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FOCUS PAPER 9

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The Potential of National Legislation for the Fair Resolution of Global Debt Crises

An overview and assessment of existing laws and legislative proposals

Focus Paper 9:
The Potential of National Legislation for the Fair Resolution of Global Debt Crises
An overview and assessment of existing laws and legislative proposals

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1. Introduction

The already dramatic debt situation in the Global South has been worsening since the onset of the COVID-19 pandemic. In the face of multiple crises, there is a threat of a wave of sovereign defaults. At the same time, the coordination between creditors in the event of necessary debt restructuring has become more difficult, as the creditor profiles of low- and middle-income countries have become significantly more complex than they were in the 1990s. Making sure that private creditors participate in debt relief measures is a key issue to resolving debt crises.

Since there is still no political will in the international community to create an international sovereign workout mechanism, the debate on the potential of national legislation to enforce the equal treatment of creditors has gained new momentum.[1] The main issue within this debate is how to make restructuring negotiations of critically indebted states more efficient by preventing uncooperative (private) creditors from collecting their claims in full before national courts, thereby undermining multilateral debt relief agreements. The newly rising momentum is also linked to the experience with the G20 Debt Service Suspension Initiative (DSSI), a debt moratorium adopted by the G20 to address the financial constraints of the COVID-19 pandemic; private creditors did not participate despite repeated pleas from the public sector.[2]

In the New York State Parliament, two bills were introduced in the Senate and the House of Commons in 2020 and 2021, each aiming to restrict private creditors' ability to sue debtor states and bring about enforcement in New York courts.[3,4] The potential of such legislation is also increasingly being discussed in academic circles, and concrete legislative proposals are being drafted.[5] Civil society organisations from both the Global South and the Global North, including erlassjahr.de, demand corresponding legislation.[6] Since 2020, even the International Monetary Fund (IMF) and the World Bank, which have long been reluctant to recommend statutory measures,

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[1] This debate is not new. For example, in 2018, the European Parliament passed a resolution calling on member states to introduce anti-vulture fund laws analogous to the Belgian law already in place at the time. National legislation to curb vulture funds also explicitly appears in the United Nations' 2015 Addis Ababa Action Agenda on financing for development.

[2] See, among others, Jones, T. (2021): "How the G20 debt suspension initiative benefits private lenders", October 2021, Jubilee Debt Campaign. https://jubileedebt.org.uk/wp-content/uploads/2021/10/How-the-G20-debt-suspension-initiative-benefits-private-lenders_10.21.pdf

[3] See Rivera, G.; Davila, M. (2023): „model law for restructuring unsustainable sovereign and subnational debt“ https://www.nysenate.gov/legislation/bills/2023/A2102/amendment/A

[4] See Fahy, P.; Hoylman-Sigal, B. (2023): „New York Taxpayer and International Debt Crises Protection Act“ https://www.nysenate.gov/legislation/bills/2023/S4747

[5] See, for instance, Buchheit, L. / Gulati, M. (2021): "The Duty of Creditors to Cooperate in Sovereign Debt Workouts", in: *Virginia Public Law and Legal Theory Research Paper* (2021–41); Connelly, S. / Ferreira Lima, K. P. / Tan, C. (2020): *Proposal for debt suspension legislation*, 3.06.2020, Law & Finance Working Group, The IEL Collective. https://warwick.ac.uk/fac/soc/law/research/centres/globe/ielcollective/working-groups/lawfinance/debt/proposal_for_debt_suspension_legislation_12_oct_2022.pdf; Reichert-Facilides, D. (2022a): "Draft Proposal for a Foreign Sovereign Debt Restructuring Law". https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4164656; and, an interview with Buchheit, L., Gelpern, A., and Goldmann, M. (2022) published by the Friedrich-Ebert-Stiftung and erlassjahr.de: "Solving global debt crises, involving private creditors – the role of national legislation in G7 countries", 27.06.2022. https://www.fes.de/en/shaping-a-just-world/article-in-shaping-a-just-world/solving-global-debt-crises-involving-private-creditors-the-role-oft-national-legislation-in-g7-countries

[6] See, for example, African Sovereign Debt Justice Network (2022): "African Sovereign Debt Justice Network's Statement on the Occasion of the 2022 Spring Meetings of the IMF and the World Bank", 18.04.2022, AfronomicsLAW. https://www.afronomicslaw.org/sites/default/files/pdf/AfSDJN_Statement_pdf_0.pdf; Civil7 Germany (2022): "Communique 2022 – Progress towards an equitable world must be more than a promise!", p. 11. https://venro.org/fileadmin/user_upload/Dateien/Daten/Publikationen/Sonstige/Civil7_Communiqué_2022.pdf; and erlassjahr.de and MISEREOR (2022): "Global Sovereign Debt Monitor 2022", Recommendations to the German Federal Government. https://erlassjahr.de/en/publications/

have repeatedly expressed positive views on the potential impact of national legislation on more efficient debt restructurings.[7]

In the public debate, it often remains unclear what exactly is meant by national legislation in this context. Political discourse often speaks of national laws to curb the practice of "vulture funds"[8], while the civil society and academic debate is dominated by proposals that are not limited to the problem of a few aggressive hedge funds but aim to improve the overall legal framework for debt restructuring more generally.

This briefing aims to shed light on the various existing laws and newly discussed legislative proposals, discussing both their potential and limitations. Additionally, this focus paper addresses the aspects of national legislation that erlassjahr.de believes particular attention should be paid to in order to best ensure that borrowing states are actually protected and debt restructurings are made fairer and more efficient. Information and differentiated assessments shall be contributed to the debate, also with the view to the German coalition agreement which has set the target of improving international debt relief mechanisms.

In the following, the evolving legal action of private creditors and the resulting issues for fair and efficient debt restructurings will be discussed (Section 2). This section also discusses why the passage of legislation is also relevant outside the major financial centres of New York and London. Then, relevant issues to consider when passing national legislation will be identified (Section 3). Subsequently, various proposals for national legislation and existing law are presented and evaluated against the criteria mentioned in section 3 (Section 4). The results are summarized in section 5.

2. Why do we need national legislation?

2.1. Increasing legal action brought against defaulting debtor states

By virtue of their state immunity, defaulting debtor countries were protected from legal action by foreign creditors until the end of the Second World War. Instead of legal consequences, the governments of critically indebted states had to weigh the political, economic, and sometimes military consequences when considering whether to continue servicing their debts or stop their repayments. After the end of the Second World War, however, there was a gradual change in the interpretation and application of state immunity rights, which meant that cases of a state engaging in 'commercial activities' could be reviewed and condemned by the courts of another state.[9] In the

[7] World Bank (2022a): "Global Economic Prospects Special Focus: Resolving High Debt after the Pandemic", p. 60. https://thedocs.worldbank.org/en/doc/cb15f6d7442eadedf75bb95c4fdec1b3-0350012022/related/Global-Economic-Prospects-January-2022-Topical-Issue-1.pdf; World Bank (2022b): "Potential Statutory Options to Encourage Private Sector Creditor Participation in the Common Framework". https://documents1.worldbank.org/curated/en/099802006132239956/pdf/IDU0766c0f2d0f5d0040fe09c9a0bf7fb0e2d858.pdf; IMF Managing Director Kristalina Georgieva at the press conference of the International Monetary and Financial Committee on 21.04.2022 from minute 42. https://www.youtube.com/watch?v=lF2tqcmGeRA and IWF (2020): "The International Architecture for Resolving Sovereign Debt Involving Private-Sector Creditors – Recent Developments, Challenges, And Reform Options", Policy Paper No. 2020/043. https://www.imf.org/en/Publications/Policy-Papers/Issues/2020/09/30/The-International-Architecture-for-Resolving-Sovereign-Debt-Involving-Private-Sector-49796

[8] Speculative hedge funds that specialize in buying up bonds at highly downgraded prices at the secondary market in times of crisis in order to collect them by legal means, in full and with default and penalty interest, are called vulture funds. When successful, they can earn returns of 700 per cent or more.

[9] In this respect, the enactment of the "Foreign Sovereign Immunities Act 1976" in the US and the "State Immunity Act 1978" in Great Britain is particularly relevant. For more background information, see, among others, Schumacher, J. / Trebesch, C. / Enderlein, H. (2018): "Sovereign defaults in court", in: *ECB Working Paper Series* 2135, February 2018, Eurosystem, p.10. https://www.ecb.europa.eu/pub/pdf/scpwps/ecb.wp2135.en.pdf

field of debt, a precedent-setting case emerged in 1992 when the Supreme Court in New York upheld the suing bank's claim in the Republic of Argentina v. Weltover, Inc., ruling that the issuance of government bonds was a commercial activity and that New York courts had jurisdiction in the event of delayed payment.[10] As a result, legal action by private creditors against defaulting debtor governments increased steadily over the 1990s and 2000s. While in the 1980s, only about 5 per cent of restructuring negotiations were accompanied by legal action from individual creditors against the defaulting debtor state, this ratio rose to 50 per cent by the mid-2010s.[11] Most legal action is instigated by hedge funds that either specialise in this business model or were founded for precisely this reason.[12]

Even if creditors are granted the right to take legal action, the enforcement of a disputed title — for example, by seizing the property of the debtor state located abroad — remains a difficult matter as a large part of debtor state property located abroad continues to enjoy state immunity. Unlike private companies, defaulting debtor states cannot be liquidated, and no supranational body can impose a judgement by force. However, this does not prevent specialized hedge funds in particular from attempting to enforce seizures and foreclosures in any possible way. In the case of Argentina, for example, suing creditors attempted to seize a famous Argentine naval vessel, Argentina's shares in the aerospace company SpaceX, and even an Argentine dinosaur fossil that was on display in Europe.[13] Overall, the proportion of legal action accompanied by attempted seizures had skyrocketed by 2010.[14] Nonetheless, in most cases, these attempted foreclosures are ultimately legally unenforceable. Thus, the question of whether a sovereign state services its debt and follows a contentious ruling remains an inherently political decision in which the debtor state's government has to continue to weigh the economic and political ramifications of its actions.[15] However, the practice of filing lawsuits is increasingly narrowing this scope for political decision-making; it would be a misunderstanding to see legal success as the creditors' only goal. Rather than gaining possession of a dinosaur fossil or naval vessel, which would be difficult to liquidate, the claimant aims to increase the political and economic costs of not servicing claims and to reach an out-of-court agreement with the debtor state through their more dominant position. It is, therefore, not surprising that more than 50 per cent of these cases are ultimately settled out of court. [16]

2.2 Increased difficulty of debt restructuring as a consequence of legal action

The phenomenon of private creditors taking legal action poses various challenges to the fair and efficient restructuring of sovereign debt.

[10] Blackman, J. / Mukhi, R. (2010): "The evolution of modern sovereign debt litigation: Vultures, Alter egos and other legal fauna", in: *Law and Contemporary Politics* 73(47), p. 52. (https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1586&context=lcp).

[11] Schumacher / Trebesch / Enderlein (2018), p. 17.

[12] Ibid., p. 12.

[13] Ibid., p. 13.

[14] Ibid., p. 22.

[15] For a political economy perspective on the question of why and when debtor countries use the default option, see Roos, J. (2019): "Why Not Default? The political economy of sovereign debt", Princeton University Press.

[16] Schumacher / Trebesch / Enderlein (2018), p. 23.

When creditors take legal action, it increases the cost of debt restructuring for the borrowing countries

For many debtor states, especially the smaller states, the costs and human associated with protracted litigation should not be underestimated.[17] Furthermore, there are additional costs due to the exclusion from the capital market during the process: Schumacher et al. (2018) were able to show that it is virtually impossible for debtor countries to sell new bonds on the international capital markets as long as they were involved in legal action with individual creditors. When there are no legal actions from individual creditors, debtor governments frequently sell new bonds on an above-average basis in the year following a successful restructuring. Thus, borrowing countries usually regain access to new financing promptly. However, this does not apply to countries that are in a legal dispute with individual creditors, even if they have already agreed on a restructuring plan with most of their other creditors.[18] The most effective way to increase the costs of default to the debtor state is if suing creditors can secure a legally binding claim to the debtor states' foreign payment transactions or bring export earnings to a standstill. Not servicing corresponding claims then creates immense opportunity costs for the debtor state.[19]

Litigation practice increases the bargaining power of creditors vis-à-vis the borrowing country

The increasing prevalence of litigation complicates a central option for debtor states in a debt crisis, namely defaulting on payments. In this sense, taking legal action shifts the bargaining power to the disadvantage of the debtor state. Often the threat of a lawsuit is enough to negotiate very favourable outcomes for creditors. When Belize wanted to restructure its outstanding debt in 2012 and proposed a 45 per cent haircut to bondholders, vulture funds managed to push it down to 10 per cent by threatening legal action.[20] Similarly, in 2015, Ukraine's bondholders also managed to enforce what was widely seen as very favourable treatment by pointing to the very high costs associated "with multiple litigations as creditors attach assets and attempt to block payment systems (…).“'[21].

Litigation practice leads to unequal treatment of creditors

When individual bondholders take legal action, it leads to creditors being treated unequally. This was particularly evident in the case of Venezuela, which continued to service its bondholders on time when the country had already stopped repaying other creditors, such as Russia and China.[22] Similarly, Greece serviced the claims of foreign bondholders as a matter of priority over all other creditors and, among other factors, justified its decision on the grounds of concern about legal disputes in the United Kingdom.[23] As a result, holdout creditors received upwards of 60 per cent more repayments than they would have if they had been obliged to participate in the restructuring.

[17] The Wall Street Journal estimates that Elliot Management Corporation's legal costs in the lawsuit against Argentina exceeded $100 million US dollar. See Schumacher / Trebesch / Enderlein (2018), p. 71.

[18] Ibid., p. 25 ff.

[19] According to media reports, in 2015 bondholders of Ukraine managed to enforce what is generally considered to be extraordinarily favourable treatment by threatening legal action and the associated very high costs for Ukraine. See, among others, Schumacher et al. (2018), especially pp. 49 ff. and the sources cited there.

[20] Ibid., p. 47 f.

[21] Wallace, C. (2015): "Ukraine Struggles to Restructure Its Sovereign Debt", in: *Institutional Investor*, 22.06.2015. https://www.institutionalinvestor.com/article/b14z9yd1zvk83d/ukraine-struggles-to-restructure-its-sovereign-debt; Asonuma, T. / Tresbech, C. (2015): Sovereign Debt Restructurings: Preemptive or Post-Default, CESifo Working Paper, No. 5605, Center for Economic Studies and ifo Institute (CESifo), Munich. https://www.econstor.eu/bitstream/10419/123249/1/cesifo_wp5605.pdf

[22] Schumacher et al. (2018), p. 51.

[23] Ibid., p. 47.

Legal action delays the start and conclusion of debt restructuring negotiations

It is now evident that debtor countries attempt to avoid defaulting on payments as much as possible and delay the start of necessary debt restructuring negotiations. In doing so, they often justify their decision explicitly by referring to the high costs of a possible lawsuit.[24] This is disadvantageous both to the debtor state and to the majority of (cooperative) creditors since early debt rescheduling can reduce overall costs.[25] Preferential treatment of individual creditors as a result of increasing legal action also leads to a decrease in the willingness of other creditors to grant necessary relief because they fear that their concessions will only be used for preferential payments to the holdout creditors. This makes it more difficult to bring restructuring negotiations to a successful conclusion.

2.3. Why national legislation make sense even outside the major financial centres

The majority of bond contracts of countries in the Global South are issued under British or New York law. To limit creditors' rights of action under contract is therefore particularly useful in these two jurisdictions. However, enacting civil procedure laws that can limit the enforcement rights of creditors (see Excursus: Contract Law vs. civil procedure law) is also helpful outside these jurisdictions. They can make the respective jurisdictions in which those laws are enacted a so-called *Safe Habour* for the debtor states: Creditors who have obtained legal title elsewhere would then be unable to enforce that title by seizing assets located in or transferred through a jurisdiction that has enacted a civil procedure law on enforcement to that effect. For example, a strength of the Belgian law (see 4.1.1) is that funds transferred through the Brussels-based clearing house *Euroclear* can no longer be seized by plaintiffs.

As long as plaintiffs can block payment systems, they can exert great pressure on debtor countries. These, in turn, may feel compelled to meet the claim of the plaintiff creditor at the expense of other creditors and their own debt sustainability. Restricting creditors' enforcement rights trough civil procedure laws is all the more relevant the larger a country's foreign trade and financial sector are. The series of attachment attempts launched by some US-based hedgefonds against the Republic of Congo from 2006 onwards is a good example to illustrate the relevance of such laws: At the time, the Republic of Congo was actively trying to prevent the seizure of its oil export revenues. It would have helped the Republic of Congo if it had been able to conduct its export transactions through countries that had enacted such civil procedure law on enforcement. However, since this option did not exist at the time, the hedgefunds ultimately managed to block all of the Republic of Congo's oil exports for years.[26]

Moreover, passing civil procedure laws on enforcement outside of the United States and the United Kingdom would make it easier for progressive forces in these two important financial centres to gain majorities to pass appropriate legislation themselves. Finally, the adoption of national laws may also advance the international debate on what fair restructuring procedures should look like at the international level. In order to influence the international debate in a progressive way, it is important that the aspects mentioned under 3.2 in particular are taken into account when national laws are adopted.

[24] Ibid., p. 44.

[25] See, among others, Trebesch, C. / Asonuma, T. (2016): "Sovereign debt restructurings: Preemptive or Post-Default", in: *CESifo Working Paper* 5606, Center for Economic Studies and ifo Institute (CESifo), Munich; Andritzky, J. / Schumacher, J. (2019): "Long-Term Returns in Distressed Sovereign Bond Markets. How Did Investors Fare?", in: *IMF Working Paper* 19(13).

[26] Schumacher et al. (2018), p. 69.

Excursus: Contract Law vs. civil procedure law

Restructurings under contract aim to modify the rights of creditors to repayment. By contrast, civil procedure law on enforcement do not intend to formally reduce repayment rights, but only limit their enforcement through the court system.

In the case of a restructuring under contract law, in principle only those liabilities which are governed by the same law as the contract itself are affected by the modifications. After successful restructuring, the restructured claims are enforceable worldwide only to the extent permitted by the modified contract. Therefore, enacting a law that allows to modify the rights of creditors to debt service makes particular sense in financial centres under whose laws a large number of debt contracts have been concluded. The enforcement rights of creditors whose claims are governed by a different law are not restricted by restructurings conceived purely in terms of contract law - even in the jurisdiction that adopted the law.

In the case of the enaction of civil procedure law, the situation is the other way around: in principle, all outstanding liabilities can be covered, regardless of the contract law under which they have been incurred. However, civil procedure laws only limit the enforcement rights of creditors in the jurisdiction where the law has been passed. Whether creditors can continue to enforce their (formally still existing) rights in full in other jurisdictions then depends on the civil procedure laws in those jurisdictions.

3. Elements to be considered when adopting national laws

National laws have the potential to make debt restructuring more efficient and more equitable.

Efficiency means minimizing the overall costs associated with debt crises for all those affected. This means ensuring that the aggregated avoided costs by the many are greater than the diminished profit opportunities of the few. If debt restructuring negotiations are started and completed more quickly thanks to national laws, the costs associated with debt crises for the population of the debtor country and the costs of the majority of creditors can be reduced, while only a few aggressive creditors have to forgo additional gains. National laws can make debt restructurings more efficient in this sense, since their primary objective is to facilitate **creditor coordination**, thereby ensuring that a solution desirable to the majority of creditors is reached.

Additionally, national laws can help make debt restructurings more **equitable** and strengthen the negotiating position of the debtor country. This is necessary, because the current structures of the international debt architecture not only lead to inefficient outcomes in terms of total costs, but also, and more importantly, to an unfair distribution of costs between creditors and the population of the debtor country. This equity problem is not only due to the fragmented creditor landscape, but to the existing **power asymmetries** between the creditors (as a collective) and the debtor country. Moreover, creditor rights codified in contract law are usually given priority, both in debt restructuring negotiations and before courts, over the fundamental economic, social and cultural rights of the population of the debtor country, which apply under international law but are difficult to capture. This **equity problem** will not automatically be achieved through better coordination of creditors and a more efficient design of debt restructurings. On the contrary, a high degree of creditor coordination also leads to a strengthening of the collective bargaining power of creditors vis-à-vis the debtor country. From a civil society perspective, therefore, any reform of the international debt architecture - especially one that primarily aims to improve creditor coordination - must include consideration of how to improve the negotiating position of the debtor country and the enforcement of the basic economic and social rights of its people. National laws can also make a **transformative contribution** in this regard, but for this to happen, some aspects need to be taken into account in their design.

When analysing how national laws should be designed, it therefore makes sense to distinguish between elements that are necessary to increase efficiency and those that aim to increase the fairness of restructurings.

3.1. Making debt restructurings more efficient through national legislation

In order to make debt restructuring as efficient as possible, attention must be paid to the following aspects when designing national laws to safeguard international debt restructurings:

- **All countries**, regardless of their income status or other classifications, should benefit from the protective effect of a corresponding law, because debt crises do not only affect the lowest-income countries.
- **All private and public creditors should be covered by the law**, regardless of their priority business activity. Although it is primarily private creditors who use the legal process to enforce their claims, it also makes sense to restrict the enforceability of public claims. As a result, the sometimes difficult distinction between private, public, and semi-public creditors would lose relevance, at least in this context.
- The suable and enforceable amount should be limited to the amount agreed in **restructurings**. If, on the other hand, the purchase price of claims on the secondary market is chosen as the reference point, the potential of national laws to facilitate creditor coordination in restructurings would not be fully exploited.
- To fully exploit their regulatory potential, national laws should be constructed in a forward-looking manner and thus also **safeguard future restructuring**. Both the enforceability of claims issued before the law was passed and claims issued in the future must be restricted.
- A law should have an effect on all claims**, regardless of the law under which they were issued**. **Enforcement of legal titles obtained elsewhere should be limited** to the extent that could be obtained in national courts within the meaning of the law. This is the only way to ensure effective protection against attachment attempts and to effectively protect payment systems and assets of the debtor state from the access of creditors.
- **Equal treatment of creditors** must be a prerequisite for the legal protection of the debtor state: if the debtor state gives priority to individual creditors contrary to the agreement with its other creditors, the suable and enforceable amount of the other creditors should be adjusted to this level. Temporary enforcement protection (see 3.2.) should also be granted only if the debtor country has ceased repayments to all foreign creditors for the period of the negotiations.

3.2. Making debt restructurings more equitable through national legislation

To realize the transformative potential of national laws and to make debt restructurings more equitable, the following aspects must be taken into account:

- The goal of minimizing **economic, social and cultural costs in the debtor country** should be explicitly stated in the explanatory memorandum of the law.
- A **successful restructuring**[27] should be defined primarily as the result of an **international restructuring process in which the government of the country in which the law is passed participates**. If, on the other hand, the approval of a qualified majority of creditors is defined as a prerequisite for legally

[27] The central aspect of a national law to legally safeguard successful international debt restructurings is the granting of permanent legal action and enforcement protection, so that claims in national courts are only enforceable to the extent agreed in the restructuring proceedings. The key challenge in passing a law is therefore to define when a "successful restructuring" can be assumed for the purposes of the law.

safeguarding restructurings, the transformative potential of national laws will not be fully exploited.[28] This is due to the fact that obtaining the consent of a qualified majority of creditors in many cases requires the extensive participation of private creditors, who hold the bulk of the claims. Funds and banks, however, unlike public creditors, have no development policy mandate. Their consent in restructuring procedures can therefore be expected - if at all - only where partial relief reduces the losses of all parties involved (i.e. address the efficiency problem), but not where debt relief leads to a fairer distribution between creditors on the one hand and the population of the debtor country on the other hand (i.e. address the equity problem). Despite their development mandate, public creditors in the past have also often granted debt relief too little and too late to enable sustainable and social development of the debtor country. But at least in principle, they have committed themselves, for example in the Paris Club, to granting debt relief to the extent deemed necessary by an external debt sustainability analysis conducted by the International Monetary Fund. This is a **crucial starting point for being able to further demand the respect for the economic, social and cultural rights of the populations of critically indebted countries in restructuring negotiations**.

- A law that aims to safeguard the outcome of international restructurings should be formulated in such a way that it remains **open to future developments** at the international level. Current frameworks - such as those of the Paris Club or the Common Framework - should therefore not be cited as the only points of reference, but could be mentioned by way of example (see e.g., New York Taxpayer and international Debt Crisis protection Act in Section 4.2.2).
- A law that aims to safeguard the outcome of international restructuring processes in which the government of the country adopting the law participates, should safeguard internationally coordinated debt restructurings **even if the government itself does not hold any claims against the debtor country but provides political support for restructuring, for example under the Paris Club or the Common Framework**.
- A law that primarily aims at safeguarding the outcome of international restructuring processes in which the government of the country adopting the law participates can name the **safeguarding of qualified majority decisions as an additional option**.[29] If this option is included, **a law should aim at safeguarding international negotiated restructurings consented by a (qualified) majority of creditors ex-post** rather than conducting the negotiations themselves before national courts. Proceedings before national courts that require the consent of a

[28] Limiting creditors' rights of action and enforceability even against the interest of the majority of creditors if the government participates in the restructuring, can be legitimized by reference to the public duties of the state in which the law is enacted. Depending on the national context, it may vary which public duties can be invoked in this sense. For Germany, for example, it is conceivable to refer to the obligations under international law arising from the International Covenant on Economic, Social and Cultural Rights and to legally safeguard restructurings in this sense if the restructuring is necessary to ensure the basic social and economic rights of the population in the debtor country. A non-exclusive criterion of such a restructuring requirement could be defined as an independent and robust human rights impact assessment and/or debt sustainability analysis, for example by the IMF or the Office of the High Commissioner for Human Rights (OHCHR), in which the relevant debt relief needs have been identified to be needed to achieve the objective mentioned here. Moreover, it should generally be assumed that restructurings negotiated through an internationally coordinated process were necessary because of the objectives stated here, unless there is evidence that the public creditors granted the debt relief for extraneous political reasons. The role of the court should thus be limited to verifying whether there are obvious indications that the government is trying to exploit the newly created law in the unintended sense of the law and bind (private) creditors to a debt restructuring that does not appear necessary according to the criteria stated in the law. Justifying the safeguarding of international restructurings with reference to the public duties of the state in which the law is enacted also has the advantage that it creates a further basis for civil society actors, for example, to demand that the government actually complies with these very public duties in future restructuring negotiations.

[29] Defining a successful restructuring primarily as an internationally negotiated restructuring in which the government of the country adopting the law participates also entails difficulties - despite all the advantages (see above): It practically obliges debtor states to conduct restructuring negotiations in the established international forums dominated by creditor states. It therefore seems sensible to safeguard not only restructurings that take place within the framework of an international publicly coordinated process, but also restructurings that have been agreed to by a qualified majority of creditors. This makes it easier for debtor states to enter into and proactively conduct restructuring negotiations outside the established procedures of the Paris Club or the Common Framework. It is important that this criterion is defined only as an additional criterion of a successful restructuring and by no means as an exclusive criterion.

qualified majority of creditors threaten to **entrench and obscure existing power asymmetries**, rather than transforming them. This is due to the fact that proceedings before a national court give the impression that the various rights of the parties to conflict - and thus also the fundamental social and economic rights of the population of the debtor state - are adequately taken into account and brought into relation with each other. However, this cannot be guaranteed by the requirement of a qualified majority of creditors' consent, since in this case the amount of remission is not determined by judges but by the creditors themselves.

- The debtor country should also be strengthened by granting **temporary protection against enforcement for the period of the negotiations**. This is also advisable for efficiency reasons, so that no individual creditor can use the legal process to secure preferential treatment before negotiations are completed. However, granting temporary enforcement protection is even more important since it can have a transformative effect in strengthening the debtor's negotiating position in future restructurings. To this end, debtor states that conduct debt restructuring negotiations in a constructive manner should be granted protection from lawsuits for the entire period of the negotiations. A corresponding law must define when the debtor country can be assumed to be conducting negotiations in a constructive manner. To be truly transformative, extreme care must be taken in defining "good faith" negotiations. The following criteria may be considered as non-exclusive criteria for defining constructive conduct of negotiations:
    - A **specific period of time** after the start of negotiations could also be formulated as a non-exclusive criterion during which it should be assumed in principle that the debtor country is conducting the negotiations in good faith, provided that behaviour to the contrary is not openly apparent.
    - In order to contribute to global climate justice through the adoption of a national law, **natural disasters** should also be defined as a criterion suggesting that debtor states have a legitimate interest in restructuring their claims so that they automatically benefit from enforcement protection for a certain period of time after the occurrence of a natural disaster. Similarly, other external shocks could be defined as triggers for temporary time-limited enforcement protection.
    - The **commencement of negotiations within the framework of an internationally coordinated process such as the Paris Club or the Common Framework** could be defined as one non-exclusive good faith criterion. A temporary ban on enforcement should be granted in these cases as long as negotiations in these frameworks continue and are not unjustifiably delayed by the debtor country. If the debtor country rejects a creditor restructuring proposal, this should not be considered an unjustified delay, provided that the debtor country can credibly demonstrate that the creditor proposal will not restore debt sustainability in a sustainable manner that respects the fundamental social and economic rights of the debtor country's population. This should also apply in particular if the repayment modalities proposed by creditors conflict with the debtor country's obligations arising from international agreements - such as the **Paris agreement**.
    - In cases where a debt relief need has been calculated in the context of an **external debt sustainability analysis, conducted, for example, by the IMF or a robust and independent human rights impact assessment conducted by another internationally recognised body**, and the debt relief is deemed necessary in those external analyses, the debtor country should be assumed to be negotiating constructively in good faith.
- It must be ensured that **lawsuits not covered by the law do not become more promising**. By passing a law, the legislature closes a regulatory gap that currently exists in most jurisdictions. This may also make lawsuits that are not regulated by the law more viable, as judges may have reason to believe that the legislature intentionally did not regulate these cases. However, it will hardly be possible to cover all cases in which lawsuits should not be granted for reasons of efficiency and fairness. The text of the law should therefore state that the enactment of the law does not diminish the debtor's ability to raise

defences to actions on other bases. Reference to the **illegitimacy of the debt** and reference to the **International Covenant on Economic, Social and Cultural Rights** should be explicitly mentioned as a possible basis for defence.

- National laws restricting the legal action of (private) creditors can also help to establish **transparency as a creditor's responsibility**. Creditors should be required to disclose their own claims and the agreed-upon terms of the credit agreements in the litigation process. Additionally, the suability and enforceability of claims should be linked to the fact that creditors have also **complied with international disclosure standards prior to the initiation of a lawsuit**. Consequently, creditors would already be encouraged to participate in existing but so far underutilized transparency initiatives such as the OECD initiative.[30] Moreover, such a formulation could safeguard future international agreements on creditors' disclosure obligations, all the way to the creation of an internationally accessible and mandatory debt register.[31]

4. Evaluation of individual laws and legislative proposals

The previous sections have outlined both the need for national legislation to safeguard internationally negotiated restructurings and the requirements for their efficient and fair design. In the following, existing laws and legislative proposals introduced into the debate are presented.[32] First, their genesis and main characteristics are presented, followed by an assessment based on the requirements introduced in Section 3. The laws and legislative proposals analysed are divided into three categories:

1. Laws aiming to prevent aggressive legal action by a limited group of creditors, usually specialized hedgefunds (also known as vulture funds). These are referred to as **anti-vulture fund laws** in expert discussions and in this focus paper.
2. Laws that impact all (private) creditors regardless of their primary business activities and that bind the enforceability of legal action to multilaterally agreed-upon debt restructuring. The main purpose of these laws is to ensure that (private) creditors cannot undermine multilaterally agreed-upon debt restructurings by refusing to participate through legal recourse (known as a 'holdout'). Here, we use the term **anti-holdout laws** for this category.[33]
3. Laws that are also intended to affect (private) creditors regardless of their priority business activities and to secure multilaterally agreed-upon debt restructuring, but which explicitly formulate the consent of a qualified majority of creditors as a condition of successful restructuring. In this focus paper, we refer to these legislative proposals, which are a specific subcategory of anti-holdout laws, as **laws for safeguarding majority decision voting**.

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[30] OECD Debt Transparency Initiative https://www.oecd.org/finance/debt-transparency/

[31] For the demand for an internationally accessible and mandatory debt register see erlassjahr.de; Misereor (2019): "Global Sovereign Debt Monitor" https://erlassjahr.de/en/publications/

[32] In this paper, it was not possible to address all the legislative proposals that have been submitted by various parties. Therefore, we focused on those laws and legislative proposals that have already been passed or are in the formal legislative process. In addition, the proposal by Reichert-Facilides is included in this analysis due to its particular importance for the German discussion. Notably, the proposal by Buchheit, L. / Gulati, M. (2021) and the proposal by Connelly, S. et al. (2020) are not discussed.

[33] While the term 'anti-vulture fund' is also used in political and academic debate, 'anti-holdout' laws is not yet a settled term and is used by erlassjahr.de to distinguish from the much narrower anti-vulture fund laws.

Table 1: Comparison of laws and legislative proposals

Legend:
- ✓ applicable
- ✓ rather applicable
- ✗ rather not applicable
- ✗ not applicable

	Anti-vulture fund legislation		Anti-holdout legislation		Legislation to protect majority voting decisions	
	Belgian legislation ´on combating the activities of vulture funds´	France´s Sapin II law	British *Debt Relief (Developing Countries) Act* of 2010	*New York Taxpayer and International Debt Crisis Protection Act*	*New York model law to restructure unsustainable sovereign and subnational debt*	Legislative Proposal on the Restructuring of Foreign Sovereign Debt by Reichert-Facilides
Efficacy criteria						
Do all countries benefit from the protective effect of the law?	✓ applicable	✓ rather applicable	✗ not applicable	✓ rather applicable	✓ applicable	✓ rather applicable
Are all creditors covered by the law?	✗ not applicable	✗ not applicable	✓ applicable	✓ applicable	✗ rather not applicable	✓ applicable
Will the recoverable amount be limited to the amount agreed in restructuring proceedings?	✗ not applicable	✗ rather not applicable	✓ applicable	✓ applicable	✓ applicable	✓ applicable
Does the law safeguard future restructurings?	✓ applicable	✓ rather applicable	✗ not applicable	✓ applicable	✓ applicable	✓ applicable
Will enforcement of legal titles obtained elsewhere also be restricted?	✓ applicable	✓ applicable	✓ applicable	✓ applicable	✗ not applicable	✓ applicable
Is the equal treatment of creditors a condition to safeguard debt restructurings?	✗ not applicable	✗ rather not applicable	✓ applicable	✓ applicable	✓ applicable	✓ applicable
Equity criteria						
Is the protection of the fundamental economic, social and cultural rights of the population of the debtor country / the developmental necessity of the debt relief formulated as an explicit objective of the law?	✓ applicable	✗ not applicable	✓ applicable	✓ applicable	✓ applicable	✓ applicable
Is the restructuring to be safeguarded defined as the result of an international restructuring process / is the safeguarding of debt restructurings also possible against the majority of creditors?	✗ not applicable	✗ not applicable	✓ rather applicable *	✓ applicable	✗ not applicable	✗ not applicable
Is the law open to future developments at the international level / can it safeguard debt restructurings negotiated on the basis of rules that are newly agreed upon internationally?	✗ not applicable	✗ not applicable	✗ not applicable	✓ applicable	✗ not applicable	✗ not applicable
Insofar as the law refers to the safeguarding of majority decisions: Are internationally negotiated		✓ applicable			✗ not applicable	✓ applicable

restructurings safeguarded instead of conducting the negotiations themselves in national courts?						
Is the debtor country granted temporary enforcement protection for the duration of the negotiations?	✗	✓	✗	✗	✗	✓
Are other plea options, such as reference to the illegitimacy of the debt or incompatibility with the guarantee of ICESCR rights, explicitly mentioned?	✓	✗	✗	✗	✗	✓
Does the law help to establish transparency as creditor's responsibility?	✗	✗	✗	✓	✗	✗

* In the UK Debt Relief (Developing Countries) Act of 2010, the Heavily Indebted Poor Countries (HIPC) debt relief initiative was defined as the only initiative to be safeguarded. This was an initiative agreed upon by public actors - significantly the G7/8 countries. However, these countries, together with the multilateral creditors who also participated in the initiative, held the bulk of the debt.

4.1 Anti-vulture fund laws

The aim of anti-vulture fund laws is to prevent aggressive legal action by hedge funds that specialise in this type of strategy. However, there is no legal definition of a vulture fund. In the public sphere, vulture funds are usually defined as creditors who buy up the claims of an already critically indebted or defaulting country on the secondary market at a greatly devalued price and then bring legal action for their claims in full — including penalties and default interest — before national courts. If successful, they can generate returns of 700 per cent or more.[34] Existing anti-vulture fund legislation also defines this conduct as a central criterion for illegitimate behaviour, which is to be prevented by the adopted laws. Another feature of vulture funds is an often very opaque ownership structure. Many funds are based in tax havens. Moreover, some are independent subsidiaries of larger investment funds or banks and were founded exclusively for this business area.

The *Champerty Defense* in US case law was a prototype of an anti-vulture fund law. However, this legal standard only existed until the mid-1990s.

Excursus: Champerty Defense
The *Champerty Defense* is a rule of law that restricts the suability and enforcement of debt instruments explicitly acquired with the intent of seeking legal redress. In the 1990s, hedge funds deliberately sought to override this case-law practice.[35] In 1996, the American hedge fund Elliot Associates, L.P. was able to set a precedent that reinterpreted the legal norm that had hitherto been common practice. The fund had purchased Peruvian bonds at a price of about half of their real face value and filed legal action for full repayment in New York courts. Due to the accepted interpretation of the *Champerty Defense* at that time, the New York District Court initially ruled in favour of Peru. In appeal proceedings, however, the fund was found to be correct on the grounds that Elliot had purchased the debt instruments in order to be paid in full and only wanted to take legal action in an emergency if this was imperative for the primary objective (to be paid in full). This interpretation of the *Champerty Defense* de facto eliminated its

[34] Schumacher et al. (2018), p. 71; erlassjahr.de (2022): "Von Gläubigern und Schuldnern – Informationen und Lösungsideen zur Schuldenkrise im Globalen Süden", p. 38. https://erlassjahr.de/wordpress/wp-content/uploads/2022/11/Handbuch-Von-Glaeubigern-und-Schuldnern.pdf

[35] Ibid., p. 12.

protective effect. In 2004, the *Champerty Defense* was formally removed from the New York Code of Law for purchases over 500,000 USD. [36,37]

Evaluation of anti-vulture fund legislation from the perspective of erlassjahr.de

Anti-vulture fund laws act as a deterrent and can prevent aggressive legal action by hedge funds that specialise in this practice. This prevents the negative consequences of such legal action, such as the huge legal costs incurred by debtor states and the risk that concessions from other creditors will be undermined. The deterrent effect of such laws can therefore create an incentive for creditors to participate in debt restructuring and ultimately make them more efficient.

However, anti-vulture fund laws have weak spots:

1. Providing a detailed definition of a vulture fund, with the aim of reliably determining which stakeholders are covered or not covered by the law is not always unassailable, as the *Champerty Defense* shows.
2. Legislative initiatives against vulture funds are often based on the perception of such actors' immoral behaviour. Although this helps to mobilise public support, it also makes the initiatives vulnerable, especially if these stakeholders could also be covered by broader legislation (like anti-holdout laws). Moreover, by referring to the immoral practice of 'vultures', the right of 'normal' creditors to full repayment is implicitly portrayed as sacrosanct. As a result, anti-vulture fund laws squander the opportunity to make clear and to regulate by law that granting (partial) debt relief is the *duty* of *each and every* creditor in certain circumstances. This duty does not arise from speculation on especially high profits but from the inherent risk of every loan transaction and from the opportunity for an interest gain, which is also justified by this risk.
3. As anti-vulture fund laws focus exclusively on particularly speculative creditors, these laws do not close the path for legal action with regard to other uncooperative creditors who do not engage constructively in debt restructuring negotiations. Such laws do not fully protect international debt restructuring agreements and do not fully exploit the potential of national legislation to strengthen the negotiating position of debtor states that conduct negotiations in good faith. During the COVID-19 debt crisis, the main problem was not legal action by a few particularly speculative creditors. In fact, virtually no private creditor participated in public debt relief, such as the DSSI that took place in 2020 and 2021. The challenge is, therefore, the mass holdout of many rather than the reprehensible behaviour of a few. Thus, anti-vulture fund laws are not the major means of choice to solve the current crisis.

[36] Blackman, J. / Mukhi, R. (2010), p. 54.

[37] In March 2023, a bill was introduced in the New York State Legislature that aims to restore the original purpose of the champerty defense by allowing lawsuits to be prevented. The preconditions include that the plaintiff creditor has a history of repeated purchases of devalued debt instruments and recovered them through legal action or has not participated in a restructuring that was accepted by two-thirds of the creditors. In addition, under the new proposal, the champerty defense would again be effective for purchases over $500,000. The bill was introduced in the New York Lower House as A5290 and in the New York Senate as S5623 and has not yet passed.

4.1.1 Belgian legislation 'on combating the activities of vulture funds'[38]

Evolution

In 2008, Belgium was the first country to pass an anti-vulture fund law.[39] This came about because legal action by private creditors against states that were part of the *Heavily Indebted Poor Countries* (HIPC) initiative was seen as a threat to achieving the objectives of this initiative and the complementary *Multilateral Debt Relief Initiative* adopted in 2005. However, in principle, the law did not limit the potential for vulture funds to take legal action and demand enforcement. Instead, the law initially immunized funds intended for international cooperation or for official development aid from attempted seizure by vulture funds.

Inspired by the successful lawsuit of the hedge fund *NML Capital* against Argentina, the Belgian law was comprehensively reformed in the summer of 2015 with the adoption of a new anti-vulture fund law by the Belgian parliament.[40] The New York court ruling against Argentina prevented the South American state from servicing the claims of good-faith creditors that had participated in restructuring Argentina's sovereign debt in 2005 unless the Argentine government also simultaneously paid off the vulture fund in full. This was achieved by not allowing the correspondent bank, *Bank of New York Mellon,* to process payments for as long as the vulture fund had not been paid out. For the first time, a (New York) court ruling threatened to make funds that the debtor transferred abroad for regular payments accessible to the suing creditors. Prior to this incident, the claimants had regularly won their cases in courts but could not enforce them anywhere since debtor states' assets are usually subject to diplomatic immunity. Owing to the possible impact on future debt restructuring, the case received a lot of international attention. *Euroclear*, a Brussels-based clearing house through which many countries in the Global South process their payments to creditors, also received a corresponding order from the New York Court in the spring of 2015 to not carry out any debt service payments in the Argentina case.[41] It was against this backdrop that Belgian legislators saw an urgent need for action and reformed the existing anti-vulture fund law in the summer of 2015.[42]

Shortly after the announcement of the legislative initiative, pressure from national and international financial lobby groups in opposition to the law became stronger. Lobbyist groups, including the *Belgian Financial Sector Federation* and the *Institute of International Finance*, as well as the Belgian Central Bank, intervened, with the Minister of Finance and the chairperson of the Parliamentary Finance Committee arguing that the functioning of secondary markets would be harmed by the law and that contractual rights of creditors would be unduly restricted by arbitrary criteria.[43] Belgium's national bank also called for a mathematical formula to be used to

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[38] See "Projet de loi relative à la lutte contre les activités des fonds vautours". https://www.dekamer.be/FLWB/PDF/54/1057/54K1057005.pdf

[39] See "Project de loi visant à empêcher la saisie ou la cession des fonds publics destinés à la cooperation international, notamment par la technique des fonds vautours". https://www.senate.be/www/?MIval=/dossier&LEG=4&NR=482&LANG=fr

[40] See Kaiser, J. / Geldmacher, D. (2014): "Geierfonds – was sie tun, warum es sie gibt, und was man gegen sie tun kann". https://erlassjahr.de/wordpress/wp-content/uploads/2016/03/Fachinfo-46.pdf

[41] Reuters (2015): "BRIEF-U.S. court orders Euroclear not to process Argentine debt payments". https://www.reuters.com/article/argentina-debt-citigroup-euroclear-idUSL2N0WR2FQ20150325; MercoPress (2015): "Griesa blocks Euroclear from processing any Argentina bonds payments". https://en.mercopress.com/2015/03/26/griesa-blocks-euroclear-from-processing-any-argentina-bonds-payments

[42] For the background of the Belgian anti-vulture fund law see also Sourbron, L. A. / Vereeck, L. (2017): "To Pay or Not to Pay? Evaluating the Belgian Law Against Vulture Funds", *Journal of Globalization and Development* 2017. https://www.degruyter.com/document/doi/10.1515/jgd-2017-0010/html

[43] Ibid. Opponents also based their opposition on the argument that vulture funds could not be sufficiently distinguished from "normal" hedge funds in the law and that linking the recovery price to the purchase price would deprive investors who invest in bonds issued by distressed sovereigns of the opportunity to make a profit. Thus, it is argued that such legislation would also lead to less capital market access for low- and middle-income countries, see Wozny, L. (2017): "National Anti-Vulture Funds Legislation: Belgium's Turn", *Colum. Bus. L. Review*, 679. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249219). The argument that capital market access for low- and middle-income countries would be effectively restricted after 2015 can be clearly refuted: In 2017, debt-creating inflows to low- and

establish a "manifest disproportion between the purchasing price paid by the creditor and the face value of the loan or debt".[44] However, legislators rejected all objections raised, and the law was finally passed in July 2015.[45] After the law passed, *NML Capital* brought legal action before the Belgian Constitutional Court on the grounds that the law was unconstitutional because it infringed *NML Capital*'s property rights, discriminated between creditors in an improper way, and arbitrarily recognized some claims as legitimate and others as illegitimate.[46] The Belgian Constitutional Court dismissed the lawsuit in 2018 and maintained the anti-vulture fund law in its entirety.[47]

When the successful adoption of the anti-vulture fund law was imminent, financial groups began lobbying for another law to facilitate the seizure of government assets used for diplomatic purposes.[48] Belgian legislators saw both the protection of diplomatic immunity and the objective of the anti-vulture fund law at risk since the revised anti-vulture fund law did not conclusively clarify whether it could even be applied to attempts by vulture funds to seize contributions in Belgium that were lower than the purchase price of the claim, i.e. to try to enforce only part of their claims in Belgium. In July 2015, therefore, another law[49] was adopted via an urgent procedure, which was intended to guarantee the sovereign and diplomatic immunity rights in accordance with the relevant UN Convention (which has not yet come into force).[50] Above all, it clarified that assets intended for sovereign purposes, such as paying countries' diplomatic representatives, enjoy almost complete immunity. However, this does not apply to assets that are used, or are intended to be used, for 'commercial activities'; access to export earnings or cash flows intended for servicing creditor rights or the payment of imports are not fundamentally prevented by this law.

Elements of the law[51]

- The law protects **all states** from the activities of vulture funds, regardless of their income status or other criteria.
- The law **limits both the enforceability of claims** and the **enforcement of disputed legal titles elsewhere**, thereby restricting, among other things, access to payments to be settled through the clearing house *Euroclear*, which is based in Belgium.
- The law is effective **irrespective of the legislation under which the contracts were concluded.**
- The law **limits the amount** that a creditor can claim through legal action **to the amount that they paid for the debt instrument on the secondary market**. The precondition for this is that the creditor attempts to obtain an **unlawful advantage**.

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middle-income countries surged through widespread bond placements, see World Bank (2019): "International Debt Statistics" (https://openknowledge.worldbank.org/bitstream/handle/10986/30851/IDS2019.pdf?sequence=5&isAllowed=y). Global economic developments were the main factor influencing the decline in capital market access in 2016, for example.

[44] Sourbron and Vereeck (2017), p. 8.

[45] For the justification of the Belgian legislator, cf. Sourbron and Vereeck (2017).

[46] Wozny (2017), p. 743.

[47] For a review of the Constitutional Court's reasoning against NML Capital, see Iversen, A. (2019): "Vulture Fund Legislation", Banking & Financial Services Policy Report, Wolters Kluwer, Vol. 38, Number 5, March 2019, University of Oslo Faculty of Law Research Paper No. 2019.57, p. 5 (https://ssrn.com/abstract=3456479).

[48] Sourbron and Vereeck (2017).

[49] The law was inserted into Article 1412 of the Judicial Code, which regulates the seizure of foreign property. https://www.dekamer.be/FLWB/pdf/54/1241/54K1241001.pdf

[50] The terms of the law largely correspond to Articles 18, 19, and 21 of the "United Nations Convention on Jurisdictional Immunities of States and Their Property", which was adopted by the UN General Assembly in 2004 but has not yet entered into force. See Iversen (2019).

[51] Only the 2015 reformed Anti-Vulture Fund Law is discussed below, not the first law passed in 2008 or Article 1412, also passed in 2015.

- In order to prove an unlawful advantage, it must be proven that there is a **clear discrepancy between the purchase price of the bond and the nominal value of the claim** or between the purchase price and the amount that the creditor attempts to collect through legal action. **One of the following six criteria must also be met** for an unlawful advantage to be considered as such within the meaning of the law:
  - **At the time the creditor bought the claim** on the secondary market, **the debtor state was in default** or there was an imminent threat of a default.
  - The creditor is located in a country included in the **list of non-cooperative countries and territories** (provided by the *Financial Task Force on Money Laundering)* or in the list of countries that refuse to negotiate and sign an agreement providing for the automatic exchange of information in tax and banking matters with Belgium (**Belgian *blacklist***).
  - The creditor systematically **uses legal proceedings to** collect its claims.
  - The creditor **refuses to participate in debt restructuring measures**.
  - The creditor has **exploited the weak position of the debtor state** to enforce unfair restructuring.
  - Full repayment of the sums demanded by the creditor would demonstrably have an adverse effect on the debtor state's public finances and **could jeopardise the socio-economic development of the state's population**.

Evaluation of the law from the perspective of erlassjahr.de

As an anti-vulture fund law, the general assessment of this type of law is also applicable to this particular Belgian law (see Section 4.1). From the perspective of erlassjahr.de, the following aspects of this Belgian law deserve to be discussed in further detail.

The positive aspect is that **all countries** potentially benefit from the law's protective effect. This is particularly welcome since, in practice, vulture funds do not only focus on low-income countries but can also target countries with higher income in times of financial difficulty, such as Greece in 2012.

It is also welcomed that the law is designed as civil procedure law on enforcement and, thus, **restricts the enforceability of claims irrespective of the law under which the liabilities were issued** and also restricts the enforcement of judgments obtained elsewhere (see Excursus: Contract law vs. civil procedure law in Section 2.3).

Since the law aims to stop the particularly aggressive practice of vulture funds, **not all creditors are covered by the law**. The basis for determining the recoverable amount are not international restructurings, but the price paid by creditors for their claims on the secondary market. This effectively removes the ground for vulture funds to operate their business model - but international restructurings cannot be fully protected in this way. Therefore, the law **cannot ensure equal treatment of creditors in restructurings** - because the price paid by a claiming creditor on the secondary market is independent of the haircut of international restructurings.

However, it is positive that the law does not seek to define "vultures" as actors but instead seeks to restrict the unlawful actions itself. Thus, the law does not just restrict the behaviour of specialized hedge funds but may also have an effect on public or semi-public creditors who, in the manner defined here, are aiming to obtain an unlawful advantage. This is of particular use because of the increasing difficulty to differentiate between private, public, and semi-public creditors.

erlassjahr.de also welcomes the fact that the criteria for unlawful conduct are quite broadly defined and that the law applies if a creditor meets only one of the six criteria mentioned above. The inclusion of the sixth criterion is particularly useful, which stipulates that the full recovery of claims in court can be prevented if it can be

demonstrated that it would have a detrimental effect on the debtor state's public finances and could jeopardise the socio-economic development of the state's population. The law thus makes **explicit reference to the economic and social rights of the population of the debtor country**.

4.1.2. France's *Sapin II* law[52]

Evolution

In December 2016, France adopted the *Sapin II* law, which intended to prevent the seizure of property in France belonging to foreign countries under certain conditions. Before this law was adopted, the courts had the regulatory monopoly to rule on the circumstances under which seizing foreign state property was permissible. The majority of the regulations in this area came from case law practice itself, and case law was subject to frequent changes.[53] Most recently, the long-standing legal dispute between the Congolese government and the company *Commisimpex*, as well as a ruling by the French Court of Cassation on this case, made it significantly easier to seize foreign state property in France, including the bank accounts of diplomatic representatives.[54] This prompted French legislators to take action and regulate the question of state immunity rights by law. Foreign assets intended for sovereign purposes, such as paying diplomatic representatives, are almost completely immune from seizure attempts as per Article 59 in the new law. In addition, Article 60 specifically protects foreign assets from vulture funds, thereby also immunising assets that are intended for commercial, non-sovereign purposes such as servicing other creditors. This particular article is the focus of the subsequent discussion and analysis.

Elements of the law (Article 60)

- The article protects all **developing countries**, as defined by the Development Assistance Committee (DAC) of the Organization for Economic Cooperation and Development (OECD) at the time the title in question was issued (as of 2022, this includes 140 countries[55]).
- The article restricts the legal action and enforcement options of vulture funds, defined here as **creditors that acquired the claims on the secondary market at a time when the debtor country was already in default or had announced the restructuring of the claims**.
- Restrictions are placed on the legal enforcement of debt instruments and instruments or rights that have similar characteristics to debt instruments. **This is also likely to restrict the enforcement of legal titles obtained elsewhere**.
- The article grants debtor states **temporary enforcement protection**. Pending the conclusion of restructuring negotiations by a qualified majority of creditors, the legal action and enforcement options of vulture funds as defined above are restricted to **four years** from the date payment was ceased or restructuring was announced. In the event of manifestly abusive conduct on the part of a creditor, the judge may extend the period to **six years**.

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[52] The French anti-vulture fund law is not a stand-alone law, but an article within the framework of the law „Loi No. 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique" (https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000033558528/).

[53] Spinelli, J. and Dehaudt-Delville, Y. (2020): "In brief: enforcement proceedings against sovereign states in France" (https://www.lexology.com/library/detail.aspx?g=904caceb-5cad-4c32-b9e8-72c0fb8c4036).

[54] Glucksmann, E. (2017): "Commisimpex v. Republic of Congo", American Journal of International Law, Volume 111, p. 453-460 (https://www.cambridge.org/core/journals/american-journal-of-international-law/article/abs/commisimpex-v-republic-of-congo/05F54FFDD595F640BCDAECA05248260A).

[55] For a complete list of countries on the OECD DAC list, see https://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/DAC-List-of-ODA-Recipients-for-reporting-2022-23-flows.pdf.

- The article grants debtor states **long-term enforcement protection**. Insofar as a **representative majority** of creditors who together hold at least 66 per cent of the principal amount of the outstanding claims have agreed to a restructuring, the legal action and enforcement options of vulture funds are limited to the amount that they would have received if they had participated in the restructuring.
- This article is only effective on a **forward-looking** basis and only applies to debt instruments acquired on the secondary market from the date of its entry into force.

Evaluation of the law from the perspective of erlassjahr.de

As this French law is an anti-vulture fund law, the general assessment of this category of law is also applicable (see Section 4.1). In addition, the following aspects of this law also deserve to be discussed in further detail.

From erlassjahr.de's perspective, it is problematic that the **group of countries protected by the law is arbitrarily limited to countries that meet the DAC definition of a developing country**. There is no factual reason for this restriction because countries that are not listed as DAC countries can be in default and fall victim to vulture funds. Instead, the classification is a purely political decision common in global debt management.

The French law's protective effect is also limited by the fact that it only regulates the enforceability of such claims that were acquired after it came into force in December 2016. As a result, the law is **only effective in a forward-looking manner** and - unlike the British law, for example (see Section 4.2.1) - cannot restrict the enforcement of previously obtained legal titles. Limiting the law to forward-looking cases and excluding debt instruments acquired before the law came into force was based on the argument that legal decisions would be more predictable for market participants; however, laws can also be enacted with retroactive effect if public interest legitimises this. In particular, older bond contracts often do not have Collective Action Clauses (CACs) that bind a minority of creditors to a majority decision (see Section 4.3), so a debtor country may need protection precisely for these claims. Contrary to what is often presented in the secondary literature, the text of the law defines the *acquisition* of the claims by the creditors and not the *issuance* of the bond by the debtor state as the material date. This is welcomed since the law can, therefore, in certain cases also act as a protective function for debt securities issued by the debtor state before 2016. The restriction resulting from this regulation is thus not as significant as has often been argued in public debates. Nevertheless, it would have been welcomed if French legislators had not included this restriction at all.

On the other hand, the fact that debtor countries are granted **temporary protection against enforcement** is positive. Unlike other laws, restructuring negotiations are not defined narrowly as a multilateral debt relief initiative pre-defined by public creditors under which the country seeks debt restructuring negotiations. The law is applicable even if a country has entered into negotiations with its creditors outside of such an initiative. This positive effect is limited by the fact that it only restricts potential legal action from creditors who acquired the claims on the secondary market at a time when the debtor country was already in default or had announced a debt restructuring. It would be better to impose a temporary prohibition of enforcement on all creditors for the duration of debt restructuring negotiations and to maintain it for as long as the debtor country conducts the negotiations in good faith. In doing so, the criteria for good-faith negotiations should be defined in more detail (see Section 3.2.).

Another positive aspect of this law is that vulture funds cannot undermine internationally agreed debt restructuring measures. Unlike in the Belgian Anti-Vulture Fund Act, the enforceable amount is not based on the price they paid for their claims on the secondary market, but on the extent of a successful restructuring. This ensures **comparable participation in debt relief**, at least for vulture funds. However, to ensure that safeguards for internationally agreed-upon debt restructurings are truly effective, it would be necessary that not only vulture

funds but all creditors would be stopped from legally collecting more than they would have received if they had participated in such a restructuring – like in anti-holdout laws (see Section 4.2). In addition, from erlassjahr.de's point of view, it is problematic that the French law only covers restructuring measures that have been approved by a **qualified majority of creditors**. This requirement **does not strengthen public actors with a development mandate vis-à-vis private and commercial actors**, and the law is not open enough to possible future developments at the international level.

Finally, it should be noted that the protective effect of the French law is severely limited by the specific combination of anti-holdout and anti-vulture fund elements. Vulture funds are not effectively deprived of the basis for their business model. On the contrary, with a little luck, they can still obtain huge profits since they are not limited to seeking their purchase price when filing for legal action, as with the Belgian law (see 4.1.1). Access to these potential funds is linked to the results of successful restructuring. If the restructuring is not complete within four or a maximum of six years, vulture funds can even demand the full nominal value of the claims, including penalties and default interest. At the same time, this law, unlike anti-holdout laws, does not fully protect multilaterally agreed debt restructuring since vultures' legal options are limited to the result of these kinds of restructuring.

4.2. Anti-holdout legislation

Similar to anti-vulture fund legislation, anti-holdout laws limit the suability of creditors' claims against debtor states. However, they relate to the safeguarding of multilateral debt restructuring agreements and are not specifically designed to protect borrowing countries against the activities of individual creditors deemed as immoral. They limit the amount that is enforceable through legal recourse for ***all* creditors** to the extent agreed upon in a multilateral restructuring agreement.

The first law to interact with this concept was the British *Debt Relief (Developing Countries) Act* (see 4.2.1), which was passed in Great Britain in 2010. In July 2022, the *New York Taxpayer and International Debt Crises Protection Act* (see 4.2.2) was first introduced in the lower house of the New York Parliament. This state law also focuses on binding all creditors to debt restructuring that were agreed upon as part of an international initiative. The most important difference between the two laws is that the British law aimed exclusively at safeguarding the relief under the *Heavily Indebted Poor Countries Initiative* and therefore has a backwards-looking effect only. The New York state bill, on the other hand, aims to safeguard future international debt relief initiatives.

Evaluation of anti-holdout laws from the perspective of erlassjahr.de

A positive feature of anti-holdout laws is that they do not focus on the concrete behaviour of individual creditors but bind all creditors to multilaterally agreed-upon debt restructuring. While anti-vulture fund laws can only safeguard the results of multilaterally agreed debt restructuring to a limited extent, anti-holdout laws effectively ensure that the participation of creditors in debt restructuring negotiations is more attractive than not participating and insisting on full repayment. In particular, in the context of the Covid19 pandemic, it is clear that for borrower countries that not only aggressive vulture funds pose a problem but also that "normal" creditors or entire creditor groups sometimes do not participate in debt relief. For example, private creditors have almost entirely refused to comply with the G20 debt moratorium, the DSSI, which was designed to provide debtor states with breathing space to tackle the pandemic. In some cases, the refusal of private creditors to participate even ensured that they were paid out with funds released by the waiver of public creditors, which should have gone to the pandemic response. Forward-looking anti-holdout laws, especially in New York and London, would have allowed borrowing countries to suspend payments under the DSSI without having to fear legal consequences.

A disadvantage of some anti-holdout laws is that they only restrict creditors from suing their debtors after multilateral restructuring negotiations have been successfully concluded. As a result, they cannot prevent uncooperative creditors from taking legal action before the conclusion of negotiations and thereby make them more difficult ex-ante. Although the two (proposed) laws presented below do not include this option, providing temporary enforcement protection is entirely compatible with the logic of anti-holdout laws. In fact, it would help to achieve the objective of anti-holdout laws to increase the efficiency – and most importantly the fairness (see 3.2) – of multilateral debt restructuring negotiations.

4.2.1 The British Debt Relief (Developing Countries) Act of 2010[56]

Evolution

By the end of the 1990s, the British government came to an agreement with the rest of the G8 countries, the IMF and the World Bank to grant 40 low-income countries comprehensive debt relief under the Heavily Indebted Poor Countries (HIPC) debt relief initiative. At the time, most of the outstanding claims against this group of countries were held by the G8 countries and multilateral creditors who participated in the debt relief initiative. The proportion of private claims had steadily declined over the 1980s and 1990s, as private creditors stopped making further loans available at the outbreak of the debt crisis at the beginning of the 1980s and in some cases continued to be paid out while public creditors kept the indebted states on the verge of solvency with bridging loans. This quasi-bailout of private creditors by public funds led to a decline in the share of private creditors' claims vis-à-vis the HIPC countries from just over 30 per cent in 1980 to around 6 per cent in 2000.[57] The remaining small group of private creditors were not only called upon to participate in the debt relief, but their participation was even formally formulated as a condition for public creditors to grant the agreed-upon waivers in the first place.

Instead of participating in the debt treatment, from the early 2000s onwards individual private creditors increasingly tried to undermine the initiative and collect their claims in full (including penalty and default interest) through the courts, thus benefiting from the new fiscal space of beneficiary countries that was created through the debt relief under the initiative. As of September 2008, 54 lawsuits against HIPC countries had been filed in national courts, ten of which were filed in the UK.[58]

First, the British government tried to counteract this practice by supporting World Bank buy-back programmes and providing technical and legal assistance to sued governments in court proceedings.[59] In July 2009, it announced its intention to take statutory measures and consulted stakeholders in public hearings until October 2009.[60] The specific aims of the proposed law were equal treatment of creditors and to realise the HIPC initiative's development policy objectives. As part of the public consultation process, international law firms and the

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[56] See "Debt Relief (Developing Countries) Act 2010". https://www.legislation.gov.uk/ukpga/2010/22/pdfs/ukpga_20100022_en.pdf

[57] Information based on World Bank (2022): "International Debt Statistics". https://www.worldbank.org/en/programs/debt-statistics/ids/products

[58] World Bank and IMF (2009): "Heavily Indebted Poor Countries (HIPC) Initiative and Multilateral Debt Relief Initiative (MDRI) – Status of Implementation". https://www.imf.org/external/np/pp/eng/2009/091509.pdf. The case of Donegal International v. Zambia attracted particular attention. See also: erlassjahr.de (2022): "Von Gläubigern und Schuldnern – Informationen und Lösungsideen zur Schuldenkrise im Globalen Süden", p.39.

[59] Through lending under buyback programs, the World Bank enabled HIPC countries to buy back the receivables outstanding against them on the secondary market. Since these claims were already trading at a heavily devalued price on the secondary markets, this led to a reduction in the outstanding claims against the HIPC countries. However, this did not ensure a truly comparable participation of private creditors in the relief provided by the HIPC initiative.

[60] British Treasury (2009): "Ensuring effective debt relief for poor countries: a consultation on legislation". http://data.parliament.uk/DepositedPapers/Files/DEP2009-2123/DEP2009-2123.pdf

Emerging Markets Trade Association argued that the law would jeopardise the attractiveness of London as a financial centre, unlawfully encroach on creditors' property rights and make it more difficult for HIPC countries and other low- and middle-income countries to receive finance in the future.[61] As a result of these concerns, the law finally obtained the necessary majority in May 2010 only through the inclusion of a sunset clause. The clause provided that the law was to expire after one year. Unless the law had been extended, all judgments already concluded were to lose their validity. In 2011, the British government stated that no negative side effects had been observed, whereas the law had created relief for some HIPC states. Therefore, the permanent effect of the law was decided.

Elements of the law

- The law grants enforcement protection to **all 40 states that were part of the original HIPC initiative**.
- The law restricts the enforceability of claims against HIPC countries in UK courts **to an amount sustainable for the country under the HIPC initiative as calculated by the IMF and the World Bank**.
- The claims covered by the law relate exclusively to claims that should have been part of a HIPC debt treatment. As a result, the law has an exclusively **backwards-looking** effect and is therefore irrelevant to future debt relief initiatives. Claims against HIPC states arising from lending after the law was adopted are explicitly not restricted in their enforceability.
- **Restructured debt** or new claims replacing old claims from the HIPC period are also reduced in their enforceability to the extent that would have been suable by law on the basis of the original claim.
- Long-term **public external debt** is taken into account. The distinction between domestic and foreign debt is based on the creditor's legal residence or registration.
- The enforceability of **short-term claims** and **liabilities that arose from the delivery of goods or the provision of services** and claims that replace liabilities is not restricted.
- **Secured lending** is treated the in the same way as unsecured lending.
- **Titles already disputed from court proceedings or international arbitration awards cease to be valid** and may only be enforced to the extent that would have been suable on the basis of the new law. This would not be the case if the legal titles were to be increased vis-à-vis the original ruling. The enforcement of arbitration awards is not restricted in cases in which the British legislators assumed that a restriction would be contrary to international obligations. This applies in particular to titles awarded by the **International Centrum for Settlement of Investment Disputes**.
- The law **limits the enforcement** of claims rather than rescheduling the original claims themselves. British courts are obliged not to grant higher recoveries regardless of the jurisdiction that governs the initial claims (see Excursus: Contract law vs. civil procedure law in Section 2.3).

Evaluation from the perspective of erlassjahr.de

As this British law is an anti-holdout law, the general assessment of this category of law is also applicable (see Section 4.2). Additionally, the following aspects of this law deserve to be discussed in further detail.

This law's intent is to curb lawsuits against HIPC states; this target was mostly met. As a result, only a **very limited number of states** - a maximum of 40 - benefits from the protective effect of the law. While a total of 12 lawsuits were brought against HIPC states in British territory up until 2009, only one creditor brought a lawsuit

[61] Townsend, I. (2010): "Debt Relief (Developing Countries) Bill", Research Paper 10/17, p. 29. https://researchbriefings.files.parliament.uk/documents/RP10-17/RP10-17.pdf

before British courts after the 2010 law was adopted.[62] Since the law **also restricts the enforcement of already disputed legal titles**, it also helped to enforce more favourable solutions for debtor states even in cases where a judgement had already been made before the law was adopted. This happened in *Hamsah Investments* and *Wall Capital Ltd.* v. Liberia. In 2009, a British court condemned Liberia to repay $20 million to the suing investment fund. This was much more than the amount creditors would have received for their claims if they had participated in the HIPC initiative. The law improved Liberia's negotiating position, and the two parties were able to reach an out-of-court agreement on a repayment amount of $1.3 million in 2010.[63]

In creating the law, the British government had made itself vulnerable by framing non-participation in debt restructuring negotiations as the prerogative of any creditor and relying heavily on the immoral practice of 'vultures' and the negative consequences of this aggressively speculative practice for the general public in its argument for the law. Rhetorically, the government bases its argument for the law strongly on the unethical actions of these vulture funds and the negative consequences of their speculative practices for the general public. However, since a proportion of the lawsuits against HIPC countries were brought by a country's normal creditors and not by vulture funds, the government deemed it necessary to include them to ensure the law's effectiveness.[64] Thus, the *Debt Relief (Developing Countries) Act* ultimately restricts the possibility for **all creditors** to go to court for enforcement. erlassjahr.de explicitly welcomes that. However, it would be even better to explicitly state in the explanatory memorandum of the law and in public communications that it is legitimate to subject unwilling creditors, be they individual vulture funds or a normal creditor, to international debt restructuring negotiations if the public interest requires so (see also Section 3.2).

The biggest limitation of the law is that it serves a single purpose: **to safeguard the debt relief of the HIPC initiative retrospectively**. In discussions in the House of Commons on the bill, it was suggested that the ability to sue should be limited to the purchase amount of the receivables plus a maximum annual interest rate of 6 per cent instead of an existing multilateral agreement so that the law could also be forward-looking.[65] The regulation of an upper limit of legitimate profits was considered arbitrary by the British government. In addition, it was rejected because it was deemed unfair to limit the possibility for private creditors to enforce their claims through legal recourse in cases where bilateral and multilateral creditors themselves did not grant remissions. From erlassjahr.de's perspective, both points are understandable. However, the British legislator could have formulated the law in a forward-looking way by protecting future debt restructuring. This option, too, was ruled out by the British Government; it also explicitly stated that even if the HIPC initiative were to be extended to further countries, the law would only protect the 40 countries that were included at the time the law was adopted. On the one hand, this was due to the fact that the British government, like the IMF, the World Bank, and the G8 countries at the time, assumed that the HIPC initiative would solve the problem of over-indebtedness once and for all.[66] This assumption proved to be wrong. On the other hand, the British government had already acknowledged that similar problematic individual cases could also arise in the future that would require a corresponding law. However, fearing that London would lose its appeal as a global financial centre due to a considerably extended

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[62] The World Bank and IMF's 2014 "Statistical Update" on the implementation of the HIPC Initiative reports a lawsuit filed by Celtic Capital against Tanzania. The British courts upheld the plaintiff and ordered Tanzania to repay US$700,000. This corresponded to the original amount of the claim. Compared to the other cases, this was a very small claim amount and unlike other plaintiffs, Celtic Capital did not seek to include default or penalty interest. Why the lawsuit was approved in its entirety is still not clear without an insight into the procedural documents. It is possible that the debt was a commercial claim and therefore did not fall within the scope of the law. It is also possible that the debt only arose after the law was passed, or that the case was already being negotiated before the law was passed and was only included in the World Bank and IMF report afterwards.

[63] Dearden, N. et al. (2010): "Liberia case limits pickings for vultures", The Guardian, 26.11.2010. https://www.theguardian.com/world/2010/nov/26/liberia-limits-pickings-for-vultures

[64] Townsend (2010), p. 17.

[65] Ibid., p. 15.

[66] Ibid., S. 21.

law, it was not willing to enact such a law without corresponding laws having already been passed in other important financial centres.[67]

The law explicitly did not restrict the enforceability of **commercial claims** arising from the delivery of goods or the provision of services or of claims that replaced such original commercial claims. In the secondary literature, this has been criticized in part because a large proportion of existing claims at the time arose from such commercial transactions, and the exclusion also contradicts the principle of equal treatment of creditors.[68] On the other hand, the exemption of commercial claims is often justified on the grounds that the import of essential goods and services could be made more difficult if the enforceability of such claims were also restricted. The assumption expressed in the debate on the Act that a large part of outstanding liabilities would continue to be attributable to such trade transactions in the future and that the exclusion of these claims from restructuring negotiations would therefore be problematic does not appear to have materialized today. At least, they are not present at the aggregate level for all countries in the Global South where most private claims are held in the form of bonds. However, it cannot be ruled out that the exclusion of these claims could lead to difficulties in restructuring negotiations in individual cases. It is, therefore, difficult to make a conclusive assessment of whether or not it makes sense to exclude these commercial claims.

In addition to providing financial relief for individual states, the law sends out an **important signal**: Namely, that legislators are willing and able to safeguard and enforce international debt relief initiatives against the will of uncooperative creditors. In this respect, the law can serve as a model for today's legislative initiatives. In particular, it is to be welcomed that the British parliamentarians did not allow themselves to be intimidated by the various arguments put forward by the financial industry. In retrospect, this proved to be the right decision because the objections raised, in particular the threat of more difficult access to the capital market and the loss of attractiveness of the financial centre, proved to be groundless.[69] To generate a majority in favour of the bill, it was helpful that the law limits the enforcement of claims rather than restructuring the original claims themselves. Since, in this case, a judicial decision does not trigger the formal reduction of repayment rights but only restricts their enforcement on British soil, this was not considered an unlawful interference with valid contract law.[70]

4.2.2 Legislative proposal: New York Taxpayer and International Debt Crises Protection Act of 2022[71]

Evolution

In July 2022, the *New York Taxpayer and International Debt Crises Protection Act* was first introduced in New York Parliament's lower chamber by Democratic lawmaker Patricia Fahy. In the 2023 legislative session, the bill was reintroduced by Fahy in the New York Assembly, with the number A2970, and in parallel by Brad Hoylman-

[67] Ibid.

[68] Waibel, M. (2010): "Debt relief to poor countries: Rules v. Discretion", Butterworths Journal of International Banking and Financial Law (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1612242) and Chukwu F. (2011): "Refocusing on the Objectives: A Critique of the UK's Debt Relief (Developing Countries) Act, 2010", p. 48. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3202517

[69] The same arguments were already put forward when discussing the mandatory inclusion of CACs in bond contracts, which did not materialize at that time. For more on the impact of the inclusion of CACs on the borrowing capacity of low- and middle-income countries, see Chung and Papaioannou (2020).

[70] This was less a legal argument than a political one, i.e., what the parliamentarians considered conceivable, legitimate, and compatible with the principle of property rights under the rule of law. Legally, it would presumably also have been possible to implement a procedure that would have led to the restructuring of the creditors' rights themselves.

[71] See "New York Taxpayer and International Debt Crises Protection Act" (https://www.nysenate.gov/legislation/bills/2023/S4747).

Sigal in the New York Senate with the number S4747, and was considered in the Legal Affairs Committee. In response, the bill received a large public response, with star economist Joseph Stiglitz as well as José Antonio Ocampo (Colombia's Finance Minister from 2022-2023) and Martín Guzmán (Argentina's Economy Minister from 2019-2022), among others, speaking in favour of the bill.[72] The aim of the law is to safeguard the international debt relief initiatives in which the US government participates so as to 'avoid, mitigate or resolve' debt crises and related humanitarian crises. The law also seeks to minimise the costs of unresolved debt crises and unequal participation of public and private creditors that New York taxpayers have to bear. The law prominently highlights the problematic nature of bailing out private creditors, whose further payment is only made possible by the withdrawal of public creditors. Further, the law is justified by the possibility of a financial crisis resulting from an unresolved debt crisis and its negative effects on the state of New York. The law explicitly focuses on the pressing COVID-19 pandemic-related debt crisis but is oriented towards the long-term so that future debt relief initiatives could also be safeguarded by the law.

Elements of the proposed law

- The law aims to safeguard international debt relief initiatives such as the **HIPC initiative**, the Moratorium **DSSI**, the Common Framework for Debt Treatment beyond the DSSI (**Common Framework**) and any **similar initiatives** established in the future.
- Potentially, **all countries** included in an international debt relief initiative will be protected.
- Requirements for future initiatives include the **involvement of the US government** in cooperation with other states, international financial institutions and commercial creditors.
- The Act seeks to limit the enforceability of claims in New York courts to a level that ensures **comparable treatment** by the plaintiff creditor with public creditors, including the US government in particular. The law requires that public and private creditors share the cost of debt relief equally.
- The law **restricts suability** in the aforementioned manner for all claims arising from a loan transaction that was concluded before a benefiting debtor country applied for a corresponding debt relief initiative.
- Claims should only be enforceable if the suing **creditor transparently discloses the terms and conditions of the contracts**.

Evaluation from the perspective of erlassjahr.de

Since the New York bill is an anti-holdout bill, the general assessment of this category of legislation is also applicable (see Section 4.2). Additionally, the following aspects of this New York bill deserve to be discussed in further detail.

In contrast to the British law (Section 4.2.1), the legislative proposal discussed here aims to safeguard **future international debt restructuring** agreements as well. To this end, it is helpful that the law establishes "**comparable treatment**" as a fundamental principle since debt rescheduling agreements will, in many cases, e.g., in the G20 Common Framework, be individual decisions without predefined remission limits. Additionally, the proposed law does not refer exclusively to existing procedures such as the G20 Common Framework. Consequently, the law is **open to future developments at the international level**. Furthermore, the proposed law aims to **restrict the enforcement of domestic or foreign judgments that have already been obtained**.

[72] Stiglitz, J.; Guzman, M. und Ocampo, J. A. (2023): "Support memorandum to the New York Taxpayer and International Crisis Protection Act (Hoylman-Signal/Fahy bill)" (https://policydialogue.org/files/publications/papers/SUPPORT-MEMORANDUM-Guzman-Ocampo-Stiglitz.pdf).

Another positive attribute of this proposed law is that it has the potential to enforce debt cancellations that are supported by the US government within the framework of an international initiative. **If necessary, this can also take place against the will of (private) creditors.** To be sure, enactments based solely on a decision by the US government alone would not likely benefit from the Act's protective effect because the Act explicitly safeguards enactment initiatives that are jointly supported by the US government, other governments, international financial institutions and commercial creditors. Unlike laws designed to safeguard a qualified majority vote (see Section 4.3), however, this law does not explicitly specify limits on the percentage of creditors that must approve the proposal.

All countries benefiting from future international initiatives will benefit from the protection of the law. Although this means that a **relevant number of countries can potentially benefit from the protective effect of the law**, the problem arises that so far, and presumably also in the future, only a limited number of countries will ever benefit from corresponding initiatives. This problem cannot be solved by passing national laws alone. However, two measures are conceivable to at least minimize the problem: First, when formulating the text of the law, one should take care that the term "international initiative" includes, as far as possible, all restructurings in which the government of the country passing the law participates. This means, for example, that restructurings agreed on a case-by-case basis within the framework of the Paris Club should also be covered. Whether the present bill is sufficiently clearly defined at this point for New York jurisdictional practice is beyond the author's competence to judge. For a comparable German law, it would be desirable to be more explicit at this point and at least name the Paris Club in the list of "initiatives" to be safeguarded or to avoid the term "international initiative" altogether - which is difficult to define anyway - and safeguard all internationally negotiated restructurings in which the German government participates. On the other hand, in addition to restructurings that take place within the framework of an international initiative, it is also possible to safeguard restructurings that have been approved by a qualified majority of creditors. This makes it easier for debtor states to enter into restructuring negotiations outside the established procedures of the Paris Club or the G20 Common Framework and to conduct them proactively. It is important that this possibility of securing a qualified majority of creditors is defined only as one criterion of a successful restructuring and by no means as the exclusive criterion (see also 3.2).

In contrast to the UK anti-holdout law (Section 4.2.1), the proposed legislation is intended to safeguard future restructurings that have yet to be negotiated. Therefore, granting temporary enforcement protection for the negotiation period would also be desirable. However, the current bill **does not guarantee a temporary protection** from lawsuits and executiosn. If the debtor country is granted temporary enforcement protection for as long as it conducts the negotiations in a constructive manner, the debtor country's negotiating position vis-à-vis its creditors could also be improved, thus minimizing the risk of insufficient remission (for a possible definition of "constructive conduct of negotiations", see Section 3.2). This is particularly relevant for restructurings, where, unlike in the HIPC Initiative, the need for remission is not defined in advance but negotiated on a case-by-case basis.

Further, it is welcome that the legislative proposal makes transparency about the claim a condition of enforceability. Transparency thus also becomes part of the creditors' responsibility. This point is particularly important, as a lack of transparency has so far been discussed in creditor-dominated debates almost exclusively as a problem of a weak administrative apparatus in debtor countries. The demand in the New York bill corresponds to the civil society demand for a public debt register, through which creditors may only sue for claims that have been disclosed in a transparent debt register.[73]

In conclusion, it must be said that the law is formulated rather **vaguely** in some aspects. This relates in particular to the concept of the "international initiative," but also to the question of what is actually meant by comparable

[73] See, among others, erlassjahr.de and MISEREOR (2022): "Global Sovereign Debt Monitor 2022" Recommendations for the German Federal Government. https://erlassjahr.de/en/publications/

treatment and which creditors it affects. The advantage of such a general formulation is undoubtedly that it leaves the proposed law very **open to future developments** at the international level. However, for a comparable German law, it is at least questionable whether the cases to be covered are defined with sufficient precision.

4.3 Legislation to protect majority voting decisions

Currently, an increasing number of legislative proposals are being introduced that aim to obtain and legally safeguard comprehensive restructuring by a qualified majority decision of creditors. Like anti-holdout laws (Section 4.2), these laws are intended to be effective for all (private) creditors, regardless of their priority business activity and to prevent undermining of internationally agreed-upon debt restructuring by legal means. Unlike anti-holdout laws, however, these legislative proposals intervene more strongly in the process of international debt restructuring negotiations and make the approval of a qualified majority of creditors a prerequisite in order to legally safeguard the outcome of negotiations against lawsuits by uncooperative creditors. In this way, these proposals are based on the principles of collective action clauses, which are already contractually agreed-upon in many government bonds and allow bond debt to be reduced by a qualified majority decision of the bondholders.[74]

Furthermore, unlike past practices in sovereign debt restructuring, the New York bill (Section 4.3.1) aims to conduct debt restructuring negotiations in New York courts and thus not only formulates requirements for international restructuring negotiations but explicitly creates a new negotiation framework.

In addition to the question of whether negotiations are conducted in national courts, the laws presented here differ in particular with regard to their intended legal effect: The proposed New York law (Section 4.3.1) is designed as a contract law while the proposal by Reichert-Facilides (Section 4.3.2) is designed as civil procedure law on enforcement (see Excursus: Contract law vs. civil procedure law in Section 2.3).

Evaluation of legislation protracting majority voting decisions from the perspective of erlassjahr.de

Debt restructuring in the interest of the creditor majority can be regulated more efficiently by adopting the draft laws presented in Sections 4.3.1 and 4.3.2. However, they do not change the power imbalance between debtors and creditors (as a collective) effectively. This is due to the fact that, like negotiations on the basis of CACs, agreements on the amount of and conditions applied to debt relief are primarily the result of the balance of power between the borrowing state and its creditors. To achieve the required majority vote and thus a timely debt restructuring, the debtor will often feel forced to make excessive concessions to the creditors. Consequently, there is a risk that the negotiated relief will be inadequate and that no sustainable debt situation will be achieved.[75] Unlike negotiations based on CACs, the New York legislative proposal (Section 4.3.1) requires restructuring processes to be mediated by an impartial actor.[76] However, there is no explicit mandate that the

[74] CACs are usually only included in bond contracts - they have not played a role for bank loans and public creditor contracts to date. Only fourth-generation CACs allow all outstanding bond claims to be restructured together across series, without holders of an individual bond being able to boycott a restructuring. Older CACs only allow the restructuring of individual bonds or, in the case of a cross-series restructuring, require both the qualified consent of all bondholders and the consent of a majority of the creditors of the individual bonds. It is estimated that a quarter of all outstanding bond contracts do not contain fourth-generation CACs. See Munevar, D. (2021): "Sleep now in the fire. Sovereign Bonds and the Covid-19 Debt Crisis" (https://www.eurodad.org/sovereign_bonds_covid19). Unlike CACs, the legislative proposals discussed here aim to make a qualified majority vote binding on all creditors, whether or not CACs have been agreed to in the respective contracts of bondholders, banks, or other private or public creditors. Similar to fourth-generation CACs, they are intended to enable debt restructuring across series by a qualified majority vote.

[75] Munevar (2021, p. 16 ff) sees Ecuador's 2020 debt restructuring negotiations based on CACs as exemplary of such a case.

[76] The first two Reichert-Facilides bills provided for the appointment of a restructuring advisor with similar tasks. In the third revision, discussed in section 4.3.2, such an advisor is no longer included. For the previous proposals see Reichert-Facilides, D. (2021):

basic social and economic rights of the population in the debtor state must be taken into account when reviewing the restructuring proposal.[77] Ultimately, the decisive point is that both proposals, which are presented below, do not offer the possibility of enforcing a necessary debt relief against the will of a majority of creditors. This protects creditors and private creditors in particular from being subjected to an agreement involuntarily.

4.3.1 New York model law to restructure unsustainable sovereign and subnational debt[78]

Evolution

In May 2021, a bill (NY S6627) was first introduced for consideration in the New York Parliament to facilitate and legally safeguard foreign sovereign debt restructuring in New York courts. In the 2023-2024 legislative session, the bill was reintroduced in the Senate as S5542 and in the New York State House of Commons as A2102A but has not passed to date. Unlike the other bills and legislative proposals discussed here, NY S6627 does not 'merely' provide retroactive protection for internationally negotiated restructuring. Rather, the proposal aims to create a new framework for restructuring negotiations in New York courts. If a restructuring has been successfully conducted within this framework, this bill, like the other laws discussed, aims to protect this negotiated outcome from lawsuits by uncooperative creditors. NY S6627 is primarily aimed at restructuring claims issued under New York law. However, creditors holding claims issued under a different law may voluntarily join the proceedings. The proposed law is intended to reduce the social costs of sovereign debt crises and to minimize the risks to global financial stability and the need for bailouts of private creditors. Further, it should contribute to the legal certainty of creditors.

Elements of the proposed law

- The scope of the debt restructuring proceedings may, in principle, include all **private and public bilateral and public multilateral claims** against the requesting country that were issued under **New York law**. Creditors whose claims have been issued under another jurisdiction may join the proceedings voluntarily. The borrowing country is obliged to list the claims that are not part of the proceedings.
- Only the borrowing country is **entitled to apply** and only insofar as it has not already restructured its foreign debt in the past ten years under this or a similar law and its debt situation is unsustainable without restructuring.
- To be eligible, a debtor country must **cooperate with the International Monetary Fund**. In practice, this should mean that debtor countries must have an active program with the IMF.
- It is up to the debtor country to submit a **restructuring plan** and, if necessary, amend it during the proceedings. The restructuring plan should show how the claims that are subject to the proceedings are to be restructured.
- The restructuring process shall be supervised and reviewed by an independent person to facilitate an effective and fair agreement among the parties. The person shall be nominated and appointed by the

"Diskussionsentwurf Staatsschuldenrestrukturierungsgesetz", Institute for Law and Finance. https://www.ilf-frankfurt.de/fileadmin/user_upload/Diskussionsentwurf_Staatsschuldenrestrukturierungsgesetz.pdf or Reichert-Facilides, D. (2022b): "Überarbeiteter Diskussionsentwurf Staatenrestrukturierungsgesetz", Institute for Law and Finance. https://www.ilf-frankfurt.de/fileadmin/user_upload/%C3%9Cberarbeitung_Diskussionsentwurf_Staatsschuldenrestrukturierungsgesetz.pdf

[77] For the German legal context, it would be appropriate in this regard to stipulate that any restructuring must take into account Germany's obligations under international law, which arise, among other things, from the United Nations International Covenant on Economic, Social and Cultural Rights.

[78] See Rivera, G.; Davila, M. (2023): https://www.nysenate.gov/legislation/bills/2023/A2102/amendment/A.

Governor of the State of New York if both the debtor state and a majority of the creditors agree to the appointment.

- For restructuring, **creditor groups** must be formed on the basis of a proposal from the debtor country. Public bilateral and public multilateral claims must be placed in separate groups respectively.
- Claims within a creditor group must **be treated equally**; however, in principle, different creditor groups can be treated differently.[79]
- For a restructuring plan to be adopted, **a qualified majority** of all creditor groups must agree to it. Within a creditor group, an approval rate of at least two-thirds of the outstanding claims and half of the claim holders is required.
- If the debtor country wishes to **borrow** during the negotiations, it is obliged to disclose the conditions and the intended purpose of the funds. Existing creditors must consent to borrowing by a qualified majority. The **new loans taken out will be given priority for repayment.**
- Contractually agreed-upon provisions for the restructuring of claims that conflict with NY S6627 shall lose their effectiveness. NY S6627 thereby also **permits the restructuring of older contracts in which CACs have not yet been included**.
- Once the required approval rate has been reached, all **claims that were part of the procedure are amended in accordance with the restructuring plan**. Enforcement for the full satisfaction of the original claims is, therefore, not enforceable in New York courts or elsewhere.

Evaluation from the perspective of erlassjahr.de

As the New York model law functions to safeguard majority voting decisions, the general assessment of this category of law is also applicable (see Section 4.3). Additonally, the following aspects of New York Senate bill S6627 deserve to be discussed in further detail.

If the law is passed, potentially **all countries** will have the opportunity to apply for restructuring under the law. However, it is unsatisfactory that the New York bill stipulates that debtor countries are only entitled to **apply for restructuring every ten years**. Implicit in this is the assumption that over-indebtedness problems are always the result of an irresponsible budgetary policy on the part of the debtor country and that they must be tempered in their demand for debt relief. The fact that countries can also get into a debt crisis through no fault of their own due to external shocks such as natural disasters and may then have to ask their creditors for restructuring again at shorter intervals is not taken into account in this proposed legislation. The responsibility of lenders, whose willingness to grant credits is the other side of the coin of over-indebtedness, is also not considered. The requirement is also problematic because the law offers no assurance that sufficient relief will be granted in the event of a restructuring under the law, thereby achieving a debt situation that is (presumably) sustainable in the long term (see assessment of the laws in Section 4.3).

As the proposed Model Law is drafted as a contract law (see Excursus: Contract law vs. civil procedure law in Section 2.3), **it relates primarily to the restructuring of claims issued under New York law**. This **does not limit the ability of all creditors** to sue and enforce. Creditors whose claims are governed by a different debt law and who have not voluntarily participated in the restructuring may continue to seek enforcement of their claims in New York courts. It is true that the text of the law explicitly mentions the possibility of jointly restructuring claims governed by a different law within this framework. Whether this will come about, however, depends on whether comparable laws are enacted in other countries - particularly in the United Kingdom as another important financial centre. Instead of specifying this possibility, which the U.S. law itself cannot influence, it would be more important to restrict the enforcement access of creditors whose claims are subject to foreign law in U.S. courts,

[79] Given that multilateral claims are already prioritized today, such unequal treatment between different creditor groups is already common practice in the current structures.

likewise by means of a law conceived in terms of enforcement law or by supplementing this law. In addition, restructuring proceedings conducted in a third country, such as the United Kingdom, or internationally, should be recognized and secured by the New York Act, provided that the procedural rules are substantially similar to those set forth in the New York Model Law. Ultimately, erlassjahr.de believes that it is more desirable in any case for internationally negotiated restructurings to be designed as civil procedure laws on enforcement, instead of the negotiations themselves being conducted before national courts. This is particularly true since the Model Law requires the consent of a **qualified majority of creditors**, and conducting negotiations before a national court therefore runs the risk of **concealing the continuing asymmetry of power** between debtor and creditor by means of a procedure that appears to be governed by the rule of law (see more detail in 3.2).

It also remains unsatisfactory that debtor states must have concluded an **active program with the IMF**. In the view of erlassjahr.de, laws aimed at securing a majority decision by creditors rather than a restructuring negotiated in existing formats such as the Paris Club or the G20 Common Framework have only one advantage: they encourage debtor states to conduct negotiations proactively without being bound by the rules set by creditors within the existing formats – e.g., as the requirement to conclude an IMF loan program. By stipulating that debtor nations must mandatorily agree to an IMF program, the New York Model Law squanders this very advantage.

A positive aspect is that only the debtor country has the right to submit a restructuring plan and to amend it during the negotiations. In practice, of course, the freedom to design a corresponding restructuring plan is severely restricted by the requirement that a majority of creditors must approve the restructuring.

The proposed law stipulates that creditor groups should be formed for the vote. A successful restructuring is only possible if all creditor groups agree to the restructuring proposal by a qualified majority in each case. Thus, instead of consistently applying the principle of fourth-generation CACs to enable cross-series debt restructuring by a qualified overall majority to all liabilities, restructuring, under this law, can be boycotted by the refusal of a single creditor group. The procedure thus loses efficiency. At the same time, the condition that public bilateral and multilateral creditors must be grouped is probably an important prerequisite in terms of practical policies for public creditors to be willing to carry out restructuring in this context in the first place or to enact such a law for their jurisdictions. It is unlikely that public creditors, who in many cases hold only a small proportion of the claims, will engage in a procedure in which they can be outvoted by private creditors alone. Ultimately, however, it remains unlikely that public creditors will engage in proceedings that are conducted before national courts.[80] It can therefore be assumed that public creditors will continue to coordinate within the existing multilateral formats. The decisive advantage of the proposed law is that it creates a coordinated framework for restructuring private claims. Therefore, we also welcome the fact that the law allows for the restructuring of individual claims (for example only private ones) as long as there is full disclosure of the claims that are not included in the proceedings.

4.3.2 Legislative Proposal on the Restructuring of Foreign Sovereign Debt by Reichert-Facilides[81]

Evolution

[80] While the role of the courts in the New York proposal is limited to overseeing the due process of law, the political signalling effect should not be underestimated.

[81] See Reichert-Facilides (2022a): "Draft Proposal for a Foreign Sovereign Debt Restructuring Law". https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4164656. For the first two versions of the bill, see Reichert-Facilides (2021) and Reichert-Facilides (2022a).

German lawyer Daniel Reichert-Facilides introduced a model law for restructuring foreign sovereign debt in 2022. As a model law, it is designed to be adapted to various national legal contexts. This law primarily seeks to safeguard international debt restructuring negotiations by limiting the amount creditors can sue for to a multilaterally agreed-upon amount. Accordingly, the law restricts the legal enforcement possibilities of creditors rather than formally restructuring the claims themselves and is designed as civil procedure law on enforcement (see Excursus: Contract law vs. civil procedure law in Section 2.3). The proposal resembles anti-holdout laws (see Section 4.2). However, the legislative proposal specifies very precisely *how* debt restructuring negotiations are to be conducted at the international level for the law to apply. It thereby makes the approval of a qualified majority of creditors a main prerequisite.[82]

Elements of the proposed law

- The restructuring of all long-term public external debt held by **public bilateral or private creditors** shall be restructured jointly in international negotiations. In principle, the criteria for external debt are based on currency and contract law.
- All low- and middle-income countries, as defined by the World Bank, should be **eligible to apply**.
- Short-term liabilities and trade **liabilities arising from the import of goods or the rendering of services shall not be subject** to the restructuring procedure.
- The informal **seniority status of multilateral claims** is explicitly recognized in the law and consolidated by the fact that the inclusion of multilateral claims in the restructuring process is explicitly not provided for.
- A **restructuring plan** is to be submitted by the debtor country at the beginning of the proceedings. In the restructuring plan, all outstanding liabilities of the debtor country at home and abroad must be listed, and the conditions under which the outstanding foreign debt is to be restructured should be formulated.
- The restructuring plan must ensure **similar treatment** of the various creditors. The legal text specifies very precisely how to calculate the similar participation of different creditors.
- The restructuring plan must include a debt sustainability analysis in which the government of the debtor country must formulate **adjustment measures** to ensure, inter alia, that the debtor country achieves a **primary surplus** as a result of the restructuring.
- In addition, **global sustainability goals** should be taken into account within the restructuring plan.
- The restructuring plan and the amount of debt relief need to be adopted by a qualified **majority of creditors**. The legislative text proposes an approval rate of two-thirds of the capital sum of the claims in question.
- During the negotiations, a **moratorium** should be granted to the debtor county. The adoption of the proposed law would safeguard the moratorium by a **temporary prohibition of foreclosure** during the period of negotiations (but for a maximum of one year).
- The outcome of the negotiations is to be secured by a **permanent limitation of the means of enforcement** by national courts so that lawsuits for claims are only possible to the extent agreed upon in the restructuring proceedings.
- The vote is to be **monitored and authenticated by an appropriate financial institution**. Typically, this would be an institution that reviews voting under CACs agreements today, such as investment banks.

[82] Similar to the legislative proposal S6627 (Section 4.3.1), the first two proposals by Reichert-Facilides (2021 and 2022b) were still aiming at conducting restructuring negotiations before German courts. However, they also already made it possible to safeguard negotiations conducted under comparable conditions at the international level or in third countries. In the third revised proposal discussed here, the possibility of conducting negotiations before national courts was abandoned altogether.

Evaluation from the perspective of erlassjahr.de

Since the proposal by Reichert-Facilides is a bill that functions to **safeguard majority voting decisions**, the general assessment of this category of legislation is also applicable (see Section 4.3). In addition, the following aspects of the proposed law deserve to be discussed in further detail.

In principle, a positive aspect of this model bill is that a qualified majority of the creditors participating in the proceedings is sufficient and that no requirement is formulated regarding the minimum participation of creditors. This increases the incentive for creditors to participate in the restructuring negotiations. It is also advantageous that, as in the New York State Model Law proposal (see 4.3.1), only a restructuring proposal submitted by the debtor country itself can be voted on in the proceedings.

Compared to existing frameworks for negotiation, such as the G20 states' *Common Framework*, which primarily allows access to low-income countries, the present proposal aims to allow a **larger number of countries** to participate in coordinated debt restructuring negotiations. Nevertheless, focusing on the World Bank's income classification remains subpar. Critically indebted high-income countries such as Antigua and Barbuda, Barbados, and Chile also need to be able to conduct coordinated debt rescheduling negotiations. Similarly, it's not only low- and middle-income countries that fall victim to aggressive litigation strategies. In Greece, too, the lawsuit behaviour of private creditors has made restructuring negotiations more difficult and contributed to the unequal treatment of creditors (see 2.2). In the view of erlassjahr.de, debt restructuring negotiations of all countries should therefore be safeguarded by an appropriate law.

From the perspective of erlassjahr.de, the fact that **multilateral creditors** should be categorically kept out of debt restructuring negotiations is problematic. A preferential servicing of some multilateral claims might be useful in some cases. However, totally excluding their claims de facto turns the unofficial 'preferred creditor status' held by multilateral creditors into an official 'exempt' status, which is difficult to legitimise and in turn is likely to lead to a *moral hazard* on the part of multilateral creditors.[83] It would be better not to explicitly specify in the text of the law who must participate in the decrees, but to outsource this decision to the procedure itself. If creditors agree that multilateral creditors should participate, there is nothing to prevent this decision from being safeguarded. Moreover, such an approach would also allow, for example, only private claims to be restructured under the procedure described by Law while public bilateral claims continue to be negotiated under existing forums such as the Paris Club or the G20 Common Framework.

We welcome the fact that debtor countries are granted a **debt service moratorium during the negotiations and that this would be legally protected by the proposed law**. Granting a moratorium on the opening of restructuring negotiations contributes to the effect that debtor states directly, and not only after a successful conclusion of negotiations, enjoy a relevant advantage by initiating debt restructuring. This would create an important incentive for debtor governments to start restructuring negotiations at an early stage and not, as is currently common practice, only when nothing else can be done. Besides the immediate relief granted to debtor states, it is also paramount to establish a comprehensive debt moratorium for fair and efficient debt restructuring negotiations; this prevents individual creditors from gaining access to the debtor's existing capital before other beneficiaries. Since creditors must completely waive repayments during the negotiation period, a moratorium can also increase the willingness of creditors to cooperate in debt restructuring negotiations and conclude them in a timely manner. However, it is problematic that the moratorium is to be granted only for a maximum of one year. The good intention behind this is to create an incentive for negotiations to be concluded in a timely manner. In the current form of the legislative proposal, however, this primarily weakens the debtor's negotiating position. Negotiations

[83] See Kaiser, J. (2021): "Häufig vorgebrachte Argumente gegen die Beteiligung multilateraler Entwicklungsbanken und was von ihnen zu halten ist". https://erlassjahr.de/produkt/fachinformation-67-haeufig-vorgebrachte-argumente-gegen-die-beteiligung-von-multilateralen-entwicklungsbanken-an-schuldenerlassen-und-was-von-ihnen-zu-halten-ist/

lasting more than a year only have disadvantages for the borrowing country. Moreover, they are therefore under greater pressure to agree to debt restructuring plans, even if the agreement cannot ensure debt sustainability for the country in the long term. It would be better to grant the moratorium for an indefinite period of time as long as the debtor country conducts the negotiations in good faith (for a possible definition of "good faith", see Section 3.2).

It is particularly problematic that the model law requires debtor states to generate a **primary surplus** while restructuring is underway. While this is to ensure that the debtor can reliably resume repayments after a restructuring, this is problematic in several respects. First, this requirement is based on a lack of understanding of financing public expenditure. Contrary to the logic of an individual household, public debt is usually continually refinanced rather than repaid. To demand something from countries in the Global South that is difficult to implement in the present circumstances even in hard-currency and export-surplus countries, does not seem appropriate. Second, it unduly restricts the sovereign monetary and fiscal policies of debtor states. After all, countries with a primary deficit can also repay their external debt, which is the subject of debt restructuring negotiations, insofar as the deficit is financed in local currency. Third, debtor countries usually have to restructure their foreign debt in times of crisis, which is also when domestic public expenditure is particularly important. This is, for example, the case for states that need to restructure their claims in the wake of climate disasters. The primary surplus target obliges countries to cut public spending rather than increase it.

Like all laws designed to safeguard majority voting decisions, the legislative proposal by Reichert-Facilides is strongly oriented toward the private-sector logic of restructuring over-indebted companies. Since restructuring is only provided for by the consent of a qualified majority of creditors, neither the public duties of the debtor state nor those of the state in which the law is enacted are adequately taken into account (for an alternative approach, see Section 3.2). In this regard, the only welcome aspect is that the law explicitly emphasises the right of debtor states to defend themselves against the enforcement of claims on the grounds of state necessity or the illegitimate nature of the claims, even outside the restructuring process described here. The private-sector focus of the proposed legislation is also evident from the inclusion of the stipulation that a private-sector financial institution would oversee the restructuring process and authenticate its outcome. Such an institution could be, for example, an investment bank such as Deutsche Bank, which charges fees for a corresponding service. From the perspective of erlassjahr.de, this is not desirable. Debt restructuring negotiations should be understood as public affairs for which the necessary infrastructure is also provided by the public sector. The costs should under no circumstances have to be borne solely by the debtor country.

It is to be welcomed that the text of the law explicitly mentions further possibilities for the debtor country to plead its case, citing as an example the reference to the **illegitimacy of the claims**.

5. Conclusion

National laws that restrict creditors' ability to take legal action can make debt restructuring negotiations more efficient. They can thus protect the interests of creditors who participate in debt restructuring negotiations in good faith and contribute to burden sharing.

Moreover, if they are designed accordingly, national laws can strengthen the negotiating position of the debtor country vis-à-vis its creditors. In this way, they can act as a corrective to the unbalanced legal processes that have been pursued more and more unilaterally since the 1990s, which seek to enforce creditor rights without taking adequate account of the fundamental rights of the population of an indebted state. Thus, debtor governments can be encouraged through appropriate legislation to enter into coordinated restructuring

negotiations in a timely manner and in the interest of the country's long-term economic stability and to guarantee the fundamental economic and social rights of their own people. Since the adoption of such laws would also help to shape international economic relations in a way that rewards rather than punishes, as is currently the case, a government's advocacy of the social concerns of its own people, they can also help to strengthen progressive political forces in the debtor country itself.

Parliaments intending to pass such a law must be aware that massive resistance from the financial industry is to be expected. This was already evident when the British and Belgian laws were passed. The counterpressure is likely to be many times greater if the law seeks not only to safeguard initiatives that have already been completed, as in the British law, and if, unlike the Belgian law, it is designed to have an effect on all creditors and not just on classic vulture funds. Both Belgium and the UK have been able to create legislation despite massive lobbying. Furthermore, they've done so without endangering the attractiveness of their financial jurisdiction or causing other negative consequences, for example, increasing the costs of lending to low- and middle-income countries. When introducing national laws to limit the enforceability of claims, it is therefore essential that parliaments learn from the experience of previous battles.

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