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Proposal for a New Regulation of Speculation in Sovereign Debt

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Over the past few years, several countries have undertaken to regulate the speculation in sovereign debt pursued by so-called "vulture funds." The various realizations and attempts present a series of loopholes that make a new regulation of this speculation advisable. A proposal for a new regulation, legally justified and precisely framed, is all the more desirable given that some legislators, in particular from the New York State Legislature, have recently taken up the issue of speculation.

Debt sustainability is the only realistic regulation benchmark. It is inconceivable to ban debt purchases on the secondary market as this would significantly impact the liquidity of sovereign debt and the cost of the borrowed money. Nevertheless, sovereign debt speculation is unacceptable if it undermines the human rights of the populations of the debtor countries. Therefore, some limitations should be set. Every endeavor undertaken by a creditor to get paid should be endorsed by a court informed about the terms of the debt. The claims of speculative funds should be capped at the amount paid to acquire the debt instruments. Besides this amount, the creditor should be able to obtain interest on his investment. This interest offsets the risk that the creditor may not recoup the money.

Introduction

1. The speculation to be regulated – The extent of sovereign indebtedness and the looming crisis raise concerns about speculative episodes.[1] The problem of speculation is exemplified by the Argentine Republic attacked at the beginning of the century by so-called "vulture funds."[2] These funds purchase distressed sovereign debts at low prices on the secondary market and then claim payment of these debts at their face value plus significant interest, penalties, and costs.[3] Sovereign states, mainly in Africa and South America, whose debt is targeted by speculative funds, are typically in a difficult financial situation. The funds often refuse the restructuration of the debt instruments they hold and then aggressively and decisively engage in legal proceedings to force their debtors to pay. To achieve their goals, these holdouts use courts worldwide first to condemn their debtors and then seize their assets.

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[1] See the large number of "risks of overall debt distress" threatening Low-Income Countries according to the World Bank (<worldbank.org/en/programs/debt-toolkit/dsa>).

[2] On the epilogue to this high-profile dispute, see Martin Guzman and Joseph Stiglitz, *How Hedge Funds Held Argentina for Ransom*, THE NEW YORK TIMES, <nytimes.com/2016/04/01/opinion/how-hedge-funds-held-argentina-for-ransom.html> (April 1, 2016).

[3] Human Rights Council of the United Nations, REPORT OF THE INDEPENDENT EXPERT ON THE EFFECTS OF FOREIGN DEBT AND OTHER RELATED INTERNATIONAL FINANCIAL OBLIGATIONS OF STATES ON THE FULL ENJOYMENT OF ALL HUMAN RIGHTS, PARTICULARLY ECONOMIC, SOCIAL AND CULTURAL RIGHTS, 5 (A/HRC/14/21, April 29, 2010).

Although often criticized, speculative activities in sovereign debt nevertheless present several merits to which it is essential to pay attention when contemplating their regulation. The most common criticism of so-called "vulture funds," which are often based in tax havens and opaque in their operations, is that of immorality. Indeed, they seek to make huge profits by attacking impoverished countries. They are generally blamed for disrupting the proper operation of states and depriving them of resources essential to their missions. In addition to the profits they are likely to make from the efforts of other creditors who agree to participate in restructuring measures, speculative funds are also criticized because of the risk they pose to these measures. These funds are also sometimes blamed for targeting development assistance granted by certain states. On the other hand, the merits of so-called "vulture funds" include liquidity, reduced cost of capital, and stability. Indeed, they contribute to the smooth functioning of the secondary market, which is vital because it enables primary creditors to get rid of the debt instruments they hold. This option reduces the cost of state financing. Speculative funds also have a supervisory role, ensuring that restructuring terms are not abusive and that the measures envisaged are not opportunistic.

2. A particular regulation – In its 2019 final report on the activities of vulture funds and their impact on human rights, the Advisory Committee of the United Nations Human Rights Council highlights the growing consensus on the need to curb the activities of funds speculating in sovereign debt.[4] The Committee notes that, at a national level, "[s]tates should undertake concrete steps aimed at regulating the disruptive litigation of vulture funds concerning sovereign debt."[5]

[4] Human Rights Council of the United Nations, ACTIVITIES OF VULTURE FUNDS AND THEIR IMPACT ON HUMAN RIGHTS – FINAL REPORT OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE, 11 (A/HRC/41/51, May 7, 2019).

[5] Human Rights Council of the United Nations, ACTIVITIES OF VULTURE FUNDS AND THEIR IMPACT ON HUMAN RIGHTS – FINAL REPORT OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE, 16 (A/HRC/41/51, May 7, 2019). In addition to a direct solution involving the adoption of a specific regulation of speculation in sovereign debt (some countries have already done so, see *infra* nos. 5-11), implementing a bankruptcy mechanism to deal with sovereign debt problems seems desirable. Such a mechanism would indirectly address the difficulties posed by so-called "vulture funds." In the absence of an international consensus, such a mechanism does not currently exist, nor does it seem likely to do so in the near future (see, for example, the International Monetary Fund's attempt to set up a *Sovereign Debt Restructuring Mechanism* in 2002). Another indirect approach to the speculative phenomenon generally consists of inserting collective action

Moreover, the United Nations Conference on Trade and Development stresses that "[t]he enactment of national legislation is particularly needed in jurisdictions that govern international bonds or where payments are processed."[6]

In the absence of specific rules for the resolution of sovereign debt problems, these are addressed through the sole application of contracts. Therefore, speculative creditors only need to ask the judges to apply the terms of the debt instruments they hold.[7] A regulation specifically aimed at the speculative phenomenon appears attractive insofar as it equips judges and thus facilitates their task by pointing them to the path to follow. Direct legislation avoids the need for judges to be attentive to the economic, political, sociological, and diplomatic considerations raised by speculation in sovereign debt, which go beyond the mere application of the law.

3. The rationale and scope of the regulation – In the conclusion of one of its 2020 reports, the International Monetary Fund notes that "[t]he desirability of wider application of targeted statutory tools of the kind already in place in a few countries to complement the contractual approach (*i.e.*, "anti-vulture fund" legislation) could be further explored to limit holdout creditor recovery in specified circumstances, though they should be carefully designed to limit the impact on creditors' rights and avoid undermining the secondary market."[8] The diversity of the criticisms and merits of speculative activities convinces us of the need for a justified and balanced regulation.

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clauses into sovereign debt covenants to enable a majority of creditors to decide for all of them that a restructuring should be undertaken.

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

[7] As the United States District Court for the Southern District of New York noted in the Argentine case, "[u]nlike bankruptcy courts, which have significant power to reallocate debtors' assets to satisfy creditor claims, the court in this case is limited to enforcing the terms of the specific contracts before it" (United States District Court for the Southern District of New York, *NML Capital Ltd. v. Republic of Argentina*, 2009 U.S. Dist. LEXIS 21530, 13 (March 18, 2009)).

[8] International Monetary Fund, THE INTERNATIONAL ARCHITECTURE FOR RESOLVING SOVEREIGN DEBT INVOLVING PRIVATE-SECTOR CREDITORS – RECENT DEVELOPMENTS, CHALLENGES, AND REFORM OPTIONS, 47, <imf.org/en/Publications/Policy-Papers/Issues/2020/09/30/The-International-Architecture-for-Resolving-Sovereign-Debt-Involving-Private-Sector-49796> (September 23, 2020).

Since difficulties surrounding sovereign debt are likely to have significant negative impacts, regulating speculative activities must pursue sustainability. As the activities of so-called "vulture funds" generally undermine the finances of already fragile states, debt sustainability justifies limiting the claims of these creditors. The argument also helps determine the extent of regulation needed. Indeed, creditors' rights can only be limited, and their speculative activities restricted, to the extent that they are at odds with debt sustainability.

4. An imperfect situation requiring improvement – Having specified the phenomenon to be regulated, explained the importance of regulation, and justified it in a previous contribution,[9] the present paper aims to outline and draft such regulation. While this is a difficult task, given the complexity of speculation in sovereign debt, we are grateful to some legislators who have provided food for thought through their realizations and attempts (**Part I**). We will begin by outlining them, focusing on their strengths and weaknesses. In the second phase, we will propose a new regulation that legislatures could implement. Our proposal is based on interesting elements of the British, Belgian, and French Laws, as well as of the U.S. and New York Bills, while avoiding their problematic elements (**Part II**). Since some New York legislators are considering a regulation of the speculation in sovereign debt, as evidenced by the recent Bills introduced in the New York State Legislature,[10] this paper proposes a balanced text that could be adopted there (**Appendix**).[11]

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[9] Justin Vanderschuren, *Sovereign Debt Speculation: A Necessary Restraint Justified by a Concern for Debt Sustainability*, Working Paper (September 2023), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4574399>. For further consideration on the regulation of speculation in sovereign debt, see our doctoral thesis (on the basis of which some of the ideas defended in this paper are built): Justin Vanderschuren, LES ACTIONS JUDICIAIRES DES SPÉCULATEURS SUR LES DETTES SOUVERAINES – RÉGLEMENTER LES ACTIVITÉS DES FONDS DITS "VAUTOURS" DANS UN SOUCI DE SOUTENABILITÉ (2022). The present paper is made as of September 15, 2023.

[10] See *infra* nos. 14-16.

[11] The text is of wider interest in view of a recent statement of Andrew Mitchell, British Minister of State (Development and Africa), Foreign, Commonwealth and Development Office, during a meeting of the International Development Committee of the British House of Commons: "[v]ulture funds are incredibly unattractive, and we should certainly look at legislation to see whether we can help with that" (International Development Committee, ORAL EVIDENCE : FUTURE OF UK AID, <committees.parliament.uk/oralevidence/11988/pdf> (December 6, 2022)).

Part I: Various realizations and attempts

5. The various texts – For over ten years, national legislatures have been addressing the issue of speculation in sovereign debt, intending to regulate the activities of so-called "vulture funds." While the Belgian Legislature was the first to take action in the early 2000s, the first legislation to deal directly with the phenomenon was passed in the United Kingdom in 2010. With the *Debt Relief (Developing Countries) Act*, the British Legislature restricted speculation targeting countries protected by the Heavily Indebted Poor Countries Initiative of the World Bank and the International Monetary Fund (**Chapter 1**). In 2015, Belgium passed a law to combat the activities of vulture funds (**Chapter 2**). The following year, French lawmakers included a provision in the so-called "Sapin II" Law designed to protect certain states in financial difficulty from measures of constraints undertaken by speculative funds (**Chapter 3**). In addition to these three enacted pieces of legislation, other initiatives were taken across the Atlantic. In 2008 and 2009, Bill no. 110 H.R. 6796 and Bill no. 111 H.R. 2932 were introduced in the U.S. House of Representatives. These bills aimed to pass a *Stop Vulture Funds Act* (**Chapter 4**). New initiatives were taken in 2023 by members of the New York State Legislature. They introduced various bills that directly affect speculation (**Chapter 5**). This first part presents a broad outline of the various realizations and attempts to address speculation in sovereign debt. We will focus on the strengths and weaknesses of each text to draw valuable lessons for our proposal for a new regulation of speculation in sovereign debt.

Chapter 1: The British Debt Relief (Developing Countries) Act

6. The referral to the HIPC Initiative – With the *Debt Relief (Developing Countries) Act 2010*, the British Legislature is pursuing the objectives of the Heavily Indebted Poor Countries Initiative of the World Bank and the International Monetary Fund.[12] This Act prevents decisions allowing the recovery of

[12] Before this, an initiative to enact anti-speculation legislation was taken in May 2009 with the *Developing Country Debt (Restriction of Recovery) Bill*

sovereign debts above the amount recoverable under the Initiative from being made or enforced. The British Act aims to address the problems posed by funds acquiring Heavily Indebted Poor Countries' debts at a low market value and then sue the sovereign debtors in order to recover the full value of the debts after other creditors have granted relief that has enabled the debtors to improve their financial situation.[13]

The limitation introduced by the *Debt Relief (Developing Countries) Act* applies when a creditor seeks a judgment against a protected debtor state or when he pursues the enforcement of a decision already obtained.[14] The Act specifies that the restriction applies to a judgment given by a court in the United Kingdom, a foreign judgment, and an award made in an arbitration. The limitation imposed on creditors' claims is binding on the courts without granting them any power of appreciation.[15] The fact that the law applicable to the qualifying debt is the law of a country outside the United Kingdom does not matter.[16]

The British Act encourages agreements between sovereign debtors and their creditors. Thus, the protective mechanism is

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(House of Commons, *Developing Country Debt (Restriction of Recovery) Bill*, <publications.parliament.uk/pa/cm200809/cmbills/091/2009091.pdf> (May 8, 2009)). In 2012 and 2013, legislation similar to the British *Debt Relief (Developing Countries) Act 2010* was passed in the three Crown Dependencies. Thus, the Isle of Man has its *Heavily Indebted Poor Countries (Limitation on Debt Recovery) (Isle of Man) Act 2012*. Jersey has its *Debt Relief (Developing Countries) (Jersey) Law 2013*. Guernsey and Alderney have their *Debt Relief (Developing Countries) (Guernsey and Alderney) Law 2013*.

[13] Sophie Hughes, Simon James, Andrew Yianni, and Deborah Zandstra, *The HIPC Debt Relief Bill: Making Forgiveness Compulsory*, 4 LAW AND FINANCIAL MARKETS REVIEW 269, 270 (2010). The preparatory work for the Act also makes explicit reference to "vulture funds." (see *Debt Relief (Developing Countries) Bill*, Committee Stage Report, Research paper 10/26, <researchbriefings.files.parliament.uk/documents/RP10-26/RP10-26.pdf> (March 11, 2010): "[t]he legislation would restrict the activities of so-called 'vulture funds'").

[14] Section 3 and Section 5. About the British immunity regime for foreign states, see the *State Immunity Act 1978*.

[15] The British Government had once suggested allowing the courts some discretion over the level of the payment to minimize the risk of undermining the proper functioning of the financial markets. As the Government pointed out, "[t]his discretion would ensure that the court is always in a position to strike a fair balance between property rights and the wider public interest" (H.M. Treasury, ENSURING EFFECTIVE DEBT RELIEF FOR POOR COUNTRIES: A CONSULTATION ON LEGISLATION, 20 and 27, <gov.uk/government/organisations/hm-treasury> (2009)). Subsequently, however, the British Government backtracked, noting the risk of undermining legal certainty and the potentially negative consequences of doing so (H.M. Treasury, ENSURING EFFECTIVE DEBT RELIEF FOR POOR COUNTRIES: A RESPONSE TO CONSULTATION, 15, <gov.uk/government/organisations/hm-treasury> (2010)).

[16] Section 3(9).

inapplicable when the debtor fails to offer to pay an amount that complies with the terms of the Heavily Indebted Poor Countries Initiative.[17]

7. The protected states and affected debts – The *Debt Relief (Developing Countries) Act* protects a defined series of qualified debts. It specifies that "'[q]ualifying debt' means a debt incurred before commencement that is public or publicly guaranteed, is external, is a debt of a country to which the Initiative applies or a potentially eligible Initiative country, and in the case of a debt of a country to which the Initiative applies, is incurred before decision point is reached in respect of the country."[18]

The countries whose debts are potentially protected are, on the one hand, those to which the Heavily Indebted Poor Countries Initiative applies and, on the other, those that are potentially eligible.[19] The creditor has no bearing on the application of the British mechanism since the limitation depends on the debt being pursued. It is, therefore, irrelevant whether the debt is owed to the original creditor or to a creditor who has acquired it on the secondary market.

The *Debt Relief (Developing Countries) Act* defines the various concepts used to qualify protected debts.[20] It lists what the notion of debt includes and what it does not. It also specifies the public and external nature of the debts concerned. A public debt is a debt contracted by the country, its government, or one of their parts or departments,[21] by the central bank or other monetary authority of the country, or by a body corporate controlled by them. Under the British Act, a public or publicly guaranteed debt of a country is external unless the creditor was resident in the country if decision point was reached in respect of the country before commencement, at the time that point was reached, or otherwise, at commencement.[22]

Since the British Legislature's intention was precisely to limit the protection provided to a specific stock of historical debts, the *Debt Relief (Developing Countries) Act* provides that, to be

[17] Section 6.
[18] Section 1(3).
[19] Section 1.
[20] Section 2.
[21] These parts include "any municipality of other local government area in the country" (Section 2(6)).
[22] Section 2(9). As Michael Waibel points out, the criteria of the law applicable to the debt, the place of issuance, and the currency of payment are irrelevant (Michael Waibel, *Debt relief to poor countries: Rules v. Discretion*, BUTTERWORTHS JOURNAL OF INTERNATIONAL BANKING AND FINANCIAL LAW 295 (2010)).

protected, the debt must have been incurred before the Act came into force.[23] This temporal limitation was justified by the concern that the protective mechanism might have had the undesirable effect of driving legal business away from London.[24]

Chapter 2: The Belgian loi relative à la lutte contre les activités des fonds vautours

8. The impossible "illegitimate advantage" – In 2015, after a quick legislative process,[25] Belgium passed a law combatting the activities of funds described as "vulture."[26] The mechanism limits the rights of a creditor pursuing an illegitimate advantage through the purchase of a debt owed by a state. Under the Belgian Law, a secondary creditor seeking payment in Belgium may not obtain an enforceable title if the payment gives him an illegitimate advantage. Similarly, no measures of constraint may be taken in Belgium at the creditor's request if they contribute to such an illegitimate advantage.[27] When a creditor takes action against a debtor state, the judge has to examine whether this conforms with the law.[28]

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[23] Section 1(3).

[24] See *Debt Relief (Developing Countries) Bill – Explanatory notes*, para. 45, <publications.parliament.uk/pa/ld200910/ldbills/053/en/2010053en.pdf>, where it is stated that "if the legislation were to apply to debts not yet contracted, it would be easy to avoid the impact of the legislation, for example by providing that the governing law was (say) New York law, and that US courts would have exclusive jurisdiction."

[25] The Law was challenged by an action for annulment lodged with the Belgian Constitutional Court in March 2016. The Court rejected this constitutional challenge raised by NML Capital Ltd. (decision no. 61/2018, <const-court.be/public/f/2018/2018-061f.pdf> (May 31, 2018)).

[26] In response to some of the activities of these funds, the Belgian Legislature had already, in 2004 and 2008, adopted two laws aimed at regulating certain measures of constraint (*loi modifiant […] la loi du 28 avril 1999 visant à transposer la Directive 98/26/CE du 19 mai 1998 concernant le caractère définitif du règlement dans les systèmes de paiement et de règlement des opérations sur titres* (November 19, 2004) and *loi visant à empêcher la saisie ou la cession des fonds publics destinés à la coopération internationale, notamment par la technique des fonds vautours* (April 6, 2008)).

[27] Article 2.2. It should be noted that Article 1412*quinquies* of the Belgian *Code judiciaire* generally provides that properties belonging to a "foreign power" and located within the territory of the Kingdom are, in principle, exempt from seizure, subject to the exceptions it specifies (see also Article 1412*ter* and Article 1412*quater*). Thus, a creditor may lodge a request with the enforcement judge to get the authorization to seize the assets of a foreign power, provided that he can demonstrate that one of the exceptions has been met. The Belgian judge will then be required to apply the *loi relative à la lutte contre les activités des fonds vautours*.

[28] PROPOSITION DE LOI RELATIVE À LA LUTTE CONTRE LES ACTIVITÉS DES FONDS VAUTOURS, RAPPORT FAIT AU NOM DE LA COMMISSION DES FINANCES

The Belgian Law provides that the rights of a creditor seeking an illegitimate advantage by redeeming a debt on a state are limited to the price paid.[29] The Belgian Legislature aims thus to discourage the activities of speculative funds trying to reap substantial gains that consist of the difference between the purchase price of the debt and its face value.

The key concept of the Belgian Law is that of "illegitimate advantage." The search for such an advantage is derived from the existence of a manifest disproportion between the purchase price of the debt and its face value or between the purchase price and the sums the creditor claims for payment.[30] Moreover, this manifest disproportion must be supplemented by at least one of the six criteria listed in the Law.[31]

The six criteria are alternative so that if only one is encountered (in addition to the finding of a manifest disproportion made by the judge), the Belgian mechanism has to be applied.[32] The first criterion is that the debtor country is in a state of actual or imminent insolvency at the moment of the redemption of the debt by the pursuing creditor. The second criterion is that the headquarters of the creditor is registered in a tax or banking haven.[33] The third criterion is the creditor's systematic use of legal proceedings to obtain payment of debts it has purchased in the past. The fourth criterion is the creditor's refusal to participate in restructuring measures of the debtor state debt. The fifth criterion is the abuse by the creditor of the debtor state's weak position to negotiate a manifestly imbalanced payment agreement. The sixth criterion is that full payment of the sums

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ET DU BUDGET, doc. no. 54 1057/003, 4, <lachambre.be/FLWB/PDF/54/1057/54K1057003.pdf> (June 19, 2015).

[29] Article 2.1.

[30] Article 2.3. The Belgian Legislature deliberately chose not to include any arithmetical criterion to define manifest disproportion to avoid easy circumvention of any given proportion. However, the absence of an arithmetical measure was roundly criticized, both during the preparatory work for the Law and after its adoption, because it would undermine the legal certainty which is essential to the smooth functioning of the sovereign debt markets (see, for example, the comment by the National Bank of Belgium, PROPOSITION DE LOI RELATIVE À LA LUTTE CONTRE LES ACTIVITÉS DES FONDS VAUTOURS, RAPPORT FAIT AU NOM DE LA COMMISSION DES FINANCES ET DU BUDGET – ANNEXE 1, doc. no. 54 1057/003, 33, <lachambre.be/FLWB/PDF/54/1057/54K1057003.pdf> (June 4, 2015)).

[31] Article 2.4.

[32] The disparity of the criteria indicates that the Belgian Legislature drew inspiration from landmark cases to establish a profile of the "vultures" speculating in sovereign debt (Leentje Ann Sourbron and Lode Vereeck, *To Pay or Not to Pay? Evaluating the Belgian Law Against Vulture Funds*, JOURNAL OF GLOBALIZATION AND DEVELOPMENT 1, 7 (2017)).

[33] Since there is no exhaustive tax or banking havens list, Article 2.4 refers to various lists.

claimed by the creditor would have a clearly adverse impact on the public finances and that such payment would likely compromise the socio-economic development of the debtor's population.

9. The protected states and affected debts – Belgium's anti-vulture fund Law refers to the "rachat d'un emprunt ou d'une créance sur un État," without specifying who the debtor is. Thus, *a priori*, all debtor states may benefit from the protective mechanism implemented.[34] The Belgian Legislature has not limited its application to the poorest states or those facing financial difficulties. References to the precariousness of the foreign debtor state are only made in some of the criteria used to assess the illegitimate advantage. Thus, insofar as these criteria are alternative and some have no connection with the financial situation of the debtor state, it should be concluded that the mechanism put in place is not reserved solely for the poorest states.

Although sovereign debt instruments can take various forms, in the absence of more precise indications in the text of the Belgian Law, it must be understood that all the financial contracts a state underwrites are covered.[35] *A priori*, any debt is covered, as long as it is transferable.[36] It should also be noted that while the transfer of the debt instrument is a cardinal condition for applying the mechanism, which refers to "rachat," the Belgian Law does not specify the moment at which the debt redemption must have occurred. The only temporal criterion contained in the Law is that the debtor country is in a state of actual or imminent insolvency at the moment of the redemption of the debt by the pursuing creditor. However, this criterion does not have to be imperatively met since it is an alternative one. Finally, it should

[34] During the preparatory work for the Law, it was noted that the euro zone states could therefore be concerned (PROPOSITION DE LOI RELATIVE À LA LUTTE CONTRE LES ACTIVITÉS DES FONDS VAUTOURS, DÉVELOPPEMENTS, doc. no. 54 1057/001, 10, <lachambre.be/FLWB/PDF/54/1057/54K1057001.pdf> (April 30, 2015)).

[35] Patrick Wautelet, *La chasse aux "vautours" est ouverte – Du bon usage de la loi du 12 juillet 2015*, in Rafaël Jafferali, Vanessa Marquette, and Arnaud Nuyts (ed.), LIBER AMICORUM NADINE WATTÉ, 560-561 (2017).

[36] Olivier Creplet and Julien Courbis, *La loi belge du 12 juillet 2015 relative à la lutte contre les activités des fonds vautours*, REVUE LUXEMBOURGEOISE DE BANCASSURFINANCE 70, 80 (2016). See also Alexandre Belle, *La loi belge anti-fonds vautours au sein du droit international sur la dette souveraine : le droit national comme outil de signalement et de gestion de risques de défaut*, REVUE BELGE DE DROIT INTERNATIONAL 166, 170 (2018).

be noted that the Belgian Law applies to debts redeemed before and after its entry into force.[37]

Chapter 3: The French loi "Sapin II"

10. The prohibition on measures of constraint – Article 60 of the French Law no. 2016-1691 of December 9, 2016, on transparency, the fight against corruption, and the modernization of economic life, known as the "Sapin II" Law, limits the possibilities of implementing measures of constraint related to debts owed by states suffering financial difficulties.[38,39] With this limitation, the French Legislature aims to combat the activities of certain creditors speculating on these debts, particularly so-called "vulture funds."[40] Under French Law, measures of constraint targeting the property of foreign states must be authorized in advance by a court, whose decision is taken following a non-adversarial procedure in which the debtor state is not present.[41] Article 60 of the "Sapin II" Law prohibits

[37] This temporal application was criticized because it would have been necessary for the Law to apply only to purchases taking place after its commencement in order to safeguard legal certainty for investors (see PROPOSITION DE LOI RELATIVE À LA LUTTE CONTRE LES ACTIVITÉS DES FONDS VAUTOURS, RAPPORT FAIT AU NOM DE LA COMMISSION DES FINANCES ET DU BUDGET, doc. no. 54 1057/003, 23-24, <lachambre.be/FLWB/PDF/54/1057/54K1057003.pdf> (June 19, 2015)). The Belgian Constitutional Court approved the temporal application of the Law (decision no. 61/2018, para. B.22.1 et seq., <const-court.be/public/f/2018/2018-061f.pdf> (May 31, 2018)).

[38] Before that, two Bills aimed explicitly at combating the actions of so-called "vulture funds" had been introduced in the French National Assembly in 2006 and 2007 but were never adopted (Assemblée nationale française, proposition de loi no. 3214, <assemblee-nationale.fr/12/propositions/pion3214.asp> (June 28, 2006) and Assemblée nationale française, proposition de loi no. 131, <assemblee-nationale.fr/13/propositions/pion0131.asp> (August 2, 2007)).

[39] Article 60.V provides that the central state, federated states, and their public establishments are regarded as foreign states.

[40] These funds were designated during the preparatory work for the Law (Assemblée nationale française, *Compte rendu intégral, session ordinaire de 2015-2016*, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE, 3888, <assemblee-nationale.fr/14/pdf/cri/2015-2016/20160203.pdf> (June 6, 2016)). The anti-speculation provision was challenged before the French Constitutional Council, which ruled that it is compliant with the French Constitution (decision no. 2016-741, <conseil-constitutionnel.fr/en/decision/2016/2016741DC.htm> (December 8, 2016)).

[41] Article 60.I refers to Article L. 111-1-1 of the French *Code des procédures civiles d'exécution*, which provides that precautionary measures or compulsory execution measures may only be implemented on a property belonging to a foreign state with the prior authorization of the judge by means of an order issued on a unilateral request. See the arguments in support of the French rule reproduced in Sébastian Denaja, RAPPORT N^OS. 3785 ET 3786 FAIT AU NOM DE LA COMMISSION DES LOIS CONSTITUTIONNELLES, DE LA

the judge from granting such authorization when various conditions illustrative of a "vulture" behavior are met.[42]

In order to ensure that the judge is adequately informed, the French Law provides that the creditor must communicate the deed by which he has acquired the debt and disclose the date and full financial terms of the transaction[43,44].

While a judge may not authorize measures of constraint against the property of a foreign state when the conditions for applying the protective mechanism are met, an exception is nevertheless provided for.[45] The judge can authorize such measures when the creditor reduces his demands to a certain level.[46] Measures are possible when a proposal to alter the terms of the issuance contract, applicable to the debt instrument involved, has been accepted by creditors representing at least 66 percent of the principal amount of eligible claims and has come into force. In this case, the creditor must have requested measures for sums whose total amount is less than or equal to the amount he would have obtained if he had accepted the proposal. Thus, measures of constraint may be authorized if the creditor limits his claims to what he would have obtained if he had followed the debt restructuring effort.[47]

11. The terms and conditions – The French protective mechanism, which applies to debt instruments acquired from the entry into force of the provision establishing it,[48] is activated

LÉGISLATION ET DE L'ADMINISTRATION GÉNÉRALE DE LA RÉPUBLIQUE, SUR LE PROJET DE LOI (N° 3623) […] RELATIF À LA TRANSPARENCE, À LA LUTTE CONTRE LA CORRUPTION ET À LA MODERNISATION DE LA VIE ÉCONOMIQUE […], 278, <assemblee-nationale.fr/14/pdf/rapports/r3785-tI.pdf> (May 26, 2016).

[42] Article R. 111-1 of the French *Code des procédures civiles d'exécution* provides that the enforcement judge of the Paris judicial court has sole jurisdiction to rule on the request for authorization.

[43] The debt instruments concerned are specified by references to provisions of the French *Code monétaire et financier* (Article 60.I and Article 60.VIII).

[44] Article 60.IX. These documents and data must be provided, failing which the application will be inadmissible. The information must be certified by an auditor.

[45] Article 60.IV.

[46] In the event of authorization requested on the basis of Article 60.IV, measures of constraint may only be authorized by the judge subject to compliance with the general immunity regime (see Articles L. 111-1 et seq. of the French *Code des procédures civiles d'exécution*).

[47] With this exception, the French Law indirectly imposes a collective action clause on creditors (Sylvain Bollée, *Les dispositions de la loi Sapin 2 relatives à l'immunité d'exécution*, 43 RECUEIL DALLOZ 2560, 2560 (2016)).

[48] Article 60.VI.

when various conditions relating to the financial situation of the debtor state and the terms of acquisition of the debt are met.[49]

The first condition is that the foreign state was on the list of official development assistance recipients drawn up by the Development Assistance Committee of the Organisation for Economic Co-operation and Development when it issued the debt instrument. The judge must therefore consider the financial situation of the debtor state at the time of issuance of the debt instrument concerned by the creditor's legal action.

The second condition concerns the situation of the debtor state at the time of acquisition of the debt instrument by the pursuing creditor. He must have acquired the instrument when the foreign state was in default on it,[50] or had proposed a modification of its term.

The third condition is that the default on the debt instrument is less than 48 months old at the time when the creditor requests a measure of constraint, *or* the first proposal to amend the terms of the debt instrument is less than 48 months old when the creditor requests a measure of constraint, *or* a proposal to amend the terms of the debt instrument has been accepted by creditors representing at least 66% of the principal amount of eligible claims, irrespective of the threshold required, where applicable, for entry into force.[51] The judge may extend both time limits of 48 months to 72 months in the event of a "manifestly abusive behavior of the holder of the debt instrument."[52]

Chapter 4: The U.S. Bill no. 110 H.R. 6796 and Bill no. 111 H.R. 2932

12. The prohibition on sovereign debt profiteering – In 2008 and 2009, two similar Bills were introduced in the U.S. House of Representatives to prevent speculation and profiteering in the defaulted debt of certain poor countries.[53] These Bills, which were not adopted, aim to pass a "Stop VULTURE Funds Act."[54] The proposed Act makes sovereign debt profiteering illegal and

[49] Article 60.I.
[50] The default situation is defined following the clauses stipulated in the debt agreement or, in the absence of such clauses, by a default on the initial due date specified in the debt agreement (Article 60.III).
[51] We use italics.
[52] Article 60.II.
[53] 110 H.R. 6796 (August 1, 2018) and 111 H.R. 2932 (June 18, 2009).
[54] Section 1. The other title is *Stop Very Unscrupulous Loan Transfers from Underprivileged countries to Rich, Exploitive Funds Act*.

penalizes it by providing that "[w]hoever willfully violates subsection (a) shall be fined an amount equal to the total amount sought by the person through the sovereign debt profiteering."[55]

The Bills prevent the profiteering in certain countries' defaulted debts by limiting the amount recoverable by secondary creditors who have acquired them at a discount to their face value, whom they call "vulture creditors."[56] The term "sovereign debt profiteering" refers to any act with threat of, or recourse to, litigation, by a vulture creditor seeking the payment of the debt in an amount that exceeds the total amount paid to acquire the debt plus 6 percent simple interest on the total amount.[57] The text provides that the maximum amount recoverable does not include legal fees and other costs associated with collection.

The proposed legislation makes the use of U.S. courts to further sovereign debt profiteering impossible. It stipulates that "[a] court in or of the United States may not issue a summons, subpoena, writ, judgment, attachment, or execution, in aid of a claim under any theory of law or equity a purpose of which would be furthering sovereign debt profiteering."[58] Furthermore, "[i]f it appears to a court in or of the United States that an action brought in the court constitutes, or is in furtherance of, sovereign debt profiteering, the court shall, on its own initiative or at the request of any interested party, promptly dismiss the action."[59]

In the interests of transparency, U.S. courts must require creditors to take different steps and file a series of documents before granting anything to creditors taking actions involving the collection of sovereign debt.[60] These disclosure requirements aim to obtain as much information as possible about creditors and debts being pursued. It should also be noted that failure to comply with the obligation of transparency and the procedures it imposes has significant consequences since violating measures shall be void.[61] To help ensure that the statements submitted by

[55] Section 4.
[56] Section 3(1). The term "vulture creditors" does not include the Government of the United States or any agency of the Government of the United States, any foreign state, or any international financial institution (as defined in Section 1701(c)(2) of the *International Financial Institutions Act*).
[57] Section 3(4).
[58] Section 5(a). If the jurisdictions do not respect the limitation, the measures decided shall be void (Section 5(c)).
[59] Section 5(d).
[60] Section 5(b). Whenever large institutional creditors, such as banks, seek repayment within the maximum authorized threshold, they would be required to release potentially sensitive information (James Bai, *Stop Them Circling: Addressing Vulture Funds in Australian Law*, 35 SYDNEY LAW REVIEW 703, 729 (2013)). Furthermore, the application of the Act would lead to this information being made public (Section 6(b)).
[61] Section 5(c).

creditors are accurate, it is stipulated that "[a] party against whom a summons, subpoena, writ, judgment, attachment, or execution is sought in an action brought with respect to collection of sovereign debt of a foreign state, and the foreign state, shall be entitled to discovery to determine the veracity of the matters attested to in any affidavit required by subsection (b)."[62]

13. The protected states and affected debts – The key term "sovereign debt profiteering" used in the U.S. Bills involves the "defaulted sovereign debt" of a "qualified poor country."[63]

The term "sovereign debt" refers to "a commercial obligation of a foreign state, whether evidenced by a claim, contract, note, negotiable instrument, award, or judgment."[64] A "defaulted sovereign debt" means "any sovereign debt for which payment has been refused by a foreign state, which is subject to an announced moratorium, upon which an award or judgment has been entered, or upon which a payment of interest or principal has not been paid according to the terms of the debt obligation."[65]

"Qualified poor countries" are foreign states on a list compiled and maintained by the Secretary of the Treasury.[66] These countries are defined as "foreign states that are eligible for financing from the International Development Association but not from the International Bank for Reconstruction and Development;"[67] but do not fall into one of the categories of banned countries.[68] Indeed, the U.S. Bills refuse that states hostile to the United States or its policies can benefit from the

[62] Section 5(e).
[63] The term "foreign state" used to define the notion of "qualified poor country" includes a political subdivision of a foreign state, or an agency or instrumentality of a foreign state (Section 3(6)).
[64] Section 3(2).
[65] Section 3(3).
[66] Section 3(9). Section 6(d)(1) also provides that the Secretary of the Treasury must, in an annual report, explain how it determined which countries would be included in the list. The report is submitted to the Committees on Financial Services and on the Judiciary of the House of Representatives and the Committees on Foreign Relations and on the Judiciary of the Senate, and made available to the public.
[67] Section 6(a)(1). To ensure that these foreign states are adequately informed, Section 6(c) requires that the Secretary of the Treasury provides written notice of the provisions of the Act within 90 days after the date of its enactment.
[68] Section 6(a)(2). Foreign states not eligible for protection are determined by the Secretary of the Treasury in consultation with the Secretary of State.

envisioned protective mechanism.[69] Thus, "qualified poor countries" do not include states whose government and military or other security forces engage in gross violations of human rights, states whose government has an excessive level of military expenditures, states whose government has supported acts of international terrorism, or states whose government does not cooperate with the United States on international narcotics control matters.[70]

The U.S. Bills provide that the prohibition on the use of U.S. courts to further sovereign debt profiteering applies to actions brought or pending on or after the date of the enactment of the Act.[71] However, the Bills make no distinction between debts incurred prior to the date of enactment and those incurred afterward.[72]

Chapter 5: The 2023 New York Bills

14. Two committed Bills – Since the Bills introduced in the House of Representatives over a decade ago, no legislation has been passed in the United States. Very recently, two initiatives (Bill no. A5290 and Bill no. S5623,[73] on the one hand, Bill no. A2970 and Bill no. S4747,[74] on the other hand) were introduced in the New York State Legislature, both in the Assembly and the Senate. If enacted[75], these Bills would affect the activities of so-called "vulture funds."[76] Bill no. A5290 and Bill no. S5623 aim

[69] John Muse-Fisher, *Starving the Vultures: NML Capital v. Republic of Argentina and Solutions to the Problem of Distressed-Debt Funds*, 102 CALIFORNIA LAW REVIEW 1671, 1698 (2014).
[70] Section 6(a)(2).
[71] Section 5(h).
[72] Eloy Peral, *Curtailing Vulture Funds in Low-Income Sovereign Debt Litigation: American and British Legislative Responses*, BUSINESS LAW BRIEF 17, 21 (2010-2011).
[73] <nysenate.gov/legislation/bills/2023/a5290> (March 7, 2023) and <nysenate.gov/legislation/bills/2023/S5623> (March 9, 2023).
[74] <nysenate.gov/legislation/bills/2023/a2970> (February 1, 2023) and <nysenate.gov/legislation/bills/2023/s4747> (February 14, 2023). A similar Bill had already been introduced in the New York State Legislature in the past (<nysenate.gov/legislation/bills/2021/A10595> (July 6, 2022)).
[75] The parliamentary session ended without a vote. Some legislators have indicated that they will introduce a similar bill during the next parliamentary session. It should be noted that opposition to these Bills was considerable (see in particular the letter of *The Credit Roundtable* organization, <cdn.ymaws.com/thecreditroundtable.org/resource/resmgr/initiatives/230515_ny_state_assembly_crt.pdf> (May 15, 2023)).
[76] In addition to these two Bills, there are Bill no. A2102A and Bill no. S5542, which deal with sovereign debt restructurings and would have an indirect effect on speculation since they aim to facilitate restructurings in which such funds often refuse to participate

to modify the champerty rule and then significantly impact these activities by preventing the purchase of sovereign debt for speculative purposes. Bill no. A2970 and Bill no. S4747 are aimed at implementing international debt relief initiatives and, in this way, they impede the holdout behavior of speculative funds.

15. The modification of the champerty rule – Bill no. A5290 and Bill no. S5623 provide for various amendments and additions in Section 489 of the New York Judiciary Law entitled "Purchase of claims by corporations or collection agencies." The Bills revise the champerty rule prohibiting the purchase of debts with the intent and for the purpose of bringing an action or proceeding thereon. The first subdivision of Section 489 of the New York Judiciary Law provides that "no person or co-partnership, engaged directly or indirectly in the business of collection and adjustment of claims, and no corporation or association, directly or indirectly, […] shall solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, *with the intent and for the purpose of bringing an action or proceeding thereon* […]."[77] Under Bill no. A5290 and Bill no. S5623, this rule remains in place, but some of its terms are modified, specifically to combat so-called "vulture funds."[78]

First, the fact that the champerty rule does not apply to sovereign debt exceeding five hundred thousand U.S. dollars is repealed. In 2004, the champerty rule was amended to stipulate that it would no longer apply to sovereign debts exceeding this amount.[79] Bill no. A5290 and Bill no. S5623 remove this

(<nysenate.gov/legislation/bills/2023/a2102/amendment/a> (January 23, 2023) and <nysenate.gov/legislation/bills/2023/S5542> (March 8, 2023)).

[77] We use italics.

[78] The rationale for the text introduced in the Senate reads as follows "[t]his bill will strengthen this provision and eliminate the safe harbor for transactions over $500,000 to prevent vulture funds from profiteering from countries' debt at the expense of people" (<nysenate.gov/legislation/bills/2023/S5623>).

[79] At the time, this change was motivated by the fact that "[m]arkets have developed for the purchase and sale of claims including claims that are in default" and that "[t]he ability to collect on these claims without fear of champerty litigation is essential to the fluidity of commerce in New York" (New York State Assembly, *An act to amend the judiciary law, in relation to the purchase of claims for valuable consideration – memorandum in support of legislation*, Bill no. A07244C, <assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=A07244&term=2003&Summary=Y&Actions=Y&Floor%26nbspVotes=Y&Memo=Y&Text=Y> (March 25, 2003)).

limitation, which will impact the activities of speculative funds generally pursuing large amounts.

Second, Bill no. A5290 and Bill no. S5623 make it easier to demonstrate the assignee's intent and purpose of bringing action or proceeding, required to activate the champerty rule. Since demonstrating intent and purpose is not easy,[80] the Bills provide three situations from which judges can deduce them. These scenarios reflect the business model used by so-called "vulture funds." The first situation is that of the assignee's (or its affiliates') history of acquiring claims at significant discounts from their face values and bringing legal actions to enforce those claims. The second is that of refusal of the assignee, or any predecessor in title to the claim, to participate in a consensual settlement of the claim if holders of not less than two-thirds (by outstanding amount) of similar claims against the obligor had agreed to accept the terms of that settlement. Lastly, the third situation is that of other facts or circumstances a court may find relevant in assessing the assignee's intent and purpose in taking the assignment.

Third, although it does not appear directly related to the champerty doctrine, Bill no. A5290 and Bill no. S5623 add a new Section 489-a in the Judiciary Law dealing with sovereign debt modifications. This new provision imposes a duty on the holders of instruments governed by the law of the state of New York calling for the payment of a monetary obligation by a foreign state to participate in good faith in "qualified restructurings"[81] affecting such instruments.[82] If adopted, new Section 489-a of the Judiciary Law will have an impact on speculative funds since their business model drives them to refuse to participate in the restructuring of the distressed sovereign debt they hold.

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[80] See the key decision of the United States Court of Appeals for the Second Circuit in the Peruvian litigation involving *Elliott* fund (United States Court of Appeals for the Second Circuit, *Elliott Associates LP v. Banco de la Nacion*, 194 F.3d 363 (October, 20, 1999)).

[81] A "qualified restructuring" means a modification of the terms of some or all of the unsecured debt instruments issued by a foreign state whose debt has been assessed as unsustainable by the International Monetary Fund within the prior twelve months provided that the modification is accepted by the holders of not less than two-thirds in amount and more than one-half in number of the debt instruments affected by the modification. New Section 489-a provides that are excluded, for purposes of voting, any instruments that are owned or controlled, directly or indirectly, by the foreign state or any of its agencies or instrumentalities.

[82] The term "foreign state" is defined by a reference to 28 U.S. Code § 1603(a) which specifies that the term, except as used in Section 1608, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state.

16. The support of international debt relief initiatives – Bill no. A2970 and Bill no. S4747 relate to New York state's support of international debt relief initiatives for certain developing countries. They aim to make such initiatives more effective by ensuring private creditors participate alongside public creditors on comparable terms.[83] Bill no. A2970 and Bill no. S4747 aim to amend the Debtor and Creditor Law by adding a new Article 10-B entitled "Recoverability of Sovereign Debt." This provision would limit debt claims against debtor states eligible to participate in one or more of the international debt relief initiatives in which the United States Government has engaged.[84] The Bills are interesting since they limit the speculation to an extent compatible with the sustainability of sovereign debt.

Bill no. A2970 and Bill no. S4747 provide that any debt claim incurred prior to the date of the state's application to participate in one or more international initiatives shall only be recoverable to the extent that it comports with burden-sharing standards and up to the proportion that would have been recoverable by the United States federal Government under the applicable international initiative if the Government had been the creditor holding the claim. Moreover, new Article 10-B of the Debtor and Creditor Law provides that the debt claim has to meet "robust disclosure standards."

[83] This goal makes these Bills similar in some respects to the British *Debt Relief (Developing Countries) Act* (*supra* nos. 6-7).

[84] Bill no. A2970 and Bill no. S4747 give examples of such initiatives: the Heavily Indebted Poor Countries Initiative, the Debt Service Suspension Initiative, and the Common Framework for Debt Treatments beyond the DSSI.

Part II: A new regulation of speculation in sovereign debt

17. The terms and conditions to be specified – After emphasizing the effectiveness of regulating vulture funds' activities at a national level, the Advisory Committee of the United Nations Human Rights Council, analyzing the British, Belgian, and French Laws, pinpoints various valuable guidelines that could be drawn from them. The Committee states that "(a) protection should be extended to any debt-distressed country and not only to heavily indebted poor countries; (b) procedures should allow for the identification of debts that are protected from the claims of vulture funds, on the basis of objective criteria; (c) concerns about the socioeconomic situation of the debtor State and the well-being of its population should be adequately incorporated and addressed by the legislator; and (d) issues regarding the lack of transparency in the secondary debt market and the operation of vulture funds in tax havens should be also tackled."[85] These hints are essential and need to be clarified. Speculation in sovereign debt is such a sensitive and complex phenomenon that it requires a thorough reflection.[86] An important point is that an objective, precise, and informed judicial appraisal of speculative funds' claims is essential (**Chapter 1**). As the claims need to be carefully assessed in light of their implications, it is advisable to provide for their limitation rather than their prohibition (**Chapter 2**). Finally, since this limitation ensures that speculation does not undermine sovereign debt sustainability, it is crucial to specify the players and debts targeted (**Chapter 3**).

Chapter 1: An objective, precise, and informed judicial appraisal

18. A prior judicial approval – Stakes surrounding sovereign debt and speculation make it clear that creditors' claims should

[85] Human Rights Council of the United Nations, ACTIVITIES OF VULTURE FUNDS AND THEIR IMPACT ON HUMAN RIGHTS – FINAL REPORT OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE, 9 (A/HRC/41/51, May 7, 2019).

[86] Criticizing Belgium's fast-paced legislative process, some lament that "[t]he drafting of the statute is very poor" (Hakim Boularbah, *Successfully enforcing an arbitral award*, in Vanessa Foncke and Benoît Kohl (ed.), WHAT COUNSEL IN ARBITRATION *CAN DO*, *MUST DO* OR *MUST NOT DO?*, 99 (2015)).

be subject to judicial oversight. It is important that a court approves in advance any action aimed at condemning or implementing a measure of constraint related to sovereign debt.[87] The judge must independently assess, based on legal criteria and an analysis of factual circumstances, whether the pursued debt should be protected. In order to ensure consistent case law and the expertise of the judges dealing with this complex matter, it is advisable to concentrate disputes before specially designated courts.[88] To keep the judge thoroughly informed, legal proceedings should be conducted on an adversarial basis, except in exceptional cases where the creditor could justify recourse to a unilateral procedure.[89]

Debtor states do not always have the resources to react to legal action taken against them, and they are sometimes unaware of the importance of the steps taken by their creditors.[90] Consequently, it is helpful to provide that a copy of the request for judicial appraisal has to be sent by the creditor to the diplomatic agent of the debtor state in the country where the proceedings are initiated.[91] To ensure that the sovereign debtor is fully informed, a copy of the regulation should also be attached.[92]

19. A need for objectivity and precise criteria – Two of the main criticisms leveled at the above-mentioned regulations of speculation in sovereign debt are the subjective nature of the decisions taken by the courts[93] and the imprecision of the criteria

[87] This dual situation is not, for example, covered by the French Law, which only regulates measures of constraint (*supra* no. 10).
[88] This concentration feature is incorporated in the French mechanism (*supra* no. 10).
[89] The French Law sets up such a unilateral proceeding (*supra* no. 10). The surprise effect assertion presented in favor of such a procedure does not justify a departure from the adversarial principle, at least not in all cases.
[90] See, for example, United States Court of Appeals for the District of Columbia Circuit, *FG Hemisphere Assocs. v. Democratic Republic of Congo*, 447 F.3d 835, 842 (May 19, 2006), where, after default judgments had been rendered against the country, the Court approved its justification of "excusable neglect."
[91] This measure was outlined in the *Developing Country Debt (Restriction of Recovery) Bill*, which preceded the British *Debt Relief (Developing Countries) Act* (*supra* no. 6).
[92] It could also be envisaged to provide written notice of the provisions of the regulation to each state included on the list of protected states (on this list, see *infra* no. 25). This was envisaged in the U.S. Bills, which stipulated that the Secretary of the Treasury would provide such written notice within 90 days after the date of the enactment of the Act (*supra* no. 13).
[93] Examples include the two limits of 48 months, which the French judge can extend to 72 months in the event of a "manifestly abusive behavior of the holder of the debt instrument" (*supra* no. 11), or the "other facts or circumstances as a court may find relevant in assessing the assignee's intent

used.[94] Yet these loopholes are likely to undermine legal certainty and, in so doing, jeopardize the smooth functioning of sovereign debt markets. They also have an impact on the legitimacy and effectiveness of the regulation of the secondary market for sovereign debt instruments.[95]

Litigation between speculative creditors and their sovereign debtors is often addressed as a question of morality.[96] However, the multiple issues at stake in these high-profile cases call for an objective approach to speculation that goes beyond the moral and stigmatizing viewpoint with which investment in the secondary market is generally approached.[97] This objectivity is all the more critical when it comes to regulating the phenomenon. It is essential to avoid any moral considerations as well as elusive concepts that reflect them in the interests of objectivization and legal certainty that the sensitivity of speculation in sovereign debt calls for.[98] Although, as Lee Buchheit and Mitu Gulati note, "[m]alice aforethought is an

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and purpose in taking the assignment" in the New York Bills to amend the champerty rule (*supra* no. 15).

[94] Regrettably, many of the terms used in the Belgian Law are imprecise and could thus undermine legal certainty (*supra* no. 8. On the Belgian Constitutional Court's assessment of the criticism of imprecision, see para. B.18.4. et seq. of its ruling on the constitutional challenge raised by NML Capital Ltd. (decision no. 61/2018, <const-court.be/public/f/2018/2018-061f.pdf> (May 31, 2018))). U.S. Bill no. 110 H.R. 6796 and Bill no. 111 H.R. 2932 are also problematic in penalizing whoever *willfully* violates the prohibition on sovereign debt profiteering (*supra* no. 12).

[95] See United Nations Conference on Trade and Development, SOVEREIGN DEBT RESTRUCTURINGS: LESSONS LEARNED FROM LEGISLATIVE STEPS TAKEN BY CERTAIN COUNTRIES AND OTHER APPROPRIATE ACTION TO REDUCE THE VULNERABILITY OF SOVEREIGNS TO HOLDOUT CREDITORS – VULTURE FUNDS IN ACTION: ECONOMIC AND SOCIAL IMPACT, 6, <un.org/en/ga/second/71/se2610bn.pdf> (October 26, 2016).

[96] The words of Gordon Brown, former Prime Minister of the United Kingdom, are often quoted to illustrate the hostility toward speculative funds: "We particularly condemn the perversity where vulture funds purchase debt at a reduced price and make a profit from suing the debtor country to recover the full amount owed – a morally outrageous outcome. […]" (Gordon Brown, SPEECH BY THE CHANCELLOR OF THE EXCHEQUER AT THE UNITED NATIONS GENERAL ASSEMBLY SPECIAL SESSION ON CHILDREN, <webarchive.nationalarchives.gov.uk/20100407194022/http://www.hm-treasury.gov.uk/speech_chex_100502.htm> (May 10, 2002)).

[97] Olivier Creplet and Julien Courbis, *La loi belge du 12 juillet 2015 relative à la lutte contre les activités des fonds vautours*, REVUE LUXEMBOURGEOISE DE BANCASSURFINANCE 70, 75 (2016).

[98] These moral considerations are embodied in the Belgian Law, whose key notion is that of "illegitimate advantage" (*supra* no. 8). The immorality of the vulture funds' actions was pointed out during the preparatory work for the Law (see, for instance, PROPOSITION DE LOI RELATIVE À LA LUTTE CONTRE LES ACTIVITÉS DES FONDS VAUTOURS, DÉVELOPPEMENTS, doc. no. 54 1057/001, 5, <lachambre.be/FLWB/PDF/54/1057/54K1057001.pdf> (April 30, 2015)).

essential trait of the genuine vulture creditor,"[99] limiting the activities of funds speculating in sovereign debt cannot be made conditional on a finding of any intent on the part of the creditor suing a debtor state.[100] Requiring courts to assess such intent is likely to generate more litigation.[101,102] Indeed, the appraisal of such an evanescent notion is inherently subjective and, therefore, incompatible with the legal certainty required for the proper operation of the markets.[103] In the same way and for the same reasons, the attitude of the sovereign debtor cannot be taken into account either.[104]

The protective mechanism put in place must be activated by judges when the conditions for its application are met. Whatever features are deemed helpful in regulating the activities of so-called "vulture funds," one fundamental requirement is that these features have to be precise. The rules must be properly formulated to prevent such funds with much expertise from

[99] Lee Buchheit and Mitu Gulati, *Responsible Sovereign Lending and Borrowing*, 73 LAW AND CONTEMPORARY PROBLEMS 63, 67 (2010). See also on this "malice aforethought," Lee Buchheit and Elena Daly, *Minimizing Holdout Creditors – Carrots*, in Lee Buchheit and Rosa Lastra (ed.), SOVEREIGN DEBT MANAGEMENT, 5 (2014).

[100] During the preparatory work for the Belgian Law, one of the legislators introducing the text stated that there must be a specific intention and the judge will have to assess whether or not this intention exists (PROPOSITION DE LOI RELATIVE À LA LUTTE CONTRE LES ACTIVITÉS DES FONDS VAUTOURS, RAPPORT FAIT AU NOM DE LA COMMISSION DES FINANCES ET DU BUDGET, doc. no. 54 1057/003, 18, <lachambre.be/FLWB/PDF/54/1057/54K1057003.pdf> (June 19, 2015)). However, this assessment by the judge was not anticipated in the Law as enacted.

[101] Patrick Wautelet, *Vulture funds, creditors and sovereign debtors: how to find a balance?*, in Mathias Audit (dir.) INSOLVABILITÉ DES ÉTATS ET DETTES SOUVERAINES, 155 (2011).

[102] The challenging assessment of the creditor's intention, as provided in the champerty rule that the New York Bill no. A5290 and Bill no. S5623 seek to modify, demonstrates the inadequacy of using such a criterion (*supra* no. 15).

[103] The British Government thus refused to take the intention of the creditor into account when determining how to treat their claim, noting that it did not consider that "differences perceived by some participants in motive between or amongst creditors provide a basis to determine differential treatments in law" (H.M. Treasury, ENSURING EFFECTIVE DEBT RELIEF FOR POOR COUNTRIES: A RESPONSE TO CONSULTATION, 9, <gov.uk/government/organisations/hm-treasury> (2010)).

[104] In the Argentine case, the Republic was found by the United States Court of Appeals for the Second Circuit to be a "uniquely recalcitrant debtor" (United States Court of Appeals for the Second Circuit, *NML Capital, Ltd. v. Republic of Arg.*, 727 F.3d 230, 247 (August 23, 2013)). The subjective argument of intention had again been taken up by Justice Thomas Griesa to tune his view of the case, arguing at the time of the 2015 change of presidency that "[p]ut simply, President Macri's election changed everything," and that "[m]ost importantly, the Republic has shown a good-faith willingness to negotiate with the holdouts" (United States District Court for the Southern District of New York, *NML Capital, Ltd. v. Republic of Arg.*, 2016 U.S. Dist. LEXIS 26355, 178 (March 2, 2016)).

taking advantage of loopholes and avoid the debate surrounding them becoming too wide-ranging.[105] Precise rules also ensure legal certainty. In addition, the vagueness of the criteria is likely to give judges too much leeway in their assessment while the issues at stake undoubtedly go beyond their jurisdiction.[106]

20. Transparency – Since any action aimed at condemning or enforcing a condemnation concerning a sovereign debt will be subject to prior judicial appraisal, the creditor will be expected to disclose to the judge the conditions under which the debt being pursued was acquired. The Advisory Committee of the United Nations Human Rights Council recommends enhancing and promoting transparency, as it enables the courts to have access to all relevant documents and information on the amounts concerned and the identity of creditors.[107]

Here again, the regulation must be clear and precise.[108] In fact, it will essentially be the information relating to the amount paid to acquire the debt being pursued that will have to be disclosed to the judge, as this amount is key.[109] The judge could request other information to verify how the debt was acquired in order to avoid abuses that could surround it. It should be stipulated that the pursuing creditor must communicate the contract by which he has acquired the debt, failing which his claim will be inadmissible. This contract must provide information on the

[105] Commenting on the Belgian Law, Hakim Boularbah wrote that it is "ambiguous on numerous issues" and that "[t]here is no doubt that it will provoke a lot of discussions and controversy when it will come to its application to a particular case" (Hakim Boularbah, *Successfully enforcing an arbitral award*, in Vanessa Foncke and Benoît Kohl (ed.), WHAT COUNSEL IN ARBITRATION *CAN DO*, *MUST DO* OR *MUST NOT DO?*, 99 (2015)).

[106] Questions raised by sovereign debt litigation often go beyond legal analysis alone, encompassing economic, political, sociological, and diplomatic issues. Therefore, it is advisable to equip courts and show judges the path to follow.

[107] Human Rights Council of the United Nations, ACTIVITIES OF VULTURE FUNDS AND THEIR IMPACT ON HUMAN RIGHTS – FINAL REPORT OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE, 18 (A/HRC/41/51, May 7, 2019). The Advisory Committee of the United Nations Human Rights Council points out that so-called "vulture funds" can operate on the secondary market with great secrecy in terms of both ownership and operations. The Committee also notes that sovereign debt instruments are thus traded between investors without the debtor states concerned necessarily being aware or informed of operations affecting them (Human Rights Council of the United Nations, ACTIVITIES OF VULTURE FUNDS AND THEIR IMPACT ON HUMAN RIGHTS – FINAL REPORT OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE, 3 (A/HRC/41/51, May 7, 2019)).

[108] We cannot, therefore, be satisfied with a broad formulation such as the one used in New York Bill no. A2970 and Bill no. S4747 (*supra* no. 16).

[109] See *infra* no. 21 et seq.

financial terms of the acquisition.[110] Finally, it is essential to provide a means for the debtor to determine the veracity of the information transmitted by the pursuing creditor.[111]

Chapter 2: A limitation of the claims

21. A limitation rather than a prohibition – Without any restrictions on the claims brought to courts by funds speculating in sovereign debt, decisions tend to be very high in relation to the amount paid to purchase debt instruments on the secondary market.[112] Therefore, it is appropriate that the envisioned regulation moderates their expectations for the sake of the sustainability of the pursued debts.[113]

The limitation should be privileged over prohibition.[114] Indeed, by completely barring creditors from claiming the payment of the debt instruments they hold, there is a considerable risk of disrupting sovereign debt markets as creditors will be less inclined to invest.[115] Yet, the importance of well-functioning markets is well known as borrowing is essential to compensate for the potential gap existing between the revenues that states can enjoy and the expenses that their missions entail.[116] Moreover, investors in the secondary market for sovereign debt contribute to its liquidity and, consequently, reduce the cost of

[110] The transparency requirements of the French mechanism are similar to those advocated here (*supra* no. 10). The requirements set in the U.S. Bills are much more cumbersome and intrusive, so they should not be implemented (*supra* no. 12).
[111] The U.S. Bills are attractive because they offer a possibility of discovery to determine the veracity of the creditor's statements (*supra* no. 12).
[112] Ryan Avery, *Out of the Desert and to the Oasis: Legislation on Predatory Debt Investing*, 18 UNIVERSITY OF MIAMI INTERNATIONAL AND COMPARATIVE LAW REVIEW 267, 286 (2011).
[113] In the summary of a March 2023 report on debt relief in low-income countries, the International Development Committee of the British House of Commons notes that "[b]y diverting money away from vital public services, the opportunity cost of servicing unsustainable public debt can be devastating" (International Development Committee, DEBT RELIEF IN LOW-INCOME COUNTRIES, <publications.parliament.uk/pa/cm5803/cmselect/cmintdev/146/summary.html> (March 10, 2023)).
[114] *A fortiori*, it is not advisable to penalize the creditors or to void their claims, as envisaged by the U.S. Bills (*supra* no. 12).
[115] Elizabeth Broomfield, *Subduing the Vultures: Assessing Government Caps on Recovery in Sovereign Debt Litigation*, 2010 COLUMBIA BUSINESS LAW REVIEW 473, 510-511 (2010).
[116] Robert Kolb, *The Virtue of Vultures: Distressed Debt Investors in the Sovereign Debt Market*, THE JOURNAL OF SOCIAL, POLITICAL AND ECONOMIC STUDIES 368, 370 (2015).

capital.[117] Last but not least, compared to prohibition, the limitation of creditors' claims is better aligned with the respect due to their possessions.[118]

The limitation of claims should apply in the situation where a case is brought before the courts for condemnation as well as in the situation where it is brought for enforcing a condemnation already obtained, be it a judicial decision or an arbitral award.[119] This is a critical precision, given that some national courts will doubtless continue to condemn debtor States to the total amounts claimed by their speculative creditors, who will then seek to enforce these decisions elsewhere in the world.[120]

As speculative funds often engage in numerous legal actions around the world, it is essential to ensure that any amounts already obtained in connection with the debt instrument being pursued are deducted from the amount that can be granted.[121]

The limitation is relevant only insofar as the creditor and the debtor are at odds over payment of the debt being pursued, and a court is asked to decide on the matter. There is no justification for limiting a sovereign debtor's willingness to pay a debt in full,

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[117] The exit option offered by so-called "vulture funds" makes state financing less risky. It thus contributes to the smooth functioning of the markets and reduces the cost of borrowing supposedly (see United States Court of Appeals for the Second Circuit, *Elliott Associates LP v. Banco de la Nacion*, 194 F.3d 363, 380 (October 20, 1999)).

[118] For all these reasons, we do not share the recommendation of the Advisory Committee of the United Nations Human Rights Council that claims which are manifestly disproportionate to the amount initially paid to purchase a sovereign debt should not be considered (Human Rights Council of the United Nations, ACTIVITIES OF VULTURE FUNDS AND THEIR IMPACT ON HUMAN RIGHTS – FINAL REPORT OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE, 18 (A/HRC/41/51, May 7, 2019)). The Committee nevertheless asserts that it is a good practice to limit the value of the claims of speculative funds to the discounted price originally paid for the debt instruments (Human Rights Council of the United Nations, ACTIVITIES OF VULTURE FUNDS AND THEIR IMPACT ON HUMAN RIGHTS – FINAL REPORT OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE, 18 (A/HRC/41/51, May 7, 2019)).

[119] The Belgian Law provides this double effect as its mechanism covers both judgments and measures of constraint (*supra* no. 8). It is difficult to understand the scope of the French Law, which refers only to measures of constraint and does not consider the requests for initial condemnations (*supra* no. 10).

[120] It is doubtful that all national legislatures will adopt our proposed regulation so that some national jurisdictions will not be subject to it.

[121] See Section 3 of the British *Developing Country Debt (Restriction of Recovery) Bill*, which preceded the *Debt Relief (Developing Countries) Act* (*supra* no. 6): "the maximum recovery amount calculated under (a) and (b) above shall be reduced by a sum equal to any amounts recovered from other actions related to the same defaulted sovereign debt." See also on the same consideration regarding the French Law, Paul Giraud, *La restriction des mesures conservatoires et d'exécution forcée exercées par les fonds dits vautours : le syndrome du "milieu de gué"*, REVUE DE DROIT INTERNATIONAL D'ASSAS 359, 369-370 (2018).

even if a speculator holds it. This exclusion of negotiated agreements from the mechanism reflects the business model of so-called "vulture funds." Indeed, there can be no speculation in sovereign debt justifying regulation when there is no threat of, or recourse to, litigation.[122]

22. The price paid – Since limiting the claims of speculative funds is to be preferred to prohibiting them, it is necessary to determine the extent of this limitation. *De lege feranda*, the measure should be that of the amount paid by the creditor in order to acquire the debt instrument on the secondary market.[123,124] This solution is inspired by the *Lex Anastasiana*, which provides that the assignee cannot demand more from the debtor than what he has paid to the assignor.[125] The limitation to the price paid is reasonably proportionate to the objective of combating the activities of certain funds which purchase debts at reduced prices regarding to their face value, then pursue payment at this value plus interest, penalties, and costs, expecting a future improvement of the financial situation of the targeted distressed debtor states.[126]

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[122] A parallel can be drawn with the U.S. Bills which only prohibit "sovereign debt profiteering" and specify that the term does not include "the purchase or sale of such a debt, or the acceptance of a payment in satisfaction of the debt obligation, without threat of, or recourse to, litigation" (*supra* no. 12).

[123] See, in the same vein, Human Rights Council of the United Nations, ACTIVITIES OF VULTURE FUNDS AND THEIR IMPACT ON HUMAN RIGHTS – FINAL REPORT OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE, 18 (A/HRC/41/51, May 7, 2019): "[i]t is a good practice to limit the value of the claims of vulture funds to the discounted price originally paid for the bonds." The British Government pointed out that this approach would not ensure fairness between creditors since they might be entitled to differing amounts of repayment on identical debts bought at different moments (H.M. Treasury, ENSURING EFFECTIVE DEBT RELIEF FOR POOR COUNTRIES: A CONSULTATION ON LEGISLATION, 26, <gov.uk/government/organisations/hm-treasury> (2009)). However, the Government noted some benefits of this approach, indicating that "[e]nsuring that any individual creditor remains entitled to a reasonable return on their investment could be argued to balance the position of that creditor and the benefits of full participation in debt relief. This approach would focus on preventing creditors earning high profits at the expense of debt relief, which constitutes the clearest contravention of international efforts" (*ibid.*).

[124] The Belgian Law and the U.S. Bills provide this limitation (*supra* no. 8 and no. 12). See also the British *Developing Country Debt (Restriction of Recovery) Bill* that preceded the *Debt Relief (Developing Countries) Act* (*supra* no. 6)

[125] Adolf Berger, ENCYCLOPEDIC DICTIONARY OF ROMAN LAW, 547 (1953). According to Matthias Storme, it is "a powerful rule to protect good faith debtors and creditors and only them" (Matthias Storme, *Cherry-Picking Vultures and Other Speculations*, 22 EUROPEAN REVIEW OF PRIVATE LAW 813, 814 (2014)).

[126] See Belgian Constitutional Court, decision no. 61/2018, para. B.16.1. et seq., <const-court.be/public/f/2018/2018-061f.pdf> (May 31, 2018).

By limiting the rights that funds derive from the debt instruments they hold, there is a departure from the strict application of the *Pacta sunt servanda* rule.[127] This departure can be logically justified. Horatia Muir Watt points out that, although the debtor state has legally committed itself to pay the sums stipulated in the contract, it should be emphasized that this commitment has not been made in favor of the purchaser of the debt at a discount on the secondary market.[128] Since speculative funds are not parties to the original covenants they are pursuing, it is conceivable, without any significant infringement of their property rights, to limit their claim to what is really at stake for them.[129,130]

23. The interest and costs – Limiting the claims of so-called "vulture funds," while less disruptive than banning them, is nevertheless not without impact on financial markets. In order to maintain incentives to invest in the secondary market for sovereign debt, it is crucial that those who do so are allowed to claim interest in addition to the amount paid to purchase the debt instruments.[131] The possibility offered to creditors to obtain interest on the amount paid is logically in line with the concern to neutralize the abusive nature of the exercise of their rights by reducing their claim to a normal one for a financial actor seeking

[127] As Key Nakajima points out, "[a]s a matter of principle, all the terms of contract shall be performed, unless otherwise indicated by the proper law of the contract" (Key Nakajima, THE INTERNATIONAL LAW OF SOVEREIGN DEBT DISPUTE SETTLEMENT, 13 (2022)).

[128] Horatia Muir Watt, *Note sous Cass., 28 mars 2013*, REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 674, 677 (2013).

[129] *A priori*, the risk that the debtor state will need to be protected by the mechanism affects the price at which speculative funds purchase debt instruments on the secondary market (see the parallel drawn by Malik Laazouzi with the French *mécanisme du retrait litigieux* (Malik Laazouzi, *Réflexions sur le retrait litigieux des créances en situation internationale*, in MÉLANGES EN L'HONNEUR DU PROFESSEUR BERTRAND ANCEL, 1019 (2018)).

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

[131] This is envisioned in the U.S. Bills, which allow a 6 percent simple interest per year on the total amount, calculated from the date the defaulted sovereign debt was so acquired (*supra* no. 12).

to make a profit with his investment.[132] It is therefore essential not to restrict the creditors' claims solely to the purchase prices, as this would affect the liquidity of the secondary market too significantly.[133] The interest that creditors is allowed to obtain should cover, on the one hand, the risk of not recovering the money invested and, on the other hand, the cost of the unavailability of this money.[134,135] As a result, speculative funds will be entitled to claim, in addition to the amounts paid to acquire debt instruments on the secondary market, interest at the interest rate fixed by these instruments. This interest can be claimed from the date the creditors acquired rights over the sovereign debt.[136]

In addition to the interest they may claim, when creditors have to take legal proceedings to obtain payment, they should be compensated for the cost of these actions. As the costs claimed by speculative funds are often significant,[137] the regulation of their activities must set an acceptable amount for such costs. The solution we recommend is a lump-sum indemnity, whose amount is linked to the claim.[138] Depending on the scale of the dispute, a basic amount, as well as minimum and maximum indemnities, are stipulated. In each case, depending on the circumstances and, in particular, the financial capacity of the

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

[133] This is one of the weaknesses of the Belgian Law highlighted by Daniel Brutti: "Belgium's law, which caps creditor recovery at price paid, effectively extinguishes incentives to trade in distressed sovereign bonds, as no rational investor would incur transaction costs to acquire an asset that can never appreciate" (Daniel Brutti, *Sovereign debt crises and vulture hedge funds: issues and policy solutions*, 61 BOSTON COLLEGE LAW REVIEW 1819, 1847 (2020)).

[134] John Muse-Fisher, *Starving the Vultures: NML Capital v. Republic of Argentina and Solutions to the Problem of Distressed-Debt Funds*, 102 CALIFORNIA LAW REVIEW 1671, 1680 (2014).

[135] Investing in the secondary market is a dangerous business and investors are well aware of the risks. However, these risks must be quantifiable to ensure that some investors are prepared to take them. One of these risks is, for example, that the debt will be restructured and, as a result, its payment will be reduced (see *infra* no. 24).

[136] See the British *Developing Country Debt (Restriction of Recovery) Bill* that preceded the *Debt Relief (Developing Countries) Act* (*supra* no. 6).

[137] Pablo López and Cecilia Nahón, *The Growth of Debt and the Debt of Growth: Lessons from the Case of Argentina*, 44 JOURNAL OF LAW AND SOCIETY 99, 116 (2017). The authors refer to "tens of millions of dollars in legal fees" paid by the Argentine Republic to speculative funds.

[138] This solution is inspired by the Belgian *indemnité de procédure*, which represents a flat-rate contribution to the successful party's legal fees and expenses. For further details on this indemnity, see Bénédicte Biémar, *L'accès économique à la justice*, in Georges de Leval (dir.), DROIT JUDICIAIRE – TOME 2 : PROCÉDURE CIVILE – VOLUME 1 : PRINCIPES DIRECTEURS DU PROCÈS CIVIL, COMPÉTENCE-ACTION-INSTANCE-JUGEMENT, 478-495 (2021).

unsuccessful litigant, the judge may vary the amount awarded within the legal range.

24. The application of restructuring terms – The terms of a restructuring correspond in principle to a debt service that is realistic and, it is to be expected, sustainable. Consequently, in situations where a restructuring takes place,[139] its terms should apply to the speculators' claims that our regulation aims to curb.

When the restructuring terms entail a loss for a speculative fund since he would receive an amount inferior to the amount paid to purchase the debt instrument on the secondary market, their implementation is justified on the grounds of equity between creditors. There would be no justification for so-called "vulture funds" to benefit from more favorable terms, even if they had invested at a time when the sovereign debtor was already facing financial difficulties.[140]

We see no reason to refuse speculative funds to benefit from the terms of a restructuring.[141] In certain instances, debt instruments are purchased on the secondary market at a price lower than the amount at which they might be valued after a restructuring.[142] Since curbing speculation in sovereign debt is justified on the grounds of debt sustainability, speculators should be subject to terms deemed viable for the sovereign debtor, even if these terms involve a profit. This consideration is likely to perpetuate the supervisory role of so-called "vulture funds" insofar as they will

[139] Many sovereign debts are equipped with collective action clauses that facilitate restructurings (International Monetary Fund, FOURTH PROGRESS REPORT ON INCLUSION OF ENHANCED CONTRACTUAL PROVISIONS IN INTERNATIONAL SOVEREIGN BOND CONTRACTS, 4, <imf.org/en/Publications/Policy-Papers/Issues/2019/03/21/Fourth-Progress-Report-on-Inclusion-of-Enhanced-Contractual-Provisions-in-International-46671> (March 6, 2019)). While collective action clauses come in various forms, the most high-profile is undoubtedly the provision enabling a given proportion of creditors to decide to restructure a sovereign debt on behalf of the whole. See also the New York Bill no. A2102A and Bill no. S5542 which aim to facilitate sovereign debt restructurings (*supra* no. 14).

[140] This risk is calculated and taken into account in the interest that investors should be able to derive from their purchase of debt instruments on the secondary market (*supra* no. 23).

[141] A parallel can be drawn with the French mechanism, where the judge can authorize measures of constraint if the creditor limits his claims to what he would have obtained if he had followed the debt restructuring effort (*supra* no. 10).

[142] Patrick Wautelet, *Vulture funds, creditors and sovereign debtors: how to find a balance?*, in Mathias Audit (dir.) INSOLVABILITÉ DES ÉTATS ET DETTES SOUVERAINES, 153-154 (2011).

be inclined to make sure that debtor states do not engage in opportunistic restructurings.[143]

Chapter 3: The targeted players and debts

25. The players – The limitation of claims to the amount paid to acquire the debt instruments being pursued means that it is not necessary to characterize the creditors to whom the protective mechanism applies.[144] Indeed, since creditors are only authorized to recover from their sovereign debtors the amount they have paid to purchase the debt instruments, only secondary creditors are limited in their demands.[145]

The departure from the *Pacta sunt servanda* rule, which means that speculative creditors will not be able to pursue the face value of the debt instruments, logically raises the question of who will benefit from the protection against speculation. Since concern for debt sustainability justifies the limitation, not all states could be protected, regardless of their financial situation.[146] Confining protection to certain countries, precisely defined on the basis of their financial situation, ensures that the regulation is proportionate and that the restriction of creditors' property rights is justified by the difficulties the debtor states face, which no

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

[144] We can therefore be critical of the Belgian Law, which, with specific criteria such as the creditor's headquarters in a tax or banking haven, seeks to characterize the vulture funds it targets (*supra* no. 8).

[145] While it may be necessary to moderate the claims of primary creditors to resolve a crisis through restructuring, the resolution of this problem should not be part of the regulation under consideration, whose sole aim is to limit speculation. Regarding the secondary creditors, this limitation does not prejudge the debate surrounding the obligation to participate in certain relief efforts (*supra* no. 24).

[146] We are therefore critical of the alternative criteria used to determine when the Belgian mechanism is applicable, as they make the scope of application of the Law too broad (*supra* no. 8). See Patrick Wautelet, *La chasse aux "vautours" est ouverte – Du bon usage de la loi du 12 juillet 2015*, in Rafaël Jafferali, Vanessa Marquette, and Arnaud Nuyts (ed.), LIBER AMICORUM NADINE WATTÉ, 562-578 (2017). The author notes that the special treatment of the claims against sovereign debtors may be justified when the Belgian mechanism is used to counter the action of a creditor attacking a state suffering from a manifest development deficit and the amount claimed is such as to cripple the state's ability to meet some of its most vital obligations to its citizens. However, the extensive scope of the Belgian Law, given the alternative nature of the criteria used to categorize an "illegitimate advantage," implies that no distinction is made between debtor states as well as between situations in which they may find themselves. In certain situations, however, the goals advanced by the Belgian legislature are insufficient to justify the special treatment of a creditor's claim.

longer enable them to provide essential services to their population.[147] This limitation of protection to certain countries is all the more justified given that too broad a scope of application of the regulation is likely to have adverse implications for the sovereign debt markets.

Assessing the activities of so-called "vulture funds" and their impact on human rights and examining the anti-speculation legislations adopted to date, the Advisory Committee of the United Nations Human Rights Council argues that "protection should be extended to any debt-distressed country […]."[148] However, it is not sufficient to assert that debt-distressed countries must be protected; it is also necessary to identify them precisely in order to avoid that states benefit from the mechanism while their debts are sustainable.[149,150] To help objectivize situations and facilitate the task of judges, it is appropriate to stipulate that certain states are automatically protected without being expected to demonstrate their impecuniosity.[151] Since one argument against speculative funds is that they sometimes profit from development assistance granted to certain countries, the list of official development assistance recipients drawn up by the

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[147] See Régis Bismuth, *L'émergence d'un "ordre public de la dette souveraine" pour et par le contrat d'emprunt souverain ? Quelques réflexions inspirées par une actualité très mouvementée*, ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 489, 502 (2012). The author analyzes the British *Debt Relief (Developing Countries) Act*'s reference to Heavily Indebted Poor Countries under the Initiative of the World Bank and the International Monetary Fund.

[148] Human Rights Council of the United Nations, ACTIVITIES OF VULTURE FUNDS AND THEIR IMPACT ON HUMAN RIGHTS – FINAL REPORT OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE, 9 (A/HRC/41/51, May 7, 2019).

[149] Even if some of the criteria used in the Belgian Law are linked to sovereign debt unsustainability, such as the adverse impact of the payment claimed by the creditor on the public finances of the debtor state, some criteria are not, such as the creditor's headquarters in a tax or banking haven (*supra* no. 8). As a result, the Belgian mechanism could be applied in scenarios where sovereign debt is not unsustainable.

[150] The term "state" to be protected must be broadly construed. Unlike the Belgian Law which only protects states, the extension to sub-state entities is included in the British Act (Section 2(6)), the French Law (Article 60.V), the U.S. Bills (Section 3(6)), and the New York Bill no. A5290 and Bill no. S5623.

[151] If we draw a parallel with the British Act referring to the HIPC Initiative (*supra* no. 6), the advantage of using a fixed list of countries is that it relies on an objective and widely recognized benchmark aimed at returning sovereign debt to a sustainable level (H.M. Treasury, ENSURING EFFECTIVE DEBT RELIEF FOR POOR COUNTRIES: A CONSULTATION ON LEGISLATION, 25, <gov.uk/government/organisations/hm-treasury> (2009)). However, the restriction of the British protection to the countries covered by the HIPC Initiative is inadequate in two respects. On the one hand, the activities of speculative funds are not limited to these countries and, on the other, the terms of this Initiative are defined in a precise timeframe, whereas the difficulties faced by debtor states are evolving (*supra* no. 6).

Development Assistance Committee of the Organisation for Economic Co-operation and Development could be used to identify countries to be protected.[152] Another rationale for referring to this list is to be found in the need for consistency on the part of states granting development assistance.[153]

It is crucial to provide that the protected state must appear on the list when the claim is pursued. Indeed, the payment sought must affect the sustainability of the debtor state's debt for its limitation to be justified.[154] Moreover, we see no reason why, in order to be protected, a state should have defaulted on its debt or proposed restructuring measures.[155]

In the situation where the state targeted by the speculation is not on the list, the protection put in place should not necessarily be unavailable to it.[156] The debtor state may demonstrate that

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[152] The French Law refers to this list (*supra* no. 11). During the preparatory work for the Law, it was stressed that it is important to put an end to the practices of these funds, which target and capture public development assistance (Assemblée nationale française, *Compte rendu intégral, session ordinaire de 2015-2016*, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE, 4236, <assemblee-nationale.fr/14/pdf/cri/2015-2016/20160211.pdf> (June 9, 2016)).

[153] Although it did not lead to the adoption of a text, the coherence argument was brandished by Melissa Parke, an Australian legislator, who notes that "[i]t does not make sense for Australia and other countries to give debt relief and foreign aid so generously while allowing vulture funds to take this money through litigation" (Commonwealth of Australia House of Representatives, OFFICIAL HANSARD, no. 10/2012, 7791, <parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/7503935a-ef9f-47a5-9ab8-7a228d52f809/toc_pdf/House%20of%20Representatives_2012_06_25_1143_Official.pdf;fileType=application%2Fpdf> (June 25, 2012)). This argument was indirectly taken up in the U.S. Bills which stated that "[a]t the same time that the international community has been extending debt relief to the poor countries of the world, a new form of business has emerged for the purpose of speculating in and profiteering from defaulted sovereign debt at the expense of both the impoverished citizens of the poor nations and the taxpayers of the world who have participated in international debt relief" (Section 2(6)).

[154] Since the situation of a state may change, it seems inappropriate to consider the presence of the state on the list at the time it issued the debt instrument, as the French Law does (*supra* no. 11. See Paul Giraud, *La restriction des mesures conservatoires et d'exécution forcée exercées par les fonds dits vautours : le syndrome du "milieu de gué"*, REVUE DE DROIT INTERNATIONAL D'ASSAS 359, 369-370 (2018)).

[155] Thus, a weakness of the French mechanism, which requires that the creditor has acquired the debt instrument while the foreign state was defaulting on this instrument or had proposed a modification of the terms of the instrument, lies in the fact that it only protects states that have defaulted or undertaken a restructuring. However, the harmful impact of speculative activities exists outside these situations (*supra* no. 11).

[156] French senators Marie-Noëlle Lienemann and Jérôme Durain called for deleting the reference to the list used in the French Law. In their view, it is essential to take account of the vulture fund practices, which do not limit their speculation to poor countries, even if they mainly speculate in their debts. The

satisfaction of the claim would concretely and specifically impair its ability to carry out its missions relating to the fundamental rights of its population.[157]

On the creditor's side, although the possibility is undoubtedly theoretical, all the more so when the state is included on the list of protected countries, nothing should prevent the creditor from demonstrating that the claim would in no way undermine the sustainability of the debtor's debt. This possible challenge ensures that states whose financial situation was distressed at the time the debt instrument was acquired, but has improved in the meantime, are not unduly protected.[158]

Finally, we might wonder whether the behavior of a state could deprive it of protection.[159] This exclusion does not fit in with the justification of sustainability. Given this cardinal justification, the protective regulation should apply regardless of the attitude

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senators pointed out that Greece, which was not on the list of countries receiving official development assistance, was the victim of several vulture funds in 2012. Marie-Noëlle Lienemann and Jérôme Durain also pointed out that limiting the protection to the debts owed by countries receiving official development assistance could encourage speculative funds to develop their speculative activities in countries that would not benefit from such assistance (Marie-Noëlle Lienemann and Jérôme Durain, *Amendement n° 193 rectifié bis*, <senat.fr/enseance/2015-2016/713/Amdt_193.html> (July 4, 2016). See also Joël Labbé and André Gattolin, *Sous-amendement n° 677 à l'amendement n° 634 du Gouvernement*, <senat.fr/enseance/2015-2016/713/Amdt_677.html> (July 5, 2016)).

[157] Hayk Kupelyants insists on the importance of calling in experts since "[t]he concept of debt 'overhang' does not have the requisite legal precision to be susceptible to straightforward application in judicial proceedings" (Hayk Kupelyants, SOVEREIGN DEFAULTS BEFORE DOMESTIC COURTS, 202 (2018)).

[158] NML Capital Ltd. stressed in its action for annulment of the Belgian Law that it is unjustified to limit the rights that a creditor derives from a debt that he had bought when the state was insolvent if the state is solvent when the creditor demand for payment (Belgian Constitutional Court, decision no. 61/2018, para. A.38.2., <const-court.be/public/f/2018/2018-061f.pdf> (May 31, 2018)).

[159] The U.S. Bills excluded from their protection a whole series of countries for various reasons, including gross violations of internationally recognized human rights, excessive level of military expenditures, support for acts of international terrorism, and failure to cooperate on international narcotics control matters (*supra* no. 13). This exclusion can be linked to a remark made by Elis Bebb during the preparatory work for the *Debt Relief (Developing Countries) (Guernsey and Alderney) Law 2013*. The legislator disputed the fact that the legislation would benefit states financing terrorism. He gave the example of Rwanda, one of the countries covered by the Heavily Indebted Poor Countries Initiative, which supported rebels within the Democratic Republic of Congo (his speech is transcribed in Island of Guernsey, *Heavily Indebted Poor Countries Initiative – Official report*, lines 1208-1218, <gov.gg/CHttpHandler.ashx?id=100406&p=0> (November 28, 2012)).

adopted by the state.[160] Moreover, states must be protected from speculation whether they participate in the legal proceedings or not.[161]

26. The affected debts – While debts protected from speculation can be specified in terms of their legal form, it is not advisable to specify which ones should be protected and which should not.[162] Indeed, if this is done, there is a risk that speculative funds will devise legal arguments to circumvent the protective mechanism. Moreover, the limitation of the claims to the amount paid to acquire the debt instruments obviates the need to specify the legal forms of debt that can benefit from the mechanism and those that cannot. The exclusion of debts for goods and services, as well as short-term debts, which is helpful to avoid undermining the functioning of the states,[163] is not necessary when the mechanism provides that the creditor will be able to recover his stake.

Besides their legal form, debts protected from speculation can also be determined on the basis of the moment in time when they were contracted. In order to ensure the sustainability of sovereign debt, the protection must benefit all debts, whether incurred before or after the commencement of the Act. It is also irrelevant when the creditor has purchased the debt instrument on the secondary market.[164] Moreover, since the fundamental rights of creditors are in no way undermined by the proposed regulation, nothing prevents the retroactivity of the protection.[165]

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[160] The British mechanism, which incorporates an exception where the debtor fails to offer to pay the recoverable amount, must therefore be criticized (*supra* no. 6).

[161] Consider here, by way of example, the situation of states that may not defend themselves even though they have been taken to court. One thinks of the problematic situation in the Democratic Republic of Congo, which led a U.S. court to follow the justification of "excusable neglect" put forward by the country in a procedure in which it had defaulted (United States Court of Appeals for the District of Columbia Circuit, *FG Hemisphere Assocs. v. Democratic Republic of Congo*, 447 F.3d 835, 841 (May 19, 2006): "the DRC was plainly hampered by its devastating civil war, which cost over three million lives, shattered the DRC's already shaky political structure, and set off hyperinflation that peaked at over 500% per year in 2000").

[162] The British Act (Section 2), the French Law (Article 60.I and Article 60.VIII), and the U.S. Bills (Section 3(2)) list the different types of debt concerned by their mechanism.

[163] This exclusion is included in the British *Debt Relief (Developing Countries) Act* (Section 2(3)).

[164] Legislation, like the French one, that is limited to protecting debts acquired from the date of its entry into force is not advisable (*supra* no. 11).

[165] It should be noted that some authors pay little attention to the problem that could arise from the retroactivity of a measure relating to sovereign debts that have already been incurred. Such is the case with Steven Schwarcz's proposal

Conclusion

27. An indispensable application – The problems that speculation in sovereign debt poses are convincing arguments for a regulation that so-called "vulture funds" cannot circumvent. The elements of the proposal we have just presented must be incorporated into an Act that cannot be ignored. Otherwise, the protective mechanism would be rendered ineffective. This large scope of the regulation is made necessary by the regular disparity in resources between the players involved in the speculative phenomenon under study. Indeed, speculative funds generally have considerable resources, whereas sovereign debtors being sued often lack the expertise to defend themselves properly.

The regulation must be applied by the court that has to appraise the claim of a creditor, regardless of the law applicable to the debt instrument being pursued.[166] This clarification is essential given the importance of applicable law clauses in sovereign debt covenants. It is crucial to protect debtor states against themselves because their need for liquidity may lead them, when issuing debts, to make choices attesting to their creditworthiness and to abstain from anything that might make them appear to be unreliable contracting parties.

28. A trial period – Given the complexity of sovereign debt markets, the regulation of speculation is sensitive and requires cautious and balanced implementation. It is therefore advisable to consider a temporary validity of the regulation in order to assess its effects.[167] Depending on its results and consequences,

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for a model law to facilitate restructurings. He takes his argument from the justification of public interest and general interest set out in Article 1 of the First Protocol to the European Convention on Human Rights, noting that "[r]etroactivity under the Model Law should arguably satisfy both tests […] because unsustainable sovereign debt can harm debtor nations, their citizens, and their creditors, and can also jeopardize the stability of the financial system" (Steven Schwarcz, *Sovereign Debt Restructuring and English Governing Law*, 12 BROOKLYN JOURNAL OF CORPORATE, FINANCIAL AND COMMERCIAL LAW 73, 90 (2017)).

[166] This disregard for the law applicable to the debt instrument is explicitly taken up in the British mechanism (Section 3(9)), the Belgian one (Article 2.2), and the French one (Article 60.I).

[167] An expiration date was implemented for the British *Debt Relief (Developing Countries) Act*. This Act was initially expiring at the end of the period of one year beginning with commencement, with a possibility to extend it for a further year or make it permanent (Section 9(1)). The *Debt Relief (Developing Countries) Act 2010 (Permanent Effect) Order 2011* (<legislation.gov.uk/uksi/2011/1336/made>) made permanent the legislation

it could then be decided to extend the regulation for a certain period of time or make it permanent. Temporary validity would ensure that no undesirable effects have emerged concerning the availability and cost of credit for states. If the legislation were to be adopted by the New York State Legislature, as we might hope, the test period would also be an opportunity to gauge the impact on New York's position as a financial center and the use of its law and jurisdictions.[168]

due to expire on June 7, 2011. The U.S. Bills also provide for the evaluation of the Act which consists of an annual report that "discusses how this Act has advanced the policies of the United States with respect to poor countries and supported the goals and purposes of the Enhanced HIPC Initiative […], the Multilateral Debt Relief Initiative, and other international efforts to provide debt relief to poor countries" (Section 6(d)(3)).

[168] These considerations were brought to the fore when the British Act was evaluated (House of Lords, *Debt Relief (Developing Countries) Act 2010 (Permanent Effect) Order 2011*, <hansard.parliament.uk/Lords/2011-05-17/debates/11051755000168/DebtRelief(DevelopingCountries)Act2010(PermanentEffect)Order2011> (May 17, 2011)).

Appendix

A BILL

To regulate speculation in sovereign debt

Section 1

Any request for payment of a sovereign debt instrument, whether to obtain a judgment against a debtor state or to implement measures of constraint, must be submitted to a court. The request is submitted to [specially designated courts]. The procedure is conducted on an adversarial basis, except in exceptional cases where the creditor could justify recourse to a unilateral procedure.

Section 2

The creditor must send a copy of the request to the diplomatic agent of the debtor state in the country where the procedure is initiated. A copy of this Act is attached.

Section 3

When the debtor state is on the list of official development assistance recipients drawn up by the Development Assistance Committee of the Organisation for Economic Co-operation and Development at the time the creditor submits the request, the court can only grant the creditor's claim up to the amount paid to acquire the debt instrument for which payment is being sought. In addition to the amount paid to acquire the debt instrument being pursued, the creditor can be granted interest at the interest rate fixed by the debt instrument from the date the debt instrument was acquired. The court can grant the creditor a lump-sum indemnity to cover the costs occasioned in order to obtain payment of the debt instrument. Depending on the scale of the dispute, a basic amount, as well as minimum and maximum indemnities, are stipulated. Regarding the circumstances and, in particular, the financial capacity of the unsuccessful litigant, the court may vary the amount of the indemnity awarded within the legal range.

When a state is not on the list, it can demonstrate that the satisfaction of the claim of the creditor would concretely and specifically impair its ability to carry out its missions relating to the fundamental rights of its population.

Whether the debtor state is on the list or not, nothing prevents the creditor from demonstrating that the payment requested would not concretely and specifically impair the ability of the state to carry out its missions relating to the fundamental rights of its population.

The limitation of the claim of the creditor applies only in the situation where the creditor and the debtor are at odds over the payment of the debt instrument being pursued.

Any amounts already obtained in connection with the debt instrument being pursued are deducted from the amount the court can grant.

If the debt instrument being pursued pertains to a debt that has been restructured, the terms of the restructuring apply to the claim of the creditor.

Section 4

The creditor must disclose to the court the contract by which the debt instrument being pursued was acquired, failing which the claim will be inadmissible. The court can request any information it deems relevant.

The debtor state is entitled to discovery to determine the veracity of the information disclosed by the pursuing creditor.

Section 5

The limitation set out in Section 3 benefits all debt instruments, whether incurred before or after the commencement of this Act. The moment when the creditor bought the debt instrument being pursued is irrelevant.

Section 6

The term “sovereign debt instrument” includes debts owed by a state as well as sub-state entities.

Section 7

This Act applies regardless of the law applicable to the debt instrument being pursued.

Section 8

This Act has an initial validity of two years from its commencement.

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