de la dette souveraine" pour et par le contrat d'emprunt souverain ? Quelques réflexions inspirées par une actualité très mouvementée*, ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 489, 493 (2012).

undertaken. As these decisions are binding on all creditors, the activities of vulture funds are indirectly captured since one of the features of their business model is the refusal to take part in debt restructurings.

In addition to indirect solutions, three states in Europe have enacted legislation directly addressing speculative activities in sovereign debt.[122] First, with the adoption of the Debt Relief (Developing Countries) Act, the British legislature was concerned with contributing to the objectives of the Heavily Indebted Poor Countries Initiative of the World Bank and the International Monetary Fund by seeking to counter speculation that would undermine the very thing that the Initiative aims to protect. Thus, the British Act limits the amount creditors can recover from certain HIPC debts. Second, in 2015, Belgium passed a law aimed, as its title clearly states, at combating the activities of vulture funds. The mechanism limits the rights of a creditor pursuing an illegitimate advantage through the acquisition of a loan or claim on a state. The rights of this creditor against the debtor state are limited to the price it paid for this loan or claim. Third, section 60 of the French law n° 2016-1691 of December 9, 2016, known as "the Sapin II law", addresses the activities of funds speculating in sovereign debts by making it impossible for them to take measures of constraint against the property of foreign states located in France. One of the conditions of the French rule is that the holder of the debt instrument acquired it while the foreign state was in default on the debt instrument or had proposed a modification of its terms.

24. The unenacted 111 H.R. 2932 U.S. bill – In 2009, a bill addressing the vulture funds phenomenon was introduced in the U.S. House of Representatives but remained unenacted. This text

[122] In 2009, the Parliamentary Assembly of the Council of Europe called on the governments of the Council of Europe member states, at the national level, to reinforce their legal arsenal in order to curb the action of vulture funds (PROTECTING FINANCIAL AID GRANTED BY COUNCIL OF EUROPE MEMBER STATES TO POOR COUNTRIES AGAINST FINANCIAL FUNDS KNOWN AS "VULTURE FUNDS", recommendation n° 1870(2009), point 9.1., <https://pace.coe.int/en/files/17748/html> (May 29, 2009)). See also, at the European Union level, the resolution *Enhancing developing countries' debt sustainability* of the European Parliament (2016/2241(INI), point AC and point 37, <https://www.europarl.europa.eu/doceo/document/TA-8-2018-0104_EN.html> (April 17, 2018)).

aimed at prohibiting profiteering in distressed sovereign debt.[123] According to section 3(1), "[t]he term "vulture creditor" means any person who directly or indirectly acquires defaulted sovereign debt at a discount to the face value of the obligation so acquired […]." Section 3(4) explains that "sovereign debt profiteering" means "any act by a vulture creditor seeking, directly or indirectly, the payment of part or all of defaulted sovereign debt of a qualified poor country, in an amount that exceeds the total amount paid by the vulture creditor to acquire the interest of the vulture creditor in the defaulted sovereign debt (excluding any amount paid for attorneys' fees or other fees and costs associated with collection), plus 6 percent simple interest per year on the total amount, calculated from the date the defaulted sovereign debt was so acquired […]."[124] Section 5(a) provides that courts in or of the United States "may not issue a summons, subpoena, writ, judgment, attachment, or execution, in aid of a claim under any theory of law or equity a purpose of which would be furthering sovereign debt profiteering."

In the 111 H.R. 2932 U.S. bill, the cardinal notion of "sovereign debt profiteering" is only conceivable with regard to a "defaulted sovereign debt" of a "qualified poor country". A "defaulted sovereign debt" means "any sovereign debt for which payment has been refused by a foreign state, which is subject to an announced moratorium, upon which an award or judgement has been entered, or upon which a payment of interest or principal has not been paid according to the terms of the debt obligation."[125] So-called "qualified poor countries" are identified on a list compiled and maintained by the Secretary of the Treasure.[126] According to section 6(a), the "qualified poor countries" are those "foreign states that are eligible for financing from the International Development Association but not from the International Bank for Reconstruction and Development", but as long as they do not belong to one of the categories of banned countries. Thus, states whose government or any military or security forces engage in gross human rights violations; states

[123] See section 4, which even provides for penalties for whoever willfully violates the prohibition.
[124] However, the term does not include the purchase or sale of such a debt, or the acceptance of a payment in satisfaction of the debt obligation, without threat of, or recourse to, litigation.
[125] Section 3(3).
[126] Section 3(9).

whose government has excessive military expenditures; states whose government has provided support for acts of international terrorism; and states whose government does not cooperate with the United States on international narcotics control matters cannot benefit from the protection against sovereign debt profiteering put in place by the bill.[127]

25. The three New York bills in the pipeline – Early 2023, three bills were introduced in the New York State Legislature that, if enacted, would have an impact on the activities of so-called "vulture funds."[128] The first bill n° S5542, which deals with sovereign debt restructurings, would have an indirect effect on their speculative activities since it aims at facilitating restructurings in which the funds often refuse to participate.[129] The second bill n° S4747, which relates to the recoverability of sovereign debt, would also have an indirect effect on speculators as it facilitates the implementation of international debt relief initiatives.[130] The third bill n° S5623 would have a more direct impact on speculation in sovereign debt since it modifies the

[127] See section 6(a)(2) for further information.

[128] This impact will be significant since many sovereign debts are governed by New York law. In 2021, Gizelle Datz stated that "[s]ince most bonds are issued under New York or English law (IMF 2013) and no legislative action has been pursued in the US yet, ample room remains for holdout creditors to attempt to conquer the perennial challenges of sovereign debt enforcement in New York courts, especially since NML Capital's remarkable victory over Argentina" (Giselle Datz, *Placing Contemporary Sovereign Debt: The Fragmented Landscape of Legal Precedent and Legislative Pre-emption*, in Pierre Pénet and Juan Flores Zendejas (ed.), SOVEREIGN DEBT DIPLOMACIES, 276 (2021)). It should be noted that the U.K. International Development Committee promotes the adoption of similar legislation in its report on Debt relief in low-income countries (<https://publications.parliament.uk/pa/cm5803/cmselect/cmintdev/146/summary.html> (March 10, 2023), see in particular para. 62 and 63).

[129] <www.nysenate.gov/legislation/bills/2023/S5542> (March 8, 2023). A similar bill has been introduced in the New York State Assembly (<www.nysenate.gov/legislation/bills/2023/a2102/amendment/a>), and similar versions of the bill were introduced during the 2021-2022 legislative session. It should be noted that the senators introducing the text target "vulture funds," specifying in particular that "[b]ecause New York has no financial and legal architecture governing sovereign debt contracts, its power is being superseded by a few bad faith creditors who are exploiting a void in the State's legal system to engage in destabilizing and speculative behavior."

[130] <www.nysenate.gov/legislation/bills/2023/s4747> (February 14, 2023). A similar bill has been introduced in the New York State Assembly (<www.nysenate.gov/legislation/bills/2023/a2970>), and a similar version of the bill was introduced during the 2021-2022 legislative session.

champerty rule that affects the business model of the funds.[131,132] While these bills would have many positive effects, it is regrettable that they are designed without regard to the merits that can be attributed to so-called "vulture funds."[133]

The first bill n° S5542 provides for the insertion of various sections in the banking law and aims at offering effective mechanisms for restructuring unsustainable sovereign debt. The purpose is, among other things, to reduce the social costs of sovereign debt crises; the systemic risk to the financial system; the creditor uncertainty; and the need for sovereign debt bailouts. With the proposed mechanism, a state that considers its debt unsustainable can file a voluntary "petition for relief." The state has to certify that it needs relief to restructure claims that, absent such relief, would constitute unsustainable debt. The mechanism is open to all states as long as relief has not been sought during the past ten years. Once the petition for relief is filed, the state has to notify all of its known creditors of its intention to negotiate a debt restructuring plan. The plan designates classes of claims and specifies the proposed treatment of each class of claims. The plan provides adequate means for its implementation and certifies that if it becomes effective and binding on the state and its creditors, the state's debt will become sustainable. A debt restructuring plan becomes effective and binding on the state and its creditors when it has been submitted by the state and agreed to by each class of such creditors' claims designated in the plan, considering that "[a] class of claims has agreed to a plan if creditors holding at least two-thirds in amount and more than one-half in number of the claims of such class voting on such plan agree to the plan." The bill provides for an "independent monitor" who is meant to facilitate and encourage an effective, prompt, and fair agreement by the parties. A significant feature of the proposed legislation is its scope. Indeed, it provides that, where it applies, the text shall operate retroactively and override

[131] <www.nysenate.gov/legislation/bills/2023/S5623> (March 9, 2023). A similar bill has been introduced in the New York State Assembly (<www.nysenate.gov/legislation/bills/2023/a5290>). The senator introducing the text in the Senate expressly points at "vulture hedge funds" in her justification of the text, stating that "[f]or years, vulture hedge funds have built their wealth off struggling nations by using the same playbook – they bet on a nation's economic failure and engage in predatory practices that increase poverty and get in the way of economic recovery."

[132] On the champerty rule that bill n° S5623 intends to amend, see *supra* n° 7.

[133] See *supra* n° 17-18.

any contractual provisions inconsistent with the provisions of the text. While interesting, unfortunately, the bill suffers from some loopholes. It is unfortunate, for example, that the cardinal concept of "unsustainable debt" that is used in the bill is not specified and is just assessed by the debtor state. As Deborah Zandstra *et al.* regret, the text leaves essential questions unanswered. These shortcomings could lead to market uncertainty and unintended consequences for sovereign debtors and stakeholders.[134]

The second bill n° S4747 relates to New York state's support of international debt relief initiatives for certain developing countries.[135] The goal is to make such initiatives more effective by ensuring that private creditors participate alongside public creditors on comparable terms. It aims at amending the debtor and creditor law by adding a new article that would limit debt claims against debtor states eligible to participate in one or more of the international debt relief initiatives in which the United States government has engaged.[136] It provides that any debt claim incurred prior to the date of the state's application to participate in one or more international initiatives shall only be recoverable to the extent that it comports with burden-sharing standards and up to the proportion that would have been recoverable by the United States federal government under the applicable international initiative if the government had been the creditor holding the claim. Moreover, the envisioned article provides that the debt claim has to meet robust disclosure standards without giving further details. Despite this imprecision, the bill is interesting since it limits the speculation to an extent compatible with the sustainability of sovereign debt. Nevertheless, it seems to us imperfect since the sustainability analyses on which the international debt relief initiatives are based do not usually take sufficiently into account the social

[134] Deborah Zandstra, Robert Houck, Hugo Triaca, Jonathan Zonis, and Andrew Yianni, *Sovereign Debt Restructuring – Three New York Assembly Active Bills*, 14, <www.cliffordchance.com/content/dam/cliffordchance/briefings/2023/05/sovereign_debt_restructuring_three_new_york_assembly_active_bills.pdf> (May 2023).

[135] Bill n° S4747 is similar in some respects to the British legislation to which the legislative findings refer.

[136] Examples of such initiatives include the Heavily Indebted Poor Countries Initiative, the Debt Service Suspension Initiative, and the Common Framework for Debt Treatments beyond the DSSI.

problems derived from the servicing of sovereign debt.[137] The importance of adopting such legislation in the United States has already been emphasized by the representatives who introduced the 111 H.R. 2932 U.S. bill.[138] They stated in the findings of the bill that "[i]n order to successfully prevent the speculation and profiteering in the defaulted sovereign debt of poor countries in a uniform fashion, and prevent the use of the courts of the United States to assist in such profiteering, national legislation is required to regulate the practices and procedures used in litigation against foreign sovereigns."

The third bill n° S5623 provides for various amendments and additions in section 489 of the judiciary law. The bill amends the champerty doctrine, which prohibits the purchase of claims with the intent and for the purpose of bringing an action or proceeding thereon. First, the rule that the doctrine does not apply to sovereign debt exceeding five hundred thousand dollars is repealed. Second, the bill makes it somewhat easier to demonstrate the assignee's intent and purpose by stating that they may be inferred from the assignee's recalcitrant attitude or history of acquiring claims at significant discounts from their face values and bringing legal actions to enforce those claims. Third, although it does not appear directly related to the champerty doctrine, bill n° S5623 adds a new section 489-a in the judiciary law imposing a duty on the holders of instruments governed by the law of the state of New York to participate in good faith in qualified restructurings affecting such instruments. In addition to the criticism that some of the terms used are imprecise, it is feared that this new bill will have a significant negative impact on the secondary market for sovereign debt.

Chapter 3: The relevance of a tailored regulation

26. The inadequacy and imperfection of the solutions already proposed – Solutions already on the table are not fully

[137] Mauro Megliani, *For the Orphan, the Widow, the Poor: How to Curb Enforcing by Vulture Funds against the Highly Indebted Poor Countries*, 31 LEIDEN JOURNAL OF INTERNATIONAL LAW 363, 370 (2018). On this main criticism of the viability tests, see *infra* n° 31.
[138] On this bill, see *supra* n° 24.

satisfactory. On the one hand, indirect solutions to the vulture funds phenomenon, such as the statutory approach and the contractual approach, are not a panacea. Indeed, the first approach is difficult to put in place, while strategies exist to circumvent the second. Moreover, all sovereign debt contracts do not have collective action clauses. On the other hand, national legislations that directly address the activities of vulture funds seem to be perfectible. For example, we can point to the scope of the British legislation, which only protects the debts of Heavily Indebted Poor Countries within the meaning of the World Bank and International Monetary Fund initiative; the vagueness of the Belgian law, which uses vague concepts such as "illegitimate advantage"; or the time application of the French law, which only applies to debt securities acquired as of its entry into force. The criticism of the existing national legislations seems to be shared by the International Monetary Fund, which notes, with regard to anti-vulture fund legislation, that "depending on their design, these options can raise important legal and policy issues and would need to be carefully tailored to accomplish their objectives."[139] Finally, while the recent New York bills are interesting in many respects, it is regrettable that they do not take into account the beneficial effects of a secondary market for sovereign debt in which speculators can intervene.[140] Given the imperfection of the solutions already proposed, it is appropriate to reflect on the relevance of a tailored regulation of the vulture funds activities.

27. The usefulness of national legislation – Since the activities of speculative funds are made possible by the absence of a global understanding of sovereign debt issues, a mechanism dealing with distressed sovereign debt is desirable. Moreover, the

[139] International Monetary Fund, THE INTERNATIONAL ARCHITECTURE FOR RESOLVING SOVEREIGN DEBT INVOLVING PRIVATE-SECTOR CREDITORS – RECENT DEVELOPMENTS, CHALLENGES, AND REFORM OPTIONS, 2 (September 23, 2020).

[140] Given the lobbying pressure they face, it seems unlikely that such bills will be enacted. Regarding bill n° S4747, see, for instance, The Credit Roundtable stressing that "[i]n summary, the bills threaten the global financial system and rules-based international order" (<https://cdn.ymaws.com/thecreditroundtable.org/resource/resmgr/initiatives/230515_ny_state_assembly_crt.pdf> (May 15, 2023)). It should be noted, however, that bill n° S4747 has received support from Joseph Stiglitz (<https://policydialogue.org/files/publications/papers/SUPPORT-MEMORANDUM-Guzman-Ocampo-Stiglitz.pdf>).

mobility of vulture funds reinforces the conviction that an international solution is needed to address speculation in sovereign debt. Unfortunately, the lack of consensus on the way to deal with the financial difficulties faced by debtor states makes it utopian to address the vulture funds phenomenon through a complete understanding of the problems associated with sovereign debt.[141] Since "[w]aiting for an international consensus is like waiting for Godot", we agree with Leentje Sourbron and Lode Vereeck that "a combination of contractual, international, and national solutions would actually be the most promising way forward in the short run, absent a treaty solution that might change practice in the long run."[142] In the same vein, regarding the difficulties that the pandemic has posed, Joseph Stiglitz, Robert Howse, and Anne-Marie Slaughter note that "[t]he problem of negotiating socially and economically sustainable sovereign-debt workouts may simply not be solvable without moving to a global restructuring regime" but "[i]n the meantime, however, under the ever-present shadow of the current global crisis, it is critical to move forward with such limited solutions as exist."[143]

Although rules of conduct surrounding sovereign debts have developed in recent years – see, for example, the 2015 United Nations resolution on the basic principles of sovereign debt restructuring operations[144] –, these rules are generally included in soft law instruments.[145] While the use of soft law, in particular

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[141] In 2007, members of the French National Assembly introduced a bill aimed at combating the actions of funds speculating in sovereign debt since they had already pointed out that an international solution to the problem was illusory, given the legal complexity of the system (French National Assembly, PROPOSITION DE LOI VISANT A LUTTER CONTRE L'ACTION DES FONDS FINANCIERS DITS "FONDS VAUTOURS", 4, <https://www2.assemblee-nationale.fr/documents/notice/13/propositions/pion0131/(index)/propositions-loi/(archives)/index-proposition> (August 2007)).

[142] Leentje Ann Sourbron and Lode Vereeck, *To Pay or Not to Pay? Evaluating the Belgian Law Against Vulture Funds*, JOURNAL OF GLOBALIZATION AND DEVELOPMENT 1, 6 (2017).

[143] Joseph Stiglitz, Robert Howse, and Anne-Marie Slaughter, *Covid-19 is no excuse for sovereign creditors to move the goalposts on debt*, THE GUARDIAN, <www.theguardian.com/business/2020/jul/13/covid-19-is-no-excuse-for-sovereign-creditors-to-move-the-goalposts-argentina-debt> (July 13, 2020).

[144] General Assembly of the United Nations, BASIC PRINCIPLES ON SOVEREIGN DEBT RESTRUCTURING PROCESSES (A/RES/69/319, September 10, 2015).

[145] Celine Tan, *Reframing the debate: the debt relief initiative and new normative values in the governance of third world* debt*, 10 INTERNATIONAL JOURNAL OF LAW IN CONTEXT 249, 251 (2014).

through the adoption of codes of conduct, to better manage the difficulties encountered by sovereign states concerning their debts is enthusiastic at some points, it is to be feared that such recourse is unable to protect debtors from the activities of vulture funds. Soft law is insufficient in addressing speculation due to the absence of a mechanism to compel states and creditors to respect it and, even more, to sanction non-compliant behavior.[146] This weakness convinces us of the relevance of proposing a tailored regulation of speculative activities in sovereign debt, to be included in binding national legislations.[147]

Noting the important deterrent role played by British, Belgian, and French legislation, the U.N. Human Rights Council Advisory Committee finds that concerns raised by the activities of vulture funds can only be effectively tackled if more countries enact national laws to limit their claims.[148] The multiplication of local initiatives increases their possible positive effects, on the one hand, and leads to a knock-on effect, on the other.[149]

28. The need to equip national courts – Due to the lack of a specific mechanism and authority intended to deal with the difficulties encountered by debtor states in servicing their debts,

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[146] Charlotte Julie Rault, THE LEGAL FRAMEWORK OF SOVEREIGN DEBT MANAGEMENT, 228 (2017). In some respects, see however Mauro Megliani who notes that "under the UN practice, declarations of principles are resorted to in relation to matters of major importance and are expected to be widely implemented" (Mauro Megliani, *The Odious Debt Doctrine: Formalizing Values*, 53 L'OBSERVATEUR DES NATIONS UNIES 107, 116 (2023)).

[147] In the opinion of Devi Sookun in the conclusion of her book on vulture funds lawsuits, "[t]he only way in which vulture funds can be tackled is by legislation such as that passed by Belgium and the UK and under consideration in the USA" (Devi Sookun, STOP VULTURE FUND LAWSUITS: A HANDBOOK, 106 (2011) (note that the Belgian law referred to by the author is the law of April 2008 and not the law of July 2015 – on this first law see *supra* n° 14)).

[148] Human Rights Council of the United Nations, ACTIVITIES OF VULTURE FUNDS AND THEIR IMPACT ON HUMAN RIGHTS – FINAL REPORT OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE, 9 (A/HRC/41/51, May 7, 2019). See also Pierre Pénet and Juan Flores Zendejas, *Rethinking Sovereign Debt from Colonial Empires to Hegemony*, in Pierre Pénet and Juan Flores Zendejas (ed.), SOVEREIGN DEBT DIPLOMACIES, 38 (2021): "Anti-vulture funds legislations demonstrate that state legislation remains relevant to bring about important transformations in the world of sovereign debt."

[149] See DEBT RELIEF (DEVELOPING COUNTRIES) BILL, explanatory notes, para. 46, <https://publications.parliament.uk/pa/cm200910/cmbills/017/en/10017x--.htm>: "[i]n supporting the Bill, the Government hopes to provide international leadership, and to encourage other countries to consider further steps to address the issue of uncooperative creditor litigation against HIPCs."

disputes are generally submitted to national courts.[150] Considering the claims of speculative funds, these courts have to apply the terms and conditions of contracts.[151] In matters of sovereign debt, it is difficult, if not impossible, for judges to go beyond the application of the law and to have an overall view of the problems posed by these debts of a peculiar nature. As John Pottow explains, "[f]or those jurisdictions without specialized insolvency or business tribunals, confronting sovereign-debt problems in the posture of a general civil action for breach of contract is especially awkward."[152] Moreover, the national courts that hear vulture funds cases often cannot perceive the full impact of their decisions. And even if they were aware of this, we can doubt that this should impinge on their decision.[153]

The solution consisting in adopting legislation explicitly aimed at the phenomenon of vulture funds appears attractive insofar as it legally equips judges and thus facilitates their task by showing them the path to follow. Assessing the U.S. anti-vulture funds bill, Ryan Avery believes that it provides "a reasonable remedy considering that courts lack the financial expertise to render proper judgments, especially considering the broad effect that

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[150] In the vulture funds business model, "[i]mportantly, their key battleground is local courts" (Saskia Sassen, *Neither Legal nor Illegal – Today's Operational Spaces Barely Captured in Law*, in Christine Landfried (ed.), JUDICIAL POWER – HOW CONSTITUTIONAL COURTS AFFECT POLITICAL TRANSFORMATIONS, 379 (2019)).

[151] Fanny Giansetto, LE TRAITEMENT JURIDICTIONNEL DE L'INSOLVABILITE DE L'ETAT, 18 (2017).

[152] John A. E. Pottow, *Mitigating the Problem of Vulture Holdout: International Certification Boards for Sovereign-Debt Restructurings*, 49 TEXAS INTERNATIONAL LAW JOURNAL 221, 230 (2014). More generally, Martin Guzman points out the problems posed by the fact that "domestic judges of major lending jurisdictions such as New York, who do not understand the nature of sovereign debt restructuring processes, are still the ones in charge of deciding what the ultimate goals of a restructuring should be, and what remedies should be implemented to achieve those goals" (Martin Guzman, *An analysis of Argentina's 2001 default resolution*, 110 CIGI PAPERS, 15 (2016)).

[153] See United States District Court for the Southern District of New York, *A.I. Credit Corp. v. The government of Jamaica*, 666 F. Supp. 629, 633 (August 20, 1987): "it is not the function of a federal district court in an action such as this to evaluate the consequences to the debtor of its inability to pay nor the foreign policy or other repercussions of Jamaica's default." See also United States District Court for the Southern District of New York, *National Union Fire Ins. Co. v. People's Republic of Congo*, 729 F. Supp. 936, 945 (December 22, 1989): "[t]his Court is not the appropriate government institution to weigh the harm to the Congo of paying a valid judgment, against the harm to an insurer (including its shareholders, and, ultimately, other policy holders) that would flow from its being denied its legal right to enforcement of the judgment."

these decisions have on international markets."[154] Moreover, the adoption of direct legislation makes it possible to overcome the criticism that it is not for judges to engage in considerations that go beyond the contracts on which the claims brought before them are based.[155]

Part III: The justification and magnitude of the regulation

29. A measured regulation – Although speculation in sovereign debt is a matter of concern, we regret that its assessment often lacks measure. Balancing the criticisms with the merits, we are convinced that the speculative phenomenon cannot be apprehended in a Manichean way.[156] This balance calls for a measured regulation. Indeed, it is vital to limit speculative activities consisting in buying sovereign debts on the secondary market at a price that is lower than their nominal value and to seek full payment in court only if this speculation hinders the states' responsibility to respect and guarantee the fundamental rights of their population.[157] However, the regulation should not undermine the secondary market for sovereign debt and its

[154] Ryan E. Avery, *Out of the Desert and to the Oasis: Legislation on Predatory Debt Investing*, 18 UNIVERSITY OF MIAMI INTERNATIONAL AND COMPARATIVE LAW REVIEW 267, 268 (2011).

[155] According to Hayk Kupelyants, "courts should virtually never consider broader public policy arguments […] to override contractual language and established legal rules." This argument is justified since "the courts are not well suited to weigh various conflicting and irreconcilable public policy considerations that might arise in sovereign debt litigation (subject to the policy considerations embedded in the law)" (Hayk Kupelyants, SOVEREIGN DEFAULTS BEFORE DOMESTIC COURTS, 24-25 (2018)).

[156] Some commentators, however, draw a firm conclusion from the balance of arguments. See, for instance, John Muse-Fisher, *Starving the Vultures: NML Capital v. Republic of Argentina and Solutions to the Problem of Distressed-Debt Funds*, 102 CALIFORNIA LAW REVIEW 1671, 1686 (2014): "sovereign vulture funds create problems that outweigh their spurious benefits." See also Sebastian Grund, SOVEREIGN DEBT RESTRUCTURING AND THE LAW – THE HOLDOUT CREDITOR PROBLEM IN ARGENTINA AND GREECE, 159 (2023): "the costs of dealing with and fending off vultures outweigh the benefits of a more liquid secondary market that they sometimes create."

[157] Julieta Rossi, *Sovereign Debt Restructuring, National Development and Human Rights*, 23 SUR – INTERNATIONAL JOURNAL ON HUMAN RIGHTS 185, 191 (2016).

beneficial impacts on states funding. Moreover, it is important to be careful not to encourage moral hazard.[158]

Convinced of the relevance of a tailored regulation of vulture funds activities, it is necessary to justify this regulation and determine the benchmark against which it should be assessed. The sustainability of sovereign debt seems to be the only one respecting all the interests at stake. First, we will explain what the principle of sustainability aims at (**chapter 1**). Second, we will apply it to speculation in sovereign debt and see how it justifies the regulation of speculative activities as well as its magnitude (**chapter 2**).

Chapter 1: The sustainability principle

30. A burden for some states – As the 111 H.R. 2932 U.S. bill points out, many poor countries have been struggling under the burden of international debts for many years.[159] There has been an increase in the number of developing countries listed in the International Monetary Fund and World Bank classification of countries burdened with unsustainable debt or presenting a high or medium risk, and most of the low-income countries now belong to one or other of these categories[160].

While states should be able to service their debts using their revenues, the reality is quite different. Indeed, in some situations, sovereign debt is issued to pay past debt maturities.[161] However,

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[158] Marianne Verhaert and Goedele Liekens, PROPOSITION DE RESOLUTION VISANT A POURSUIVRE LA LUTTE CONTRE LES FONDS VAUTOURS ET A SOUTENIR LES INITIATIVES INTERNATIONALES EN VUE DE TROUVER DES SOLUTIONS STRUCTURELLES MULTILATERALES POUR LE REAGENCEMENT DE LA DETTE DES PAYS EN DEVELOPPEMENT, 5-6, <www.lachambre.be/FLWB/PDF/55/2040/55K2040001.pdf> (June 3, 2021).

[159] U.S. bill 111 H.R. 2932 to prevent speculation and profiteering in the defaulted debt of certain poor countries, and for other purposes, section 2(1). See also U.S. bill 110 H.R. 6796.

[160] European Parliament, ENHANCING DEVELOPING COUNTRIES' DEBT SUSTAINABILITY, 2016/2241(INI), point H, <https://www.europarl.europa.eu/doceo/document/TA-8-2018-0104_EN.html> (April 17, 2018).

[161] During the parliamentary work of the Heavily Indebted Poor Countries (Limitation on Debt Recovery) Act 2012, William Teare noted that "[t]he debtor must be in a position to repay debt, notably through the efficient use of the loans to generate income that will be used to repay the debt. For the poorest countries, high levels of debt have themselves become a barrier to development" (House of Keys, HEAVILY INDEBTED POOR COUNTRIES

as Pablo López and Cecilia Nahón point out, "issuing debt to pay for debt maturities and finance capital flight gets countries into downward debt traps; conversely, longer-term debt flows channelled to expand the real economy or conduct public works could be a positive intertemporal assignment of resources, if they are limited in volume and bring about repayment capacity."[162] The relevance of a sovereign debt issuance can thus be assessed regarding the use made of the money. It is crucial for debtor states not to get caught in a debt trap in which new debts only add to the burden without lessening it.[163]

31. A main criticism of the viability tests – While there is no commonly held view of what constitutes debt sustainability for states,[164] the criteria used in the viability analyses can be criticized. The major criticism of these assessments, such as the Debt Sustainability Analysis of the International Monetary Fund,[165] is that they do not sufficiently take into account the social harm that debt services can cause.[166] This shortcoming is undoubtedly explained by the fact that the difficulties affecting sovereign debts are often reduced to the sole financial relationship between the sovereign debtor and its creditors, without taking into account the particularity of the former, which has to ensure various missions for the benefit of its population.[167]

However, financial considerations alone cannot be taken into account without considering the impact of debts and their service on populations. Cephas Lumina stressed in one of his reports as an independent expert for the United Nations Human Rights Council that "[d]ebt sustainability assessments must not be

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(LIMITATION ON DEBT RECOVERY) BILL 2012, second reading, vol. 129, n° 20, 1689-1692 (May 8, 2012)).

[162] Pablo J. López and Cecilia Nahón, *The Growth of Debt and the Debt of Growth: Lessons from the Case of Argentina*, 44 JOURNAL OF LAW AND SOCIETY 99, 121-122 (2017).

[163] Olivier Klein, *Comment éviter le piège de la dette après la pandémie ?*, 141 REVUE D'ECONOMIE FINANCIERE 281, 289 (2021).

[164] Steven L. Schwarcz, *Sovereign Debt Restructuring: A Model-law Approach*, 6 JOURNAL OF GLOBALIZATION AND DEVELOPMENT 343, 359 (2015).

[165] See <www.imf.org/external/pubs/ft/dsa/>.

[166] Mauro Megliani, *For the Orphan, the Widow, the Poor: How to Curb Enforcing by Vulture Funds against the Highly Indebted Poor Countries*, 31 LEIDEN JOURNAL OF INTERNATIONAL LAW 363, 370 (2018).

[167] Celine Tan, *Reframing the debate: the debt relief initiative and new normative values in the governance of third world* debt*, 10 INTERNATIONAL JOURNAL OF LAW IN CONTEXT 249, 256 (2014).

limited to economic considerations (the debtor State's economic growth prospects and ability to service their debt obligations) but must also take into consideration the impact of debt burdens on a country's ability to achieve the Millennium Development Goals and to create the conditions for the realization of all human rights."[168] In a 2018 report, Juan Pablo Bohoslavsky, another independent expert for the Human Rights Council, noted that a debt could not be judged as sustainable if the social dimension of sustainability and the impact on human rights are ignored.[169] According to the United Nations Conference on Trade and Development, a debt is sustainable when its service does not impair the social and economic development of society.[170] In the same vein, the United Nations Human Rights Council Advisory Committee states that "debt sustainability is only achieved when debt service does not result in violations of human rights and human dignity, and does not prevent the attainment of international development goals."[171] Generally, the scientific literature also calls for social issues to be taken into account when the sustainability of a sovereign debt is assessed.[172]

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[168] Human Rights Council of the United Nations, REPORT OF THE INDEPENDENT EXPERT ON THE EFFECTS OF FOREIGN DEBT AND OTHER RELATED INTERNATIONAL FINANCIAL OBLIGATIONS OF STATES ON THE FULL ENJOYMENT OF ALL HUMAN RIGHTS, PARTICULARLY ECONOMIC, SOCIAL AND CULTURAL RIGHTS – GUIDING PRINCIPLES ON FOREIGN DEBT AND HUMAN RIGHTS, principle 65 (A/HRC/20/23, April 10, 2012). The European Parliament also took up this point (EUROPEAN PARLIAMENT, ENHANCING DEVELOPING COUNTRIES' DEBT SUSTAINABILITY, 2016/2241(INI), point R, <https://www.europarl.europa.eu/doceo/document/TA-8-2018-0104_EN.html> (April 17, 2018)). Noting that IMF-World Bank debt sustainability assessments (DSA) are usually used by lenders to guide their lending, the European Parliament stresses the need to address their pitfalls, most notably the lack of integration of human rights (*ibid.*, point 21).

[169] Human Rights Council of the United Nations, GUIDING PRINCIPLES ON HUMAN RIGHTS IMPACT ASSESSMENTS OF ECONOMIC REFORMS – REPORT OF THE INDEPENDENT EXPERT ON THE EFFECTS OF FOREIGN DEBT AND OTHER RELATED INTERNATIONAL FINANCIAL OBLIGATIONS OF STATES ON THE FULL ENJOYMENT OF HUMAN RIGHTS, PARTICULARLY ECONOMIC, SOCIAL AND CULTURAL RIGHTS, 14 (A/HRC/40/57, December 19, 2018).

[170] United Nations Conference on Trade and Development, ROADMAP AND GUIDE ON SOVEREIGN DEBT WORKOUTS, 24, <https://unctad.org/system/files/official-document/gdsddf2015misc1_en.pdf> (April 2015).

[171] Human Rights Council of the United Nations, ACTIVITIES OF VULTURE FUNDS AND THEIR IMPACT ON HUMAN RIGHTS – FINAL REPORT OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE, 12 (A/HRC/41/51, May 7, 2019).

[172] See, among others, Michael Riegner, *Legal Frameworks and General Principles for Indicators in Sovereign Debt Restructuring*, 41 THE YALE JOURNAL OF INTERNATIONAL LAW 141, 170-171 (2016). On the importance of taking human rights into account when discussing sovereign debt

32. What is at stake – It is crucial, in our view, that the sustainability of sovereign debts is assessed regarding the capacity of states to service them without repayment being made to the detriment of the provision of essential services to their population.[173] As Emma Muce Scali stresses, "unsustainable debt burdens […] and the costs associated with their servicing, can reduce the amount of resources available, especially to poorer countries, for the realisation of human rights, hinder the achievement of development goals and pose a more general threat to economic, social and political stability and to democratic regimes."[174] In many countries, debt repayment often occurs to the detriment of the realization of the fundamental economic, social, or cultural rights of the population.[175] In addition to undermining economic, social, and cultural rights, the service of sovereign debt can also impair the civil and political rights of populations.[176] Moreover, as noted by H.M. Treasury in its consultation prior to the enactment of the Debt Relief (Developing Countries) Act 2010, "[a] country that is

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rescheduling measures, see Matthias Goldmann, *Human Rights and Sovereign Debt Workouts*, in Juan Pablo Bohoslavsky and Jernej Letnar Cernic (ed.), MAKING SOVEREIGN FINANCING AND HUMAN RIGHTS WORK, 99-100 (2014). Juan Pablo Bohoslavsky and Kunibert Raffer explain that "frameworks for debt sustainability analysis should be based on a more comprehensive understanding of debt sustainability, incorporating human rights and social and environmental dimensions " (Juan Pablo Bohoslavsky and Kunibert Raffer, *What Have We Learnt?*, in Juan Pablo Bohoslavsky and Kunibert Raffer (ed.), SOVEREIGN DEBT CRISIS – WHAT HAVE WE LEARNT?, 283 (2017)).

[173] See also Mauro Megliani, *For the Orphan, the Widow, the Poor: How to Curb Enforcing by Vulture Funds against the Highly Indebted Poor Countries*, 31 LEIDEN JOURNAL OF INTERNATIONAL LAW 363, 375 (2018).

[174] Emma Muce Scali, SOVEREIGN DEBT AND SOCIO-ECONOMIC RIGHTS BEYOND CRISIS – THE NEOLIBERALISATION OF INTERNATIONAL LAW, 85 (2022).

[175] Human Rights Council of the United Nations, ACTIVITIES OF VULTURE FUNDS AND THEIR IMPACT ON HUMAN RIGHTS – FINAL REPORT OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE, 15 (A/HRC/41/51, May 7, 2019). In its report, the Committee points to the rights to food, health, education, adequate housing, and work. In Venezuela, for example, the government continued until late 2017 to fully and timely meet its financial obligations despite the lack of food and medicine (Julian Schumacher, Christoph Trebesch, and Henrik Enderlein, *Sovereign Defaults in Court*, 131 JOURNAL OF INTERNATIONAL ECONOMICS, 3 (2021)).

[176] Nicola Jagers, *Sovereign Financing and the Human Rights Responsibilities of Private Creditors*, in Juan Pablo Bohoslavsky and Jernej Letnar Cernic (ed.), MAKING SOVEREIGN FINANCING AND HUMAN RIGHTS WORK, 181 (2014). The author gives, as an example, the effect on the granting of legal aid for access to justice.

forced to spend more servicing historical debt than it is able to spend on education and health services combined faces a self reinforcing cycle of poverty."[177]

Besides the negative consequences suffered by populations, the unsustainability of sovereign debts is likely to have more global adverse effects. Since debt sustainability is a necessary condition for the economic recovery of a state, the continued repayments of an unsustainable debt are likely to make things worse for both the debtor and the creditors. The latter will suffer from the deterioration of the debtor's economic prospects, which will reduce the probability of future payments.[178]

33. The scope of the principle – Sovereign debt sustainability has been a long-standing concern of the United Nations. In the Millennium Declaration of 2000, the General Assembly affirmed its determination to address the debt problems of low- and middle-income countries comprehensively and effectively through a variety of national and international measures to make their debt sustainable in the long term.[179] In a 2010 resolution on external debt sustainability and development, the Assembly emphasized that sustainability is essential for development.[180] The principle of sustainability is also included among the basic principles on sovereign debt restructuring operations listed in the important resolution adopted by the United Nations General Assembly in 2015. The eighth principle provides that "[s]ustainability implies that sovereign debt restructuring workouts are completed in a timely and efficient manner and lead to a stable debt situation in the debtor state, preserving at the outset creditors' rights while promoting sustained and

[177] H.M. Treasury, ENSURING EFFECTIVE DEBT RELIEF FOR POOR COUNTRIES: A CONSULTATION ON LEGISLATION, 3, <https://data.parliament.uk/DepositedPapers/Files/DEP2009-2123/DEP2009-2123.pdf> (2009). See also recently the report of the U.K. International Development Committee on Debt relief in low-income countries: "[b]y diverting money away from vital public services, the opportunity cost of servicing unsustainable public debt can be devastating" (<https://publications.parliament.uk/pa/cm5803/cmselect/cmintdev/146/summary.html> (March 10, 2023)).

[178] Martin Guzman, *An analysis of Argentina's 2001 default resolution*, 110 CIGI PAPERS, 4 (2016).

[179] General Assembly of the United Nations, UNITED NATIONS MILLENNIUM DECLARATION, para. 16 (A/RES/55/2, September 8, 2000).

[180] General Assembly of the United Nations, EXTERNAL DEBT SUSTAINABILITY AND DEVELOPMENT, 2 (A/RES/65/144, December 20, 2010).

inclusive economic growth and sustainable development, minimizing economic and social costs, warranting the stability of the international financial system and respecting human rights."[181] The Assembly further emphasizes the importance of sustainability in many other texts. For example, debt sustainability is still referred to in its 2030 sustainable development program: "[w]e recognize the need to assist developing countries in attaining long-term debt sustainability through coordinated policies aimed at fostering debt financing, debt relief, debt restructuring and sound debt management, as appropriate."[182]

In the opinion of the United Nations Conference on Trade and Development, the principle of debt sustainability, which implies that debt is viable if it can be serviced without jeopardizing the social and economic development of the debtor state, constitutes a general principle of law, at least an emerging one.[183] It should also be noted that this principle has tangible applications in positive law, such as in the Belgian law of July 12, 2015, aiming at combating the activities of vulture funds, which uses it as a criterion triggering the application of its anti-speculation mechanism.[184]

Studying the emergence of sovereign debt sustainability as a principle of public international law, Juan Pablo Bohoslavsky and Matthias Goldmann note that "[i]n a fairly consistent pattern, debt sustainability is today reflected in international legal

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[181] General Assembly of the United Nations, BASIC PRINCIPLES ON SOVEREIGN DEBT RESTRUCTURING PROCESSES, 2 (A/RES/69/319, September 10, 2015).

[182] General Assembly of the United Nations, TRANSFORMING OUR WORLD: THE 2030 AGENDA FOR SUSTAINABLE DEVELOPMENT, para. 69 (A/RES/70/1, September 25, 2015). In the same vein, at the European level, it has recently been stated that "sustainable development goals [are] an absolute priority for its 2030 strategy" (Committee on Development of the European Parliament, REPORT ON ENHANCING DEVELOPING COUNTRIES' DEBT SUSTAINABILITY (2016/2241(INI)), 12 (A8-0129/2018, March 28, 2018)).

[183] United Nations Conference on Trade and Development, ROADMAP AND GUIDE ON SOVEREIGN DEBT WORKOUTS, 24, <https://unctad.org/system/files/official-document/gdsddf2015misc1_en.pdf> (April 2015).

[184] Leentje Ann Sourbron and Lode Vereeck, *To Pay or Not to Pay? Evaluating the Belgian Law Against Vulture Funds*, JOURNAL OF GLOBALIZATION AND DEVELOPMENT 1, 7 and 12 (2017). The Belgian law refers to the situation where the complete payment of a creditor's claims would have an identifiable unfavorable impact on the public finances of the debtor state and would be likely to compromise the socioeconomic development of its population.

practice and may be considered a principle of public international law."[185] These authors highlight the "shift in sovereign debt restructuring practice away from an almost exclusive focus on creditors' rights towards a global public interest in both the financial well being of a debtor state, and in mitigating the impact of debt crises on the broader economic, social and human rights situation in the country."[186]

34. The consequences – By virtue of the principle of debt sustainability, we think that states could not be obliged to devote all their resources to service their debt.[187] This rule is enshrined in section 1(2), *in fine*, of the International Covenant on Civil and Political Rights, on the one hand, and in section 1(2), *in fine*, of the International Covenant on Economic, Social, and Cultural Rights, on the other. These articles provide that "[i]n no case may a people be deprived of its own means of subsistence."

Long before the adoption of these pacts, Montesquieu was already defending the idea that a state can only be a debtor to a certain degree, and when it surpasses that degree, the title owed to a creditor vanishes.[188] Based on the principle of the sustainability of sovereign debt, Gaston Jèze argued in 1935 at The Hague Academy of International Law that a state is entitled to suspend or reduce its public debt service as soon as essential public services are compromised or neglected in order to service the debt.[189] In line with this idea, Edwin Borchard notes that, although "[a] State is, like a private debtor, liable for the fulfillment of its debts with all its assets and revenues, present and future", this particular debtor "also enjoys the so-called *beneficium competentiae* which assures the debtor's continued

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[185] Juan Pablo Bohoslavsky and Matthias Goldmann, *An Incremental Approach to Sovereign Debt Restructuring: Sovereign Debt Sustainability as a Principle of Public International Law*, 41 THE YALE JOURNAL OF INTERNATIONAL LAW 13, 21 (2016).

[186] *Ibid.*, 26.

[187] See also Julieta Rossi, *Sovereign Debt Restructuring, National Development and Human Rights*, 23 SUR – INTERNATIONAL JOURNAL ON HUMAN RIGHTS 185, 192 (2016).

[188] L'ESPRIT DES LOIS, Book XXII, Chapter XVIII, translation by Thomas Nuget, <https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/montesquieu/spiritoflaws.pdf > (1748).

[189] Gaston Jèze, *Les défaillances d'État*, RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE 377, 391 (1935).

existence by exempting the necessaries of life from seizure by its creditors."[190]

The preeminence of human rights leads us to the conclusion that the unsustainability of a sovereign debt has consequences on its service. Part of the justification for these consequences is also to be found in the obligation of diligence of creditors. The Guiding Principles on Foreign Debt and Human Rights developed within the United Nations aim to ensure that the provision of capital to states is made in a thoughtful and responsible manner that does not affect sustainability and respects human rights. These principles notably provide that "[n]on-State lenders have an obligation to ensure that debt contracts to which they are party or any policies related thereto fully respect human rights." The responsibility of creditors for preventing and resolving unsustainable debt situations "includes the obligation to perform due diligence on the creditworthiness and ability to repay of the borrower as well as the duty to refrain from providing a loan in circumstances where the lender is aware that the funds will be used for non-public purposes or for a non-viable project." Eventually, it was also highlighted that "[a]ll lenders should conduct due diligence to ensure that the proposed loan will not increase the Borrower State's external debt stock to an unsustainable level that will make debt repayment difficult and impede the creation of conditions for the realization of human rights."[191]

For all these reasons, we agree with the United Nations Human Rights Council that excessive or disproportionate debt servicing that takes away financial resources meant for the realization of

[190] Edwin Borchard, STATE INSOLVENCY AND FOREIGN BONDHOLDERS – GENERAL PRINCIPLES, 81 (1951).

[191] Human Rights Council of the United Nations, REPORT OF THE INDEPENDENT EXPERT ON THE EFFECTS OF FOREIGN DEBT AND OTHER RELATED INTERNATIONAL FINANCIAL OBLIGATIONS OF STATES ON THE FULL ENJOYMENT OF ALL HUMAN RIGHTS, PARTICULARLY ECONOMIC, SOCIAL AND CULTURAL RIGHTS – GUIDING PRINCIPLES ON FOREIGN DEBT AND HUMAN RIGHTS, principles 16, 23, and 39 (A/HRC/20/23, April 10, 2012). This obligation of lenders to extend credit in a manner that does not jeopardize debt sustainability was reiterated several times by the United Nations General Assembly (see notably General Assembly of the United Nations, TRANSFORMING OUR WORLD: THE 2030 AGENDA FOR SUSTAINABLE DEVELOPMENT, point 69 (A/RES/70/1, September 25, 2015)).

human rights should be adjusted or modified accordingly to reflect the preeminence of these fundamental rights.[192]

Chapter 2: The application of the principle to speculative activities

35. Applicability – While the problems posed by the activities of vulture funds arise from private acts of sovereign states, this does not mean that considerations of international law are ineffective. In a lecture given at The Hague Academy of International Law, Prosper Weil explained that there is nothing to prevent from thinking that principles borrowed from general international law may have a specific effect in contractual matters.[193] While the imperfect legal basis of the sustainability argument – which is often taken up in soft law instruments – undoubtedly makes it difficult to put it forward during lawsuits,[194] this weakness cannot be regarded as peremptory and does not render the argument inoperative. In addition to this relative weakness of the sustainability argument, we are convinced that, due to its sensitivity, it should be implemented into a regulation rather than directly formulated as a defense during litigation.[195]

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[192] Human Rights Council of the United Nations, REPORT OF THE INDEPENDENT EXPERT ON THE EFFECTS OF FOREIGN DEBT AND OTHER RELATED INTERNATIONAL FINANCIAL OBLIGATIONS OF STATES ON THE FULL ENJOYMENT OF ALL HUMAN RIGHTS, PARTICULARLY ECONOMIC, SOCIAL AND CULTURAL RIGHTS – GUIDING PRINCIPLES ON FOREIGN DEBT AND HUMAN RIGHTS, principle 49 (A/HRC/20/23, April 10, 2012).

[193] Prosper Weil, *Problèmes relatifs aux contrats passés entre un État et un particulier*, RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE 97, 188 (1969).

[194] Mauro Megliani, *For the Orphan, the Widow, the Poor: How to Curb Enforcing by Vulture Funds against the Highly Indebted Poor Countries*, 31 LEIDEN JOURNAL OF INTERNATIONAL LAW 363, 374 (2018).

[195] Before the United States Court of Appeals for the Second Circuit, the Argentine Republic had argued that the claim of its creditor would plunge the country into a new financial and economic crisis. However, the argument was unuccessful, as the Court ruled on October 26, 2012, that the country had enough money to pay (United States Court of Appeals for the Second Circuit, *NML Capital, Ltd. and others v. Republic of Argentina*, 699 F.3d 246, 263 (Octobre 26, 2012)). In its August 23, 2013 decision, the Court of appeals upheld its opinion, elaborating as follows: "Argentina and the Euro Bondholders warn that Argentina may not be able to pay or that paying will cause problems in the Argentine economy, which could affect the global economy. But as we observed in our last opinion, other than this speculation, 'Argentina makes no real argument that, to avoid defaulting on its other debt,

36. Impactful activities – If the sustainability argument can be used to justify the suspension or reduction of sovereign debt servicing, it seems to us that it can, *a fortiori*, be used to advocate for the limitation of vulture fund activities.[196] Indeed, the business model of these funds targets sovereign debtors whose economic situation is distressed in such a way that the fundamental rights of populations are undermined. Since the sustainability of sovereign debts implies that they can be serviced only if the service does not impair the essential state missions, the actions of vulture funds undermine them when the execution of the claims being pursued is likely to affect the resources of debtor states substantially.[197] As Cephas Lumina notes "[f]rom a human rights perspective, the settlement of excessive vulture fund claims by poor countries with unsustainable debt levels has a direct negative effect on the capacity of the Governments of these countries to fulfil their human rights obligations, especially with regard to economic, social and cultural rights."[198]

If we accept that the principle of sustainability of sovereign debts implies that these debts should be serviced insofar as essential services to populations are not affected, the corollary is that these

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it cannot afford to service the defaulted debt, and it certainly fails to demonstrate that the district court's finding to the contrary was clearly erroneous.' […] Moreover, and perhaps more critically, Argentina failed to present the district court with any record evidence to support its assertions" (United States Court of Appeals for the Second Circuit, *NML Capital, Ltd. v. Republic of Arg.*, 727 F.3d 230, 246 (August 23, 2013)).

[196] Considering the content of the British, Belgian, and French anti-vulture funds legislation, the United Nations Human Rights Council Advisory Committee concludes that "concerns about the socioeconomic situation of the debtor State and the well-being of its population should be adequately incorporated and addressed by the legislator" (Human Rights Council of the United Nations, ACTIVITIES OF VULTURE FUNDS AND THEIR IMPACT ON HUMAN RIGHTS – FINAL REPORT OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE, 9 (A/HRC/41/51, May 7, 2019)).

[197] Mauro Megliani, *For the Orphan, the Widow, the Poor: How to Curb Enforcing by Vulture Funds against the Highly Indebted Poor Countries*, 31 LEIDEN JOURNAL OF INTERNATIONAL LAW 363, 381 (2018). The author seems to limit his argument to the situation of Heavily Indebted Poor Countries within the meaning of the World Bank and International Monetary Fund Initiative, whereas we think that it could be used more broadly.

[198] Human Rights Council of the United Nations, REPORT OF THE INDEPENDENT EXPERT ON THE EFFECTS OF FOREIGN DEBT AND OTHER RELATED INTERNATIONAL FINANCIAL OBLIGATIONS OF STATES ON THE FULL ENJOYMENT OF ALL HUMAN RIGHTS, PARTICULARLY ECONOMIC, SOCIAL AND CULTURAL RIGHTS, 20 (A/HRC/14/21, April 29, 2020).

debts can only be enforced when and insofar as the enforcement does not negatively affect these services.[199] Since the activities of vulture funds undermine the finances of already distressed states, debt sustainability justifies that the actions of these funds are moderated.

Convinced of the relevance of the sustainability argument for addressing the speculative funds phenomenon, the Heads of State and Government of the Group of 77 stress "the importance of not allowing vulture funds to paralyse the debt-restructuring efforts of developing countries, and that these funds should not supersede a State's right to protect its people under international law."[200] For the Advisory Committee of the United Nations Human Rights Council, the obligation of states to ensure the most basic economic and social rights to their population should take precedence over their obligations to service their debts, especially when the creditors pursuing this service are vulture funds.[201]

According to us, the mobilization of the argument of sustainability and respect for human rights in order, on the one hand, to justify the enactment of national legislation aimed at regulating the activities of vulture funds, and, on the other hand, to determine the extent of such legislation, is opportune. We can point out, as Juan Pablo Bohoslavsky and Jernej Letnar Cernic do, the interest of the justification at two levels: "first, that the human rights law helps to understand, unravel, denounce and recompose asymmetric power relations that operate underneath sovereign debts that produce and reproduce human suffering; and second, that human rights law applies and offers solutions in sovereign debt contexts and can prevent human rights abuses and provide judicial and/or non judicial relief to victims."[202]

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[199] Mauro Megliani, *For the Orphan, the Widow, the Poor: How to Curb Enforcing by Vulture Funds against the Highly Indebted Poor Countries*, 31 LEIDEN JOURNAL OF INTERNATIONAL LAW 363, 375 (2018).
[200] Summit of Heads of State and Government of the Group of 77, FOR A NEW WORLD ORDER FOR LIVING WELL, point 88 (A/68/948, June 2014).
[201] Human Rights Council of the United Nations, ACTIVITIES OF VULTURE FUNDS AND THEIR IMPACT ON HUMAN RIGHTS – FINAL REPORT OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE, 17 (A/HRC/41/51, May 7, 2019).
[202] Juan Pablo Bohoslavsky and Jernej Letnar Cernic, *Placing Human Rights at the Centre of Sovereign Financing*, in Juan Pablo Bohoslavsky and Jernej Letnar Cernic (ed.), MAKING SOVEREIGN FINANCING AND HUMAN RIGHTS WORK, 5 (2014).

37. Responsibility and consistency of states – In the pursuit of sovereign debt sustainability, we believe it is the responsibility of states to legislate in order to limit the activities of speculative funds that negatively affect the populations of sovereign debtors. This responsibility derives from section 2(1) of the International Covenant on Economic, Social and Cultural Rights, which provides that "[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."[203] In a similar sense, section 2(2) of the International Covenant on Civil and Political Rights provides that "[w]here not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps […] to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant." States parties to these two instruments must therefore act to address speculative activities that violate the rights enshrined in them.[204] This responsibility can, in our opinion, be assumed by the states, particularly the United States,[205] by enacting laws aimed at ensuring the respect of such rights. We consider that limiting the claims of speculative creditors so that their legal actions do not undermine the rights of populations of debtor states is an

[203] On the debtor state side, Noel Villaroman reports that "[e]njoying the status of a higher law, ICESCR obligations must take priority and precedence before any contractual obligation assumed by states, including loan agreements, in the event of an unavoidable conflict" (Noel G. Villaroman, *Debt Servicing and its Adverse Impact on Economic, Social and Cultural Rights in Developing Countries*, 9 JOURNAL OF HUMAN RIGHTS 487, 499 (2010)).

[204] The argument of responsibility is brandished by New York Senators to justify the bill n° S5542 to provide effective mechanisms for restructuring unsustainable sovereign debt. They note that "[a]bsent an actual federal treaty, New York has the right and responsibility to fill this clear legal void." These same Senators point to the activities of vulture funds, which they link to the dramatic situations experienced by the populations of states facing an unsustainable debt (<www.nysenate.gov/legislation/bills/2023/s5542>. On this bill, see *supra* n° 25).

[205] The United States ratified the International Covenant on Civil and Political Rights on June 8, 1992, and signed the International Covenant on Economic, Social and Cultural Rights on October 5, 1977.

effective means of respecting the two aforementioned Covenants.

The argument of responsibility is also recalled in other texts adopted by United Nations bodies. According to the Guiding Principles on Business and Human Rights developed within the United Nations Human Rights Council, it is the duty of states to protect human rights.[206] Therefore, the first foundational principle provides that "States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises." It adds that "[t]his requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication." The Committee on Economic, Social and Cultural Rights also indicates that "States would violate their duty to protect Covenant rights, for instance, by failing to prevent or to counter conduct by businesses that leads to such rights being abused, or that has the foreseeable effect of leading to such rights being abused."[207]

The responsibility to strive for the sustainability of sovereign debts is not the only argument supporting the adoption of legislation regulating the speculative phenomenon. Another argument is that of consistency. For creditor states granting debt relief or cancellation to other debtor states, preventing abusive behavior that takes advantage of these concessions seems logical. States that provide development assistance should also logically seek this coherence.[208] Indeed, it is necessary to correct a form of inconsistency between, on the one hand, allowing speculative funds to operate without limitation, and, on the other

[206] Human Rights Council of the United Nations, REPORT OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES – GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS "PROTECT, RESPECT AND REMEDY" FRAMEWORK (A/HRC/17/31, March 21, 2011).

[207] Committee on Economic, Social and Cultural Rights of the United Nations, GENERAL COMMENT NO. 24 (2017) ON STATE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE CONTEXT OF BUSINESS ACTIVITIES, 6 (E/C.12/GC/24, August 10, 2017).

[208] Xavier Miny and Inès Troisfontaine, *Quand les vautours attaquent – Fonds spéculatifs spécialisés dans le rachat des dettes des États: synthèse et perspectives en droit belge*, REVUE DE LA FACULTE DE DROIT DE L'UNIVERSITÉ DE LIEGE 119, 123 (2013).

hand, helping distressed debtor states.[209] This consistency requirement argues in favor of a regulation of the speculative phenomenon to be enacted in the United States. It was already taken up in the U.S. bill 111 H.R. 2932, which noted that "[a]t the same time that the international community has been extending debt relief to the poor countries of the world, a new form of business has emerged for the purpose of speculating in and profiteering from defaulted sovereign debt at the expense of both the impoverished citizens of the poor nations and the taxpayers of the world who have participated in international debt relief."[210]

38. Responsibility of vulture funds – The consequences induced by the principle of sustainability affect all the parties involved in sovereign debt.[211] Vulture funds cannot in any way candidly argue that they should not suffer any consequences derived from the pursuit of sustainability. As Nicola Jagers notes, "the conclusion can be drawn that the orthodox view that international human rights law is exclusively applicable to states is being permeated by developments pointing towards the applicability of human rights norms to corporations."[212] For instance, the Guiding Principles on Business and Human Rights developed within the United Nations Human Rights Council take as a foundational principle that business enterprises should respect human rights and that they should avoid infringing on these rights.[213] Nicola Jagers also explains that "private creditors

[209] James Bai, *Stop Them Circling: Addressing Vulture Funds in Australian Law*, 35 SYDNEY LAW REVIEW 703, 719-720 (2013).
[210] U.S. bill 111 H.R. 2932 to prevent speculation and profiteering in the defaulted debt of certain poor countries, and for other purposes, section 2(6). See also U.S. bill 110 H.R. 6796.
[211] Regarding the human rights obligations weighing upon private creditors, see Matthias Goldmann, *Human Rights and Sovereign Debt Workouts*, in Juan Pablo Bohoslavsky and Jernej Letnar Cernic (ed.), MAKING SOVEREIGN FINANCING AND HUMAN RIGHTS WORK, 98-99 (2014) who points out that "[s]uch horizontal human rights effects […] find theoretical support in the very idea of human rights as the expression of the minimum of mutual respect which individuals owe each other in a society."
[212] Nicola Jagers, *Sovereign Financing and the Human Rights Responsibilities of Private Creditors*, in Juan Pablo Bohoslavsky and Jernej Letnar Cernic (ed.), MAKING SOVEREIGN FINANCING AND HUMAN RIGHTS WORK, 185 (2014).
[213] Human Rights Council of the United Nations, REPORT OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES – GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS:

share an active responsibility to address the negative impact that their financing to sovereigns may have on the enjoyment of human rights."[214] This responsibility, which is explained by the fact that vulture funds are secondary creditors aware of the particularities of the debts in which they invest, leads to the conclusion that it is indicated to apply the sustainability argument in order to justify the regulation of their activities, on the one hand, and to determine the extent of this regulation, on the other.

However, one might ask whether the responsibility of the creditors is not diluted when the securities are acquired on the secondary market. As Nicola Jagers notes, "[t]he private creditors may then be so remote from the lenders' human rights violations that it is simply impossible to attribute any human rights responsibility to those private creditors."[215]. According to us, the existence of a direct causal link between the activities of speculative funds and their negative impact on human rights is not required.[216] Once the negative impact of the activities of these funds on the finances of the sovereign states they are attacking has been demonstrated, the argument of the inexistence of a causal link cannot prosper; otherwise, the consideration of sustainability would be nullified. It is indeed difficult, if not impossible, to trace the money in sovereign debts and thus assess its immediate impact on the rights of the populations concerned.[217]

IMPLEMENTING THE UNITED NATIONS "PROTECT, RESPECT AND REMEDY" FRAMEWORK, 13 (A/HRC/17/31, March 21, 2011). As a commentary to this principle, it is stated that "[b]usiness enterprises should not undermine States' abilities to meet their own human rights obligations."

[214] Nicola Jagers, *Sovereign Financing and the Human Rights Responsibilities of Private Creditors*, in Juan Pablo Bohoslavsky and Jernej Letnar Cernic (ed.), MAKING SOVEREIGN FINANCING AND HUMAN RIGHTS WORK, 190 (2014).

[215] *Ibid.*, 196.

[216] See also Human Rights Council of the United Nations, ACTIVITIES OF VULTURE FUNDS AND THEIR IMPACT ON HUMAN RIGHTS – FINAL REPORT OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE, 19 (A/HRC/41/51, May 7, 2019).

[217] Juan Pablo Bohoslavsky and Jernej Letnar Cernic explain that this difficulty is "aggravated in part because international law has historically dealt exclusively with the nation state system and corporations have largely evaded oversight given their status in the cracks of that particular legal regime" (Juan Pablo Bohoslavsky and Jernej Letnar Cernic, *Placing Human Rights at the Centre of Sovereign Financing*, in Juan Pablo Bohoslavsky and Jernej Letnar Cernic (ed.), MAKING SOVEREIGN FINANCING AND HUMAN RIGHTS WORK, 4 (2014)).

39. Infringement of creditors' rights – Any infringement of creditors' rights erodes the principle that contracts must be performed and debts paid. In financial disputes involving speculative activities, respect for the rule of law is fundamental. As Tor Krever points out, "today the rule of law is increasingly viewed as a necessary requirement, or even silver bullet, for economic development."[218] Thus, as Patrick Wautelet stresses, "[b]reaching this fundamental principle requires sound justification, as it modifies the equilibrium between the parties."[219] According to us, the primary justification for undermining this principle stems from the sustainability of sovereign debts. In a situation where financial difficulties encountered by a state lead it to no longer provide certain essential services to its population so that it remains able to honor its obligations to its creditors, the implementation of a protective system is fully justified.[220]

The U.S. Supreme Court decision in *Manigault v. Springs* helps us justify the limitation of speculative activities. The Court decided that "the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected." And the Supreme Court added that "[t]his power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals."[221]

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[218] Tor Krever, *The Legal Turn in Late Development Theory: The Rule of Law and the World Bank's Development Model*, 52 HARVARD INTERNATIONAL LAW JOURNAL 287, 288 (2011).
[219] Patrick Wautelet, *Vulture funds, creditors and sovereign debtors: how to find a balance?*, in Matthias Audit (dir.) INSOLVABILITE DES ETATS ET DETTES SOUVERAINES, 128 (2011). See also Key Nakajima, THE INTERNATIONAL LAW OF SOVEREIGN DEBT DISPUTE SETTLEMENT, 84-85 (2022).
[220] Corentin De Jonghe, *Vers un encadrement européen de l'activité des fonds vautours ?*, DROIT DU FINANCEMENT DE L'ECONOMIE 8, 11 (2019).
[221] Supreme Court of the United States, *Manigault v. Springs*, 26 S. Ct. 127, 130 (December 4, 1905).

40. A limitation rather than a fight – We have demonstrated that there is a demand for the regulation of speculative activities that must be heard and translated into legislation. The sustainability of sovereign debt – in which the social harm that debt services can cause is taken into account – justifies this regulation.[222] However, the scope of this legislation remains to be addressed. The particularities of the phenomenon under study convince us of the appropriateness of a limitation rather than a fight.

The bill that the U.S. Congress should adopt cannot be Manichean since the arguments must be balanced in the interest of all stakeholders. Therefore, the adoption of anti-vulture funds measures must be done with caution, taking into account all the characteristics of sovereign debt and its markets.[223] Since the activities of speculative funds are legal as their claims are based on rights they hold, James Bai notes that "[v]ulture funds are an especial problem because their legal activities do not manipulate statutory loopholes, which can be closed, or precedents, which can be overruled."[224] Moreover, in addition to the fact that speculative activities are generally based on the enforcement of contracts, merits are deriving from these activities.

Jonathan Goren presents what is at stake: "a proposed solution that tries to do too much is doomed to fail. For instance, if vulture fund suits were categorically banned or it became illegal to sell sovereign debt on the secondary market, credit to the developing world would become prohibitively expensive or dry up" but "[a]t the same time, if the status quo remains or it becomes easier to sue a sovereign for breaking its promise to pay back a debt, it

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[222] Juan Pablo Bohoslavsky and Kunibert Raffer stress that "the scope of the *pacta sunt servanda* principle is limited by human rights" (Juan Pablo Bohoslavsky and Kunibert Raffer, *What Have We Learnt?*, in Juan Pablo Bohoslavsky and Kunibert Raffer (ed.), SOVEREIGN DEBT CRISIS – WHAT HAVE WE LEARNT?, 280-281 (2017)).

[223] Joshua Burress stresses it, "[o]ne thing is for certain, when it comes to issues that have the potential to significantly impact sovereign relations, decision-makers should tread lightly" (Joshua Burress, *Sovereign Disobedience: The Role of U.S. Courts in Curtailing the Proliferation of Sovereign Default*, 25 INDIANA INTERNATIONAL AND COMPARATIVE LAW REVIEW 269, 308 (2015)). The measure is all the more critical because, as Georgios Pavlidis notes, "[u]nnecessary or hastily designed impediments to debt recovery risk hurting sovereign debt markets" (Georgios Pavlidis, *Vulture litigation in the context of sovereign debt: global or local solutions?*, 12 LAW AND FINANCIAL MARKETS REVIEW 93, 97 (2018)).

[224] James Bai, *Stop Them Circling: Addressing Vulture Funds in Australian Law*, 35 SYDNEY LAW REVIEW 703, 715 (2013).

would incentivize a rush to the courthouse and it would become impossible for a country that really could not pay to undertake legitimate debt restructuring efforts."[225]

It appears from the foregoing that the initial paradigm must be modified insofar as the action of national parliaments, and, in particular, that of the U.S. Congress, while dealing with the speculative phenomenon cannot be reduced to a simple fight against it, but should instead be part of a logic of limitation. As Eloy Peral notes, "[a]nti-vulture fund legislation that is not carefully calibrated to advance the goals of debt relief while minimizing the adverse effects that may result from tampering with credit markets, such as a reduction in liquidity, will be counter-productive."[226]

41. The measure of the desired regulation – Since vulture funds are not parties to the original contracts they are pursuing, it is possible to envisage limiting their claim to what is really at stake for them, which alone would be the subject of a legitimate expectation of recovery when payment at face value would run counter to the principle of the sustainability of sovereign debt. Doing so would not constitute a significant infringement of their rights of ownership.[227] As previously contemplated in the 111 H.R. 2932 bill,[228] the measure of speculation in the case of unsustainable debt pursued should be the amount paid by the creditor to acquire the debt in the secondary market.

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[225] Jonathan Goren, *State-to-State Debts: Sovereign Immunity and the "Vulture" Hunt*, 41 THE GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 681, 693-694 (2010).

[226] Eloy A. Peral, *Curtailing Vulture Funds in Low-Income Sovereign Debt Litigation: American and British Legislative Responses*, BUSINESS LAW BRIEF 17, 23 (2010-2011).

[227] In the same vein, the U.N. Human Rights Council Advisory Committee, evaluating the limitation to the price paid to acquire the title contained in the Belgian law, qualifies this price as the "actual price of the sovereign debt" (Human Rights Council of the United Nations, ACTIVITIES OF VULTURE FUNDS AND THEIR IMPACT ON HUMAN RIGHTS – FINAL REPORT OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE, 11 (A/HRC/41/51, May 7, 2019)). Christopher Wheeler and Amir Attaran point out that "[c]reditors who acquire sovereign debt for pennies on the dollar in the secondary market can have no reasonable expectation of full payment" (Christopher C. Wheeler and Amir Attaran, *Declawing the Vulture Funds: Rehabilitation of a Comity Defense in Sovereign Debt Litigation*, 39 STANFORD JOURNAL OF INTERNATIONAL LAW 253, 263 (2003)).

[228] See *supra* n° 24. This same limitation is provided in the Belgian anti-vulture funds law.

The limitation of speculative actions, even if less disruptive than their prohibition, is, however, not without impact on the financial markets.[229] In order to maintain incentives to invest in the secondary market, it is necessary that those who engage in it be able to make a profit from their investment, in the form of a legally quantified interest, as it was contemplated in the 111 H.R. 2932 bill.[230]

The possibility of earning a legally prescribed interest on the amount paid to acquire the debt on the secondary market is logically in line with the concern to neutralize the abusive nature of the exercise of vulture funds rights by reducing their demand to a typical claim of a financial actor seeking to make a profit from its investment.[231] A creditor seeking compensation for the risk of not recovering the money incurred and for the unavailability of this money cannot be blamed.

Moreover, if creditors have to go to courts to obtain payment of their claim to the extent allowed, they should not be denied the right to recover, to a fair extent, their legal fees.[232] However, once again, it seems logical to limit this claim. It could be provided that a percentage of the amount claimed could be granted as reimbursement of the costs related to the pursuit of the payment of the claim.

42. The trigger – The departure from the sacrosanct principle *pacta sunt servanda*, resulting from the fact that speculative creditors will not be allowed to pursue the nominal value of the debt, logically raises the question of the beneficiaries of this protection against speculation. Since the justification for the limitation is to be found in the cardinal argument of the sustainability of sovereign debt, one cannot simply retain that all states must be protected, regardless of their state of fortune.

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[229] See Eloy A. Peral, *Curtailing Vulture Funds in Low-Income Sovereign Debt Litigation: American and British Legislative Responses*, BUSINESS LAW BRIEF 17, 23 (2010-2011).

[230] It mentioned a 6 percent simple interest per year on the total amount, calculated from the date the defaulted sovereign debt was acquired (see *supra* n° 24).

[231] Corentin De Jonghe, *Vers un encadrement européen de l'activité des fonds vautours ?*, DROIT DU FINANCEMENT DE L'ECONOMIE 8, 14 (2019).

[232] The 111 H.R. 2932 bill provided that the maximum amount recoverable does not include any amount paid for attorneys' fees or other fees and costs associated with collection.

In order to determine which states should be protected since their debt would be unsustainable, one could, for example, retain that they are states on the list of recipients of official development assistance established by the Development Assistance Committee of the Organisation for Economic Co-operation and Development.[233] It is essential to provide that the state is on the list at the time the debt is pursued.

When the state targeted by the speculation is not on the list at the time of the pursuit of the claim, that does not mean that the protection put in place is inaccessible. The state could demonstrate that the satisfaction that would be given to its creditor would concretely and specifically affect its ability to ensure its missions relating to the fundamental rights of its population.

Nothing seems to prevent a creditor from seeking to demonstrate that the payment requested would in no way affect the sustainability of the debtor's debt.

Conclusion

43. A momentum – In its 2020 report on *The international architecture for resolving sovereign debt involving private-sector creditors*, the International Monetary Fund concluded that "the desirability of wider application of targeted statutory tools of the kind already in place in a few countries to complement the contractual approach (*i.e.*, "anti-vulture funds" legislation) could be further explored to limit holdout creditor recovery in specified circumstances, though they should be carefully designed to limit the impact on creditors' rights and avoid undermining the secondary market."[234] Following this conclusion, we have demonstrated in this article the relevance of a tailored regulation

[233] The French anti-speculation law already uses this list. The idea of using a list was also included in the 111 H.R. 2932 bill. It was provided that the "qualified poor countries" protected were to be understood as "foreign states that are eligible for financing from the International Development Association but not from the International Bank for Reconstruction and Development" (see section 3(9) and section 6(a)).

[234] International Monetary Fund, THE INTERNATIONAL ARCHITECTURE FOR RESOLVING SOVEREIGN DEBT INVOLVING PRIVATE-SECTOR CREDITORS – RECENT DEVELOPMENTS, CHALLENGES, AND REFORM OPTIONS, 47 (September 23, 2020).

of the speculative activities in sovereign debts by adopting a legislative text explicitly aimed at them.

Our argument lies in the concern for the sustainability of sovereign debt. It is crucial that debts owed by states are not served at the expense of the fundamental rights of their population. The idea that a creditor could not obtain from a sovereign debtor whose debt is unsustainable more than what it has invested in acquiring it permits to reconcile the creditor's right of ownership with the fundamental rights of the debtor's population. Since this limitation could lead investors to turn away from the sovereign debt market, it is essential to maintain an incentive to invest in this market. With respect to the costs incurred by the creditor, if it does not appear justified to prevent the creditor from claiming them, a certain measure must nevertheless prevail.

It is essential that the U.S. legislature regulates speculation in sovereign debt.[235] This action is all the more justified since, in matters of sovereign debt, U.S. law and jurisdictions have preeminence.[236] The U.S. legislature may find in this paper the rationale for its action addressing speculation in sovereign debts

[235] The African Ministers of Finance, Planning, and Economic Development have very recently stressed the need to fortify the international debt legal framework through, among other things, anti-vulture funds legislation (<https://www.uneca.org/stories/african-ministers-call-for-a-reformed-global-debt-architecture> (March 20, 2023)).

[236] In a 2019 report, the International Monetary Fund noted that "[a]s a share of the nominal principal amount […], about 45 percent of the total stock outstanding of international sovereign bonds are governed by English law and about 52 percent by New York law" (International Monetary Fund, FOURTH PROGRESS REPORT ON INCLUSION OF ENHANCED CONTRACTUAL PROVISIONS IN INTERNATIONAL SOVEREIGN BOND CONTRACTS, 5 (March 6, 2019)). Regarding the possible evolution of English law, it should be noted that Andrew Mitchell, the Minister of State, Foreign, Commonwealth, and Development Office of the United Kingdom, very recently indicated in the House of Commons that "[w]e are extremely concerned about the use of vulture funds, and Britain has been the lead country in trying to clamp down on them" and that "we will continue with that work" (House of Commons, Oral Answers to Questions, vol. 732, column 9, <https://hansard.parliament.uk/Commons/2023-05-02/debates/12250c3c-6e6a-4789-9b37-f21b790b7986/CommonsChamber> (May 2, 2023)). See also the report of the U.K. International Development Committee on Debt relief in low-income countries (<https://publications.parliament.uk/pa/cm5803/cmselect/cmintdev/146/summary.html> (March 10, 2023)).

as well as an indication of the extent to which it should be regulated.[237]

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[237] For further reflections on the speculative phenomenon and details on the regulation to be put in place, see our doctoral dissertation (on the basis of which some of the ideas defended in this paper are built): Justin Vanderschuren, LES ACTIONS JUDICIAIRES DES SPECULATEURS SUR LES DETTES SOUVERAINES – REGLEMENTER LES ACTIVITES DES FONDS DITS "VAUTOURS" DANS UN SOUCI DE SOUTENABILITE (2022). This contribution is made as of September 15, 2023.