'A journey of a thousand miles begins with a single step.("千里之行始於足下")'

Laozi, Chinese Philosopher

Evaluating Reform Proposals in Sovereign Debt Restructuring: A Path Towards Resilience and Fairness

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Abstract

This article examines proposals for revamping the framework governing sovereign debt restructurings ('SDRs'). It critically compares three primary approaches: the centralised statutory approach, the decentralised contractual approach, and the model law approach. An evaluation of these proposals determines whether a harmonised approach through an international law treaty is both desirable and feasible for SDRs, or if an ad hoc and pluralist approach under the existing system is more advantageous. The article advocates for the model law approach as the most promising in developing a comprehensive SDR governance framework. It offers evaluative criteria for examining various proposals, as well as suggesting potential solutions to unresolved issues.

1. Introduction

In 1776, *Adam Smith* argued that '[w]hen it becomes necessary for a state to declare itself bankrupt, in the same manner as when it becomes necessary for an individual to do so, a fair, open and avowed bankruptcy is always the measure which is both least dishonorable to the debtor, and least hurtful to the creditor'.[1] Indeed, the domestic bankruptcy regime

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[1] Adam Smith, *An Inquiry into The Nature and Causes of The Wealth of Nations Volume II* (Methuen & Co. 1776) 416.

and the framework governing sovereign debt restructuring ('SDR') have many similarities. Still, sovereign states can only become 'insolvent' but not 'bankrupt', in that the liquidation process employed by the domestic bankruptcy regime for commercial entities cannot directly apply to the process of SDR. The unique characteristic of state insolvency is one of the key contributing factors leading to the absence of an international insolvency procedure for SDR.

The current SDR governing framework is problematically fragmented rather than fostering a healthy culture of legal plurality. This includes limited enforceability, power imbalances, insufficient representation, and obsolete institutional architectures. These problems would result in disagreements, expenses, and uncertainty, weakening the validity and equity of the SDR process. Furthermore, inconsistent norms and inadequate processes resulting from these weaknesses constitute formidable obstacles to developing a more effective and cohesive governing framework for SDR. Eventually, fragmentation diminishes the capability of the international SDR governing framework to address the problems presented by the SDR, posing further obstacles to international collaboration and economic stability. Thus, there is no winner in the SDR under the current framework. Hence, a recurring concern about the potential of establishing an ideal SDR governing framework has been raised. Various reform proposals have been developed and discussed by the international community.[2] These reform proposals are divided into three approaches under two categories: centralised statutory approach, decentralised contractual approach (under the market-based category), and the model law approach (under the market-based category).[3]

[2] For a comprehensive summary of SDR reform proposals made between 1976 and 2001, *see* Kenneth Rogoff and Jeromin Zettelmeyer, 'Bankruptcy Procedures for Sovereigns: A History of Ideas, 1976-2001' (2002) 49 (3) IMF Staff Papers 470; for a concise overview of SDR reform proposals made in the EU level, *see* Sebastian Grund and Mikael Stenström, 'A Sovereign Debt Restructuring Framework for the Euro Area' (2019) 42 Fordham International Law Journal 795; for the recent proposals made for sovereign default procedures, *see* Kaiser, Jürgen, 'Resolving Sovereign Debt Crises: Towards a Fair and Transparent International Insolvency Framework. 2nd rev. ed.' [2013] Friedrich Ebert Stiftung Dialogue on Globalization Series Paper; and Martin Guzman, José Antonio Ocampo and Joseph E Stiglitz, *Too Little, Too Late: The Quest to Resolve Sovereign Debt Crises* (Oxford University Press 2016) 4; for a comprehensive overview of the reform proposals resulting from the COVID-19 pandemic, *see* András Póra, 'Policy proposal trends in sovereign debt restructuring, Law and Financial Markets Review' (2021) 15 (1-2) Law and Financial Markets Review 164.

[3] For the general overview of centralised statutory and decentralised contractual approaches for reforming sovereign debt restructuring ('SDR'), *see* Steven L. Schwarcz, 'Sovereign Debt Restructuring Options: An Analytical Comparison' (2012) 2 Harvard Business Law Review 95, 103-108; Kei Nakajima, *The International Law of Sovereign Debt Dispute Settlement* (Cambridge University Press 2022) 27-58 *Nakajima*

The centralised statutory approach (i.e., a harmonised approach) refers to one where parties in the SDR process are legally bound by an obligatory unified central mechanism administered by an international authority. This approach also employs traditional hard law treaties to govern the SDR governing framework. One of the notable examples of the centralised statutory approach (but a failed attempt) to reform the SDR governing framework through a binding international law is IMF's SDR Mechanism ('SDRM').[4]

On the other hand, the decentralised contractual approach focuses on improving and modifying the contractual terms of sovereign debt contracts in order to reform the SDR process. This approach is also under the market-based category. The United States ('US') Treasury Department's market-based approach to the SDR process,[5] and the collective action clauses ('CACs') (i.e., a clause that allows creditors to agree on debt restructuring even when some creditors are against the restructuring as long as a majority agrees) are

noted that '"centralised statutory approach" modelled after the statutory mechanism of domestic corporate bankruptcy legislation […] [where] a "decentralised contractual approach" focusing on the improvement and adjustment of the contractual terms of bonds' (ibid, 27-28). (Citing Jonathan Sedlak, 'Sovereign Debt Restructuring: Statutory Reform or Contractual Solution?' (2004) 152 University of Pennsylvania Law Review 1483, 1483-1515; Holger Schier, *Towards a Reorganisation System for Sovereign Debt: An International Law Perspective* (Brill 2007) 17; Maria Chiara Malaguti, 'Sovereign Insolvency and International Legal Order' (2009) 11 International Community Law Review 307, 307-308; Mattias Audit, 'Introduction générale : dissection du risque souverain', in Mattias Audit (ed.), *Insolvabilité des états et dettes souveraines* (LGDJ 2011), 15-22; Mathias Forteau, 'Le défaut souverain en droit international public: les instruments de droit international public pour remédier à l'insolvabilité des états', in Mattias Audit (ed.), *Insolvabilité des états et dettes souveraines* (LGDJ, 2011), 225-228; and ILA Sovereign Bankruptcy Study Group, 'Working Session Report Washington DC 2014: Group Moot' (ILA 2014) <https://www.ila-hq.org/%20index.php/study-groups?study-groupsID=64> accessed 3 October 2022); András Póra, 'Policy proposal trends in sovereign debt restructuring, Law and Financial Markets Review' (2021) 15 (1-2) Law and Financial Markets Review 164, *Póra* noted that 'there is a widespread discussion between the contractual (civil law) and statutory (obligatory central mechanism, governed by an inter- national body, possibly the IMF) approach and their optimal mix' (ibid, 168); and Kathrin Berensmann, 'How could a new universal code of conduct prevent and resolve sovereign debt crises? Proposals for design and implementation' (2022) Journal of Economic Surveys 1, *Berensmann* argued that '[t]o date, the international community has instead established contractual—foremost CACs— rather than statutory approaches for solving sovereign debt problems. CACs contribute to addressing collective action problems but they cannot solve these problems entirely' (ibid, 8).

[4] Anne O. Krueger, 'A New Approach to Sovereign Debt Restructuring' (IMF 2002) <https://www.imf.org/external/pubs/ft/exrp/sdrm/eng/sdrm.pdf> accessed 3 October 2022; IMF, 'Proposed Features of a Sovereign Debt Restructuring Mechanism' (IMF 2003) <https://www.imf.org/external/np/pdr/sdrm/2003/021203.pdf> accessed 3 October 2022.

[5] The US Department of the Treasury's Report to Congress on International Economic and Exchange Rate Policy: Hearing Before the Senate Committee on Banking, Housing, and Urban Affairs (US Governing Printing Office 2003) 52-53.

notable examples of the decentralised contractual approach to reform the SDR governing framework.

The model law approach (also known as the model code approach) falls between the centralised statutory and decentralised contractual approaches for reforming the process of SDR, which also falls under the market-based category. Although the model law is still considered one of the 'basic forms of statutory approaches to cross-jurisdictional lawmaking',[6] it is different from the centralised statutory and decentralised contractual approaches. The difference between them is that model law will not be binding until the sovereign states decide to implement them or parties agree to accept them via party autonomy. It will be subject to change per the sovereign states and parties' situations. *Schwarcz* is one of the most vocal advocates of adopting the model law to address the issue of unsustainable sovereign debt burden.

When evaluating various SDR reform proposals in the following sections, implemented initiatives, such as the Debt Relief Under the Heavily indebted poor countries ('HIPC'),[7] and UNCTAD Principles on Responsible Sovereign Lending and Borrowing ('UNCTAD Principles')[8] will not be considered. This is because implemented initiatives are distinct from reform proposals because they are part of the current framework governing SDR that needs reform. By evaluating SDR reform proposals rather than implemented initiatives, more accurate insights into whether a harmonised approach through an international law treaty desired and feasible or an ad hoc and pluralist approach within the current framework are preferable for SDR in the future SDR can be provided.

Reforms may have unanticipated outcomes for the interested parties in the SDR, especially when there are several intertwining and unknown trajectories of change. This article argues that, among three approaches, the model law approach has the greatest potential for establishing an ideal SDR governing framework. After identifying and defining the

[6] Steven L. Schwarcz, 'Sovereign Debt Restructuring: A Model-Law Approach' (2016) Journal of Globalization & Development 1, 6.

[7] IMF, 'Debt Relief under the Heavily Indebted Poor Countries (HIPC) Initiative: Fact- sheet' (IMF 2021) <https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/11/Debt-Relief-Under- the-Heavily-Indebted-Poor-Countries-Initiative> accessed 12 October 2022.

[8] UNCTAD, Principles on Responsible Sovereign Lending and Borrowing (Amended and Restated as of 10 January 2012).

evaluative criteria to analyse various proposals for improving the SDR governing framework, this article will evaluate the centralised statutory approach, decentralised contractual approach, and the model law approach to reforming the SDR governing framework. These evaluations in the following sections are crucial in determining whether harmonised or ad hoc and pluralist approaches are preferable for the current SDR governing framework. At the end of this article, I will offer potential solutions to unresolved problems.

2. The Identification of Evaluative Criteria

Four groups of evaluative criteria have been developed based on the weaknesses of the current framework governing SDR. These evaluative criteria will be used to evaluate three approaches to reforming the SDR governing framework: the centralised statutory approach, the decentralised contractual approach, and the model law approach.

The weaknesses of the current framework governing SDR identified in three key themes. The first theme is the inconsistent norms and inadequate processes that create fragmentation rather than a healthy culture of legal pluralism. The second theme is the problem of limited enforceability, which poses significant risks for both sovereign debtors and their creditors. This reflects a problematic form of fragmentation caused by issues such as sovereign immunity and the lack of effective remedies for sovereign creditors. The third theme is power imbalances and inadequate representation, which can undermine the legitimacy and effectiveness of the debt restructuring process. These three themes of weaknesses reflect the major challenges that parties in the SDR process face when dealing with SDR, and they provide a framework for evaluating the effectiveness of different reform proposals.

The evaluative criteria developed in response to the weaknesses of the current framework governing SDR, focus on three key themes: inconsistent norms and inadequate processes, limited enforceability and creditor protection, and power imbalances and inadequate representation. By using these evaluative criteria to check whether various reform proposals address these themes, it can determine which proposals are most likely to address the challenges posed by the current framework governing SDR.

The table below summarises the four groups of evaluative criteria that have been developed based on the weaknesses of the current framework governing SDR. Each group includes a set of evaluative criteria and their descriptions, which will be used to evaluate three approaches to reforming the SDR governing framework in the following sections. By using these evaluative criteria, this article can assess the feasibility and effectiveness of each approach in achieving the intended goals and determine which approach is most likely to provide a coherent and effective governing framework for SDR that promotes transparency, accountability, and equitable outcomes for all parties involved in the SDR process. While not every reform proposal may fully address all three themes and related evaluative criteria, using these criteria can provide a comprehensive framework for evaluating how well a particular proposal addresses the identified weaknesses of the current framework governing SDR.

2.1 Evaluative Criteria for Sovereign Debt Restructuring Reform Proposals

Group of Evaluative Criteria	**Evaluative Criteria**	**Description**
Coherence and Consistency	Consistency and Adequacy of Norms and Processes	Reforms should aim to establish a framework for SDR that is as cohesive and consistent as possible, given the conflicting interests at stake. The goal should be to foster transparency and accountability while being sensitive to the potentially divergent outcomes for different stakeholders.
	Effectiveness of Processes	Reforms must incorporate efficient procedures to guarantee that SDR occurs promptly and effectively, delineating unambiguous guidelines and criteria for negotiations, creditor coordination, and resolution of disputes.

Enforceability and Creditor Protection	Creditor Remedies	Reforms should offer potent remedies for creditors of sovereign debt, encompassing the capacity to pursue and secure court judgments, seize assets, or enforce awards against sovereign debtors.
	Sovereign Immunity	Reforms should critically engage with the role of sovereign immunity in SDR, acknowledging both its limitations and its importance in preserving the sovereignty and dignity of sovereign debtors. The aim should be to strike a balance where creditors have some avenue for legal redress without entirely eroding the protective function that sovereign immunity serves for sovereign states.
	Enforcement Mechanisms	Reforms should ensure that judgments against sovereign debtors can be enforced, including through international arbitration or other dispute resolution mechanisms.
Power Imbalances and Stakeholder Participation	Representation of Private-Sector Creditors	Adequate representation of private-sector creditors' interests in the SDR process should be guaranteed, encompassing creditor coordination and involvement in negotiations.
	Institutional Balance	Promoting institutional balance and preventing any party or institution from wielding excessive influence over the SDR process is another crucial aspect of the proposed reforms.
	Civil Society Participation	Provisions for the involvement of civil society and various stakeholders, enabling their meaningful contributions to the framework governing SDR, must be included in the reforms.

Feasibility and Effectiveness	Implement ability	Reforms ought to be pragmatic and executable, presenting transparent guidelines and criteria for adoption and adherence.
	Impact on Outcomes	Reforms are expected to significantly enhance the efficiency and results of the SDR procedure by diminishing default risks, fostering debt stability, and securing fair outcomes for every party engaged.

3. Evaluations of the Centralised Statutory Approach

A centralised statutory approach (a statutory regime as phrased by the IMF), as noted by the IMF is 'likely to provide a more stable background than contractual provisions' for restructuring sovereign debts.[9] From the perspectives of scholars and policy makers who advocate a centralised statutory approach in handling SDR-related issues, a decentralised contractual approach is not sufficient in dealing with SDR.[10] The theoretical foundation of the centralised statutory approach to reform the SDR process is based on the corporate insolvency regimes across different jurisdictions, in particular, the US. The centralised statutory approach 'can be traced back to the […] Chapters 9 and 11, [Title 11, of the US Bankruptcy Code] thereof', '[w]hile Chapter 9 deals with the reorganisation of insolvent municipalities, Chapter 11 addresses the reorganisation of corporations'.[11]

[9] Anne O. Krueger, 'A New Approach to Sovereign Debt Restructuring' (IMF 2002) <https://www.imf.org/external/pubs/ft/exrp/sdrm/eng/sdrm.pdf> accessed 3 October 2022, 33.

[10] For example, in Charles Lipson, 'The International Organization of Third World Debt" (1981) 35 International Organization 603, 630, it has been argued that 'scope [for ad hoc arrangements] is necessarily limited—too limited to anticipate and cope with a much larger agenda of troubled debt'.

[11] Holger Schier, *Towards a Reorganisation System for Sovereign Debt: An International Law Perspective* (Brill 2007), 37; *See* also Kei Nakajima, *The International Law of Sovereign Debt Dispute Settlement* (Cambridge University Press 2022) 28-31.

As opposed to the decentralised contractual approach, the centralised statutory approach in dealing with sovereign debt default involves binding rules. Thus, it requires an international agency to supervise sovereign debtors and their creditors and adjudicate the disputes between them, either to a large extent or to some extent. Different jurists and policymakers have made various proposals to adopt a centralised statutory approach for reforming the SDR process, including 'a treaty-based framework in SDR',[12] 'a neutral court of arbitration',[13] and the notable IMF's SDRM proposals. The establishment of an international sovereign default court is subjected to two key obstacles, including '(i) the conflicts-of-interest of creditor and debtor state representatives; and (ii) the voting and political structures of the International Monetary Fund, the World Bank, and the Paris Club'.[14] Yet, reform proposals that adopt a centralised statutory approach will overcome these obstacles against establishing an international sovereign default court if it can perform well. The following sections will analyse different selected key proposals seeking to reform the SDR process via a centralised statutory approach.

3.1 Before the IMF's Proposed Features of a Sovereign Debt Restructuring Mechanism- The Analogies to Chapters 9 and 11 of the United States Bankruptcy Code

The idea of taking the principles of corporate insolvency under the US Bankruptcy Code as a reference to establish a model for SDR originates with *Oechsli*.[15] *Oechsli* argued that '[m]any of the procedures set forth in Chapter 11 of the [US Bankruptcy Code] […] for rehabilitating financially troubled businesses can be applied profitably to renegotiation of LDC [less developed country] debt'.[16] Specifically, Chapter 11 provides for a debtor-in-

[12] Maximo Paulino T. Sison III, 'Sustainability in Indebtedness: A Proposal for a Treaty-Based Framework in Sovereign Debt Restructuring' in Reza Ahangar and Can Öztürk (eds), *Accounting and Finance: New Perspectives on Banking, Financial Statements and Reporting* (IntechOpen 2019).

[13] Kunibert Raffer, 'Applying Chapter 9 Insolvency to International Debts: An Economically Efficient Solution with a Human Face' (1990) 18 (2) World Development 301.

[14] Charles Seavey, 'The Anomalous Lack of an International Bankruptcy Court' (2006) 24 (2) Berkeley Journal of International Law 499, 499.

[15] Kenneth Rogoff and Jeromin Zettelmeyer, 'Bankruptcy Procedures for Sovereigns: A History of Ideas, 1976-2001' (2002) 49 (3) IMF Staff Papers 470, 47.

[16] Christopher G. Oechsli, 'Procedural Guidelines for Renegotiating LDC Debt: An Analogy to Chapter 11 of the US Bankruptcy Reform Act' (1981) 21 Virginia Journal of International Law 305, 331.

possession model, allowing financially distressed companies to continue their operations and restructure under the oversight of a court. This could have analogous utility for sovereign debtors in maintaining economic activity and control during the restructuring process.[17]

Under Chapter 11, debtors have the possibility of remaining 'in possession', where they retain the powers and duties of trustees, may keep running their businesses, and even borrow new money with the court's permission.[18] Taking the Chapter 11 as an analogy, *Oechsli* further argued that it is essential that an SDR regime be established which allows sovereign debtors to take charge of their own economic recovery.[19] In order words, sovereign states' monetary sovereignty should be reserved during the SDR process. *Oechsli* further stated that '[t]he prospect of employing some court-like entity with binding power is not realistic' because in SDR, 'the debtor is a sovereign nation and the creditors are official and commercial entitles from many States'.[20] Through this argument, he indirectly argues that international institutions play a limited role in the proposed centralised regime for SDR. However, it does not signify that sovereign states are in charge of the whole SDR process. Through taking Chapter 11 as an analogy, it establishes several statutory instruments to establish clear communications routes and predictable timeframe for the interested parties in the SDR process.[21] Specifically, an SDR proceeding under the analogy of Chapter 11 calls for the appointment of a trustee.[22] However, given the unique challenges and sensitivities related to national sovereignty, in the context of an SDR, this trustee would not be expected to run the sovereign debtor's government or make policy decisions. Instead, their role could be more advisory, focusing on financial oversight and helping to facilitate a reorganisation plan in collaboration with the sovereign state's government. In cases where the trustee has not been appointed under the analogy of Chapter 11, 'the appointment of an examiner [shall be made] to conduct such an investigation of the debtor as is appropriate,

[17] Title 11 of the United States Code (11 U.S.C. §§ 101 to 1532), 11 USC § 1101(1) and 1108; *see* Brett H. Miller, 'Sovereign Bankruptcy: Examining the United States Bankruptcy System as a Forum for Sovereign Debtors' (1991) 22 Law & Policy of International Business 124.
[18] ibid.
[19] Christopher G. Oechsli, 'Procedural Guidelines for Renegotiating LDC Debt: An Analogy to Chapter 11 of the US Bankruptcy Reform Act' (1981) 21 Virginia Journal of International Law 305, 332.
[20] ibid 333.
[21] Kenneth Rogoff and Jeromin Zettelmeyer, 'Bankruptcy Procedures for Sovereigns: A History of Ideas, 1976-2001' (2002) 49 (3) IMF Staff Papers 470, 47.
[22] Title 11 of the United States Code (11 U.S.C. §§ 101 to 1532), 11 USC § 1106.

including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor'.[23] *Oechsli* suggested that the IMF 'could easily fill a role analogous to examiner or trustee', offering oversight and expertise without usurping the governing role of the state. [24] From *Oechsli*'s perspective, it is therefore important, although to a small extent, to have an international agency to supervise the SDR process as an examiner or trustee.

Many jurists thereafter adopted *Oechsli*'s approach, predominant examples include *Cohen*'s 'international debt restructuring agency' (i.e., a global chapter 11 approach),[25] *Suratgar*'s approach in appointing an 'ombudsman' to act as a referee in the SDR,[26] and *Kampffmeyer*'s approach in adopting concept of corporate compositions with creditors in SDR.[27] However, various scholars switched their focus from Chapter 11 to Chapter 9. For example, *Raffer*'s proposed to internationalised Chapter 9 of the US Bankruptcy Code,[28] and *Chun* argued that instead of Chapter 11, 'Chapter 9 can serve as a model for the establishment of an international bankruptcy procedure'.[29] Reorganisation of municipalities, such as cities and towns, is provided under Chapter 9 of the US Bankruptcy Code. Its goal is to shield a struggling municipality from its debtors while it works out a repayment plan and secures concessions from that owed money. In order to restructure a municipality's debt, it is common to practice either prolonging the maturity dates of its

[23] ibid 1104 (c).
[24] Christopher G. Oechsli, 'Procedural Guidelines for Renegotiating LDC Debt: An Analogy to Chapter 11 of the US Bankruptcy Reform Act' (1981) 21 Virginia Journal of International Law 305, 334.
[25] Benjamin J. Cohen, '*A Global Chapter 11*' (1989) 75 Foreign Policy 109.
[26] David Suratgar, 'The International Financial System and the Management of the International Debt Crisis' (Daniel D. Bradlow (ed.) in *International Borrowing: Negotiating and Structuring International Debt Transactions* (International Law Institute 1986) 497; David Suratgar, Michael Straus, Norman Bailey, James B. Hurlock and Lee C. Buchheit, 'Comity, Act of State, and the International Debt Crisis: Is There an Emerging Legal Equivalent of Bankruptcy Protection for Nations?' (1985) 79 (April 25-27) Proceedings of the Annual Meeting (American Society of International Law) 126, 126-127.
[27] Thomas Kampffmeyer, 'Towards a Solution of the Debt Crisis- Applying the Concept of Corporate Compositions with Creditors' (1987) Occasional Papers of the German Development Institute (GDI), No. 89, 1.
[28] Kunibert Raffer, 'International debts: A crisis for whom?' in H.W. Singer and Soumitra Sharma (eds), *Economic Development and World Debt [Selected papers of a Conference at Zagreb University in 1987]* (Macmillan Press 1989) 51-63; and Kunibert Raffer, 'Applying Chapter 9 Insolvency to International Debts: An Economically Efficient Solution with a Human Face' (1990) 18 (2) World Development 301.
[29] John H. Chun, '"Post-Modern" Sovereign Debt Crisis: Did Mexico Need an International Bankruptcy Forum?' (1996) 64 Fordham Law Review 2647, 2671.

loans, reducing the amount of principal or interest owed, or refinancing the debt via acquiring a new loan. Although Chapters 9 and 11 share similar provisions under the US Bankruptcy Code, there are important distinctions between the two. Unlike Chapter 11, because of the potential for the trustee to improperly interfere in the political and financial activities of a Chapter 9 debtor, the trustee has no broad powers of supervision in such cases. Taking Chapter 11 as an analogy further limited the role of the international agency in the SDR. It further indicated the trend of enfeeble of the status of the international agency. Such a trend also implied the infeasibility of the centralised statutory approach.

Upon evaluating the criteria, it can ascertain that adopting the principles of corporate insolvency from the US Bankruptcy Code as a model for SDR presents both merits and drawbacks. The proposed SDR framework, inspired by Chapters 9 and 11 of the US Bankruptcy Code, aims to establish transparent communication channels and predictable timeframes for concerned parties, thereby ensuring consistency and adequacy of norms and processes. Nonetheless, implementing these principles within the context of SDR may pose challenges due to the fundamental differences between corporate and sovereign debtors and the diverse interests of creditors originating from distinct states. Moreover, this proposal necessitates a cohesive and uniform governing framework that fosters transparency, accountability, and equitable outcomes for all stakeholders. While the US Bankruptcy Code offers a consistent structure for corporate insolvency, its direct applicability to SDR is yet to be determined.

The proposed framework, drawing inspiration from Chapters 9 and 11, has enforceability and creditor protection limitations. Though the US Bankruptcy Code offers creditors solutions such as court judgments, asset seizures, and award enforcement, these measures may prove ineffective when dealing with sovereign debtors due to sovereign immunity. The proposal fails to adequately address sovereign immunity obstacles, which have historically prevented creditors from obtaining legal satisfaction for unpaid debts. Furthermore, enforcement mechanisms, like international arbitration or other dispute resolution methods, may not be as effective or easily applicable in the context of SDR as they are in corporate insolvencies.

In accordance with Chapters 9 and 11, the proposal seeks to establish an SDR governance framework that empowers debtors to manage their economic recovery while maintaining monetary sovereignty amidst power imbalances and stakeholder participation. Contrary to the impression that the proposal restricts the role of international organisations like the IMF, it actually envisages a significant role for such entities. Specifically, the IMF is proposed to serve in an advisory capacity, potentially akin to an examiner or trustee, within this centralised SDR governance framework. This raises questions about potential institutional imbalances where sovereign states might still wield substantial control over the SDR process, possibly at the expense of private-sector creditors' interests. Additionally, the proposal fails to provide ample opportunities for civil society and other stakeholders to contribute meaningfully to the SDR governance framework.

Several concerns arise when assessing the feasibility and effectiveness of the proposed framework, inspired by Chapters 9 and 11 of the US Bankruptcy Code. The proposal's practicality remains uncertain, as it requires adapting rules designed for corporate insolvency to the unique context of SDR. It is unclear if guidelines and standards can be developed for adoption and compliance in a manner both realistic and implementable within the SDR process. Moreover, the proposal does not convincingly demonstrate its impact on improving the efficiency and outcomes of the SDR process, such as reducing default risk, promoting debt sustainability, and ensuring equitable results for all parties involved.

In conclusion, although using principles from Chapters 9 and 11 of the US Bankruptcy Code as a foundation for SDR presents a valuable approach, the proposal falls short in addressing the evaluative criteria comprehensively. Limitations persist regarding consistency and adequacy of norms and processes, enforceability and creditor protection, power imbalances and stakeholder participation, and feasibility and effectiveness. In addition to this proposal, additional reform proposals have been made by different jurists to advocate for a centralised statutory approach to reforming the SDR process.

3.2 IMF's Proposed Features of a Sovereign Debt Restructuring Mechanism and the Reasons for Its Failure

Based on *Barnett*, *Galvis*, and *Gouraige*'s proposal because of 'the national-level solution would provide a highly unsatisfactory response to a debtor state default' and 'it does not address the need for a mechanism to prevent a default crisis from occurring in the first place', therefore, 'we must look to institutional reforms at the international level if we are both to discourage a default crisis from arising and to cope adequately with such an emergency should it occur'.[30] One of the key reform proposals made by *Barnett*, *Galvis*, and *Gouraige* is the 'creation of an adjunct to the IMF to handle debt problems on a unified, international basis'.[31] The IMF's SDRM is a centralised statutory approach reform proposal based on the reform proposal of *Barnett*, *Galvis*, and *Gouraige*. Although the IMF's SDRM was not an entirely innovative proposal,[32] it is one of the most remarkable attempts for instituting a permanent centralised statutory SDR regime in recent history.[33] The IMF's SDRM aims to provide a framework to facilitate the incentives between the sovereign debtors and its creditors to reach a mutually beneficial agreement in terms of its cost and efficiency.[34] Ultimately, the goal of the IMF's SDRM is to create 'a predictable, orderly, and rapid process for restructuring the debts of sovereigns'.[35] Essentially, there are four core features of the IMF's SDRM, including: 'majority restructuring' (i.e., a qualified majority of creditors binds the dissenting minority to the restructuring terms), 'stay on creditor enforcement' (i.e., putting individual actions on hold during the restructuring process), 'protecting creditor interests (i.e., creditor interests are safeguarded by prohibiting payments to non-priority creditors and safeguarding the debtor's assets through IMF-endorsed policies)s, and 'priority financing' (i.e., by providing them a preference on non-

[30] Barry C. Barnett, Sergio J. Galvis, and Ghislain Gouraige Jr, 'On Third World Debt' (1984) 25(1) Harvard International Law Journal 83, 130-131.
[31] ibid, 131.
[32] *See* Jeromin Zettelmeyer and Kenneth Rogoff, 'Bankruptcy Procedures for Sovereigns: A History of Ideas, 1976-2001' (2002) International Monetary Fund Working Paper <https://www.imf.org/-/media/Websites/IMF/imported-full-text-pdf/external/pubs/ft/wp/2002/_wp02133.ashx> accessed 22 October 2022.
[33] For the reasons why it proven so difficult to create such a SDRM from a realist or structural Marxist account, *see* Eric Helleiner, 'The Mystery of the Missing Sovereign Debt Restructuring Mechanism' (2008) 27 Contributions to Political Economy 91.
[34] IMF, *Current Developments in Monetary and Financial Law, Vol. 4* (1st edn, IMF 2008) 195-382.
[35] Anne O. Krueger, 'A New Approach to Sovereign Debt Restructuring' (IMF 2002) <https://www.imf.org/external/pubs/ft/exrp/sdrm/eng/sdrm.pdf> accessed 13 June 2020.

priority credits, priority financing can be used to raise new resources after the stay of enforcement).[36]

Along with *Chun* and *Raffer*, [37] who propose to adopt Chapter 9 of the US Bankruptcy Code to reform the SDR governing framework, the IMF's SDRM also took the feature from Chapter 9 as a reference.[38] Having said that, *Raffer* argued that the IMF's SDRM 'was unclear which US bankruptcy laws should be the model […]—Chapter 9 (municipalities) or Chapter 11 (corporations)'.[39] It has been stated in the IMF's SDRM that 'Chapter 9 legislation acknowledges—and does not impair—the power of the state within which the municipality exists to continue to control the exercise of the powers of the municipality, including expenditures. This lack of independence of municipalities is one of the reasons why many countries have not adopted insolvency legislation to address problems of financial distress confronted by local governments'.[40] This remark demonstrates that the IMF's SDRM is not solely based on Chapter 9. *Raffer* further pointed out that the IMF's SDRM is different from the Chapter 9 model, where 'the Chapter 9 model has one major drawback for the IMF—the additional protection of sovereignty, governmental powers, public interest, and rights of other creditors would limit the Fund's absolute dominance'.[41] Additional protection of the monetary sovereignty under the Chapter 9 model would be a potential drawback to the IMF because it will undermine the capacity of the IMF in the SDR process. Instead of providing further sovereignty protection to the sovereign states, the SDRM of the IMF grants the IMF broad discretion over the SDR process. Particularly,

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[36] ibid, 14-17.

[37] Kunibert Raffer, 'Applying Chapter 9 Insolvency to International Debts: An Economically Efficient Solution with a Human Face' (1990) 18 (2) World Development 301; and John H. Chun, '"Post-Modern" Sovereign Debt Crisis: Did Mexico Need an International Bankruptcy Forum?' (1996) 64 Fordham Law Review 2647, 2671.

[38] It has been contended that even though 'a Chapter 9 [Title 11, of the US Bankruptcy Code] case cannot be converted into a liquidation case', [a]ll of these features could be appropriately integrated into a sovereign debt restructuring mechanism' (Anne O. Krueger, 'A New Approach to Sovereign Debt Restructuring' (IMF 2002) <https://www.imf.org/external/pubs/ft/exrp/sdrm/eng/sdrm.pdf> accessed 20 October, 13).

[39] Kunibert Raffer, 'The IMF's SDRM—Simply Disastrous Rescheduling Management?', in Chris Jochnick, and Fraser A. Preston (eds.), *Sovereign Debt at the Crossroads: Challenges and Proposals for Resolving the Third World Debt Crisis* (Oxford University Press 2006), 255.

[40] Anne O. Krueger, 'A New Approach to Sovereign Debt Restructuring' (IMF 2002) <https://www.imf.org/external/pubs/ft/exrp/sdrm/eng/sdrm.pdf> accessed 20 October 2023.

[41] Kunibert Raffer, 'The IMF's SDRM—Simply Disastrous Rescheduling Management?', in Chris Jochnick, and Fraser A. Preston (eds.), *Sovereign Debt at the Crossroads: Challenges and Proposals for Resolving the Third World Debt Crisis* (Oxford University Press 2006), 257.

IMF's SDRM enables the IMF to make two important decisions: whether to endorse a stay of payments to creditors and how much debt is sustainable (i.e., how much debt should be wiped off).[42] These roles of the IMF imply that IMF still has a duplicate role of both creditor and decision maker.

The IMF's SDRM was rejected in 2003 by the US and numbers of developing countries (such as Brazil and Mexico), because of the 'emerging markets precluded the introduction of an unfair, self-serving, and inefficient system'.[43] This characterisation stemmed from concerns that the IMF's SDRM appeared to prioritise the institution's own interests, potentially at the expense of both sovereign debtors and private-sector creditors. Specifically, the IMF's dual role as a creditor and adjudicator raised questions about conflicts of interest and procedural fairness. Yet, the 'search for a viable solution is not over'.[44] The failure of the SDRM proposal 'adds to a series of proposals which attempted to transpose features of domestic bankruptcy law and firm reorganisation law into the context of sovereign insolvency but never put to the test'.[45] *Raffer* noted that the IMF's SDRM is particularly unfair to private-sector creditors and debtors since it reflects the 'strong institutional self-interest on the part of the IMF'.[46] *Euliss* argued that the IMF's SDRM is not supported by 'sound theory', instead, it is from a set of the 'flawed implementing procedure', which stated that the IMF's SDRM suffers from 'procedural inadequacies'.[47] For instance, 'the double role of the IMF as a creditor and adjudicator' has

[42] Anne O. Krueger, 'A New Approach to Sovereign Debt Restructuring' (IMF 2002) <https://www.imf.org/external/pubs/ft/exrp/sdrm/eng/sdrm.pdf> accessed 20 October 2023.

[43] Kunibert Raffer, 'The IMF's SDRM—Simply Disastrous Rescheduling Management?', in Chris Jochnick, and Fraser A. Preston (eds.), *Sovereign Debt at the Crossroads: Challenges and Proposals for Resolving the Third World Debt Crisis* (Oxford University Press 2006), 263.

[44] ibid.

[45] Antonis Bredimas, Anastasios Gourgourinis, and Georges Pavlidis, 'The Legal Contours of Sovereign Debt Restructuring under the UNCTAD Principles' in Carlos Espósito, Yuefen Li, and Juan Pablo Bohoslavsky (eds), *Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing* (Oxford University Press 2014) 135.

[46] Kunibert Raffer, 'The IMF's SDRM—Simply Disastrous Rescheduling Management?', in Chris Jochnick, and Fraser A. Preston (eds.), *Sovereign Debt at the Crossroads: Challenges and Proposals for Resolving the Third World Debt Crisis* (Oxford University Press 2006), 248.

[47] Richard Euliss, 'The Feasibility of the IMF's Sovereign Debt Restructuring Mechanism: An Alternative Statutory Approach to Mollify American Reservations' (2003) 19(1) American University International Law Review 108, 125.

been criticised.[48] Also, other criticisms included 'the intervention in contractual rights', the potential impact on the cost of sovereign financing, and the move towards rules even though 'each sovereign insolvency has unique features that call for ad hoc solutions'.[49] According to *Eichengreen*, the main obstacle of the IMF's SDRM is the lack of political will to implement it.[50] There are few significant reasons which contributed to the collapse of the IMF's SDRM. In particular, the IMF's SDRM failed to assuage the concerns of creditors that their protection required substantial strengthening.[51] *Setser* argued that sovereign debt issuers and private investors were unclear on the outcome that they are desired from a formalised process that they could already be obtained with the current contractual infrastructure.[52] It is uncertain for private investors who invest in sovereign debts to aware of how the IMF 'prioritise new financing without the possibility of asset seizure'.[53] Since the IMF's SDRM allowed the sovereign debt issuers to restructure its debts through an assent of a supermajority of creditors and a single aggregated vote. For this reason, *Setser* concluded that the IMF's SDRM did not provide any new protection and advantage to both the sovereign debt issuers and private investors.[54] In the absence of further protection to private investors of sovereign debt, the impact of IMF's SDRM is small compared to that of IIAs contained clauses related to SDR.

One the key perceived problems that the IMF's SDRM seeks to tackle is the problem of holdout creditors in the expectation of a better settlement, particularly through litigation. To solve this problem, the SDRM proposed that the required percentage for the approval of SDR terms is 75% of the creditors (i.e., the majority vote).[55] Also, the dispute resolution

[48] Michael Waibel, Sovereign Defaults before International Courts and Tribunals (Cambridge University Press 2011), 15.
[49] ibid.
[50] Barry Eichengreen, *Toward a New International Financial Architecture: A Practical Post-Asia Agenda* (Peterson Institute for International Economics 1999) 131.
[51] Michael Waibel, Sovereign Defaults before International Courts and Tribunals (Cambridge University Press 2011), 15.
[52] Brad Setser, 'The Political Economy of the SDRM' in Barry Herman, José Antonio Ocampo, and Shari Spiegel (eds), *Overcoming Developing Country Debt Crises* (Oxford University Press 2010) 318-346.
[53] Aidan W. McConnell, 'A Different Kind of Restructuring: Forty Years of Debate and the Prospect of a Formal International Sovereign Debt Regime' (2016) CUREJ: College Undergraduate Research Electronic Journal, University of Pennsylvania, <http://repository.upenn.edu/curej/197> accessed 12 June 2020, 13.
[54] Brad Setser, 'The Political Economy of the SDRM' in Barry Herman, José Antonio Ocampo, and Shari Spiegel (eds), *Overcoming Developing Country Debt Crises* (Oxford University Press 2010) 318-346.
[55] IMF, 'Proposed Features of a Sovereign Debt Restructuring Mechanism' (IMF 2003) <https://www.imf.org/external/np/pdr/sdrm/2003/021203.pdf> accessed 3 October 2022, 13.

forum will issue an order suspending a particular legal action initiated by the holdout creditors against the sovereign debtor under the proposed SDRM framework upon the request of an activating member and confirmation by a representative creditors' committee.[56] Hence, it shows that the IMF's SDRM is capable to deal with the problem of holdout creditors problems.

On the other hand, according to the analysis above, the SDRM's failure is not exclusively due to its political impracticability. Instead, this is due to the fact that the IMF's SDRM cannot provide guarantee the extent to which parties in the SDR can obtain fair treatment. It has been noted in the IMF's SDRM that the IMF itself should not adjudicate disputes, verify claims, or check the integrity of voting due to the perception that its decisions would be influenced by the IMF's creditor interests or the debtor country's IMF membership.[57] In the IMF's SDRM, it has been suggested that a single international judicial entity with exclusive jurisdiction over all disputes between the sovereign debtor and its domestic and international creditors and among such creditors be established. Even with the existence of a single international judicial entity, meddling and influence by the Executive Board of the IMF cannot be ruled out. This is because the proposed international judicial entity 'would have no authority to challenge decisions made by the Executive Board regarding, inter alia, the adequacy of a member's policies or the sustainability of the member's debt'.[58] It means that IMF still has a duplicate role of both creditor and policy maker. With the flexibility of the IMF to adjust the policies that the proposed international judicial entity may apply to the SDR process, sovereign debtors will be at risk of not being treated fairly. In addition, the IMF's SDRM imposes restriction to the contractual freedom and flexibility to allow other stakeholders to initiate an ad hoc initiative.

Based on the evaluative criteria discussed, the IMF's SDRM proposal has strengths and weaknesses. In terms of consistency and adequacy of norms and processes, the SDRM presents a centralised statutory approach to SDR, borrowing features from Chapter 9 of the US Bankruptcy Code. However, the SDRM does not clearly specify whether it should

[56] ibid, 28.
[57] Anne O. Krueger, 'A New Approach to Sovereign Debt Restructuring' (IMF 2002) <https://www.imf.org/external/pubs/ft/exrp/sdrm/eng/sdrm.pdf> accessed 20 October 2022, 34-35.
[58] ibid 35.

follow Chapter 9 (municipalities) or Chapter 11 (corporations) as its model. Additionally, the SDRM's focus on majority restructuring, stay on creditor enforcement, protection of creditor interests, and priority financing may not provide a coherent and consistent governing framework for SDR.

Regarding enforceability and creditor protection, the SDRM does not adequately address sovereign immunity or provide effective remedies for creditors. As mentioned above, the mechanism's attempt to tackle holdout creditors by requiring a 75% majority vote for approval of restructuring terms may not be sufficient to protect the interests of creditors. Furthermore, the SDRM's proposal of an international judicial entity does not eliminate the risk of interference from the IMF's Executive Board, which could compromise the parties' fair treatment.

When it comes to power imbalances and stakeholder participation, the SDRM falls short in ensuring that private-sector creditors' interests are adequately represented. As mentioned, the mechanism's provisions primarily serve the institutional self-interest of the IMF, limiting its ability to provide additional protection to sovereignty, governmental powers, public interest, and the rights of other creditors. The SDRM also cannot provide opportunities for civil society and other stakeholders to have a meaningful voice in the framework governing SDR.

In terms of feasibility and effectiveness, the SDRM's failure to acquire political support, particularly from the US and several developing countries, speaks to its lack of implement ability. Critics have also questioned the mechanism's theoretical foundations, pointing to procedural inadequacies, such as the IMF's dual role as creditor and adjudicator. The SDRM's impact on outcomes is uncertain, as it does not provide new protection or advantages to sovereign debt debtors and private-sector creditors. The mechanism also cannot address concerns over contractual freedom and flexibility adequately.

3.3 Schwarcz's Proposed Approach- Sovereign Debt Restructuring Convention

Schwarcz proposed international community could implement a convention with a primary goal 'to foster the State's ultimate economic rehabilitation after a time of crisis'.[59] *Schwarcz*'s proposal to reform the SDR governing framework would, in effect, incorporate the IMF's SDRM approach. But instead of establishing 'a single international judicial entity that would have exclusive jurisdiction over all disputes that would arise between the debtor and its domestic and international creditors and among such creditors',[60] *Schwarcz* proposed a rather flexible approach, where 'hearings [regarding disputes arising under the proposed Convention] could occur on an ad hoc basis either before an existing international judicial body or before a new low-cost tribunal establish by the [proposed] Convention based on the ICSID model'.[61] This shall overcome one of the shortcomings of the IMF's SDRM mentioned above- no adequate guarantee that parties in the SDR can obtain fair treatment when a dispute arises. Even if the IMF and another impartial multinational institution handled administrative tasks under the proposed convention, policymaking, adjudication, and enforcement of claims arising under the proposed convention would be largely self-administered by the parties in the SDR process. Hence, parties in the SDR process may achieve fair treatment to a more significant extent under this proposal. Nonetheless, the proposed convention did not specify the limit of the adjudicatory tribunal.

Because the parties' greater flexibility when adopting the proposed convention, this proposal would be more straightforward to implement than the IMF's SDRM.[62] One of the notable examples that can be used to show the flexibility of *Schwarcz*'s proposal is that parties in the SDR process can conduct hearings ad hoc either before an existing international sovereign default court or before a new low-cost tribunal formed under the

[59] Steven L. Schwarcz, Idiot's Guide' to Sovereign Debt Restructuring, (2004) 53 Emory Law Journal 1189, 1212; also *see* Steven L. Schwarcz, Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach, (2000) 85 Cornell Law Review 956, 1020-1022.

[60] Anne O. Krueger, 'A New Approach to Sovereign Debt Restructuring' (IMF 2002) <https://www.imf.org/external/pubs/ft/exrp/sdrm/eng/sdrm.pdf> accessed 20 October 2022, 34.

[61] Steven L. Schwarcz, Idiot's Guide' to Sovereign Debt Restructuring, (2004) 53 Emory Law Journal 1189, 1212.

[62] ibid.

proposed convention based on the International Centre for the Settlement of Investment Disputes model.[63]

Nevertheless, *Schwarcz*'s proposal is subject to several limitations. First, it is unclear if this proposal offers the parties a sufficient chance to improve the norms. Second, this proposal cannot ensure transparency since it is self-executable between sovereign debtors and creditors. Thirdly, since two different institutions would adjudicate disputes arising under the proposed convention ad hoc, the proposal cannot ensure uniformity in enforcement.

Schwarcz's proposal for a convention to reform the governing framework for SDR appears to meet some of the evaluative criteria mentioned above. The proposal seems to be feasible and effective, with a flexible approach that would be straightforward to implement. It also addresses some of the issues related to enforceability and creditor protection, providing effective remedies for sovereign creditors and addressing the issue of sovereign immunity. However, the proposal falls short in some areas. In terms of consistency and adequacy of norms and processes, the proposal's flexibility might hinder the improvement of norms. The enforceability and creditor protection criteria are partially addressed by allowing ad hoc hearings, but the proposal's lack of clarity regarding the limits of the adjudicatory tribunal raises concerns. The power imbalances and stakeholder participation criteria are not adequately addressed. The proposal is self-executable between sovereign debtors and creditors, potentially excluding other stakeholders and private-sector creditors from the process.

Moreover, transparency remains an issue, as the self-executable nature of the proposal might not ensure adequate openness in the SDR process. While the proposal is more flexible and implementable than the IMF's SDRM, it may not guarantee uniform enforcement due to the possibility of using different institutions for adjudicating disputes. In summary, although *Schwarcz*'s proposal offers some improvements over the IMF's SDRM, it does not fully address the evaluative criteria. It leaves several key issues unresolved in the SDR governing framework.

[63] ibid, 1210-1212.

3.4 Sison III's Proposed Approach- A Treaty-Based Framework

Sison III's suggested to establish a treaty-based normative framework based on the UN's Basic Principles on Sovereign Debt Restructuring Process.[64] The UN's Basic Principles developed as a resolution passed by the General Assembly in September 2015.[65] One hundred thirty-six countries in Latin America, Asia, Africa, and the Caribbean voted to favour such a resolution (i.e., the UN's Basic Principles). The US, Germany, the UK, Japan, Canada, and Israel all cast 'no' votes. Forty-one countries filed a "abstain" vote, indicating they did not choose a yes or no option.[66] The resolution states that the principles of sovereignty, good faith, transparency, impartiality, fair treatment, sovereign immunity, legitimacy, sustainability, and majority restructuring should lead SDR processes. Even though this is only a resolution and is not legally binding on any UN member state, the principles it outlines help form an ideal SDR governing framework. With numerous UN member states voting against the UN's Basic Principles, the proposal's acceptability may be limited.

Sison III's proposal seeks 'to formalise the foregoing principles without necessarily adopting the resolution in toto. Its main objective is to introduce these norms as a multilateral framework in SDR without, at the moment, imposing any specific measure to implement them'.[67] In order to cope with the objections raised by countries from the global north, such as the U. S., Germany, the UK, Japan, Canada, and Israel to the UN's Basic Principles, *Sison III* suggested 'to accommodate [their] concerns about specific wordings than the more fundamental objections premised on the market-based approach to SDR'.[68]

[64] UNGA Res 69/319 (29 September 2015), Basic Principles on Sovereign Debt Restructuring Process; and Maximo Paulino T. Sison III, 'Sustainability in Indebtedness: A Proposal for a Treaty-Based Framework in Sovereign Debt Restructuring' in Reza Ahangar and Can Öztürk (eds), *Accounting and Finance: New Perspectives on Banking, Financial Statements and Reporting* (IntechOpen 2019), 5-8.

[65] UNGA Res 69/319 (29 September 2015), Basic Principles on Sovereign Debt Restructuring Process. For the general overview of this set of principle.

[66] UN, 'State of Palestine Flag to Fly at United Nations Headquarters, Offices as General Assembly Adopts Resolution on Non-Member Observer States' (2015) <https://press.un.org/en/2015/ga11676.doc.htm> accessed 13 October 2022.

[67] Maximo Paulino T. Sison III, 'Sustainability in Indebtedness: A Proposal for a Treaty-Based Framework in Sovereign Debt Restructuring' in Reza Ahangar and Can Öztürk (eds), *Accounting and Finance: New Perspectives on Banking, Financial Statements and Reporting* (IntechOpen 2019), 6.

[68] ibid, 7.

This proposed approach is similar with the *Schwarcz*'s proposal, but one of the key differences between them is that the adjudication body. *Sison III* suggested to allow the domestic courts of the sovereign states to handle the dispute related to the proposed treaty. [69] It maximised the flexibility of the SDR process, where parties in the SDR process can exercise discretion when implementing the proposed treaty according to the changing nature of the sovereign debt market. Such discretion can be exercised by the local judges, where the judgment made by the domestic courts chosen by the parties can safeguard the degrees of monetary and financial stability of the local populations. Yet, this feature might result in a low degree of cost-effectiveness since parties to the SDR process might have to resort to different jurisdictions to settle their SDR-related disputes.

Sison III's proposal for a treaty-based normative framework for SDR meets many evaluative criteria. This proposed reform aims to provide a coherent and consistent governing framework for SDR that promotes transparency, accountability, and equitable outcomes for all parties involved, addressing the consistency and adequacy of norms and processes. The proposal also addresses creditor protection, with effective remedies for sovereign creditors, addressing the issue of sovereign immunity, and ensuring that judgments against sovereign debtors can be enforced. The proposal seeks to promote institutional balance and ensure that no one party or institution has undue influence over the SDR process, addressing power imbalances and stakeholder participation. While the principles outlined in the resolution can form an ideal SDR framework, the acceptability of the proposal may be limited due to opposition from numerous UN member states. To address these concerns, *Sison III* suggests accommodating objections regarding specific wordings without imposing any specific measures for implementation.

The proposal shares similarities with *Schwarcz*'s proposal, but with a key difference in the adjudication body. *Sison III* recommends allowing domestic courts to handle disputes related to the proposed treaty, providing flexibility and enabling parties to exercise discretion based on the changing nature of the sovereign debt market. However, this feature could result in lower cost-effectiveness due to the potential need for parties to resort to

[69] ibid.

different jurisdictions for settling SDR-related disputes. Moreover, the implement ability and impact on outcomes of the proposal may be uncertain due to the varying positions of UN member states and the reliance on domestic courts for dispute resolution.

4. Evaluations of the Decentralised Contractual Approach

Since the centralised statutory approach has been subjected to many criticisms, particularly regarding its political feasibility, the international community shifted its focus to adopt a decentralised contractual approach to reform the SDR governing framework. A decentralised contractual approach, as opposed to a centralised statutory one, focuses on improving and modifying the contractual terms of sovereign debt contracts. In the absence of a uniform international SDR framework, public and private sovereign debt crises are dealt with mainly on an ad hoc and case-by-case basis via Paris Club negotiations (where it is articulated with private law and contractual instruments) or contractual disputes. Hence, private law (particularly the contractual instruments) plays a vital role in the contemporary SDR governing framework for both public and private sovereign debts. Several initiatives have been launched that have offered a set of standardised CACs and pari passu clauses for parties to employ in their sovereign debt contracts. For example, the EU Economic and Financial Committee Sub-Committee's standardised and identical CAC in 2011,[70] and the ICMA Standard Aggregated CACs for the Terms and Conditions of Sovereign Notes.[71]

The decentralised contractual approach is under the market-based category.[72] The former secretary and the under-secretary of the US Treasury Department, *Paul H O'Neill* and *John*

[70] EU Economic and Financial Committee Sub-Committee, 'Euro area Model CAC 2012' (EU, 2012) <https://europa.eu/efc/efc-sub-committee-eu-sovereign-debt-markets/collective-action-clauses-euro-area/euro-area-model-cac-2012_it> accessed 16 February 2022.

[71] ICMA 'ICMA Standard Aggregated CACs for the Terms and Conditions of Sovereign Notes' (*Icmagroup.org*, 2014) <https://www.icmagroup.org/resources-2/Sovereign-Debt-Information/> accessed 16 October 2022.

[72] As noted by *Paul H O'Neill*, '[t]he swift removal of barriers in key markets will help strengthen financial systems internationally' (The US Department of the Treasury's Report to Congress on International Economic and Exchange Rate Policy: Hearing Before the Senate Committee on Banking, Housing, and Urban Affairs (US Governing Printing Office 2003) 52). Though this statement was referring to international trade, it is also applicable to context of sovereign debt.

B. Taylor, are two of the most vocal advocates suggested that the market-based approach should be adopted to reform the SDR governing framework.[73] They suggested that '[t]o help prevent financial crises and better resolve them when they occur, we are working with others in the official sector to implement a market-oriented approach to the sovereign debt restructuring process. This contractual approach would incorporate new clauses, which would describe as precisely as possible what would happen in the event of a sovereign debt restructuring process, into debt contracts. We have proposed three clauses: Super majority decision making by creditors; a process by which a sovereign would initiate a restructuring or rescheduling—including a cooling-off, or standstill, period; and a description of how creditors would engage with borrowers'.[74] These three clauses can be applied in the SDR process. In particular, the super majority decision clause permits a supermajority of creditors to amend the sovereign debt contract's basic payment terms, which can be used to resolve the problem of holdout creditors. Also, incorporating the contractual clause setting out a clear mechanism that a sovereign state can employ to commence the SDR can prevent considerable delays in the SDR process, resulting from the necessity to initiate separate renegotiations by different types of creditors. The third clause may be used to guarantee the consistency of creditors' interactions with sovereign debtors. Further, it has been argued that '[contractual] clauses […] can create a better process for countries and their creditors to follow in the event of a debt workout'.[75] These remarks indicated that the US Treasury Department trusts the market system and believes that the functioning of the SDR process should be left to sovereign debtors and creditors through incorporating improved contractual clauses into their sovereign debt contracts.

In essence, major statutory reform and establishing an international sovereign default court are unnecessary for those who advocate adopting a decentralised contractual approach to the SDR governing framework. Instead, the SDR process's uncertainty will be reduced once

[73] ibid, 52-53; John B. Taylor, 'Using Clauses to Reform the Process for Sovereign Debt Workouts: Progress and Next Steps, Remarks at the EMTA Annual Meeting' (Under Secretary of Treasury for International Affairs, 2002) <https://web.stanford.edu/~johntayl/taylorspeeches/Using%20Clauses%20to%20Reform%20the%20Process%20for%20Sovereign%20Debt%20Workouts%20(5%20Dec%20%2002).doc> accessed 24 October 2022.

[74] ibid, 52.

[75] John B. Taylor, 'Using Clauses to Reform the Process for Sovereign Debt Workouts: Progress and Next Steps, Remarks at the EMTA Annual Meeting' (Under Secretary of Treasury for International Affairs, 2002) <https://web.stanford.edu/~johntayl/taylorspeeches/Using%20Clauses%20to%20Reform%20the%20Process%20for%20Sovereign%20Debt%20Workouts%20(5%20Dec%20%2002).doc> accessed 24 October 2022.

sovereign debt contracts include improved contractual clauses that better deal with the SDR process. However, since the parties' incorporation of the improved clauses in their sovereign debt contracts is voluntary, and the parties are free to modify the clauses based on their circumstances, a centralised enforcement mechanism is not required. The lack of a centralised enforcement mechanism for the decentralised contractual method is one of the critical flaws since it might lead to unpredictability, which may result in high costs for the disputing parties in the SDR. Furthermore, the present CACs approach has several flaws. For example, due to the absence of legal status of the Paris Club, DSSI, and the Common Framework, private-sector creditors are not obligated to treat sovereign debtors from the Global South in the same way as the rest of the sovereign creditors. Also, it has been noted that the existing ICMA's Modern 'Single-limb' CACs framework cannot prevent the sovereign debtor from obtaining a majority vote in order to compel dissenting creditors to accept its terms via the 'PAC-man' strategy.[76] A variety of reform proposals have been made in an effort to address issues like these. *Buchheit*, *Gulati*, *Zandstra*, and *Schwarcz*'s reform proposals stand out as the most prominent among other reform proposals made by the others. In the following sections, I will analyse their reform proposals respectively.

4.1 Buchheit and Gulati's Proposal- Enforcing Comparable Treatment in Sovereign Debt Workouts

Buchheit and *Gulati* highlighted the problem under the current SDR governing framework that creditors of sovereign debt could demand a more favourable (to the creditor) treatment for their own exposure from the sovereign debtor.[77] Furthermore, it has been argued that the sovereign states' economy will not be able to recover unless its unsustainable legacy debt stock is addressed.[78] This prevents the sovereign states from attracting new investments and gaining access to financial markets necessary for economic

[76] Ian Clark and Dimitrios Lyratzakis, 'Towards a more robust sovereign debt restructuring architecture: innovations from Ecuador and Argentina' (2021) 16 (1) Capital Market 31, 39.
[77] Lee C. Buchheit and Mitu Gulati, 'Enforcing Comparable Treatment in Sovereign Debt Workouts' (2022) Virginia Public Law and Legal Theory Research Paper No. 2022-67 and Virginia Law and Economics Research Paper No. 2022-23, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4229061> accessed 24 October 2022, 4.
[78] ibid.

revival. [79] *Buchheit* and *Gulati* proposed the inclusion of the 'Most Favored Creditor' ('MFC') clause in SDR agreements.[80] This would allow sovereign debtors to expediently eliminate their unsustainable legacy debt from creditors who demanded a more favourable (to the creditor) treatment for their own exposure from the sovereign debtors.

Such an approach may tackle the issue where private-sector creditors are not required to treat sovereign debtors from the Global South in the same manner as the other sovereign creditors. This approach can strengthen the current SDR governing framework. In particular, MFC clauses expressly provide that if a sovereign debtor grants better terms to a holdout private-sector creditor, those terms must be extended to all creditors who signed the original restructuring agreement.[81] Hence, this approach could be applied to ensure that each sovereign creditor is treated fairly (without regard to their status) in the SDR process. Also, the situation for the sovereign debtor can be improved by including MFC clauses in the sovereign debt contract. To a small extent, this approach is cost effective for sovereign debtors since the inclusion of the proposed provision would reduce the cost of parties in the post-SDR phrase, particularly disputes from holdout creditors will be decreased. Also, the including the MFN has not tipped the scales in favour of a single party.

Moreover, it was proposed by *Buchheit* and *Gulati* that an enhanced MFC clause be drafted to ensure that if a sovereign debtor restructures claims of a supermajority of commercial lenders, Paris Club creditors (who may be anticipated to act together), or any of its non-Paris Club bilateral creditors, and then agree to grant better terms to one or both of the other creditor groups, those more favourable terms would be given to everyone.[82] Further, it has been proposed that an enhanced MFC clause shall contain four main features: (1) 'transparency' (i.e., the sovereign debtor will be required to accept an obligation to reveal to the other creditor groups the details of all of its debt settlements with claim holders whose claims are subject to SDR, regardless of any earlier contractual obligations to keep these terms private.); (2) 'uniform methodology' (i.e., a method for determining the net present value of each settlement, including the use of a standard discount rate. This will

[79] ibid.
[80] ibid 5-13.
[81] ibid 5-6.
[82] ibid 7-8.

also need the selection of an independent calculation agent to conduct these assessments); (3) 'enforcement' (i.e., to threaten legal action against any creditors who induces the sovereign debtor to break its commitments to the creditors receiving the clause's protection); (4) 'flexibility' (i.e., mechanism allowing a supermajority of creditors to waive the clause's implementation in exceptional circumstances).[83]

This proposal provides significant flexibility so those involved in the SDR process can respond swiftly (by modifying the more favoured creditor clause) to the debt crisis without exceeding their administrative capacity. Also, the high cost of effectiveness, including the proposed contractual clause, would reduce the cost of parties in the post-SDR phrase, particularly disputes from holdout creditors. Hence, the proposed contractual clause is generally recognised in the commercial world and beneficial to many parties in the SDR process (with the exception of vulture funds), it will be supported to a large extent by many parties in the SDR process.

While this proposal offers innovative solutions to alleviate difficulties in the SDR process and maintain a balance between sovereign debtors and their creditor rights, it may not fully address all the evaluative criteria. The proposal does contribute to the effectiveness of processes and the reduction of holdout problems. Still, achieving coherence and consistency across the governing framework might not be sufficient. Additionally, it is unclear if *Zandstra*'s proposal adequately addresses enforceability and creditor protection or sufficiently tackles power imbalances and stakeholder participation. The feasibility and effectiveness of this proposal remain uncertain, as it relies on individual contract negotiations and does not provide a comprehensive solution to SDR governance.

4.2 Zandstra's Proposal- Work Plan for Further Reform of Sovereign Debt Restructuring

Zandstra's work plan for further reform of SDR is another notable reform proposals that adopting decentralised contractual approach. This reform proposal focuses on addressing

[83] ibid 9-10.

the holdout risk.[84] Holdouts can destabilise an otherwise orderly process, delaying the ability of the sovereign debtor concerned to restore debt sustainability and re-establish market access, as noted by *Zandstra*.[85] The holdout creditor still poses a problem even in cases where the majority of creditors and official sector participants support a restructuring proposal that will enable the sovereign to restore debt sustainability.

Zandstra suggested additional refinements and techniques that could be explored, as well as innovative solutions that could be developed, to alleviate the difficulties encountered in the SDR process while maintaining an adequate balance between debtor and creditor rights, and thus address the holdout risk. By eliminating the holdout problem, this proposal would stabilise the financial and monetary system of sovereign debtors and creditors. One of the most innovative proposals made by *Zandstra* concerning the reform of the contractual instrument is '[t]o design a contractual provision to suspend any legal actions initiated by bondholders against the sovereign issuer in respect of the relevant sovereign debt'.[86] This proposal offers great flexibility, allowing parties participating in the SDR process to promptly react (through modification of the contractual provision) to the debt crisis without surpassing their administrative capacities. Also, it will alleviate the challenges associated with a sovereign debt crisis while preserving an appropriate balance of sovereign debtor and creditor rights. This leads to a high cost of effectiveness, given that the proposed contractual clause will lower the expenditures incurred by parties in the SDR process. Specifically, the proposed contractual clause would reduce problems with creditors who holdout.

On the one hand, this proposal offers flexibility and reduces challenges associated with sovereign debt crises. On the other hand, it falls short of fully addressing the evaluative criteria. For instance, it may not provide a coherent and consistent governing framework nor guarantee effective enforcement mechanisms or adequate representation of all stakeholders. Additionally, the focus on holdout risk might not address other critical aspects of the SDR process, such as sovereign immunity or civil society participation. Though the

[84] Deborah Zandstra, 'A possible work plan for further reform of sovereign debt restructuring' (2018) 13 (3) Capital Markets Law Journal 356.
[85] ibid 357.
[86] ibid 371.

proposed contractual clause may reduce costs and alleviate some issues, the overall approach lacks comprehensiveness in tackling broader SDR governing framework weaknesses.

5. Evaluations of the Model Law Approach

As one of the approaches used to deal with SDR-related issues that fall within the market-based category, the model law can be implemented in two ways. The first way is for sovereign states to adopt a model law and govern SDR on a territorial basis. The second way is to utilise it as a soft law instrument that parties can agree to use via party autonomy. Even though it is similar to the decentralised contractual approach in that parties might agree to accept applicable model law, the model law approach is different. Compared to the decentralised contractual method, the model law approach addresses a greater range of issues that the contractual approach did not cover, such as the issues of transparency, enforcement, and dispute resolution.

Instead of the centralised statutory and the decentralised contractual approaches examined above, the model law approach has the greatest potential for establishing an ideal governing framework governing SDR. Through the implementation and adoption of the model law (also known as model code), the model law approach seeks to steer the behaviour of sovereign debtors and their creditors during the SDR process. This approach is also characterised as an ad hoc and pluralist approach while it relies on different sets of model law that developed by different institutions that implemented through domestic law. Adoption and implementation of the model law are voluntary. If the model law has neither been adopted nor implemented by sovereign states, it is regarded as a non-binding and voluntary rule. The model law approach is a middle ground between the centralised statutory approach and the decentralised contractual approach because it allows sovereign states to change or denounce unilaterally without breaking international law, as well as the domestic law. The model law applies not just to sovereign debtors and creditors but also to private-sector creditors who have entered into a sovereign debt contract with sovereign debtors whose jurisdiction has adopted the model law.

The model law (code) approach is not new, similar to centralised statutory and decentralised contractual approaches mentioned in the previous sections. For example, *Paulu*s's 'worldwide London approach' for the international insolvency framework (i.e., applying the INSOL International Statement of Principles for a Global Approach to Multi-Creditor Workouts (2000) not only to English banks but also to all large creditors toward debtors in severe financial distress).[87] In addition, plenty of principles and guidelines have been developed to promote sustainable sovereign debt practice practices that could be adopted as a model law (code). For example, Organisation for Economic Co-operation and Development ('OECD') Working Party on Export Credits and Credit Guarantees' Principles and Guidelines on Sustainable Lending for Low Income Countries,[88] and the aforementioned UNCTAD Principles, UN's Basic Principles for Sovereign Debt Restructuring, and IIF's Principles for Stable Capital Flows and Fair Debt Restructuring in Emerging Markets. Among the scholars who have proposed adopting a model law (code) to reform the SDR governing framework, *Schwarcz*, *Gelpern*, and *Berensmann* are the most vocal advocates of adopting the model law (code) approach. In the following sections, I will analyse their reform proposals respectively.

5.1 Schwarcz's Proposal- Model Law Approach

Since the IMF's proposed centralised statutory regime was rejected owing to the political challenges of reaching a global consensus, *Schwarcz* proposed a model law approach to restructure unsustainable sovereign debt, arguing that this would be both feasible and practical since the significant number of sovereign debt contracts are governed by the laws either of the sovereign debtors or of the destinated jurisdiction.[89] Individually, these jurisdictions may implement a model law that would provide struggling sovereign state a

[87] Christoph G. Paulus, 'Some Thoughts on an Insolvency Procedure for Countries' (2002) 50 (3) The American Journal of Comparative Law 531, 539.

[88] OECD Working Party on Export Credits and Credit Guarantees, 'Principles and Guidelines to Promote Sustainable Lending Practices in the Provision of Official Export Credits to Lower Income Countries (November 2016 Revision)' (OECD 2016) <https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=tad/ecg(2016)14&docLanguage=En> accessed 26 October 2022.

[89] Steven L. Schwarcz, 'Sovereign Debt Restructuring: A Model-Law Approach' (2016) Journal of Globalization & Development 1, 6.

realistic chance of restructuring their debt to sustainable levels.[90] In addition to facilitating the formation of international treaties by allowing such debt restructuring, the model law would also contribute to the development of the necessary norms.[91]

The purpose of the *Schwarcz* proposed model law is 'to provide effective mechanisms for restructuring unsustainable sovereign debt so as to reduce (a) the social costs of sovereign debt crises, (b) systemic risk to the financial system, (c) creditor uncertainty, and (d) the need for sovereign debt bailouts, which are costly and create moral hazard'.[92] Notably, the model law seeks to eliminate uncertainty and produce considerable cost benefits for sovereign debtors and their creditors over the current SDR governing framework while ensuring that parties in the SDR process are treated fairly and equitably. For instance, an impartial international organisation will serve as the supervisory authority, while other independent entities will handle disputes and policymaking.

Furthermore, Article 7 (1) of the proposed model law by *Schwarcz* (i.e., '[a] [p]lan shall become effective and binding on the State and its creditors when it has been submitted by the State and agreed to by each class of such creditors' claims designated in the Plan under Article 6(1). Thereupon, the State shall be discharged from all claims included in those classes of claims, except as provided in the Plan'), for example, allows each class of claims to veto the sovereign debtor's restructuring plan.[93] Accordingly, the sovereign debtor and the majority of creditors can use the proposed model law to bind any holdout creditors to an agreement's terms.

The proposed contractual clause will minimise parties' expenses in the SDR process, resulting in a high cost of effectiveness. Also, it has not tipped the scales in favour of a single party. Further, it stabilised the financial and monetary system of sovereign states. It mitigates the financial system's systemic risk. Therefore, this proposal will be widely accepted by other parties in the SDR process, except private-sector creditors who believe

[90] ibid, 30-31.
[91] ibid, 34.
[92] ibid, 35.
[93] ibid, 37.

that the prospect of holdouts is essential to guarantee that sovereign debtors would negotiate fairly might oppose this proposal.

Schwarcz's proposed model law approach to restructuring unsustainable sovereign debt aims to address several weaknesses in the current SDR governing framework. The model law seeks to reduce social costs, systemic risk, creditor uncertainty, and the need for costly bailouts while promoting fairness and equity in the SDR process. With impartial international organisations serving as supervisory authorities and independent entities handling disputes and policymaking, the model law supports the evaluative criteria of consistency, coherence, and effective processes.

However, it may not fully address the enforceability and creditor protection criteria, as the model law's provisions still rely on jurisdictions adopting and implementing the law. Additionally, while the model law facilitates stakeholder participation and institutional balance, it may not fully address the underrepresentation of private-sector creditors, who could view the prospect of holdouts as essential for fair negotiations. Lastly, the model law's feasibility and effectiveness are promising but depend on widespread acceptance and implementation by individual jurisdictions, which could face varying degrees of resistance. Overall, *Schwarcz*'s model law approach offers potential improvements to the SDR governing framework but may not entirely resolve all the identified weaknesses.

5.2 Schwarcz's Follow-Up Proposal- Soft Law as Governing Law

The absence of a uniform application of party autonomy regarding sovereign debt contracts can lead to uncertainty and unpredictability that will negatively affect the rights of creditors in the event of sovereign default. These can also affect the sovereign debtors. As *Albornoz* and *Martín* argued, 'the use of soft law principles is, nowadays, an appropriate tool to advance towards uniformity in the application of party autonomy in international commercial contracts'.[94] Due to the same nature as international commercial contracts, this

[94] María Mercedes Albornoz and Nuria González Martín, 'Towards the uniform application of party autonomy for choice of law in international commercial contracts' (2016) 12 (3) Journal of Private International Law 437, 464.

argument is also applicable to international sovereign debt contracts. Drawing on a wide range of academic studies on party autonomy in the contractual choice of law under sovereign debt contracts above, it shows that soft law will be an ideal instrument to contribute to solving the problem of the absence of a uniform application of party autonomy of choice of law and forum in international sovereign debt contracts.[95] Once the uniformity in the application of party autonomy in the international sovereign debt contract has been achieved, the problem of uncertainty and unpredictability will be solved. The Hague Principle on Choice of Law ('Hague Principle') is the predominant soft law related to the principle of party autonomy.[96] However, Hague Principle 'expressly exclude from their scope certain specific categories of contracts in which the bargaining power of one party – a consumer or employee – is presumptively weaker'.[97] It is not certain to conclude whether the Hague Principle is applicable because '[c]ontracts where one of the parties is a sovereign state are not expressly excluded from the scope of the Principles'.[98] In order to fill this vacuum, the Hague Conference on Private International Law could amend the Hague Principle to explicit include contracts involving sovereign states. Such potential reform could introduce uniformity and certainty of the application of the principle of party autonomy in sovereign debt contracts.

There are various reasons why parties choose a particular governing law and jurisdiction for their sovereign debt contract. In particular, one of the reasons contracting parties choose English, and New York laws and courts is that these jurisdictions have well-established practices in dealing with SDR and its related disputes. The more certain the parties' choices of law and forum, the more certain the SDR process that the contracting parties are aiming for. However, certainty, clarity, and uniformity for the SDR process do not necessarily mean that it is ideal or incapable of improvement in the future. That said, a degree of certainty, clarity, and uniformity of the SDR process will be desirable for public interest since an unorder SDR process will lead to an economic depression that impacts the lives of millions

[95] At the international level, the current regulations on SDR are fragmentary, which are surrounded by different layers.

[96] Approved by the Hague Conference on Private International Law on 19 March 2015, 'Principles on Choice of Law in International Commercial Contracts' (2015) 20 (2-3) Uniform Law Review, 362.

[97] ibid, Art. 1.12.

[98] María Mercedes Albornoz and Nuria González Martín, 'Towards the uniform application of party autonomy for choice of law in international commercial contracts' (2016) 12 (3) Journal of Private International Law 437, 464.

of people within its territory. Also, a certain degree of certainty, clarity, and uniformity for the SDR process will lower the cost for the SDR process for both the sovereign debtor and the creditors. Besides, a certain and uniform SDR process will further guarantee default sovereign debt creditors. Additionally, as the Paris Club form the dominant soft law instruments in the public international law sphere, it could take the lead (along with the UN, IMF, and the World Bank) to develop a set of new principle that parties in sovereign debt contracts can choose as the governing law.

The innovative way to use soft law has been raised by *Schwarcz*.[99] Further *Schwarc*'s proposed model law approach, it has been proposed that the parties can choose soft laws as the governing law for their sovereign debt contracts. Under this context, soft laws are the model laws. Unambiguous usage will be achieved by choosing the uniform soft law as the governing law for sovereign debt contracts. But sovereign debtors 'hesitate to adopt terms that make their debt contracts more restructuring-friendly, even when these initiatives are backed by a broad consensus among policymakers, international organisations, and academics'.[100] Two reasons have been identified to show why sovereign debtors are reluctant to adopt a set of standardised contractual terms of the sovereign debt contracts. The first reason is that 'non-standard terms could be (mis)read as a signal revealing adverse private information, or associating the issuer with an inferior cohort'.[101] The second reason is that 'contracts were bad at signaling', as the '[n]on -financial contract terms are too arcane, too complicated and, paradoxically, not standardized enough'.[102] These reasons of hesitation will be the potential obstacles for the international legal community to develop a set of standardise terms for parties to use for their sovereign debt contracts. Robust public debate can be used to overcome the obstacle.

In terms of the evaluative criteria, the proposed reforms address coherence and consistency, as well as the representation of private-sector creditors. However, enforceability and creditor protection may still be limited, as soft law principles are not legally binding. Additionally, the feasibility and effectiveness of these reforms would depend on the

[99] Steven L. Schwarcz, 'Soft Law as Governing Law' (2020) 104 Minnesota Law Review 2471.
[100] Anna Gelpern, Mitu Gulati and Jeromin Zettelmeyer, 'If Boilerplate Could Talk: The Work of Standard Terms in Sovereign Bond Contracts' (2019) 44 Law & Social Inquiry 617, 643.
[101] ibid.
[102] ibid.

willingness of sovereign debtors to adopt standardised contractual terms and the ability to generate a public consensus on the use of soft law in governing sovereign debt contracts. Overall, while the proposal offers some improvements in consistency and stakeholder participation, it falls short in addressing some key concerns, particularly enforceability and creditor protection.

5.3 Gelpern and Berensmann's Proposal- Best Practices Code

Gelpern's proposal of a code of best practices for reforming the SDR's governing framework is in line with the model law approach proposed by *Schwarcz*. As stated by *Gelpern*, sovereign and private-sector creditors should focus on establishing a new best practices code to facilitate inter-creditor collaboration.[103] In contrast to earlier efforts to standardise sovereign debt contracts, the best practises code is a non-contractual reform. Furthermore, *Gelpern* argued that '[a] "best practices" document would add more value than contract clauses providing for creditor committees, […] because it could address a broad range of contingencies, and evolve over time to address specific problems that come up in restructurings'.[104] Even though *Gelpern* offered an outline of the significance of the best practices code, it is not entirely clear what should be included in the code.

Berensmann has comprehended *Gelpern* proposal by providing a detailed 'proposal for the principles of a unified code of contract'.[105] As proposed by *Berensmann*, '[t]he core elements of a universal code of conduct should resemble the main principles incorporated in the diverse codes of conduct [set by different stakeholders] […]: (i) legitimacy, (ii) impartiality, (iii) negotiation in good faith, (iv) equal treatment, (v) fair creditor representation, (vi) dialogue between debtors and creditors, (vii) transparency, and (viii) restore debt sustainability'.[106] These model codes ensure that parties in the SDR process will be treated fairly in a flexible manner (i.e., each party must receive appropriate

[103] Anna Gelpern, 'Sovereign Debt: Now What?' (2016) 41 Yale Journal of International Law, Special Edition on Sovereign Debt 45.
[104] ibid.
[105] Kathrin Berensmann, 'How could a new universal code of conduct prevent and resolve sovereign debt crises? Proposals for design and implementation (2022) Journal of Economic Surveys 1, 27-28.
[106] ibid.

repreparation). At the same time, monetary and financial stability will be safeguarded. In addition, it has been emphasised that the individuals, organisations, and data engaged in debt settlements are free of prejudice and undue influence. This proposal is only superior to the model law proposed by *Schwarcz* in that the model code suggested that information on debt restructuring organisations, methods, and underlying data must be made public.[107] However, there are certain problems with the approach of using model law. For instance, the parties may not be able to depend on the model law in the SDR process since it might be too vague.

While this approach promotes inter-creditor collaboration and addresses issues such as legitimacy, impartiality, and transparency, it has limitations. The model codes may be too vague for parties to rely upon in the SDR process, and they may not fully address enforceability, creditor protection, or power imbalances among stakeholders.

6. Problems Remain Unsolved

The SDR framework is fragmented, has numerous flaws, and is unsatisfactory. There are contradictions between the diverse legal orders under the current SDR governing framework. The table below lists the problems that remain unsolved under the reform proposals mentioned above. In essence, there are three problems that remain unsolved by the reform proposal mentioned above, including (1) institutional architectures unbalanced; (2) the underrepresentation of civil society and other stakeholders; and (3) the impact of the 'Pac-man' strategy on private-sector creditors.

6.1 A List of Unsolved Problems

Problem Remain Unsolved	**Description**
Institutional Architectures Unbalanced	Institutional architectures failed to reach a balance to meet the needs of various interest groups. In

[107] ibid.

	particular, private-sector creditors' interests are always overlooked.
Underrepresentation of Civil Society and Other Stakeholders	Civil society is underrepresented in the SDR process.
Impact of 'Pac-man' Strategy on Private-Sector Creditors	It cannot prohibit the sovereign debtor from gaining a majority vote to compel dissenting creditors to accept its demands using the 'PAC-man' strategy.

7. Conclusion

Even though a unified approach via an international law treaty is desirable to reform the current SDR governing framework, it is not politically practicable to do so in light of the failures of previous attempts, such as the IMF's SDRM. On the other hand, an ad hoc and pluralist approach within the existing framework is preferable in light of the unique characteristics of SDR. However, applying a decentralised contractual approach to modify the SDR governing framework has several limits. For instance, stabilising the financial and monetary system by changing and improving the contractual terms that parties might include in their SDR agreements is challenging. Hence, the model law approach, which is being used to reform the SDR governing framework and which lies between the centralised statutory and decentralised contractual approaches, will be the most effective approach to improve the SDR governing framework among the three approaches that have been evaluated in this article. This is because such an approach permits sovereign states to change or renounce unilaterally without violating international or domestic law. The model law applies not just to sovereign debtors and creditors but also to private-sector creditors. As demonstrated in the preceding sections, both centralised statutory and decentralised contractual approaches consistently disregard the interests of private-sector creditors. Yet, the model law approach also has its shortcomings. For example, the model law might be too vague for the parties to rely upon in the SDR process. Therefore, a unique international solution to SDR needs to be adopted- mix the three approaches mentioned above into one.