Distrust, Disorder, and the New Governance of Sovereign Debt

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

Introduction

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

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

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

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

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

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

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


19. See infra Part I.C.

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

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

Second, this Article empirically examines sovereign debt restructurings based on hand-collected data and secondary sources specifically gathered and organized for this Article. We examine the formation and operation of creditor committees in eighteen sovereign debt restructurings since 1999. Our analysis focuses on the nature and outcomes of the exchanges: the trajectory of creditor behaviors over time, creditor structures and representation, and the procedural dimensions of negotiation and engagement between debtors and creditors. We consider independent variables—such as creditor structure and debtor-creditor engagement—alongside critical restructuring
outcomes, including creditor participation in the exchange and the occurrence of litigation. 31

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

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

I. Persistent Disorder and the Emergence of Sovereign Debt Governance

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

A. Collective Action Problems in Sovereign Debt

1. The Uniqueness of Sovereign Debt

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

31. See infra Part III.B–D (analyzing the selected exchanges).
vulnerable to external shocks, such as a financial crisis, an economic recession, or a natural disaster. 34 The COVID-19 pandemic underscores this point, as its economic effects are potentially devastating for vulnerable developing and emerging market countries. 35 As a result, the possibility of sovereign debt gone bad casts a long shadow, affecting the government’s ability to ensure the well-being of its citizens 36 and the financial standing of the country’s government and even its companies for generations. 37

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

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34. See id. at 20–23 (noting the origins of debt crises); see also Lee C. Buchheit et al., Revisiting Sovereign Bankruptcy 8–9 (2013), https://www.brookings.edu/-/media/research/files/reports/2013/10/sovereign-bankruptcy/ciepr_2013_revisitsovereignbankruptcyreport.pdf [https://perma.cc/7VEP-4UKC] (explaining how and why sovereign overborrowing may occur).


39. See W. Mark C. Weidemaier, Sovereign Immunity and Sovereign Debt, 2014 U. ILL. L. REV. 67, 89–101, 106–07 (2014); see also Park & Samples, supra note 13, at 1038 (noting the ability of sovereigns to assert immunity against attachment of assets or contract out of debt liability). Litigation may nonetheless serve other purposes for creditors in sovereign debt disputes, such as serving as a check on opportunistic defaults by sovereigns and enabling creditors to shape the norms of sovereign conduct. See Jill E. Fisch & Caroline M. Gentile, Vultures or Vanguards?: The Role of Litigation in Sovereign Debt Restructuring, 53 EMORY L.J. 1045, 1101–05 (2004); see also Sadie Blanchard, Courts as Information Internalsaries: A Case Study of Sovereign Debt Disputes, 2018 BYU L. REV. 497, 545–49 (2018).

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

41. Park & Samples, supra note 13, at 1037.
coordination. A lack of consensus regarding priority of payment to creditors heightens the risk of disputes among creditors. Despite the absence of traditional legal enforcement, sovereigns routinely re-pay their debts. The desire of sovereigns to retain their reputation as borrowers—and conversely the fear of being branded untrustworthy and consequently shunned by lenders—is the dominant explanation. However, reputation as an enforcement mechanism is flawed due to the inconsistent capacity and willingness of creditors to provide market-based discipline.

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

42. See Park & Samples, supra note 10, at 277–78; see also DAVID ZARING, THE GLOBALIZED GOVERNANCE OF FINANCE 128 (2020) (noting the similarities between international financial regulation and international law).


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


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


50. See Park & Samples, supra note 10, at 251 (noting the divergent economic interests of different types of bondholders); see also Fisch & Gentile, supra note 39, at 1074–79 (linking the diversity in sovereign bond restructurings to the diversity among investors). A sovereign default occurs when the government is unable or unwilling to re-pay its debt obligations. See Roos, supra note 52, at 45–45.

51. See Roos, supra note 52, at 46–48.

52. See Sean Hagan, Designing a Legal Framework to Restructure Sovereign Debt, 56 GEO. J. INT’L L. 299, 310 (2005) observing that the atomization and dispersion of the creditors have aggravated creditor
Creditor committees, which figured prominently in prior eras of sovereign debt, have played a limited role in contemporary bond exchanges. Creditors that refuse to participate in sovereign debt restructurings—"holdout creditors," in the parlance of sovereign debt—in hopes of receiving better payment terms play an outsized role in recent sovereign debt disputes.

To address collective action problems in the modern bondholder era, legal reform efforts have broadly embraced two competing paradigms: the implementation of a statutory regime and the incorporation of contractual terms. In the former category are proposals for quasi-insolvency mechanisms—most prominently, the SDRM proposed by then IMF Deputy Managing Director Anne Krueger in November 2001. The failure of the SDRM to gain political traction shifted the focus to contractual alternatives, primarily through the incorporation of collective action clauses ("CACs") with majority modification provisions. CACs are contractual provisions in sovereign bond contracts that permit a specified number of bondholders to agree to a modification of payment terms that is binding on all bondholders. By eliminating the need to obtain unanimous bondholder consent, CACs with supermajority requirements facilitate sovereign debt restructurings by deterring free riding by opportunistic holdout creditors that seek compensation for not participating. Essentially, CACs act as a de facto cramdown mechanism by enabling sovereign debtors to bind the terms of a restructuring on dissenting qua holdout creditors. In the absence of a bona coordination problems); see also Yesha Yadav, Empty Creditors and Sovereign Debt: What Now?, 9 CAP. MKTS. L.J. 103, 113–14 (2014) (describing the perverse incentives of sovereign creditors that hold credit default swaps).

53. See infra Part II.B.3.


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


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

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

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

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

Notwithstanding the widespread implementation of CACs, the shortcomings of the current sovereign debt restructuring regime have generated growing concern. Sovereign debt exchanges have become less cooperative and more prone to disputes. Recent restructurings, such as those of Argentina and Greece—though relatively few in number in historical terms—have been particularly lengthy, contentious, and costly. Institutional constraints shaping debtor and creditor behavior have continued to weaken in the face of bondholder atomization. As a result, sovereign debt restructurings are increasingly susceptible to rogue behavior. Collective action problems between sovereigns and their creditors lead to efficiency losses and disparate treatment of different creditors. Further, the current system has attracted newfound critiques of its legitimacy.
Debtor-creditor engagement can be contractually facilitated by engagement clauses that obligate the parties to negotiate in good faith through a creditor committee. Consistent with the private law approach embodied by CACs, the International Capital Market Association ("ICMA") published model provisions for sovereign bond contracts that contractually obligate debtor-creditor engagement through creditor committees. Engagement clauses reduce the flexibility of sovereigns to determine—either unilaterally or in conjunction with creditors—when, how, with whom, and on what terms to engage. For this reason, relatively few sovereigns have included engagement clauses in sovereign bond issuances.

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

B. Sovereign Debt and New Governance

1. New Governance in International Law

At its core, New Governance is defined as a counterpoint to state-centric, command-and-control regulation. The breadth of theories and practices under the umbrella of New Governance renders elusive any precise and uni-
versal definition. Nonetheless, three tenets of New Governance can be distilled from the literature, as explained below.

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

Second, New Governance employs softer rules and more flexible processes. Soft law is defined as a counterpoint to legally binding, mandatory, and universally applied hard law. The less precise, non-obligatory, and non-delegable a legal rule, the more likely that it constitutes soft law. For example, soft law can include voluntary codes of conduct, principles, and guidelines that are not directly enforceable by the state but can influence behavior through a reputational effect.

References:
75. See Lobel, supra note 18, at 373 (“The exercise of normative authority is pluralized.”).
76. Abbott & Snidal, supra note 17, at 542; see also Lobel, supra note 18, at 379–81 (referencing competition between different actors advancing different regulatory approaches, methodologies, and practices).
77. Douglas NeJaime, When New Governance Fails, 70 Ohio St. L.J. 323, 335 (2009); see also Ford, supra note 74, at 445 (characterizing the New Governance regulator as a “clearinghouse, catalyst, monitor, prod, and coordinator”).
80. Abbott & Snidal, supra note 17, at 544.
82. Lobel, supra note 18, at 388–89.
83. See Abbott & Snidal, supra note 17, at 529–30.
law. The flexibility of soft law enables New Governance regimes to create and modify regulatory frameworks in a faster and less costly manner. When the outcomes of regulation are unknown or highly contested, soft law facilitates testing and change. Over time, soft law rules and regimes can harden into hard law ones.

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

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

2. Applying New Governance to Sovereign Debt

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


85. See Ford, supra note 74, at 443 (referring to New Governance’s reversibility).

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


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


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

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


93. Gelpen, supra note 15, at 85–86.
support in the form of sovereign debt governance. While the sovereign debt governance regimes that are the focus of this Article are a recent development, the principles underlying them are not. The current system features two well-established informal coordination mechanisms: the Paris Club for official bilateral creditors (that is, other sovereigns)\(^{94}\) and the London Club for commercial bank creditors.\(^{95}\) The London Club, in particular, is characterized by its informal, collaborative, and non-institutional nature.\(^{96}\) Convened by its members on an ad hoc basis, the London Club’s bank advisory committees negotiate workouts on behalf of bank lenders.\(^{97}\) In contrast to international financial institutions such as the IMF and the Bank of International Settlements, the London Club does not have a constitutive document (such as a charter), a secretariat, a physical presence, or even a website.\(^{98}\)

While the London Club’s role has receded with the predominance of bonds over bank loans in the global sovereign debt market, its informal modus operandi is evident in debates about sovereign debt governance.\(^{99}\)

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


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

\(^{96}\) Lienau, supra note 68, at 180.


\(^{98}\) Gelpern, supra note 20, at 356–57.

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

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

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

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

1. UNCTAD Principles

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

102. See Manuelides, supra note 70, at 439, 450 (arguing that debtor-creditor engagement is best addressed through sovereign debt governance regimes, such as the IMF Lending into Arrears Policy, the IIF Principles, and the UNCTAD Principles, rather than contractually).
103. See, e.g., IMF 2013 STAFF PAPER, supra note 26, at 37–41 (identifying and summarizing several proposals, including the IIF Principles).
104. UNCTAD PRINCIPLES, supra note 25, at 3. The UNCTAD Principles are complemented by a roadmap and a guide developed by an ad hoc working group to address restructurings. See UNCTAD ROADMAP AND GUIDE, supra note 14, at 3.
105. The preamble to the UNCTAD Principles states:

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

UNCTAD PRINCIPLES, supra note 25, at 4; see also Gelpen, supra note 20, at 379 (arguing that formal adoption of the UNCTAD Principles is insufficient for their implementation and may be inimical to their effectiveness).
106. See Juan Pablo Bohoslavsky & Carlos Espósito, Principles Matter: The Legal Status of the Principles on Responsible Sovereign Financing, in SOVEREIGN FINANCING AND INTERNATIONAL LAW, supra note 20, at 73, 83.
107. Id. at 78–79; see also UNCTAD ROADMAP AND GUIDE, supra note 14, at 15 (noting the varied legal status of the UNCTAD guidelines).
ance regimes, which feature soft law reinforced or benchmarked by hard law.\footnote{108}

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

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

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

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

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

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

\(^{119}\) See IIF PRINCIPLES, supra note 27, at 6.

\(^{120}\) See Ritter, supra note 117, at 228–30. The IIF has endorsed ICMA’s model contract provisions mentioned above. IIF PRINCIPLES, supra note 27, at 8.

\(^{121}\) IIF PRINCIPLES, supra note 27, at 33.

\(^{122}\) Id. at 38.

\(^{123}\) See id. at 49–54.
between hardening the IIF Principles’ creditor committee-based approach to
debtor-creditor engagement and preserving its market-based orientation.\textsuperscript{124}

3. IMF Lending into Arrears Policy

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

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

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

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

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

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

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

Lending into Arrears Policy]. The IMF Lending into Arrears Policy is complemented by a parallel
IMF policy that applies to the extension of IMF financing to sovereigns in arrears to official bilateral
creditors. See Lee Buchheit, Guillaume Chabert, Chanda DeLong & Jeromin Zettelmeyer, How to Restruc-
ture Sovereign Debt: Lessons from Four Decades 11 (Peterson Inst. for Int’l Econ., Working Paper No. 19-8,
NTMB].

\textsuperscript{130} IMF Lending into Arrears Policy, supra note 129, at 2, 20.

\textsuperscript{131} See id. at 12–13; see also Lee C. Buchheit & Rosa M. Lastra, Lending into Arrears—A Policy Adrift,
41 Int’l L. Rev. 939, 946 (2007) (noting the policy’s focus on the nature of the engagement with creditors
stances in which creditor demands are inconsistent with the IMF-supported lending program.132 During its most recent review of the IMF Lending into Arrears Policy, the IMF signaled its willingness to strengthen this imperative to engage by making this criterion more prescriptive.133 However, the IMF has refrained from mandating creditor committees, reiterating its preference for a case-by-case determination of the appropriate form of debtor-creditor engagement that would satisfy the good faith criterion.134

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

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

A. Creditor Committees and Insolvency Law

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

Committees are designed to serve as bankruptcy watchdogs for the stakeholders they represent. Statutory committees formed under the Bankruptcy Code.


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


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

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

143. See Klee & Shaffer, supra note 138, at 1027–30 (identifying various categories of Chapter 11 committees). External constituencies may also be represented through committees. See, e.g., Corinne McCarthy, Comment, Creditors’ Committees: Giving Tort Claimants a Voice in Chapter 11 Bankruptcy Cases, 51 Emory Bankr. Dev. J. 431 (2015) (arguing in favor of forming committees to represent tort claimants).

144. In re AKF Foods, Inc., 36 B.R. 288, 289 (Bankr. E.D.N.Y. 1984) (“The function of a creditors’ committee is to act as a watchdog on behalf of the larger body of creditors which it represents.”).
ruptcy Code owe fiduciary duties to the class of stakeholders they represent.\footnote{145} Generally, creditor committees are responsible for promoting the interests of unsecured creditors, which can entail responsibilities to manage or coordinate restructuring activities.\footnote{146} The Bankruptcy Code confers broad authority to creditor committees to pursue these goals.\footnote{147} For instance, a committee may investigate the assets, liabilities, and financial condition of the debtor.\footnote{148} Committees may also be responsible for negotiating or even proposing a plan of reorganization.\footnote{149}

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

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

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

\footnote{147} See, e.g., 11 U.S.C. § 1103(c).

\footnote{148} Id. § 1103(c)(2).

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


B. Creditor Committees in Sovereign Debt Restructurings

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

The fundamental purpose of creditor committees in sovereign debt has been fairly consistent over time: to coordinate settlements in default and distressed situations. Committees can ease coordination problems among banks or bondholders by appointing a smaller number of advisors to negotiate restructuring terms with sovereign debtors. Committees may serve administrative functions—to channel communication, investigate and verify information, and negotiate transactional documents. Though committees tend to be viewed most favorably among creditor interest groups, there are potential upsides for sovereign debtors too. Committees can fill gaps in...
sovereign debt governance by coordinating collective action among creditors and imposing constraints on rogue behavior and defections.162

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

1. The Pax Britannica Era

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


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

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

165. See id.

166. Unpredictable contract interpretation by courts has contributed to instability in the global sovereign debt market. See Pottow, supra note 54, at 229 (“Judges are nevertheless asked to make important policy decisions in one-off interventions that occur every few years, a task to which they are poorly suited.”); see also Gelpern, supra note 62, at 135 (explaining why sovereign debt litigation is prone to making bad law).

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

168. CARLOS MARICHAL, A CENTURY OF DEBT CRISIS IN LATIN AMERICA 10 (1989) (“Other financial centers such as Amsterdam, Berlin, and Paris also saw considerable activity with respect to emerging countries’ bonds, but none matched the London market’s size and liquidity.”).

169. See Trish Kelly, Ability and Willingness to Pay in the Age of Pax Britannica, 1890–1914, 35 EXPLORATIONS ECON. HIST. 31, 41 (1998) (finding that trade relations with Britain help to explain sovereign
dent of the government, the CFB enjoyed close relations with the govern-
ment and periodically sought the benefit of diplomatic interventions.170
Although the CFB was by far the most visible and prominent, creditors’
associations from other European countries also played a role in some sover-
eign debt workouts during this era.171

The U.S. counterpart to the CFB—the FBPC, which was based in New
York—was formed in 1933.172 As the United States grew more assertive as a
global power in the 1800s, there is evidence that the CFB held less sway in
Central America.173 Both the CPB and the FBPC—quasi-official entities
established by governments but operating independently on behalf of pri-
ivate creditors—were important in the Pax Britannica era of sovereign debt.

The role of creditor committees in the decades before World War I offers
points of comparison with today’s sovereign debt landscape. While there are
also important differences, the parallels are significant.174 As in the current
era, bonds were the predominant financial instrument from 1870 to 1913.175
In addition to the prevalence of bonds, which often involve numerous and
disparate creditors, the pre-war era was also a period of extensive global
financial integration.176 Emerging market borrowers issued vast sums of
debt in external markets—mostly in London—during this period.177 After
borrowing booms, there were episodes of crisis and restructuring. The pri-

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

170. See Mauro & Yafeh, supra note 158, at 20–21 (describing the CFB’s relationship with the British
government); see also James H. Ronald, National Organizations for the Protection of Holders of Foreign Bonds, 3
Geo. Wash. L. Rev. 411, 424 (1955) (characterizing support from the British government as “sympa-
thetic though not aggressive”).

between the Portuguese government and bondholder committees from Belgium, France, Germany, the
Netherlands, and the United Kingdom); Ronald, supra note 170, at 426–36 (reviewing the proliferation of creditors’
committees in various European states).

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

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

174. There are a number of parallels between the current environment for sovereign debt and the
environment between 1870 and 1913. See Mauro & Yafeh, supra note 158, at 6–9 (comparing that era to
the present); see also PAULO MAURO ET AL., EMERGING MARKETS AND FINANCIAL GLOBALIZATION

175. See Mauro et al., supra note 174, at 24–26 (comparing the characteristics of sovereign bonds
today with the 1870-1913 era).

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

177. See id. at 10 (observing that other financial centers such as Amsterdam, Berlin, and Paris were
highly active but did not match the size and liquidity of London).
mary crisis and restructuring peaks in the nineteenth century occurred in the 1820s, 1870s, and 1890s. 178

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


181. Id. at 72–73.

182. See SEC, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL, AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES, PART V — PROTECTIVE COMMITTEES AND AGENCIES FOR HOLDERS OF DEFAULTED FOREIGN GOVERNMENT BONDS 10 (1937) (noting the “complete absence of feasible legal remedies available to the bondholders”). Absolute sovereign immunity—the prevailing theory of immunity at that time—provided that sovereigns could not be sued in foreign courts without their consent, regardless of the nature of the actions giving rise to the claim. See Permanent Mission of India to the U.N. v. City of N.Y., 551 U.S. 193, 199 (2007) (citing Letter from Jack B. Tate, Legal Adviser, Dep’t of State, to Philip B. Perlman, Acting Att’y Gen. (May 19, 1952), reprinted in 26 Dep’t St. Bull. 984 (1952)) (discussing the history of absolute sovereign immunity). With limited options for recovery, creditors turned to negotiations and at times lobbied their home governments to apply diplomatic pressures, or even military force, to debtor states. See Buchheit, supra note 128, at 355–56 (citing instances of creditor government indifference to bondholder lobbying as well as episodes of forceful physical interventions).

183. See Buchheit, supra note 21, at 206 (describing the formation and characteristics of independent committees and permanent protective committees).
2. The London Club Era

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

Shortly after announcing the payment moratorium, Mexico invited thirteen international banks with significant credit exposure to form a bank advisory committee, which represented creditors in the issuance of new emergency debt and the renegotiation of the existing debt. At that time, Mexico had over 500 known commercial bank creditors. Thus, consolidating efforts with a small group of thirteen creditors significantly reduced the complexity and potentially the coordination costs of restructuring negotia-
tions. Perhaps not surprisingly, the committee approach proved more feasible than efforts to communicate and negotiate with hundreds of lenders at once. By contrast, Brazil’s attempt at such a meeting with all its creditors in 1982 illustrated the difficulty of large-scale coordination and consequently was not widely emulated. 191 Although the number of creditors in a syndicated lending arrangement (up to several hundred banks) is often much smaller than in a bond financing situation (up to hundreds of thousands of bondholders), coordinating hundreds of creditors at once was already a major challenge. 192

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

Advisory committees worked fairly well in responding to the 1980s debt crisis, achieving high levels of participation and producing relatively low levels of litigation. 199 Despite the absence of formal rules shaping behavior, certain key factors made commercial banks more cooperative as sovereign creditors. Commercial banks were repeat players with business relationships with sovereign clients, which created incentives to participate in restructuring.
ing deals. In addition to lending relationships, commercial banks might hold deposits for a sovereign debtor’s state-owned enterprises and agencies. These same banks might hope to open branches and develop other financial services in that sovereign’s domestic markets. Furthermore, banks proved relatively responsive to the constraints of regulatory pressures and peer accountability. Finally, and of great practical importance, the members of a lending syndicate were fairly easy to identify and track down. The combination of these factors helped facilitate consensus and settlements during the syndicated lending era.

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

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

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

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

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

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

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

206. Unanimity requirements in bond contracts have also proven defective in the governance of a restructuring process. See, e.g., Stephen J. Choi & G. Mitu Gulati, Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds, 53 Emory L.J. 930, 952 (describing unanimous action clauses as a restructuring roadblock that burdened both debtor countries and their bondholders).

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


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

3. The Current Era

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

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

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


212. See Sturzenegger & Zettelmeyer, supra note 97, at 12.


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

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

216. See Gelpern, supra note 15, at 51–52, 57 (referencing the tight cohort of officials, banks, and law firms that handled numerous restructurings); see also Fisch & Gentile, supra note 59, at 1077–87 (explaining incentives of repeat player creditors with standing inter-creditor relationships and business ties to debtors).

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

218. Banks that were tempted to “go rogue” faced adverse consequences for their defections. See supra note 213 and accompanying text.
London Club’s advisory committees created additional constraints on creditor behavior. Bondholders today, however, are less responsive to the incentives and constraints that fostered cooperation during the syndicated lending era. With diverging interests and a wide variety of identities, sovereign creditors today are far less homogenous than the commercial banks that ruled the syndicated lending era. Even the act of locating and communicating with bondholders can be a daunting challenge.

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

III. Empirical Analysis of Sovereign Restructurings and Coordination Mechanisms

The emergence of sovereign debt governance underscores the need to examine whether its focus on debtor-creditor engagement is warranted. The UNCTAD Principles, the IIF Principles, and the IMF Lending in Arrears Policy all reference creditor committees, albeit in notably different ways and with varying degrees of prescriptiveness. These nascent governance regimes envision creditor committees as a blueprint for debtor-creditor engagement through New Governance principles. This suggests the following question: Are creditor committees a missing ingredient in sovereign debt governance?
eign debt today? Given the centrality of debtor-creditor engagement to sovereign debt governance, the answer to this question goes a long way towards assessing the value of New Governance in the context of sovereign debt.

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

A. Characteristics of Dataset

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

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

\textsuperscript{228} Some restructurings include both domestic and foreign debt. Our dataset includes all debt restructurings involving foreign law bonds. See Anna Gelpen, \textit{Domestic Bond, Credit Derivatives, and the Next Transformation of Sovereign Debt}, 83 CH.-KENT L. REV. 147, 150–51 (2008) (addressing the definition of domestic debt).

\textsuperscript{229} See generally Gelpen, \textit{supra} note 162 (noting the insufficiencies in publicly available information about sovereign debt).


\textsuperscript{232} Charles Blitzner, Table on Sovereign Bond Restructurings and Creditor Engagement – 2002–2016 (2016) (on file with authors).
1. Scope

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

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

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

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

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

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

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

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

239. Greece, for instance, changed domestic laws to install a collective action mechanism that made the exchange offer compulsory if creditors holding two-thirds of outstanding local bonds accepted the exchange offer. Such a change was not possible for Greece’s foreign law bonds. See Zettelmeyer, Trebesch & Gulati, supra note 217, at 517; see also Grund, supra note 162, at 404.
Likewise, dealing with foreign creditors involves a different set of imperatives and constraints than managing purely domestic creditors.

2. Variables

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

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

\textsuperscript{240} Argentina (2005 and 2010) is a prominent exception to this tendency. See Gelpert, supra note 62, at 137–38 (reviewing events surrounding Argentina’s default and subsequent restructurings).
\textsuperscript{241} See Fang, Schumacher & Trebesch, supra note 231, at 11–12 (explaining approaches to calculating haircuts); see also Cuenca & Trebesch, supra note 250, at 88–90 (same).
\textsuperscript{242} Within the creditor litigation variable, we also consider investor-state arbitration actions, which presents similar results as a restructuring outcome. See, e.g., Park & Samples, supra note 13, at 1058–62 (examining the use of investor-state arbitration as an enforcement tool in sovereign debt); see also Sebastian Grund, Restructuring Government Debt Under Local Law: The Greek Experience and Implications for Investor Protection in Europe, 12 CAP. MKTS. L.J. 253, 260–62 (2017) (discussing claims brought by Greek creditors in international investment arbitration tribunals).
\textsuperscript{243} See Fang, Schumacher & Trebesch, supra note 231, at 15 (illustrating the percentage share of foreign bonds by exchange in selected sovereign restructurings).
\textsuperscript{244} Whereas wealthy countries can often satisfy financing needs in domestic markets, emerging market countries often turn to international markets for financing. Most emerging market sovereign bonds issued internationally are governed by New York (sixty-six percent) and English law (twenty-eight percent). By contrast, between 2003 and 2010, over eighty percent of public bonds issued in EU countries were subject to domestic law. See Das, Papaioannou & Trebesch, supra note 186, at 42 (illustrating bond issuances from emerging markets and EU countries by governing law as of 2009).
and not others.\textsuperscript{245} And in other cases, the occurrence of default—whether or not a default has actually occurred—is a contested issue.\textsuperscript{246}

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

B. Chronological Analysis: Creditors over Time

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


\textsuperscript{246} See, e.g., Dominica (2004) and Argentina (2014).

\textsuperscript{247} See Das, Papaioannou & Trebesch, \textit{supra} note 186, at 21 (characterizing bondholder structure).

\textsuperscript{248} See id. at 22 (characterizing the representativeness of bondholder groups).

\textsuperscript{249} See id. (characterizing bondholder communication and negotiation).

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

\textsuperscript{251} Though Argentina’s debt crisis spawned numerous creditor organizations, from the GCAB to lobby groups, we consider Argentina (2005) a “no” on the involvement of a representative creditor committee because those groups were not recognized and did not play a meaningful role in negotiating
is also uneven across restructurings. While some sovereign debtors have engaged proactively and meaningfully with creditors, others have dismissed them and taken more unilateral paths to restructuring.252 The GCAB, for instance, claimed to represent over half of Argentina’s outstanding private bonds, but was never formally recognized by the Argentine government.253

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

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

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

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

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


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

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

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

259. See supra Part III.D (analyzing engagement with creditors in the selected exchanges). While it is possible that the ongoing Puerto Rico and Venezuela debt restructurings will include significant committee-based debtor-creditor engagement, the extent of engagement remains to be seen.
Table 1. Creditor Committees in Selected Restructurings, 1999-2019

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

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

C. Creditor-Side Analysis: Structure and Representation

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

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

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260. See supra notes 227–228 and infra notes 281–284 (discussing the role of creditor identity in shaping incentives and imperatives in restructuring scenarios).
a significant portion of the outstanding debt to be restructured. A committee need not have a large number of members to represent a significant portion of the outstanding debt. Committees are considered involved in a restructuring when they are officially recognized by the sovereign debtor and play a meaningful role in restructuring negotiations. For each exchange, where possible, we characterize the existence of creditor representation in binary terms (that is, yes or no). As with other descriptive determinations about sovereign debt restructuring, in the absence of precise data, qualitative judgments are made as to the extent of representation.

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

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

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

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


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

266. Fang, Schumacher & Trebesch, supra note 231, at 17.
Table 2. Creditor-Side Variables in Selected Restructurings, 1999–2019

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

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

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

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267. See supra notes 258–260 and accompanying text.
268. That creditor, TCW Asset Management, held enough bonds to exceed the threshold required under the CACs in the exchange bonds. As a result, only one creditor’s approval was needed to restructure the bonds. Sturzenegger & Zettelmeyer, supra note 231, at 209–10.
Anecdotal observations of the exchanges with the most fragmented creditor structures are mixed.\textsuperscript{269} Other than Greece, none of the exchanges with fragmented creditor structures involved a recognized and representative creditor committee. Highly fragmented exchanges also had some of the lowest participation rates in the dataset. One exception to this tendency is Ukraine (2000), which reached a ninety-eight percent participation rate—above average for a sovereign debt exchange—despite a highly fragmented creditor structure.\textsuperscript{270} Other highly fragmented exchanges fell well below average participation rates: Uruguay (2003), Dominica (2004), and Argentina (2005) were among the lowest in the sample with ninety-two percent, seventy-two percent, and seventy-six percent, respectively. The other exchange with low participation was Ecuador (2009) at ninety-one percent, which was a buy-back and a rather atypical restructuring.\textsuperscript{271}

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

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

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

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

\textsuperscript{271}. See Gelpern, supra note 234, at 317–18 (explaining the exceptional nature of Ecuador’s buy-back offer).

\textsuperscript{272}. Das, Papaioannou & Trebesch, supra note 186, at 22.


\textsuperscript{274}. See Ahdieh, infra note 294, at 248–49 (arguing that groups may fill governance gaps in the global sovereign debt market by serving as nodes of negotiation and overcoming barriers to mutually beneficial collective action).
litigating. For instance, specialists in debt litigation (for example, a distressed debt hedge fund) are likely to have very different investment strategies and incentives than other institutional investors (for example, a pension fund). In particular, distressed debt hedge funds—often labeled as “vulture” funds—have recalibrated creditor-side incentives and debtor-side imperatives by lobbying for favorable changes in substantive law and innovating litigation and enforcement strategies. Finally, some exchanges involve a significant number of retail investors, who tend to have their own divergent incentives and tendencies.

D. Procedural Analysis: Negotiations and Outcomes

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

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

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

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

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

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

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

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

281. In this context, the commitment to negotiate with a committee implicitly means that an exchange offer will not be made without the prior approval of the committee. Buchheit et al., supra note 34, at 9.
the committee to facilitate coordination and encourage participation in an approved offer. However, if negotiations are slow or unsatisfactory, proceeding without the committee would be difficult and risky.282 Undoing a commitment with a committee could destabilize the sovereign’s debt restructuring plans.

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

282. Id.

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

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

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

286. Moldova (2002) is a special case that illustrates a scenario in which a committee was not necessary for extensive engagement. See supra notes 270 and 273 and accompanying text.
Table 3. Negotiations and Outcomes, 1999–2019

<table>
<thead>
<tr>
<th>Debtor</th>
<th>Year</th>
<th>Creditor Representation</th>
<th>Creditor Engagement</th>
<th>Haircut (%)</th>
<th>Participation (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pakistan</td>
<td>1999</td>
<td>No</td>
<td>Limited</td>
<td>33</td>
<td>99</td>
</tr>
<tr>
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Sources: Cruces & Trebesch (2010), Das et al. (2013), Fang et al. (2020)

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


\(^{288}\) See IMF, Country Report No. 08/365, Seychelles: 2008 Article IV Consultation and Request for a Stand-By Arrangement—Staff Report; Staff Supplement; Public Information Notice and Press Release on the Executive Board Discussion; and Statement by the Executive Director for Seychelles 5, 15–16, 44 (2008).
We observe that Argentina (2005) and Ecuador (2009)—exchanges with almost no creditor engagement—had low rates of participation. That tendency is consistent with the notion that engaging with representative committees helps to avert debt litigation.\textsuperscript{289} However, those two exchanges also had high haircuts, which are strong predictors of participation rates.\textsuperscript{290} Rather than acting as a causal driver of participation, engagement might be better understood as a proxy for restructuring styles (that is, unilateral and adversarial versus multilateral and collaborative). In other words, the correlation between deeper haircuts and very low engagement may be part and parcel of a more unilateral and adversarial restructuring style. Meanwhile, in exchanges with extensive engagement with creditors, participation is generally high but haircuts are low, which could lend support to the idea that engaging with a committee grants leverage to creditors.\textsuperscript{291}

IV. A Critical Perspective on Sovereign Debt Governance

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

A. The Appeal of Sovereign Engagement

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

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

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

\textsuperscript{291}. Buchheit et al., supra note 34, at 9.

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


\textsuperscript{294}. See McAdams, supra note 292, at 237–38; Abbott, supra note 1, at 368–71 (each citing examples from other areas of international law).
tion of intra-group norms. Debt restructurings in the current era suggest that creditor committees may facilitate this process.

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

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

B. The Role of Institutions in Sovereign Debt Governance

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

296. See supra Part III.D (demonstrating the trend away from more unilateral, adversarial exchanges towards greater engagement).
297. See supra notes 68–71 and accompanying text (explaining the role of norms in overcoming trust dilemmas in sovereign debt).
298. See Ahdieh, supra note 293, at 258 (arguing that groups may facilitate credible commitments to agreements made by individual members).
299. See Park & Samples, supra note 10, at 281 (defining precommitment as an observable action that ensures that at some later time, the actor will perform an act that it would not have otherwise performed). The London Club, for instance, has been described as a precommitment device. See id. at 282.
300. See Park & Samples, supra note 24, at 43–48 (exploring factors that shape debtor and creditor engagement in sovereign debt restructuring).
301. See, e.g., Schumacher, Trebesch & Enderlein, supra note 230, at 617 (describing factors, including higher haircuts, that make sovereign debt litigation more likely).
302. See infra Part III.D (observing that exchanges with extensive engagement tended to produce lower haircuts than more unilateral exchanges).
303. See id. (observing that exchanges with the lowest participation had almost no engagement or limited engagement).
alternative to the open and collaborative accountability of sovereign debt governance is not hard law but rather no law at all. Rather than supplanting sovereign debt’s public international law origins or the contract-based private law system that predominates today, sovereign debt governance complements them through legal ordering of a hybrid, multi-level nature. According to its proponents, the informal, non-mandatory nature of sovereign debt governance is an inherent strength, rather than simply a concession to the political challenges of international lawmaking.

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

This raises the question of how much institutionalization is necessary in order to achieve optimal debtor-creditor engagement. The shortcomings of New Governance-influenced approaches in international financial regulation pose a cautionary note. As became evident during the global financial crisis of 2008, informal, soft law-based networks can fail at even their core function of regulatory coordination. More pointedly, self-interested market actors in times of crisis may subvert New Governance by refusing to communicate with each other and incorporate what they have learned previously. In the context of sovereign debt, the ability of New Governance-based regulation to regulate the ultimate “high politics” of a national debt crisis may be limited indeed. While sovereigns may agree to accept debtor-creditor engagement as a matter of principle, the capacity of sovereigns to...
eign debt governance regimes to serve as effective precommitment mechanisms is contestable. This Article’s finding of a positive correlation between creditor engagement and participation rate, coupled with our finding of a negative correlation between creditor engagement and haircuts (that is, the less that a sovereign engages with its creditors, the higher the haircut imposed on creditors), suggests that a sovereign may be willing to “play hardball” and refuse to meaningfully engage under financially or politically exigent circumstances.311 The procedural guidance to incentivize engagement in sovereign debt governance may become substantive disincentives if opportunistic sovereigns or creditors perceive such guidance to be an impediment to their immediate goals.

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

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

311. See infra Part III.D.


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


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

CONCLUSION

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

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

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

317. See Bogdandy & Goldmann, supra note 68, at 58.
318. See Buchheit, supra note 1, at 9 (observing that the London Club era bank advisory committees
worked “tolerably well” given the circumstances).
### Annex

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<th>Debtor</th>
<th>Year</th>
<th>Number of Bonds</th>
<th>Creditor Structure</th>
<th>Creditor Representation</th>
<th>Creditor Engagement</th>
<th>Preemptive or Post-default</th>
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* Highly concentrated or highly fragmented creditor structure.

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