

Sovereign Debt, Private Wealth, and Market Failure

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This Article argues that the norms and legal practices of global finance in the arenas of sovereign debt and private wealth have led to a significant market failure, in particular the over-supply of sovereign borrowing and a related misallocation of global capital away from its most productive uses. It suggests that this deficiency rests on two related elements: First, a separation of the risks and benefits of sovereign state control, which has resulted from a failure to properly and coherently define the lines between 'public' and 'private' across the international financial arenas of sovereign borrowing and private client banking. And, second, the self-interested and potentially internally conflicted actions of major global banks. I use the lens of 'vulture fund' asset collection efforts in sovereign debt to highlight this problematic outcome, and also ask whether such recovery efforts offer a potential 'private' correction for the market failure. Ultimately, I argue that the vulture fund strategy is insufficient as a corrective, resting on internal inconsistencies and giving rise to its own pathologies. More significant structural reforms and conceptual reconfigurations are necessary, which might capture the benefits of the funds' efforts while minimizing their costs. The Article also tentatively raises deeper theoretical and historical questions about how the lines between public and private wealth have arisen in global finance and how they might be drawn going forward.

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I. INTRODUCTION

Occasionally, the global financial pages offer up a particularly and tellingly untoward public spectacle, as happened in 2006. Officials of the Republic of Congo (sometimes referred to as Congo-Brazzaville) arrived at the United Nations to plead the case for relief from the \$9.2 billion Congolese debt burden, little of which seemed to improve the country's long-term development capacity but which, nonetheless, resulted in overwhelming debt payments. The optics of this relief effort were somewhat marred, however, by the decision of the presidential party to rent forty-four rooms at the Waldorf Astoria over two weekends, spending \$400,000 in the process. This profligacy was layered on top of recent revelations that presidential family members had purchased high-end real estate and luxury goods in France—for example, €474,000 on clothes for the fashionable first son. And this is over and above the private bank accounts to which they had access, held in either their own names or those of associates or shell companies.¹ Perhaps unsurprisingly, the extravagant display almost derailed the debt abatement program.² Indeed, a French-led coalition at the World Bank had to dissuade Bank President Paul Wolfowitz from vetoing the relief, and he subsequently insisted that stringent conditions attach to any debt cancellation due to corruption concerns.³

This sorry tale highlights how the global financial worlds of sovereign debt and personal wealth may involve, and historically have involved, the very same individuals, acting as agents for governments in sovereign debt contracts but also as private clients for various financial and legal firms. These two transactions may also implicate the very same funds—borrowed in the name of a government but then appropriated by corrupt individuals and invested as ‘personal’ wealth. As such, it points to an important market failure in global finance: the oversupply of sovereign borrowing and a related misallocation of global capital away from more productive uses, too often toward the illicit enrichment of government elites. While there has been significant scholarship in law, politics, and

1. Press Release, Glob. Witness, Republic of Congo: Is President's Son Paying for Designer Shopping Sprees with Country's Oil Money? (June 26, 2007).

2. A cancellation of the debt relief program may also have been lobbied for by so-called vulture funds seeking to recover debt from the Congolese government, at least according to sources close to the Congolese government. See Ari Berman, *Rudy's Bird of Prey*, NATION (Oct. 11, 2007), <https://www.thenation.com/article/archive/rudys-bird-prey/>.

3. For more on this episode, see, e.g., Robert Friedman, *The Vulture Wars: A New York Hedge Fund Is In a Court Battle With The Republic of Congo Over Who Is Robbing the Oil-rich but Dirtpoor African Nation*, CNN MONEY (June 12, 2006), https://money.cnn.com/2006/06/09/news/international/congo_fortune/; JASON SHARMAN, THE DESPOT'S GUIDE TO WEALTH MANAGEMENT: ON THE INTERNATIONAL CAMPAIGN AGAINST GRAND CORRUPTION 16-17 (2017).

economics on both sovereign debt issues and the problems associated with endemic corruption, the deeper questions and conceptual entanglements raised by the intersection of sovereign debt and ostensibly ‘private’ wealth have not been fully considered.⁴ In particular, one key question has yet to be properly addressed: what set of norms and legal practices have supported this market failure, and what might be done to address it?

Broadly speaking, a market failure arises when the interaction of private actors pursuing their interests in a market setting results in an outcome that is detrimental to society as a whole.⁵ In this article, I argue that the sovereign debt markets, which supply credit to sovereign state borrowers, have over-supplied credit in ways that can misallocate capital, exacerbate international financial crises, and impoverish borrower country populations. I further suggest that this deficiency rests on two related elements: First, a separation of the risks and benefits of sovereign state control, which has resulted from a failure to properly and coherently define the lines between ‘public’ and ‘private’ across the international financial arenas of sovereign borrowing and private client banking. And, second, the self-interested and potentially internally conflicted actions of major global banks. I use the lens of ‘vulture fund’ asset collection efforts in sovereign debt to highlight this problematic outcome, and also ask whether such recovery efforts offer a potential private sector fix for the market failure. Ultimately, I argue that the vulture fund strategy is insufficient as a corrective, resting on internal inconsistencies and giving rise to its own pathologies. More significant structural reforms and conceptual reconfigurations are necessary, which might better capture the benefits of the funds’ efforts while minimizing their costs.

4. There has, of course, been handwringing in popular commentary about the perfidy of international institutions that historically pressed countries for debt payments and austerity measures while turning a relatively blind eye to financial profligacy on the part of country elites. Indeed, in a depressing epilogue to the 2006 Congo-Brazzaville anecdote, the country’s debt by 2017 once more reached nearly \$9.2 billion under the same political family. And international financial institutions again noted corruption and transparency as central issues in discussing the possibility of another debt deal. Press Release, Int’l Monetary Fund, IMF Staff Concludes Program Negotiation Mission to the Republic of Congo (Apr. 19, 2018), <https://www.imf.org/en/News/Articles/2018/04/19/pr18137-imf-staff-concludes-program-negotiation-mission-to-the-republic-of-congo>. Although the IMF approved a bailout for the country in July 2019, transparency advocacy group Global Witness expressed concern at the time that the bailout would undermine the Fund’s anti-corruption drive. Joe Bavier, *IMF Approves Congo Republic Bailout After China Debt Deal*, REUTERS (July 11, 2019), <https://www.reuters.com/article/us-congorepublic-imf/imf-approves-congo-republic-bailout-after-china-debt-deal-idUSKCN1U62NR>.

5. I use the term market failure here in a broad sense and, for the purposes of this article, want to sidestep both categorization of the varieties of market failure and general theoretical questions of whether and when the costs of corrective public regulation might undermine its benefits. For the classic original coining of the term, see Francis M. Bator, *The Anatomy of Market Failure*, 72 Q. J. ECON. 351 (1958). For an interesting overview of the varieties of thinking on market failure across the social, political, and intellectual context of the twentieth century, see Alain Marciano & Steven G. Medema, *Market Failure in Context: Introduction*, 47 HIST. POL. ECON. (SUPPLEMENT) 1-19 (2015).

At base, the global arena today offers an enticing combination to debtor country elites: simultaneous access to an international pool of funds borrowed on behalf of a public entity—for which the public entity is ultimately responsible—and also to an international system highly protective of private wealth, with relatively little concern for where that wealth has come from. Particularly in times when public corruption charges are either hard to prove or treated mildly, borrower state elites can reap sizable financial benefits with relatively little risk of personal peril. Borrower country populations of course suffer on both sides: They are expected to pay down a debt burden that may well be augmented by inflated borrowing, while some portion of public wealth has been surreptitiously sequestered and then categorized as ‘personal’ through the privacy norms of global financial institutions. While this dynamic is hardly present in every country—and the magnitude of the impact would be difficult to measure—where it does exist it likely feeds into the broader tendencies of international financial crises: It would first deepen the over-leveraging of sovereign states and then exacerbate austerity measures by enabling the disappearance of public funds. The self-interested actions of debtor state elites and their creditors and bankers thus result in deeply problematic outcomes for the international community as a whole and particularly for some of its most vulnerable populations.

In Part II, I suggest that this state of events rests on two related elements. First, I discuss how modern global norms and legal practices—and in particular their incomplete and inconsistent definitions of the ‘public’ and the ‘private’ in the arenas of sovereign debt and private wealth management—have resulted in a separation of the risks and benefits of controlling a sovereign state. Contemporary practices of transnational lending to sovereigns have not involved asking whether state borrowing actually benefits (and is authorized by) the public entity itself as opposed to private individuals associated with the state. And debt repayment norms have similarly supported an expectation that all debt should be repaid as the obligation of the public entity, regardless of any private siphoning of funds. For transnational flows associated with private wealth, however, the dividing lines between the private and public have been strongly demarcated: any effort to investigate or access personal client funds on behalf of a public must overcome very high and sometimes insurmountable hurdles established to cordon off and protect the private arena. Certain government elites seem to have taken ample advantage of this disconnect, borrowing freely on behalf of an ill-defined ‘sovereign state’ and then drawing off some portion of those funds into the tightly circumscribed realm of private wealth management.

Part II also details how this market failure in contemporary global finance may well have been deepened by a second, more material factor:

the self-interested and potentially internally conflicted actions of major global banks. One way in which the practices and inconsistencies at the center of this market failure could be exposed and mitigated is through the practice of debt collection and asset recovery: When sovereign debtors fail to repay, how do creditors try to collect? And, particularly for the questions of this paper, to what degree do they try to collect against the ostensibly private assets of sovereign officials? Such a targeting of allegedly ‘private’ funds—by claiming that they are actually sovereign funds—would inject greater risk into sovereign borrowing and public corruption for government officials. This risk could help to temper the excesses of both practices: those accessing credit, supposedly on behalf of the sovereign state, could find themselves targeted if the debt proves unsustainable and if they have partaken in blurring the lines between public and private wealth. So why have sovereign debt collection efforts targeting private wealth—a strategy eventually taken up by ‘vulture funds’ toward the turn of the twenty-first century—not been more widespread in modern finance?

Although I do not make anything close to a complete causal assertion, I raise the possibility that internal conflicts of interest in key segments of the international banking establishment might be a factor. From the close of World War II through the end of the Cold War, banks, rather than individual investors or funds, played the central role in the private financing of sovereign states. And many of these banks had (and still have) not only sovereign lending interests but also personal banking or private wealth departments, whose clients could well include highly connected individuals within sovereign borrower states. As such, these institutions might have benefited sufficiently from both their sovereign lending and their private wealth departments to avoid jeopardizing the practices and individual relationships that sustained either revenue stream. In particular, it is possible that if such bank creditors had aggressively sought to recover against the privately held assets of borrowing country officials, the trail may have led awkwardly back to their own doorstep. This would have threatened not only private banking revenue, by exposing these banks as untrustworthy and insufficiently discreet from the perspective of their wealth management clients (potentially even beyond a corrupt government official clientele). In addition, such a strategy would likely have undermined their sovereign lending business as well, given that any corrupt government officials among their private banking clients would almost certainly have been gatekeepers to the even more lucrative sovereign debt revenue stream.

In Part III, I use the lens of asset collection efforts in sovereign debt to shed more light on this problematic intersection between sovereign debt and private wealth and also ask whether such recovery efforts could offer a

potential ‘private’ correction for the market failure. In particular, I focus on a specific approach adopted in several cases by so-called ‘vulture funds’—investors that purchase distressed debt on the secondary market and then hold out or litigate for a preferential outcome compared to other creditors. The collection sub-strategy at issue here effectively alleges that the lines between ‘sovereign’ and ‘private’ wealth have not been respected by the country’s officials, that certain sovereign assets have been improperly siphoned into personal accounts or shell entities controlled by those officials or their close associates, and that therefore these ostensibly private assets should be understood as public money and, consequently, collectible by creditors of the sovereign state. This strategy, adopted against Congo-Brazzaville and Argentina and thus far relatively little discussed, very explicitly targets the intersection between sovereign debt and private wealth and thus simultaneously exploits and exposes these underlying entanglements in international finance. It also provides a public benefit by shedding light on the mechanisms by which corruption can work at the highest levels and thus arguably offers a private corrective to the market failure by re-merging the benefit and the risk of controlling public sovereign assets as if they were personal wealth.

Finally, in Part IV, I ask whether the possible benefits of this vulture fund sub-strategy are great enough to outweigh the problems these funds pose for the international financial architecture. I argue that ultimately the vulture fund strategy is insufficient and unsustainable as a corrective, giving rise to its own pathologies, resting on internal inconsistencies, and depending on a flawed global restructuring framework. I also raise preliminary questions about whether other approaches could capture some of the positives with fewer negatives: Might a future sovereign bankruptcy framework include provisions to uncover and then recover improperly transferred funds on a more collective and socially beneficial basis? What political considerations should shape any such discussion? Are there alternative private approaches, more closely tracking the vulture fund strategy, that could be thought through in a non-bankruptcy setting? Could the problematic norms and practices of sovereign debt and private wealth be more directly addressed up front? Ultimately, any reform efforts at the intersection of these two areas of international finance will need to be taken with an understanding of the political complexities and historical embeddedness of their related practices. And, I suggest, seriously thinking through these issues invites deeper theoretical and historical questions into how the lines between public and private wealth have arisen in global finance and how they might be drawn going forward.

II. UN-LINKING THE RISKS AND REWARDS OF 'SOVEREIGN' BORROWING

It may seem commonplace today that a sovereign state's wealth, and a creditor's claim to it, remains separate from the personal wealth of an individual ruler or head of state. Of course, this has not always been the case. At the dawn of the Hundred Years' War, King Edward III of England arrived in Flanders with insufficient funds to support his military ambitions. He turned to private creditors on the continent for financing, and as a special inducement offered as collateral all of his jewels, those of his wife, their golden chalice and lesser crowns, his war horse, and even his grandfather Edward I's Great Crown.⁶ Dissatisfied with his inability to pay, the creditors seized the Great Crown in 1339, along with several of his family members who had personally guaranteed the loans. One cousin, the Earl of Derby, was held hostage for several months, and the Great Crown itself was not returned until 1345.⁷ While hardly widespread, this pattern of a ruler pledging his or her personalty for sovereign borrowing seems to have been an accepted practice—Charles IV and Maximilian I of the Holy Roman Empire also secured loans with a crown, coronation robe, and personal jewels.⁸

Of course, such a practice is not entirely surprising in eras of personalistic rule in which 'the sovereign' is at once a state and an earthly individual, with the mechanisms and benefits of control and final personal responsibility all ultimately resting with a single person or family.⁹ Even without a pledge of collateral, creditors would presumably have felt entitled to seize even the most personal of personalty from a ruler's family, if not for the nuisance of castle walls and defending armies. But what these episodes underscore is that the benefits and the *risks* of unfettered sovereign rule were joined together: An individual or family might enrich itself by virtue of sovereign control of a given territory, through taxation or through loans implicitly or explicitly backed by the treasure of the land. But the personal benefits and individually enjoyed luxuries resulting from that control were also at risk if things went awry. What the Congo-Brazzaville anecdote and others like it highlight are the ways in which these two things have been disconnected, at least in recent memory. Those

6. E. B. Fryde, *Financial Resources of Edward III in the Netherlands, 1337-40 (2nd Part)*, 45 REVUE BELGE DE PHILOLOGIE ET D'HISTOIRE 1142, 1144, 1154-55, 1158, 1165-66, 1176 (1967). See also Michael H. Hoeflich, *Through a Glass Darkly: Reflections Upon the History of the International Law of Public Debt in Connection with State Succession*, 1982 U. ILL. L. REV. 39, 40 (1982).

7. Fryde, *supra* note 6, at 1155, 1166.

8. Hoeflich, *supra* note 6, at 40.

9. For the classic presentation of this feature of sovereignty, see ERNST KANTOROWICZ, *THE KING'S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY* (1957). One could also say that the governmental principal-agent problem does not exist when the sovereign individual and the state is one and the same.

in control of sovereign states have in some cases managed to personally enjoy a level of luxury and power that would be unavailable to them absent the backing (or plundering) of a sovereign territory's treasure, while fully expecting that their personal lifestyles and access to funds should not be interrupted should things go wrong for the state itself.¹⁰

In this section, I argue that the rules and practices of global finance have enabled this unlinking of the benefits and the risks of sovereign borrowing and are thus at least partially responsible for the market failure that follows from this disconnect. I first briefly highlight how, from the perspective of ruling officials, the governing norms of sovereign debt have for a long time granted access to a significant pool of funds with very few questions asked. I then point out how the rules and practices of the private wealth arena may enable the disappearance of such funds into personal or individually controlled accounts. Finally, I emphasize that ruling officials are not the only actors to have benefited from such an arrangement. Certain members of the international banking establishment may also benefit on both sides of this equation—a dual benefit, or perhaps conflict of interest, that could dampen their appetite for potentially embarrassing asset recovery efforts. Overall, the norms of global finance are such that both ruling officials and financial institutions can profit on both sides, to the detriment of country borrower populations.

A. Sovereign Debt and the Failure to Inquire

In 2012, the United Nations Conference on Trade and Development (UNCTAD) published a non-binding set of Principles on Promoting Responsible Sovereign Lending and Borrowing. In the section on 'Responsibilities of Lenders,' the Principles state:

Lenders should recognize that government officials involved in sovereign lending and borrowing transactions are responsible for protecting public interest (to the State and its citizens for which they are acting as agents). . . . Lenders to sovereign borrowers are dealing with agents Any attempt by a lender to suborn a government official to breach that duty is wrongful.¹¹

10. To clarify, I focus here on situations in which rulers or heads of state enrich themselves beyond their receipt of official stipends or incomes. Queen Elizabeth II, of the United Kingdom, certainly receives a grand stipend and lives in luxury, but she has relatively little power and the procedures and sums involved all appear to be above board. If she were to enrich herself beyond these mechanisms, that would of course come closer to the problematic situations at the center of my concern.

11. U.N. Conference on Trade and Development, *Principles on Promoting Responsible Sovereign Lending and Borrowing*, art. 1, U.N. Doc. UNCTAD/GDS/DDF/2012/Misc. 1 (Jan. 10, 2012).

This statement echoed efforts by scholars and debt cancellation activists, starting roughly a decade earlier, to introduce or revive a doctrine of odious debt, by which a fallen regime's debts would not continue to its successor if those debts either were not authorized by or did not benefit the underlying population.¹² Both the UNCTAD Principles and the odious debt doctrine espouse the idea that sovereign lending should have a more substantial connection to the borrowing country's people, who will ultimately bear the brunt of either repayment or restructuring.

Perhaps unsurprisingly, these ideas have yet to gain very wide acceptance in practice, particularly in international investor and creditor circles. The longstanding norm has been to lend quite freely, without concern for the possible distinctions and relations of responsibility between public sovereign entities and the private individuals that control and staff them. And even when fiduciary-type ideas of loyalty are widely viewed to have been violated—for example, in the case of apartheid South Africa—sovereign borrowers have themselves been wary to act, concerned about the potential effect of a cancellation effort on their reputation and future capacity to access international capital markets. This is not at all to say that either the norms surrounding continuous sovereign debt repayment or their reputational underpinnings are uniform or inevitable—I have argued elsewhere that both repayment practices and creditworthiness assessments themselves are more theoretically unstable and historically variable than we often assume.¹³ But the historically common practice has been to lend to countries with very little constraint: Creditors have considered themselves relatively free from any due diligence requirement beyond an assessment of the stability and income-generating capacity of the country in question. This approach dominates expectations of debt repayment as well, where creditors have insisted on repayment even when the circumstances of a loan or the character of the borrowing regime might be considered problematic.

Such a characterization of sovereign debt norms should not be surprising to those familiar with the history of sovereign lending. In the words of one banker working in the 1970s, during which private lending to sovereigns picked up in earnest after a mid-century slump, “When I first

12. See, e.g., Seema Jayachandran & Michael Kremer, *Odious Debt*, 96 AM. ECON. REV. 82, 82 (2006); Lee Buchheit, Mitu Gulati, & Robert B. Thompson, *The Dilemma of Odious Debts*, 56 DUKE L.J. 1201 (2007). These scholars were reviving a 1927 formulation of the doctrine by Alexander N. Sack, LES EFFETS DES TRANSFORMATIONS DES ÉTATS SUR LEURS DETTES PUBLIQUES ET AUTRES OBLIGATIONS FINANCIÈRES [THE IMPACT OF STATE TRANSFORMATIONS ON THEIR PUBLIC DEBTS AND OTHER FINANCIAL OBLIGATIONS] 157 (1927).

13. See generally ODETTE LIENAU, RETHINKING SOVEREIGN DEBT: POLITICS, REPUTATION, AND LEGITIMACY IN MODERN FINANCE (2014) (arguing that the conventional wisdom expecting repayment of all debt even across major regime changes is overly simplistic, and that this norm and its associated creditworthiness assessments have been shaped over the last century by changing market structures and broader ideological shifts).

started I was amazed at how casual it all seemed. When I first signed a loan agreement for twenty million dollars for a country I hardly knew anything about, I thought ‘we must be crazy.’”¹⁴ Even when lenders did have greater knowledge of the internal rules and possible legal limitations on a sovereign borrower, they did not seem to consider this a serious impediment. For example, a 1970s syndicate involving banks from the U.S., Switzerland, Canada, and the UK, organized by Chase Manhattan, wished to make a \$500 million loan to the imperial Iranian government. The complication was that the Iranian constitution technically required parliamentary approval for a debt contract of this type—an issue that was (courageously) raised by the syndicate’s Iranian legal advisor. Notwithstanding this requirement, the Shah’s Ministry of Justice, along with the syndicate’s non-Iranian counsel, assured the syndicate that the constitutional provision was not an issue, and the loan went forward on this basis.¹⁵ This irregularity might, or perhaps should, have raised red flags and led to further inquiry on how the Shah’s appointed executive branch officials related to the underlying constitution—the document ostensibly constitutive of Iran as a public entity in the first place. But it seems no such inquiry was considered necessary. In a similar vein, Citibank made a loan to the government that was arranged through the Shah’s twin sister; the funds ultimately went to build a palace rather than the originally, if vaguely, stated housing project.¹⁶

This failure to inquire as to the properly public content of sovereign borrowing continued past one-off private creditors and into the practices of collective restructuring as well. The banks making up the informal ‘London Club’ of private creditors to sovereign states, assembled through ad hoc committees and working groups to address sovereign borrower payment difficulties, did not consider possible lending irregularities relevant to their restructuring processes.¹⁷ Even if any particular bank might have softened, the collective dynamics of the group, which I discuss in section II.C below, meant that ultimately debtor states faced a fairly unyielding united front.¹⁸ And the ‘Paris Club’ of major bilateral official lenders, which meets when needed to address the payment problems of

14. As quoted in ANTHONY SAMPSON, *THE MONEY LENDERS: BANKERS AND A WORLD IN TURMOIL* 115 (1982).

15. Bill Paul, *Caveat Lender: Chase Bank and Others Face Court Challenges on Huge Loans to Iran*, WALL ST. J., Mar. 28, 1980, at 1, 31; Jeff Gerth, *Chase’s Lawsuit Against Iran*, N.Y. TIMES, Nov. 11, 1980, at D1, D13 (describing Chase’s claim of an Iranian default on this loan).

16. SAMPSON, *supra* note 14, at 236.

17. See LIENAU, *supra* note 13, at 166-171. On the London Club generally, see, e.g., ALEXIS RIEFFEL, *RESTRUCTURING SOVEREIGN DEBT: THE CASE FOR AD HOC MACHINERY* 95-131 (2003).

18. For more on how the dynamics of restructuring limited the range of possible arguments open to sovereign states, particularly during the London Club heyday of the 1980s, see, e.g., LIENAU, *supra* note 13, at 184-190.

debtor countries, has similarly declined to address such irregularities, at least explicitly, even as it worked on efforts to restructure or cancel debt on the basis of financial hardship. This Paris Club approach is perhaps unsurprising, given that corrupt and oppressive debtor regimes have, in some cases, been actively supported by bilateral creditors as part of broader geopolitical strategies.¹⁹ While sovereign lending practices have developed beyond this point, recent scandals—in states such as Malaysia, Venezuela, and Mozambique—emphasize that the few-questions-asked policies remain widespread.²⁰ One clear result is a larger, faster, and less discriminating flow of funds into sovereign states than might otherwise exist.

B. The Construction and Protection of 'Personal' Wealth

If those in charge of sovereign states have historically had access to large sums of money while facing very little in the way of external questions or controls, any sums they then claimed as their own were subject to similarly little scrutiny. And, unsurprisingly given the pecuniary interests involved, the financial houses focused on wealth management have taken the utmost care to protect the boundaries of the private and personal.²¹ Historically, the fact that a private banking client might have held high public office or had significant access to public money in some other way was not considered relevant. Once funds had been deposited, the rules and norms of this regime effectively reified the designation of such property as 'personal,' helping to mitigate the risk of borrowing against and then siphoning away sovereign wealth.

19. Anna Gelpern has suggested that the resulting debt should, perhaps, not be characterized as a true loan in the first place. Anna Gelpern, *Odious, Not Debt*, 70 LAW & CONTEMP. PROBS. 81, 83 (2007).

20. For a sampling of the media coverage of these crises, see, e.g., Shamim Adam, *The 1MDB Deals that Continue to Haunt Goldman Sachs*, BLOOMBERG, (Nov. 2, 2018), <https://www.bloomberg.com/news/articles/2018-11-02/the-1mdb-deals-that-continue-to-haunt-goldman-sachs-quicktake>; Ben Bartenstein, *Goldman Says It's Learned from Venezuela's 'Hunger Bonds' Backlash*, BLOOMBERG, (Apr. 15, 2018), <http://www.bloomberg.com/news/articles/2018-03-15/goldman-says-it-s-learned-from-venezuela-hunger-bonds-backlash>; Paul Wallace, *U.S. Probe and Credit Suisse Lawsuit Roil Mozambique Tuna Bonds*, BLOOMBERG (Mar. 6, 2019), <https://www.bloomberg.com/news/articles/2019-03-06/u-s-probe-and-credit-suisse-lawsuit-roil-mozambique-tuna-bonds>.

21. Of course, I am speaking here of financial matters. In making the public-private distinction I do not mean to engage directly (though perhaps there is still an indirect connection) with the characterization of the private as the sphere of the body or the domestic, as distinct from a more communal, communicative, and cerebral public (i.e., Arendt or Habermas). Instead, I intend 'private' here to connote more specifically the sphere of an individual's (and perhaps his or her family's) own personal use and enjoyment, including the exclusion of others from that sphere. In this I use the term in a way that mimics more closely the colloquial understanding of private property, with its suggestion of exclusive use and protection from exogenous claims or even from external view and judgment.

Central to this policing of the private has been the provision of banking secrecy, which recently has softened somewhat but remains powerful. Although over the last century or so this norm has perhaps been most associated with Switzerland, the expectation of bank secrecy is widespread. And there is some evidence to suggest that the practice goes back to the earliest banking rules, written into Roman law, the German law of the Visigoths, and the early statutes of medieval northern Italy.²² Still, the Swiss enforcement of this norm is understood to have been the most stringent, and in 1934 Switzerland incorporated into law the imposition of criminal penalties for releasing private bank information or the identities of private clients.²³ This set the standard for bank secrecy more generally, and jurisdictions that wished to compete could not stray too far from this practice. The ‘offshore’ jurisdictions of the British Virgin Islands, the Cayman Islands, Guernsey, and Panama, for example, emulated the commitment to protecting private information when they established their financial centers in later years.²⁴

Of course, the fact that this information was not historically available to either the general public or foreign governments (or indeed Swiss authorities, for that matter) does not mean that the financial institutions themselves were necessarily unaware of the provenance of funds, at least in some circumstances. And it seems that certain more established private institutions and large commercial banks declined to accept deposits from individuals they viewed as unsavory, even if those institutions considered themselves legally entitled to do so and even if they did not begrudge the acceptance of such funds by other banks.²⁵ In his 1966 description of Swiss banks, historian and commentator T.R. Fehrenbach argued that, “No Swiss bank will knowingly accept stolen money.” That said, the definition of ‘stolen’ was carefully circumscribed. He went on to note that the funds brought to Switzerland by tyrannical public actors:

. . . cannot legally be described as stolen money. In the days when they secured it, Colonel Perón, President Batista and Premier

22. T.R. FEHRENBACH, *THE GNOMES OF ZURICH: THE INSIDE STORY OF THE SWISS BANKS* 74 (1966). Among the latter, Fehrenbach highlights the Bank of Saint Ambrosius of Milan, “which stipulated severe punishment for anyone in the bank who revealed information about clients without the client’s permission.” *Id.*

23. *Id.* at 75-76; BRADLEY BIRKENFELD, *LUCIFER’S BANKER: THE UNTOLD STORY OF HOW I DESTROYED SWISS BANK SECRECY* 17-24 (2016) (providing an accessible overview of the history of Swiss banking secrecy).

24. The provision of privacy, in order to shield against the likelihood of government regulation and taxation and the risk of creditor claims, has become central to the practice of offshore wealth management. *See, e.g.*, BROOKE HARRINGTON, *CAPITAL WITHOUT BORDERS: WEALTH MANAGERS AND THE ONE PERCENT* 128-35 (2016).

25. FEHRENBACH, *supra* note 22, at 126-28.

Tshombe were the law in their respective countries. The fact that most dictators . . . used shotguns, armed thugs, military force and nauseating tortures on many of their subjects to raise it, does not change the fact. In point of law, [such] money is as 'legal' as the royal allowance paid by the Socialist government of Great Britain to Elizabeth II.²⁶

Fehrenbach here of course uses 'the law' broadly and colloquially, given that—as highlighted by the Iran anecdote above—the actually written (if ignored) rules of these autocrats' countries may have prohibited their specific methods of rulership and also their borrowing and siphoning of funds. Nonetheless, it is certainly the case that these heads of state could have been perceived as 'the state' enough that banks felt absolved of any further need for due diligence or attention to black letter rules.²⁷

At least one American court seems to have offered preliminary support for this view based on its own encounter with the Iranian case. Following the revolution and overthrow of the Shah in 1979, the new regime brought suit against the Shah and his family in New York state court, attempting to recover wealth that it alleged had been stolen from the Iranian people. The regime overall sought \$56.6 billion in damages, claiming that the Shah's family had diverted at least \$20 billion from the government through private foundations, in particular the Pahlavi Foundation of Teheran. The suits further argued that the Shah and his family members had a "fiduciary obligation" to citizens of Iran and thus should "refrain from profiting personally" at the expense of the populace—prefiguring the language of the 2012 UNCTAD Principles mentioned above.²⁸ The suit was dismissed at the request of the Shah's estate and his widow, with the court expressing the view that New York was not an appropriate forum for the litigation, which would place an "unnecessary heavy burden" on New York courts.²⁹ The New York Supreme Court's Appellate Division upheld the dismissal, focusing largely on the great expense and administrative burden on the court system.³⁰ However, it also expressed doubt as to whether American courts could determine "whether an absolute monarch of a foreign country can be held responsible for personally profiting from the use of his powers as an

26. *Id.* at 127.

27. In this, the banks may have been subscribing to what I have called elsewhere a 'statist' theory of sovereignty, in which an entity is considered sovereign simply by virtue of its physical control of a state's territory and population, regardless of the internal political features of its governance. LIENAU, *supra* note 13, at 4-6, 36-38.

28. Islamic Republic of Iran v. Pahlavi, 455 N.Y.S.2d 987, 990 (Sup. Ct. 1982). See also, e.g., discussion in Charles Kaiser, *Iran Sues Shah and Wife for 56 Billion*, N.Y. TIMES, Nov. 29, 1979, at A16.

29. *Khomeini's Suit Against the Shah Dismissed*, UPI, (Sept. 14, 1981), <https://www.upi.com/Archives/1981/09/14/Khomeinis-suit-against-the-shah-dismissed/9321369288000/>.

30. Islamic Republic of Iran v. Pahlavi, 94 A.D.2d 374, 375 (N.Y. App. Div. 1983).

absolute monarch.”³¹ The court further noted that “there can have been very few absolute monarchs in the history of the world who did not profit personally from their powers” and even explicitly acknowledged that “these rulers and their families are said to have large investments and bank deposits in this country.”³² Ultimately, the court preferred to stay out of the “political thicket.” In doing so, it effectively gave a nod to the norms adopted by banks in their protection of arguably private wealth. It also thus inadvertently supported the unlinking of the risks and benefits of absolute sovereign control, allowing the Shah’s family and other similarly placed twentieth century ruling elites a luxury not actually enjoyed by the absolute monarchs of old, as indicated by the 14th century tale of Edward III of England and his creditors.

In addition to the rules and norms of bank secrecy, certain mechanisms of transmitting funds would have aided, and potentially continue to aid, efforts to protect such wealth. Although wire transfers constitute perhaps the simplest method to move capital, other (sometimes colorful) methods of moving funds and other valuables were used with little question. Notes one wealth manager, speaking especially of offshore banking centers, they “were very much like [author John] Grisham’s *The Firm*—people showed up with suitcases of cash to the Cayman Islands, and nobody asked any questions.”³³ Indeed, suitcases of cash and other valuables feature prominently in these anecdotes, along with the occasional plane full of cash: Speaking of the British Virgin Islands, now in the early 1990s, “there was a lot of cash being flown in on private planes, and the biggest complaint of the [BVI] banks was that they had too few cash-counting machines and they broke down from overuse.”³⁴ Perhaps not coincidentally, suitcases of cash feature in some details of high-level bribery as well, as in the *World Duty Free v. Kenya* arbitration, in which then-Kenyan president Daniel arap Moi seems to have received a suitcase full of cash as part of the negotiations for a concession agreement involving the establishment of duty-free stores at Kenya’s major airports.³⁵ This is not to say that all of the suitcases of cash deposited in these banking centers were

31. *Id.* at 375. This appeals court decision arguably cast doubt on a 1982 decision by another judge who ruled that Iran could bring a suit against the Shah’s sister. See E.R. Shipp, *Appeals Judges Back Dismissal of Suit on Shah*, N.Y. TIMES, July 4, 1983, at 23. And, as noted in Part II.A above, it is worth pointing out that certain of the Iranian loans were signed in contravention of the Iranian constitution, raising further questions about the relationship of absolute monarchy and the rule of law. For more on the political and economic background of the Iran case, see LIENAU, *supra* note 13, at 179-184.

32. *Islamic Republic of Iran*, 94 A.D.2d at 376.

33. HARRINGTON, *supra* note 24, at 138-139 (quoting a Canadian wealth manager working in London).

34. *Id.* at 139 (quoting an English manager based in Hong Kong who worked in the British Virgin Islands in the early 1990s).

35. *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/07, Award (Oct. 4, 2006).

the proceeds of corruption or other problematic activities. However, it would certainly seem a simple method of converting public funds into ostensibly private wealth, with few questions asked and perhaps little documentary evidence left to risk discovery.

Of course, several steps have been made regionally and globally to address corruption at the highest, kleptocratic levels, including through a regime of asset recovery that throws into question the historic norms of private banking. Key efforts here include the UN Convention Against Corruption (UNCAC), the related World Bank Stolen Asset Recovery Initiative (StAR), the OECD Anti-Bribery Convention, a number of state-level laws and initiatives including bank transparency laws, unexplained wealth laws, broker-dealer regulations, and programs such as the U.S. Financial Crimes Enforcement Network (FinCEN).³⁶ These shifts have led to several important victories and have certainly helped to alter the discourse in most polite society.

But the scale of funds recovered by governments through these frameworks has been disappointingly low compared to estimates of the funds siphoned away. Particularly given the liquidity and international convertibility of capital and the multiple jurisdictions emerging as global financial hubs, including for example Hong Kong and Singapore, this is likely to remain the case going forward. Even the major ‘onshore’ centers, which have been at the forefront of the shift, struggle with internal problems. For example, beginning in 1977, Swiss banks have technically been legally obligated to identify their customers.³⁷ And, beginning in the 1990s, Switzerland and other major Western countries have made efforts to improve the laws governing funds potentially linked to corruption. Still, the family and associates of Sani Abacha, who ruled Nigeria between 1993-1998, managed to store considerable wealth in Switzerland and the UK in particular. For example, Credit Agricole opened accounts worth \$147 million for relatives of Sani Abacha, determining their identity and relationship to Abacha but not inquiring into the source of funds. And Credit Suisse allowed Abacha’s sons to deposit over \$200 million without properly identifying them.³⁸

These banks were hardly alone, and the problem has persisted well beyond the 1990s. Based on a survey of 27 banks, the UK’s Financial Services Authority issued a 2011 report on the compliance of British banks with respect to regulations designed to limit money-laundering, and the

36. For a practitioner-oriented background document prepared by the World Bank Stolen Asset Recovery Initiative, see JEAN-PIERRE BRUN ET AL., ASSET RECOVERY HANDBOOK: A GUIDE FOR PRACTITIONERS (2011).

37. SHARMAN, *supra* note 3, at 96.

38. *Id.* Sometimes the method of looting can be fairly obvious with a small amount of research. For example, Abacha’s coterie seems to have diverted truckloads of cash belonging to the central bank, eventually sending the funds to foreign bank accounts. *See also id.* at 97.

picture was disappointing. Despite their responsibilities under the regulations, fewer than half the banks scrutinized high-risk clients with any extra care. And fewer than a quarter of the banks actually bothered to properly verify the source of client wealth—the space on the relevant forms for source-of-wealth information was frequently filled in “not known” or left blank altogether.³⁹ The report concluded that “it is likely that some banks are handling the proceeds of corruption or other financial crime.”⁴⁰ Although British banks can be fined for such activity, the UK regulatory authorities have tended not to impose especially serious financial penalties. For example, Coutts Bank was fined £8.75 million in 2012 for “significant, widespread and unacceptable” failures in its compliance procedures, particularly with regard to determining the source of funds from private clients from the Middle East and eastern Europe.⁴¹

The continuation of these problems has been exacerbated by the fact that, especially in recent years, significant funds move not through personal bank accounts per se but rather through legal entities such as corporations, trusts, and foundations. These entities provide another layer of discretion, rendering it yet more difficult to make any link between the individuals that may benefit from these entities and their potentially public official duties or source of funds. And the secret, numbered Swiss bank account of days past—while still alive and well today—has been joined by significant investment in real property and other assets as a store for wealth. Brooke Harrington, in her study of global wealth managers, notes that “the new norm is to hold a wide variety of assets—many of them globally mobile and fungible—in multiple jurisdictions in a complex of financial-legal structures.”⁴²

The degree to which these legal fictions are understood, certainly by the actors involved, to be merely games with names is hardly surprising but remains worthy of emphasis. Harrington relates an anecdote shared by an American wealth manager based in Geneva who works frequently with clients from the Arabian Peninsula: He mentioned a situation in which one client had displayed too transparently the degree to which he considered the corporate legal structure “a personal bank account” by another name. To wit, the client:

. . . asked me to send him \$100,000 from company funds so that he could buy a Ferrari. I had to say no, and he said, ‘What do you

39. U.K. FIN. SERVS. AUTH., *BANKS’ MANAGEMENT OF HIGH MONEY-LAUNDERING RISK SITUATIONS* 6, 27 (2011), <https://www.fca.org.uk/publication/corporate/fsa-aml-final-report.pdf>.

40. *Id.* at 6.

41. Political scientist Jason Sharman notes the modest size of the fine and points out that, “In the absence of any substantial financial penalties, and given the squeamishness over naming and shaming, it is very difficult to see why British banks’ performance would have improved since 2011.” SHARMAN, *supra* note 3, at 138.

42. HARRINGTON, *supra* note 24, at 124.

mean, no?’ I said, ‘This is a company and you’re a shareholder, so perhaps you’re requesting a distribution? I had to coach him on the right words to use, and said, ‘Would you please delete those emails you sent me requesting the cash for the Ferrari?’⁴³

A distribution or dividend from a corporation—particularly a shell corporation with no actual ongoing commercial functionality—seems fairly transparently to be a cash withdrawal. But the attention to legal form, along with a set of background and increasingly globalized norms that continue to favor privacy, regardless of potentially countervailing laws on the books, allows it to stand nonetheless.

In short, the transnational capital flows associated with private wealth have been well-protected from public scrutiny by both formal and informal rules and practices over the twentieth and into the twenty-first century. Despite recent changes in the regulatory structure designed to identify and return sovereign assets, it seems that these legal developments have proven insufficient to overcome the very high and sometimes insurmountable practical hurdles that cordon off and protect the private wealth arena. In combination with the loose standards associated with lending to countries, this has supported a separation of the risks and benefits of contemporary ‘sovereign’ borrowing. Government elites have been able to borrow freely on behalf of an insufficiently defined sovereign state and then use (or abuse) such funds with little oversight from creditors, who nonetheless have generally insisted on a background norm of full repayment. In the event that repayment proved impossible, the state’s population bore the brunt of restructuring and austerity measures, with any stolen funds set aside and protected as personal wealth. This set of incentives has exacerbated a perverse and pervasive dynamic of over-borrowing, resource misallocation, and deepening inequality.

C. Creditor Ambivalence and Internal Conflicts in the Banking Establishment

If sovereign state officials with absolutist predispositions have managed to have their cake and eat it too, they have not been alone in this enjoyment. The practice of lending to and collecting from sovereigns has a long and sordid past, and high government officials have long used bank accounts and other mechanisms to carve out and protect a portion of arguably public wealth as private. One way to rein in this tendency would be to put such officials (and their finances) at personal risk through the processes of debt collection and asset recovery, at least when they over-borrow in the name of the state but do not direct those funds to the state’s

43. *Id.* at 116.

well-being.⁴⁴ This would very explicitly tie any illicit upside of sovereign borrowing back to a downside—especially important when other measures of official accountability are lacking. One can imagine such an approach—eventually taken up in certain instances by vulture funds, as discussed below—being attractive to many creditors, as it would thereby open up an additional asset pool for collection. Given such creditor interest, at least in theory, why has such a strategy not been more widespread?

We often think of legal strategy as resulting from the diligence and creativity of clever lawyers and their clients. This is clearly true, and I note below the *sui generis* nature of the vulture funds involved in this strain of sovereign debt collection litigation. Still, exceptional tenacity is hardly the entire story. Although I do not make anything close to a complete causal assertion, I raise the possibility that internal conflicts of interest in key segments of the international banking establishment dominant in earlier periods of sovereign lending might be a factor. While we frequently imagine creditors as exclusively interested in creditor-type activities—primarily investing funds and then recovering principal plus a return—it is not always so simple. What is insufficiently commented upon, but potentially relevant to the discussion here, is the degree to which financial institutions have in some cases been involved on both sides of the sovereign debt/private wealth equation. Although I do not mean to suggest that this factor is determinative in any particular case, it could help to explain why we have seen relatively little of this private wealth-asset recovery strategy. It may also help to account for some degree of variation across particular creditors in a given sovereign debt situation, as we see in the Congo-Brazzaville case discussed more fully in Part III.

It is, for obvious reasons, exceedingly difficult to find data on whether government officials of sovereign borrower states also have partaken in the private wealth management services of major private financial institutions—including institutions that may be significant participants in the state's lending syndicates or the underwriters of its sovereign bond issuances. Still, it is noteworthy that private lending to sovereign states from World War II until the early 1990s generally was organized through major international banks along the lines of Chase Manhattan, Citibank (in its various iterations), and BNP Paribas. And many of the largest and most internationally involved financial institutions had and continue to have both sovereign lending departments and private client services. One would expect the most important of these international banks to have established long-term relationships with both sovereign state clients and their ruling elites. The relationship with the ruling elites would be inevitable given the

44. A brief mention of veil piercing is taken up below. *See infra* note 54 and text associated with notes 54-55.

need to interact with some range of actually existing natural persons who (ostensibly) act on behalf of, and enter into debt and other contracts for, the underlying state.⁴⁵ But these banks may have developed relationships with the same individuals through their private client or wealth management departments as well.

If indeed our hypothetical bank were committed on both sides of sovereign debt and private wealth, this could create something of a bind when it comes to questions of debt restructuring and especially asset recovery. Ideally, it would be helpful to know more about the internal interactions between the sovereign lending and private wealth departments of various financial establishments, including the revenue streams and potential synergies generated by both—fine-grained information that is difficult to find. Yet, one can imagine how an overly aggressive stance on sovereign debt, which might ultimately risk the need for asset recovery, might place the financial institution in the uncomfortable position of seeking to uncover its own private client accounts. It would, perhaps, be in the material interest of the bank to instead seek out a more conciliatory position on restructuring, which still recovers a respectable amount of the debt investment (at least on paper) and kicks the proverbial can down the road in the hopes that export markets and country prospects improve. This course of action would provide the bank with the upfront fees associated with a consensual sovereign debt restructuring while allowing it to simultaneously maintain a comfortable and profitable relationship with its ‘private’ client as well. Such a potential double-sided role appears to be relevant for BNP Paribas and Congo-Brazzaville, as noted below.

This dynamic could be present even if we assume, as is likely the case, that the revenues generated by a bank’s sovereign lending business are significantly higher than those generated by private wealth management for sovereign officials—or even by the private wealth division as a whole. To begin with, exposing and targeting one’s own private banking clients through sovereign debt collection would very likely eliminate not only those clients but also undermine the department writ large. Private wealth clients are notoriously publicity-shy—“skittish prey” who value “trustworthiness, discretion, and reliability” very highly.⁴⁶ A scandalous lawsuit brought by the bank to openly assert the corrupt origins of its own client’s wealth would raise eyebrows among other current and potential clients, even were their interests and funding sources more garden-variety.

45. I have written extensively elsewhere about the possible ways to conceive of this principal-agent relationship in the sovereign context, particularly in the sovereign debt arena. *See* LIENAU, *supra* note 13, at 20-56.

46. Harrington takes a close look at the centrality of client relations and the ways in which wealth managers signal “trustworthiness, discretion, and reliability” through a myriad of methods. *See* HARRINGTON, *supra* note 24, at 93. For her characterization of certain particularly elusive potential clients as “skittish prey,” see *id.* at 99.

Even more importantly, such a strategy would likely threaten a bank's sovereign lending business as well: Any government officials among its private banking clients would almost certainly be gatekeepers to the even more lucrative sovereign debt revenue stream. Particularly if officials are not primarily concerned with service to the public, one can easily imagine that they would direct a government's valuable sovereign credit business to personally preferred and trusted banking establishments.

Still, even if we assume that this dynamic helps to explain the discretion of any given bank, enmeshed in both sovereign debt and private client relationships with a particular set of government elites, what of other creditors? Surely not every financial institution has been equally caught up in such complex and potentially conflicting ties across the board. It is perhaps surprising that we have not witnessed more frequently an aggressive hunt for the alleged millions (or even billions) of sitting or deposed rulers, in the mode of the more recent vulture fund efforts. Why did most of these financial houses continue to pursue restructurings through much of the twentieth century, even when negotiations dragged on and there was little left to squeeze out of debtor countries?

This, too, might have something to do with the structure of credit markets and the interactions between creditors themselves. Not only may some banks have been enmeshed in complicated, double-sided relationships with state borrowers and their political elites. In addition, banks tended to be interconnected with each other through loan syndications, in which they held participations in one loan organized by a lead institution. As I have discussed in other writing, this not only pooled the banks' risk but also pooled their interest and their strategy when it came time to deal with a debt default.⁴⁷ This structure may have undermined the willingness to compromise on the part of banks as a whole, creating something of a creditor oligopoly: if one creditor refused to concede to a borrower's desired terms, other banks would fall in line rather than risk jeopardizing the unified front (and threatening the chance that other creditors would follow their lead in some other debt episode). But, conversely, it also seemed to have a cooling effect on the most hot-headed potential holdouts. If a bank proved too obstinate, and if it were not small enough to simply have its loan bought out, it risked being ostracized from future loan syndications and also potentially cut out of the even more important interbank lending arrangements that *also* tended to be organized by the largest banking groups.⁴⁸ Thus, even if any given bank did not have constraints vis-à-vis a particular sovereign borrower—and might have pursued a more aggressive asset recovery program in other

47. See LIENAU, *supra* note 13, at 156-160, 166-171.

48. See, e.g., *id.* at 167-68.

circumstances—the material conditions and broader market structure of sovereign debt in a specific moment could have limited the legal strategies that appeared tenable.

This range of dynamics, at both the intra-bank and the inter-bank level, thus might provide one reason why asset recovery efforts that attempt to collect arguably private wealth to satisfy unpaid sovereign debt frequently failed to materialize. There have been sizable sovereign debt episodes in the past that overlapped with allegations of vast and potentially ill-gotten wealth by leaders, including deposed leaders. Returning once more to the 1979 Iranian example, the new regime's claims about the scale of wealth taken from the country by the Pahlavi family were significant, with one report alleging that the Shah had granted himself a personal budget from the government varying from \$43 million to \$1 billion.⁴⁹ In addition, the family owned land and businesses in virtually every major sector in the country—also valuable assets, though of course less liquid and obviously bound to the territory itself.⁵⁰ While continuing to live a fairly lavish lifestyle, the family itself contested the staggering sums floated by the Iranian government and in the popular press. According to Ashraf Pahlavi, the deposed shah's sister, "After the death of my brother, if we had had the \$65 billion some people said we had, we would have retaken Iran just like that."⁵¹

Interestingly, no creditors—even if they sought payment from the new regime itself—made any moves against the assets of the deposed ruling family. Perhaps they awaited the outcomes of the new regime's asset recovery suits and were disheartened by the results. Perhaps they were given pause by the New York State Appellate Division's suggestion, discussed above, that assets accumulated by the Shah while he was an absolutist leader were properly designated as 'private.' It may also have been due to subsequent developments, in particular the Iranian hostage crisis and the resulting establishment of the Iran-U.S. Claims Tribunal, into which all claims were eventually funneled. Or they may have felt the litigation barriers were high and the chances or rewards of success were comparatively low for other reasons, which no doubt remain relevant to the many creditors today that decline to pursue an independent litigation and asset recovery strategy.

Still, it is also noteworthy that pre-revolution Iran's most significant bank relationship was with Chase Manhattan, headed by David

49. Ron Scherer, *Shah's Fabled Riches: Millions? Billions?*, CHRISTIAN SCI. MONITOR, (Apr. 23, 1980), <https://www.csmonitor.com/1980/0423/042306.html>.

50. *Id.* Reza Shah, in exile in 1941, claimed to own 10% of the land in Iran. *Id.* See also William Branigin, *Pahlavi Fortune: A Staggering Sum*, WASH. POST, Jan. 17, 1979, at A1.

51. *Sister of Shah Nurses Bitter Memories*, AUSTIN-AM. STATESMAN (Dec. 18, 1983), <https://www.newspapers.com/newspage/362866534/>.

Rockefeller, who worked extensively behind the scenes to have the Shah admitted to the United States for medical treatment when no other country would have him.⁵² There was suspicion that Chase might have provided private wealth management services for the Shah and his family, and Rockefeller received a question at Chase's annual meeting about the bank's relationship with the fallen Iranian ruler. Rockefeller responded, "Our policy is not to talk about customer relationships or even verify this is a customer."⁵³ However, he attempted to dismiss some of the grander allegations, noting that, at least in the situation at issue, he might have preferred "it was not our policy, so if I could comment further it could dispel a lot of allegations and misconceptions that have been leveled that are absurd"—perhaps a reference to the \$56 and \$65 billion numbers circulating at the time. Through a spokesperson, the bank did note that the Iranian government had been able to provide documents detailing only \$1.8 million moved into Chase over 11 years, and also pointed out that even those documents had not been verified. The bank did not volunteer additional information, beyond that captured by the Iranian documents, on any amounts held by the Shah's family or associates.

Pulling together the strands of this section, the global financial arena has developed in such a way as to enable a separation of the risks and the benefits of sovereign state control. Sovereign debt norms have granted ruling country elites access to a pool of funds with very few questions asked, while private wealth practices enabled the classification of funds as 'personal' even when accumulated in contravention of a country's own rules and even as the country itself struggled under a debt burden. And the historical intersection of sovereign debt and private wealth practices has benefited not only corrupt government elites: Certain financial institutions may also have benefited from this arrangement, working (and collecting fees) on both sides of these transnational financial flows—and thus developing potentially conflicting internal interests if the sovereign state became unable to repay its debt and any question arose of how aggressive, and how personalized, a recovery effort might become. The absence of this type of recovery action in the Iran example was hardly an anomaly, and in cases such as Nicaragua and the Philippines creditors generally pushed through a series of painful reprofiling (payment extensions) and

52. Bernard Gwertzman, *U.S. Decision to Admit the Shah: Key Events in 8 Months of Debate*, N.Y. TIMES, Nov. 18, 1979, at 1, 14. Rockefeller himself downplayed any relationship, though his older brother Nelson Rockefeller seems to have been a friend to the Shah. For a *New York Times* article on this episode based on recently disclosed documents from David Rockefeller's office, see David D. Kirkpatrick, *How a Chase Bank Chairman Helped the Deposed Shah of Iran Enter the U.S.*, N.Y. TIMES (Dec. 29, 2019), <https://www.nytimes.com/2019/12/29/world/middleeast/shah-iran-chase-papers.html>. An earlier presentation of the fall and the final months of the Shah's life is offered in, among others, WILLIAM SHAWCROSS, *THE SHAH'S LAST RIDE* (1989).

53. Scherer, *supra* note 49.

restructurings even where leaders had allegedly siphoned away significant assets from the public treasury. Although this market structure element hardly offers a complete explanatory picture, it suggests one possible reason for the creditor ambivalence around aggressive and personalized sovereign debt recovery efforts. Such ambivalence has meant that the type of creditor due diligence and assiduous debt collection that could re-inject risk into inappropriate sovereign borrowing practices has been sorely lacking. Instead of dampening the tendencies of borrower country elites to over-access international credit and push their countries more deeply into unsustainable debt, banking interests may well have exacerbated these dynamics.

III. A PRIVATE SOLUTION? VULTURE FUNDS AND RE-LINKING RISK AND REWARD

If bank creditors in the late twentieth century harbored any ambivalence about aggressively targeting the private individuals involved with sovereign states, certain creditors working in the sovereign debt arena more recently have gone in the opposite direction. In particular, several so-called vulture funds have argued that the broadest plausible swathe of assets should count as sovereign property, recoverable by legally recognized creditors such as themselves. These efforts have involved attempts to access the assets of state-owned or state-affiliated enterprises and subsidiaries, which are technically separate legal and financial entities, in a sovereign-inflected version of corporate veil-piercing.⁵⁴ And, most importantly for my purposes, these investigations have also in several cases revealed the blurred financial boundaries not just between various state entities but also between state organs and affiliates on the one hand and the natural persons that staff and control them on the other—a certain, specialized kind of sovereign veil piercing. These asset recovery efforts have thus exposed and problematized the dividing lines between public and personal wealth, including the ostensibly private wealth of corrupt individuals controlling or employed by a government. In doing so, they have retroactively re-injected an element of personal risk into unsustainable sovereign borrowing, at least where sovereign boundaries were crossed, effectively threatening the ability of state borrower elites to have their cake and eat it too.

54. Generally, these sovereign veil-piercing cases focus on questions about the intermingling of enterprise funds, control of everyday operations, and other standard alter-ego inquiries associated with piercing the corporate veil. For a relatively recent overview of sovereign-inflected veil-piercing as it might apply in the case of Venezuelan debt restructuring, see W. Mark C. Weidemaier & Matt Gauthier, *Venezuela as a Case Study in (Limited) Sovereign Liability*, 12 CAP. MKTS. L.J. 215 (2017).

To lay this out, I first provide an overview of how vulture funds fit into the ecosystem of sovereign debt market creditors. I note that a number of changes in the international arena, particularly the late twentieth century sovereign debt market structure detailed in Part II.C above, supported and shaped the vulture funds' litigation and settlement sub-strategy. I then cover in closer detail how certain vulture funds—Elliot Management subsidiaries Kensington International and NML Capital—have brought asset collection suits that targeted the lines between private and public wealth in their efforts to collect on the sovereign debt of Congo-Brazzaville and Argentina, respectively. These cases, which have remained under-analyzed, also shed light on the potential dual role of banks working on both sides of sovereign debt/private wealth and the use of shell corporations in sequestering and constructing such funds as private. I lay out the context for each case, the efforts taken by the funds to collect arguably private assets to satisfy their debt claims, and the ultimate outcomes—settlements in both, though for different reasons. These suits raise the possibility of a private sector contribution to correcting the market failure of overzealous and poorly allocated sovereign borrowing, although I discuss in Part IV below that these vulture fund actions entail their own pathologies.

A. An Opening for the Vultures

The boundaries of the “vulture fund” moniker are hazy—and I adopt the widely used term while acknowledging that the funds themselves are not fond of the appellation.⁵⁵ Roughly speaking, these funds can be understood as a species of the more general class of secondary market investors. This class of investors comprise not the original lenders to sovereign state borrowers (i.e., in the contemporary bond market, not the original purchasers of the issued sovereign bonds) but rather investors that purchased the bonds and the accompanying rights to repayment from previous creditors on what is commonly called the secondary market. Within secondary market creditors falls the sub-class of distressed debt investors, who purchase debt when borrowers are in distress, the default risks (and potential rates of return) are high, and other creditors are eager

55. For a consideration of earlier waves of vulture fund litigation strategies, see Jonathan I. Blackman & Rahul Mukhi, *The Evolution of Modern Sovereign Debt Litigation: Vultures, Alter Egos, and Other Legal Fauna*, 73 LAW & CONTEMP. PROBS. 47-61 (2010). The centrality of these funds to holdout problems in sovereign debt litigation has encouraged a number of takes on their activities. See, e.g., Christopher C. Wheeler & Amir Attaran, *Declawing the Vulture Funds: Rehabilitation of a Comity Defense in Sovereign Debt Litigation*, 39 STAN. J. INT'L L. 253 (2003); John Muse-Fisher, Comment, *Starring the Vultures: NML Capital v. Republic of Argentina and Solutions to the Problem of Distressed-Debt Funds*, 102 CAL. L. REV. 1671-1725 (2014); Jonathan C. Lippert, Note, *Vulture Funds: The Reason Why Congolese Debt May Force a Revision of the Foreign Sovereign Immunities Act*, 21 N.Y. INT'L. L. REV. 1 (2008).

to move on to other investments. As such, they provide an important element of liquidity in the market. These distressed debt investors may be passive investors, who purchase debt at a discount after an assessment that any likely restructuring outcome will result in some profit, but do not plan to participate energetically in the restructuring themselves. They may also be more activist investors, who proactively participate in debt negotiations, perhaps through a creditors' committee, and seek to maximize the return to themselves but also, ultimately, end up maximizing the return to all other creditors in the same class. So-called 'vulture funds,' at least as I define them here, are a more extreme sub-group of even the activist distressed debt investor. They not only purchase debt on the secondary market at a deep discount but then also eschew the standard debt restructuring processes used by other creditors, including other secondary market creditors. Instead, these rogue or holdout creditors, as they are also called, hold out for an even greater recovery on their investment, often through aggressive litigation strategies resulting in presumptively highly favorable, though often undisclosed, settlements. Expanding the assets available for their separate collection efforts—or exposing and embarrassing government officials to the point of surrender—can help vulture funds turn a tidy profit. Their tactics have been combative to say the least, including attempts to seize navy ships, claim foreign aid funds intended for the debtor country's population, and hold payments to other more cooperative creditors hostage.⁵⁶ They aggressively and patiently insist on maximum profit on their own debt investment, even if that success depends on undermining the more collective efforts of others—all while simultaneously claiming assets that would likely not be available absent those collective efforts. Even among the broader class of distressed debt investors, these entities are at the far end of the spectrum in the sovereign debt context, embodying a singular purity of spirit and purpose.

Structurally speaking, it is hardly surprising that we live in the heyday of the sovereign debt vulture fund. The creditor dynamics of the bank-based sovereign lending system discussed in Part II.C above shifted significantly with the U.S. Treasury's Brady Plan resolution of the 1980s sovereign debt crisis. This resolution took the sovereign loans that had been limping along on banks' balance sheets and restructured them into bonds tradeable on the market. Since the early 1990s, bonds have been the dominant borrowing mechanism in sovereign debt: with the assistance of underwriters, countries issue bonds to raise capital and then, for repayment, generally send a lump sum to a trustee bank, which in turn forwards the payments to the bondholders on record. The bonds are

56. See, e.g., Nate Raymond, *Argentina Faces Creditor Lawsuit Over U.S. Satellite Contract*, REUTERS (Mar. 25, 2014), <https://www.reuters.com/article/usa-court-argentina/argentina-faces-creditor-lawsuit-over-u-s-satellite-contract-idUSL1N0MM28U20140326>.

highly liquid and may be sold many times over on the secondary market once the state has issued the debt. This means that the debt is generally held by untold numbers of investors. Sovereign debtors will likely have no idea who their creditors are, and creditors are often unaware of the identity of their fellow creditors, perhaps excepting major institutional investors and others that are more public and active in their investment strategy in the event of a restructuring situation. The investors are not necessarily repeat players with any given sovereign or any other creditors; they tend to be more discrete in their interests and may have little reason to cooperate. In short, the time is ripe for a strategy built on purchasing deeply discounted debt on the liquid secondary market when other investors are fearful and then adopting a strategy with minimal regard for the sovereign debtor, its ruling elites, or other creditors.

The material market structure is of course not the only element that has shifted in recent decades. In addition, the global discourse highlighting and castigating corruption is a relatively recent development, also dating roughly to the end of the Cold War. As demonstrated by the Congo and Argentina cases below, part of the vulture funds' broader asset collection strategy in these cases has been to emphasize corruption not only in court settings but also in the popular media both in major international financial centers, where future capital might be raised, and in the sovereign borrower states themselves, where government officials might be embarrassed into agreeing to a settlement. Of course, corruption itself remains widespread, still protected by layers of privacy that remain difficult to pull back. But the narrative about its acceptability has shifted and international actors, financial institutions, and country populations alike, who in earlier decades displayed a higher degree of tolerance for the practice, seem to be reaching their limits. Whether it is through numbered Swiss bank accounts or mysterious shell companies, revelations of siphoned funds are now more troubling to both an angry contemporary populace and a wary IMF. As such, the shift in material creditor structures has been joined by developments on the ideational side, where the disconnect between actually corrupt practices and the narrative of clean governance has further widened the opening for this vulture fund approach. As highlighted by the Congo and Argentina cases below, an asset recovery strategy challenging the provenance of ostensibly private assets is now more likely to appeal to courts of various stripes and to cause consternation among ruling elites putting on a clean show for their domestic audiences.⁵⁷ Overall, late twentieth century changes in credit

57. Furthermore, additional changes in what might be understood as the background legal and technological infrastructure may have enabled this shift. This could include, for example, changes in U.S. discovery rules and the development of a globalized media infrastructure, each of which would have made the tactics of both asset discovery and public embarrassment more practicable. In some

markets and ideational norms thus enabled the rise of aggressive creditors with the incentive structure to challenge the way in which the risks and rewards of sovereign financial control had been unlinked in modern finance.

B. Kensington International v. Republic of Congo

The Republic of Congo, with its capital at Brazzaville, is one of the poorer and more troubled countries in the world. Also referred to as Congo-Brazzaville to distinguish it from its much larger and even more troubled neighbor, Congo-Kinshasa (or the Democratic Republic of Congo), it gained independence from France in 1960 and suffered a series of coups and coup attempts, eventually ending with an assassination of leftist leader Marien Ngouabi in 1977.⁵⁸ Current president Denis Sassou-Nguesso gained power two years later, effectively establishing a pseudo-Marxist single party state until the end of the Cold War.⁵⁹ In line with the post-Cold War pressure toward multi-party democracy, Sassou-Nguesso agreed to constitutional reforms and new elections in 1992. Unsatisfied by his subsequent loss of power to a longtime rival, he decided to reclaim power by force, assembling a private militia and launching the Congolese civil war. He eventually retook the presidential palace in 1997, with fighting continuing until 1999.⁶⁰ Through a series of problematic elections and constitutional revisions, Sassou-Nguesso remains in power to this day—among the longest-ruling autocrats in the world.⁶¹

cases, of course, Paul Singer of Elliott Management may have helped to ‘improve’ the ground himself, such as by successfully lobbying to undo champerty laws in New York State. See Martin Guzman, *Wall Street’s Worst Vulture Hedge Funds are Making a Killing by Undermining the Global Economy*, QUARTZ (June 17, 2016), <https://qz.com/707165/wall-streets-vulture-hedge-funds-are-making-a-killing-by-undermining-the-global-economy/> (noting the elimination of champerty for high-value transactions in New York State and the connections between Paul Singer and the sponsoring state senator).

58. *Ngouabi Dies of War Wounds: Congolese Leader Slain by Attackers*, N.Y. TIMES, Mar. 20, 1977, at 1, 9.

59. See, e.g., Dennis D. Cordell, *Congo Since Independence*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Republic-of-the-Congo/Congo-since-independence> (last visited Apr. 28, 2020).

60. *The Rise and Fall and Rise of Denis Sassou-Nguesso*, CNN (Oct. 16, 1997), <http://edition.cnn.com/WORLD/9710/16/sassou.nguesso.profile/index.html>. The full text of the 1999 agreement ending hostilities is available through the Kroc Institute for International Peace Studies. See *Agreement on Ending Hostilities in the Republic of Congo*, Univ. of Notre Dame, Kroc Inst. for Int’l Peace Studies, http://peaceaccords.nd.edu/wp-content/accords/Republic_of_Congo_-_CPA_1999-12-29.pdf (last visited Apr. 28, 2020).

61. See, e.g., Drew Hinshaw & Emmanuel Tumanjong, *Congo’s President Wins Third Term: The Result Handed Denis Sassou Nguesso, A Former Paratrooper Turned Military Dictator, Another Seven Years*, WALL ST. J., 24 (Mar. 24, 2016), <https://www.wsj.com/articles/congos-president-wins-third-term-1458825427>; *Curbing Their Enthusiasm*, AFR. CONFIDENTIAL (June 12, 2009) https://www.africa-confidential.com/article-preview/id/3128/Curbing_their_enthusiasm; William Clowes, *Why Should Anyone Listen to the Whitewashing of Congo-Brazzaville*, AFRICAN ARGUMENTS (Apr. 1, 2016),

Although Congo-Brazzaville boasts significant natural wealth, the country has turned to external aid and loan financing to make up for budget shortfalls resulting from economic mismanagement and exploitation, export commodity price volatility, corruption, and political discord. During the difficult early 1980s, Congo's borrowing included a number of loan contracts, totaling over \$30 million, which form the basis of the cases at issue. As the worldwide debt crisis dragged on, Congo ceased making payments on the loans in October 1985. Beginning in 1996, the loans were purchased from the original lenders by Kensington International LLC, a fund registered in the Cayman Islands and owned by Elliot Associates International, the (infamous) hedge fund group incorporated in Delaware and headquartered in New York, specializing in distressed debt and hardball tactics.⁶² Based on this debt, which Kensington doubtless purchased at a deep discount, it began contacting Congo in 1997, during the civil war, requesting full payment of the debt. It then brought suit in England, hoping that a court imprimatur would encourage payment, and eventually obtained four English court judgments between December 2002 and January 2003. As of August 2005, the total amount of these court awards based on the original \$30 million loan contracts was \$121,365,437.70, with interest accruing at a daily rate of \$22,008.23.⁶³

Beginning in 2005, Kensington launched the most aggressive phase of its recovery effort: instead of seeking voluntary, if court-ordered, payment from Congo—or participating in collective debt restructuring efforts along with other creditors—it would seize Congolese assets wherever they might be found. The difficulty, of course, lay in locating those assets and then gaining control over them. Congo had by then emerged as a major oil producer, though its significant sales still proved unable to meet its population's needs, its elites' wants, and its creditors' claims. As such, Kensington turned its attention to intercepting and seizing either the oil itself or payments made for that oil.

As part of this effort, Kensington targeted a number of transactions conducted by companies, incorporated in various locations, that were owned by or otherwise affiliated with the Congolese state or senior officials and advisors. In each case, it argued that senior officials had established a series of shell companies in order to disguise the flow of Congolese oil out of the country and the stream of payments back in. This process, Kensington suggested, served a dual purpose: First, it hid Congolese assets from creditors seeking recovery. And, as a bonus, it also

<https://africanarguments.org/2016/04/01/why-should-anyone-listen-to-the-hypocritical-whitewashing-of-congo-brazzaville/>.

62. Kensington Int'l Ltd. v. Itoua, 505 F.3d 147, 151-52 (2d Cir. 2007).

63. Kensington Int'l Ltd. v. Congo [2005] EWHC (Comm) 2684 [1] (Eng.).

hid the disappearance of a portion of these assets from the scrutiny of both the Congolese public and international actors concerned about corruption. Kensington effectively contended that payments made to or through those companies were really destined for Congo-Brazzaville, and so constituted Congolese assets that should be handed over to creditors to satisfy the English court judgments.

The facts at the center of a major U.K.-based recovery effort illustrate these dynamics nicely. Denis-Christel Sassou-Nguesso, the son of the president, ran Cotrade, which sold Congolese oil on the international market and was a wholly owned subsidiary of the country's state-owned oil company, Société Nationale des Pétroles du Congo ("SNPC").⁶⁴ Cotrade entered into a contract with Africa Oil & Gas Corporation ("AOGC"), which in turn signed a contract with Sphynx Bermuda—though both AOGC and Sphynx Bermuda were private ventures owned or controlled by Denis Gokana, who was at the time of the transactions (and through much of the litigation) the President and Director General of SNPC and a Special Advisor to the Congolese president on oil issues.⁶⁵ Sphynx Bermuda then sold the oil to Glencore, an English company that then promised the oil to BP in a standard commercial contract.⁶⁶ Upon discovering the shipment in transit on the 'Nordic Hawk' crude oil tanker, Kensington argued that the chain of transacting companies constituted a mere sham or façade, and that the \$39 million payment owed by Glencore to Sphynx Bermuda should be treated as owed directly to Congo-Brazzaville and therefore collectible by and diverted to creditors.⁶⁷

These arguments successfully convinced the English High Court, which found that, at least for the purposes of this oil transaction, the companies were in effect one and the same.⁶⁸ The court emphasized that some reason must exist for interposing additional entities into the chain of transactions, stating that, "The idea that SNPC . . . in the Congo would happily give away profits to a private middle man when they were perfectly capable of selling the oil itself to established purchasers . . . is fanciful."⁶⁹ Justice Cooke also highlighted the bewildering accounting associated with the transactions. He noted of one company, "An examination of its bank statements reveals that there was virtually no connection between the cash passing through its bank accounts and the sums it should have received for

64. *Id.* at para. 3.

65. *Id.* at paras. 3, 8.

66. *Id.* at paras. 2, 3(iii-iv).

67. *Id.* at paras. 5-7.

68. *Id.* at paras. 55, 59. Justice Cooke's opinion expressed that, given the overlapping nature of control and the fact that the same individuals (most notably Mr. Gokana) should somehow be negotiating the sale on behalf of parties with ostensibly opposing interests, the sale would effectively "be the result of negotiation and agreement between the very same people." *Id.* at para. 62.

69. *Id.* at para. 119.

the oil it sold.”⁷⁰ And perhaps even more could have been found, as the opinion further pointed out the difficulty in obtaining court-ordered records from the chain of companies involved in the transaction, suggesting that the companies “deliberately sought to conceal documents.”⁷¹

The court noted the possibility of a dual purpose for these transactions: “Whilst all these companies remain shrouded in some mystery, I conclude that [they] can only have been to protect oil or proceeds from attachment, unless there be some other nefarious purpose.”⁷² Overall, the court found that the transactions were “cosmetic” and “may have provided some scope for personal enrichment”⁷³ and again emphasized that the structures could be read in two ways: “The conclusion to be reached is that either there was blatant corruption . . . or this was an arrangement which SNPC and Cotrade sanctioned at the highest level.”⁷⁴ Of course, the duality suggested here between personal enrichment and state retention of funds does not entirely hold—it is not the case that the structures were either constructed to further corruption *or* shield funds from creditors. Retaining a larger portion of oil sale proceeds for the state itself hardly means that those proceeds would assist the underlying population; such proceeds could also augment the pool of money available to siphon away through additional transactions at a later date. Nonetheless, the court ultimately decided that, “Whatever personal benefits [Mr. Gokana] may also have obtained, the primary objective here . . . was to interpose a company between Cotrade [the Congolese oil company subsidiary] and the buyer of oil in the international market.”⁷⁵ Justice Cooke surmised that unexplained funds left in various bank accounts were effectively “payment for services rendered” by Mr. Gokana, albeit in an unconventional format.⁷⁶ The court suspected that even more elevated state officials approved of this payment structure, noting the likelihood that “the higher echelons of the State apparatus were agreeable to the

70. *Id.* at para. 89.

71. *Id.* at para. 22.

72. *Id.* at para. 120.

73. *Id.* at para. 140.

74. *Id.* at para. 154.

75. *Id.* at para. 92. Similarly, on the Sphinx companies, it noted, “I find that the main reason for the structure was its privacy, but not for himself as such. The reason was the desire for secrecy and the concealment of any legal or formal connection between the Sphinx companies, or himself, and the State of the Congo.” *Id.* at para. 113. *See also id.* at para. 146 (“It is plain that this was done for the benefit of the Congo since there is no other reason which could explain it. Wholesale corruption on the part of Mr. Gokana was not put forward as an explanation and whilst Kensington suggested there was some siphoning of monies from the Congo through the use of this structure, it is plain in my judgment that the structure was designed and operated to conceal the fact that it was the Congo . . . which was selling the oil in the international market and receiving the proceeds for it. Mr. Gokana was not activating this scheme primarily for his own benefit but for the benefit of the Congo.”)

76. *Id.* at para. 213.

personal receipt by him of some monies.”⁷⁷ After determining that the payment structures effectively disguised the receipt of assets by the state, the court decided that Kensington was “therefore entitled to final Third Party Debt Orders in respect of the purchase price for the cargo.”⁷⁸

Kensington’s efforts to collect ranged well past the U.K. and indeed implicated a number of cross-border financial transactions involving Congolese oil. In New York, it launched a Racketeer Influenced and Corrupt Organizations Act (RICO) suit against SNPC, Bruno Jean-Richard Itoua (SNPC’s Chief Executive and later the Minister of Oil and Hydraulics), and also the French bank BNP Paribas. It alleged “a conspiracy to misappropriate the resources, including oil, of [the Congo] for the private use of allegedly corrupt public officials and to facilitate and conceal that misappropriation, all at the expense of the Congolese people and of legitimate creditors like Kensington.”⁷⁹ In particular, it claimed the existence of a problematic oil prepayment scheme, in which BNP Paribas loaned Congo-Brazzaville approximately \$650 million in exchange for an SNPC pledge to deliver oil at a later date. But it contended that ultimately the Congo delivered closer to \$1.4 billion worth in oil to the bank, which allowed the bank to assist in “[diverting] oil revenues from the Republic of Congo into the pockets of powerful Congolese public officials, while at the same time protecting both the oil and the oil revenues from seizure by legitimate creditors.”⁸⁰ Kensington argued that this significant overcollateralization was achieved through agreements between “sham intermediaries,” similar to those detailed in the English case, which were part of a corrupt enterprise “to shield a substantial portion of Congo’s oil revenues from both oversight and attachment by creditors.”⁸¹

Judge Preska, in the Southern District of New York, denied the SNPC and other defendants’ motion to dismiss based on the Foreign Sovereign

77. *Id.* He surmised further that, “Mr. Gokana was not acting for himself in all of this (although he may have gained some personal benefits) but in his capacity as President and DG of SNPC and Special Adviser to the President of the Congo in oil.” *Id.* at para. 194.

78. *Id.* at para. 201. Note that the English court shied away from any specific finding that the corporate vehicles and accounts were designed primarily to hide self-dealing. Indeed, such a finding might have been more inflammatory and was not necessary for the questions of how the *Nordic Hawk* funds should be directed and, in particular, if they could be accessed by the petitioning creditors. Instead, the court focused on how such structures could obscure state funds from loan recovery efforts.

79. *Kensington Int’l Ltd. v. Société Nationale des Pétroles du Congo*, No. 05-cv-5101(LAP), 2006 WL 846351, at *1 (S.D.N.Y. Mar. 31, 2006). Note that this opinion misspells the bank defendant as “BNP Parnibas” but I will use the correct spelling of “BNP Paribas.”

80. *Itoua*, 505 F.3d at 152-53. *See also* the argument that this arrangement was “explicitly intended to enable BNP Paribas to deliver Congo’s oil into the hands of international buyers and deliver the sales proceeds back to the [Congolese President] Sassou-Nguesso regime without interference from Congo’s unpaid creditors and without oversight from anyone outside the regime’s inner circle.” *Id.*

81. *See Société Nationale des Pétroles du Congo*, 2006 WL 846351, at *1 (quoting Kensington International’s complaint).

Immunities Act (FSIA) and for lack of personal jurisdiction and failure to state a RICO claim. She held that the FSIA's commercial activity exception applied, and that Kensington had presented sufficient evidence on jurisdictional and RICO claim grounds to survive a motion to dismiss.⁸² She also proved less coy than Justice Cooke in referencing the grand corruption claims embedded in Kensington's arguments, speaking to the social interest in curbing leaders who "loot their countries, or accept bribes, or steal from their people."⁸³ The Second Circuit reversed in part and vacated in part, holding without any political commentary that SNPC was in fact immune under the FSIA and remanding to the district court to consider in the first instance whether individual officials such as Mr. Itoua were covered by the FSIA.⁸⁴ In appealing a related decision in favor of Kensington on the English court judgment, Congo requested the higher court to reassign the matter to a different judge due to Judge Preska's "hostility towards the Congo." Here the Second Circuit denied the appeal, noting further that "should the Congo persist in its pattern of obstruction and recalcitrance, it may find that more and more judges seem hostile."⁸⁵

Although English and New York courts tended to issue the initial judgments, in line with the terms of the original loan contracts and the litigation theories available, Kensington pursued a highly international recovery and pressure effort. For example, in the British Virgin Islands, Kensington successfully liquidated two corporations embedded in a larger map of companies with ties to the Congo. The court found that these private companies constituted alter egos of the Congo, part of "a convoluted and currently commercially inexplicable structure" implicating the ownership and profits of a Congolese oilfield.⁸⁶ The Eastern Caribbean Supreme Court determined that the object of the structure involved the concealment, through the two companies, of a prefinancing transaction or oil-backed loan by (again) the French Bank BNP Paribas to the Congo.⁸⁷

82. *Id.* at *13-14.

83. *Id.* at *5 (quoting Sen. Levin's Oct. 11, 2001 statement on the PATRIOT Act in discussing personal jurisdiction over Mr. Itoua).

84. *See Itoua*, 505 F.3d at 151 (BNP Paribas was not involved in at least a portion of the appeal, as the FSIA was not relevant to its defense.) As noted below, Congo eventually settled and thus rendered further appeals and decisions unnecessary.

85. *Kensington Int'l Ltd. v. Congo*, 461 F.3d 238, 245 (2d Cir. 2006) (denying appeal from order to post security for plaintiff costs on the basis that order is not appealable under the collateral order doctrine). Congo's lawyers at Cleary Gottlieb also came in for a beating: Judge Preska sanctioned the firm for attempting to dissuade a non-party witness who may have had knowledge about Congo's shipping and oil transactions from attending a post-judgment deposition. *See Kensington Int'l Ltd. v. Congo*, No. 03-cv-4587(LAP), 2007 WL 2456993, at *1, *10 (S.D.N.Y. Aug. 24, 2007); *see also* *Cleary Gottlieb Steen & Hamilton LLP v. Kensington Int'l Ltd.*, 284 Fed. Appx. 826 (2d Cir. 2008) (denying appeal and upholding sanctions).

86. *Kensington Int'l Ltd. v. Montrow Int'l Ltd.* [2007] ECSC BVIHCV2007/004, paras. 21-22 HCI (Virgin Is.).

87. *Id.* at para. 22.

The court pointed out that “the interest in the oil concession was sold at a gross undervalue,” and also noted with choice wording the role of Mr. Gokana, mentioned above as Congo’s special advisor on oil and head of the SNPC—“the same man who has been found to have orchestrated other sham transactions and structures in Bermuda, lied, perjured himself in Court, forged documents, obstructed justice and committed contempt of court.”⁸⁸ Throughout, Kensington also took a forward-looking approach, seeking to stop transactions that it felt might diminish the pool of funds available for its eventual recovery. For example, in August 2002, it obtained an injunction in the Cayman Islands that halted a pre-financing deal with energy and commodities company Vitol for \$210 million.⁸⁹

And the recovery efforts became fairly unconventional, eventually taking a highly personal turn that publicized the corruption and profligacy of the presidential family and high officials. In particular, as part of its efforts to uncover Congolese assets, Kensington obtained orders requiring disclosures by a Hong Kong secretarial services company involved with companies associated with Congolese oil.⁹⁰ The disclosed documents determined, first, the existence of an Anguilla-based company called ‘Long Beach,’ which had dealings with Sphynx Bermuda—of the English *Nordic Hawk* case mentioned above—and whose concealed beneficial owner was Denis Christel Sassou-Nguesso, son of the president and head of the Cotrade marketing arm of the national oil company.⁹¹ The documents also included detailed multi-page credit card statements indicating significant expenditures at shops such as Christian Dior, Louis Vuitton, and Roberto Cavalli in Paris, Hong Kong, Dubai, and Marbella.⁹² And, finally, the documents provided evidence that Long Beach had paid the credit card accounts of Sassou-Nguesso to cover these personal expenditures.⁹³

Although a Hong Kong court only allowed the documents to be used for debt recovery, Kensington nonetheless passed the documents to a London-based anti-corruption group, Global Witness, which then posted them on their website, eventually generating a number of news articles in the global press—a chain of events that was doubtless part of

88. *Id.* at para. 57. Counsel for the companies asserted that the court should consider how Kensington obtained the loans in the first place. However, Judge Hariprashad-Charles found “this was not relevant to the application before me. The basis on which KIL established itself as a creditor of Congo was based on four judgments of the English Commercial Court which was disclosed.” *Id.* at para. 49.

89. Kensington Int’l Ltd. v. Congo [2005] EWHC (Comm) 2684 [116] (Eng.).

90. Long Beach Ltd. v. Global Witness Ltd. [2007] EWHC 1980 [11] (Eng.).

91. *Id.* at para. 49.

92. See Glob. Witness, *supra* note 1; *Congo Leader Son Fails in Gag Bid*, BBC NEWS (Aug. 15, 2007), <http://news.bbc.co.uk/2/hi/africa/6948281.stm>.

93. See *Long Beach Ltd.* [2007] EWHC 1980 [49]. Also indicated was the existence of a second Anguilla company, Elenga Investment Limited, which through a similar beneficial ownership structure paid the credit cards of Blaise Elenga, formerly general counsel for SNPC and at the time deputy head of Cotrade. See Global Witness, *supra* note 1.

Kensington's debt collection plan, broadly writ.⁹⁴ Unsurprisingly, Sassou-Nguesso and Long Beach sued in Hong Kong and in England to have the documents removed, and also sought to keep private their efforts to remove the documents from public view.⁹⁵ Justice Burton of the London High Court demurred, not only determining that press freedom trumped the right to privacy but also commenting that Long Beach had dealings with another company (Sphynx Bermuda) found "to have entered into sham purchases and resales of Congolese oil which gave an obvious opportunity for personal gain on the part of those controlling those companies."⁹⁶ Justice Burton further noted of the individuals involved that, "The specified documents, unless explained, frankly suggest that they are [unsavory and corrupt] There is no obvious reason why [Sassou-Nguesso] should not publicly explain that the transactions shown by these documents are consistent with his honest performance of his duties . . . and his disclosed personal income."⁹⁷

Kensington itself enthusiastically participated in the public embarrassment of Congo's leaders, pointing out their profligacy in the face of the country's poverty. Jay Newman, Elliott Management's senior sovereign debt portfolio manager at the time, highlighted during Congo's 2006 debt relief effort that the Sassou-Nguesso New York hotel suite cost "more per day than the average Congolese makes in a decade."⁹⁸ He also took the opportunity to deride debt cancellation campaigners: "It is oh-so-chic to rock out with [international megastar] Bono and Kofi Annan (the UN secretary general) and there may be instances in which debt forgiveness makes sense. But rather than forgiveness, for some countries the right answers are political sanctions and, when warranted, criminal prosecutions."⁹⁹ While criminal sanctions may indeed be valid in certain circumstances, these funds have thus far not expended much energy on clarifying when debt forgiveness does in fact make sense or on pursuing

94. See, e.g., Roger Parloff, *Judge: Vulture Fund Leaked Documents to Human Rights Group*, FORTUNE (Aug. 21, 2007), <https://fortune.com/2007/08/21/judge-vulture-fund-leaked-documents-to-human-rights-group/>; Lydia Polgreen, *Unlikely Ally Against Congo Republic Grafi*, N.Y. TIMES (Dec. 10, 2007), <https://www.nytimes.com/2007/12/10/world/africa/10congo.html>.

95. See *Long Beach Ltd.* [2007] EWHC 1980 [17]. While the Congolese officials succeeded in Hong Kong, Global Witness responded to their attorneys' demand with the comment that, "You enclose what purports to be an injunction from a Hong Kong Court, which is under the sovereignty of China. Here in the United Kingdom we have the principle of free speech; for all that you are paid to infringe this principle, we nonetheless believe that any English judge will uphold it." *Id.* at para 18. The lawyers hired by Sassou-Nguesso and Long Beach specialized in privacy issues and had presumably previously represented political figures, as well as the likes of Britney Spears and Naomi Campbell. See Parloff, *supra* note 94.

96. See *Long Beach Ltd.* [2007] EWHC 1980 [49]. On freedom of expression and public/journalistic interest in publications, see *id.* at paras. 28, 41, 45.

97. *Id.* at para. 52.

98. Tony Allen-Mills, *Congo Leader's £169,000 Hotel Bill*, SUNDAY TIMES (Feb. 12, 2006), <https://www.thetimes.co.uk/article/congo-leaders-pound169000-hotel-bill-z7k8hwdk9lb>

99. *Id.*

poverty alleviation more directly. Indeed, they seem not to have come across a debt cancellation program they liked.

Of course, public relations efforts abounded on both sides, and the Republic of Congo spent approximately \$3.3 million over 2006-2007 to hire lobbyists in the United States in an effort to highlight the depravity of vulture funds and expose the political dealings of their leadership.¹⁰⁰ Indeed, there is every indication that Congolese officials felt justified in avoiding and denying recovery by Kensington: As part of the English *Nordic Hawk* case, the Caisse Congolese d'Amortissement, a department within the Congo Ministry of Finance, openly stated that it would not make payment to Kensington or other aggressive creditors who had purchased Congolese debt until after the conclusion of general debt relief negotiations.¹⁰¹ Congolese officials apparently considered defensible the establishment of shell corporations to obscure the flow of state assets, and also seemed to believe that their own domestic audience would support such efforts. News outlets reported that, in interviews in the Republic of Congo, officials said they had arranged the complex transactions to avoid aggressive creditors, with the country's information minister asserting, "We are in a war, and we have to defend ourselves."¹⁰² Congo-Brazzaville's prime minister himself admitted in January 2006 that the country had taken to defensively hiding its oil revenues to escape creditor recovery efforts. The officials launched broad counterattacks as well: Around the same time, President Denis Sassou-Nguesso accused a French investigation into alleged embezzlement by him and President Teodoro Obiang of the Equatorial Guinea of being "racist" and "colonial."¹⁰³ And Congo was hardly alone in decrying the vulture funds, with other major international figures speaking of them in similarly uncomplimentary language.¹⁰⁴

Particularly in reviewing these allegations and counter-allegations, along with the multiple court statements that were hardly complementary to the country's leadership, one might assume that Brazzaville took an intransigent stance with creditors more generally. However, this is hardly

100. See Polgreen, *supra* note 94.

101. *Kensington Int'l Ltd. v. Congo* [2005] EWHC (Comm) 2684 [51] (Eng.).

102. See Polgreen, *supra* note 94.

103. See BBC NEWS, *supra* note 92; *French Congo Fraud Probe 'Racist'*, BBC NEWS (July 6, 2007), <http://news.bbc.co.uk/2/hi/africa/6276300.stm>. Of course, it is entirely possible that the investigative and prosecutorial choices of which cases to pursue have racial and colonial overtones while still uncovering information useful to the populations on the ground.

104. For example, Gordon Brown during a speech at the UN as Chancellor of the Exchequer and IMF Governor for the UK made a point to "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, Chancellor of the Exchequer & IMF Governor for the U.K., Speech at the United Nations General Assembly Special Session on Children: Financing a World Fit for Children (May 10, 2002).

the case. While evading Kensington's aggressive recovery efforts, the Republic of Congo simultaneously entered into a consensual and widely appreciated debt negotiation with its other bondholders.¹⁰⁵ Indeed, after 1999, the trend in sovereign debt had been toward unilateral exchange offers—with Pakistan, Ecuador, Argentina, and others partaking—in which sovereigns simply presented new restructuring terms to bondholders without negotiating in advance, generally once the parameters of an appropriate restructuring framework had been vetted by the IMF.¹⁰⁶ Creditor representatives decried these unilateral offers and called the Congo-Brazzaville restructuring, which was a relatively more dialogic and consensual process, “a ray of sunshine cutting through the shadows cast by the cases of Ecuador and Argentina.”¹⁰⁷ To help the sun shine brighter, Congo paid for the expenses of the Creditors' Committee and its legal advisors, ultimately culminating in an outcome that the Committee “was pleased to endorse” and garnering market approval with a ninety-two percent participation rate.¹⁰⁸ Perhaps unsurprisingly, the Creditors' Committee was led by Congo's longtime principal financial institution—and fellow defendant in Kensington's asset recovery suits—BNP Paribas.

The Congo-Brazzaville case is interesting for, among other things, highlighting the way in which creditors' perspectives can differ significantly on the same restructuring. To some creditors, the country and its ruling officials served as a model of responsible debtor action, working conscientiously toward a negotiated solution. But vulture funds, relying on legal argument as well as atmospherics and more global accusations, charged the state's leaders with hiding and mis-valuing assets to short-change creditors and enrich themselves. Ultimately, Kensington's international asset search and associated negative publicity effort did bear fruit: The Republic of Congo agreed to a settlement in 2007 for an undisclosed amount.¹⁰⁹ This settlement obviated the outstanding court appeals and brought to a close the fund's recovery efforts, including their attempts to uncover illicit financial flows into private coffers. Still, the Congo case offers a window into one mechanism for re-linking the risk and reward of controlling sovereign capital flows, by putting in peril the

105. For a detailed discussion of the restructuring and its terms, see generally Mark B. Richards, *The Republic of Congo's Debt Restructuring: Are Sovereign Creditors Getting Their Voice Back?* 73 LAW & CONTEMP. PROBS. 273 (2010).

106. To add insult to injury, some of these exchanges also used exit consents, whereby exiting bondholders voted to change (and worsen) the terms of old bonds still held by reluctant creditors. See, e.g., Lee C. Buchheit & Mitu Gulati, *Exit Consents in Sovereign Bond Exchanges*, 48 UCLA L. REV. 59 (2000); Richards, *supra* note 105, at 274-75, 280.

107. See Richards, *supra* note 105, at 298.

108. *Id.* at 278.

109. Anu Narayanswamy, *Corruption Charges Prompt Congo to Lobby Congress*, SUNLIGHT FOUND., (Sept. 25, 2009), <https://sunlightfoundation.com/2009/09/25/corruption-charges-prompt-congo-to-lobby-congress/>.

usually protected private financial sphere of a borrowing country's high officials in the face of debt collection and asset recovery.

C. NML v. Argentina, Private Wealth Version

A similar window is provided by the most famous sovereign debt default and restructuring in recent years: Argentina—the “trial of the century,” at least in some corners of international finance.¹¹⁰ The Argentinian economy was unparalleled in South America at the beginning of the 20th century and remains one of the largest on the continent, with significant natural resources and an educated population. But many decades of external economic shocks, internal mismanagement of all stripes, and political instability and self-dealing across both military and democratic governments has taken its toll. Despite significant growth in the 1990s, by the start of the 21st century, rampant corruption, an untenable currency peg, and spreading financial crisis had brought the economy to its knees. Unemployment soared over 20%, widespread hunger was reported, and the economy as a whole contracted by one fifth. In the face of this depression, with the country cycling through five presidents in two weeks, the government defaulted on \$100 billion of debt—the largest default the world had ever seen.¹¹¹

Despite its financial pariah status and in the face of dire predictions in international financial centers, the country began to recover in the following years, in part due to the cooling of global financial contagion and greater demand for Argentina's exports, especially from China.¹¹² Particularly in light of increased poverty and inequality, the post-2003 government of Néstor Kirchner and then eventually Cristina Fernández de Kirchner prioritized social spending and, according to the World Bank, made significant strides in reducing poverty and inequality.¹¹³

110. Joseph Cotterill, *Bad Day to Be a Recalcitrant Sovereign Debtor*, FIN. TIMES: ALPHAVILLE (June 16, 2014), <https://ftalphaville.ft.com/2014/06/16/1878332/bad-day-to-be-a-recalcitrant-sovereign-debtor/>.

111. For a broad overview of this and earlier history, see, among many others, *Chronology: Argentina's Turbulent History of Economic Crises*, REUTERS (July 30, 2014), <https://www.reuters.com/article/us-argentina-debt-chronology/chronology-argentinas-turbulent-history-of-economic-crises-idUSKBN0FZ23N20140730>. For a more detailed overview of issues leading to the depression, see, e.g., *Argentina's Collapse: A Decline Without Parallel*, ECONOMIST (Feb. 28, 2002), <https://www.economist.com/special-report/2002/02/28/a-decline-without-parallel>.

112. See, e.g., *Chronology*, *supra* note 111.

113. According to a World Bank study, after the 2001 crisis, “the reduction in inequality accounted for 40 and 50 percent of the decline in extreme and moderate poverty, respectively” and noted that the expansion in the coverage of government cash transfer programs was an important contributing factor. *Skilled Labor Force and Cash Transfer Programs, Key to Decline Inequality in Argentina* [sic], WORLD BANK (Jan. 18, 2013), <https://www.worldbank.org/en/news/feature/2013/01/18/lucha-contra-desigualdad>.

Unfortunately, as detailed below, corruption allegations, high inflation, and a range of other maladies continued and intensified.

Relatively early in its recovery from the depression, the government developed a plan to restructure the vast majority of its debt through a unilateral exchange offer, initially in 2005 and again in 2010, eventually converting nearly 93% of its debt to new discounted bonds.¹¹⁴ The country could not pay *all* of its creditors in full and, indeed, on average the creditors that participated in the exchange took a 65% haircut. Vulture funds, however, saw opportunity: Given the absence of a sovereign bankruptcy regime, these more aggressive creditors could purchase debt on the secondary market and then litigate to take advantage of the country's remaining resources to not only avoid losing money but rather make a substantial profit.

The various attempts made by the most prominent of these funds, NML Capital Ltd. (another subsidiary of Elliott Management), to obtain a judgment and then enforce it against the country's assets have been well-detailed in the popular press and the scholarly literature. Among the most famous recovery efforts have included an attempt to seize a fully staffed Argentine navy training ship docked in Ghana, claim satellite launch contracts with Elon Musk's SpaceX,¹¹⁵ block the country's payments to the IMF, and access central bank reserves held in the Federal Reserve Bank of New York.¹¹⁶ And, of course, NML convinced U.S. federal Judge Thomas Griesa to adopt a novel and much-discussed interpretation of the *pari passu* clause, the loan contract term that guarantees ratable payment across creditors in the same class. On this basis, the court enjoined Argentina and its trustee bank from sending other, cooperating creditors their agreed-upon, restructured bond payments unless NML was paid in full plus interest, effectively pushing Argentina into unintended default with all of its creditors again.¹¹⁷

While maneuvering in New York at the level of contract interpretation, NML also pursued a recovery strategy akin to that displayed by its sister company Kensington against Congo-Brazzaville. And this less-

114. In doing so, it helped to cast a "long shadow" over creditors' hopes for the same more significant voice they had previously enjoyed in restructuring negotiations, as mentioned above. Richards, *supra* note 105, at 289.

115. NML Capital, Ltd. v. Space Exploration Techs. Corp., No. 14-cv-02262(SVW), 2015 WL 1334291, at *8 (C.D. Cal. Mar. 6, 2015) (finding launch service rights immune from attachment and execution under the Foreign Sovereign Immunities Act and granting defendants' motion to dismiss).

116. Noted in, among others, EM Ltd. v. Republic of Argentina, 473 F.3d 463 (2d Cir. 2007) (holding for Argentina).

117. NML Capital Ltd. v. Republic of Argentina, 727 F.3d 230 (2d Cir. 2013). The situation was considered so dire that a group of international banks, including those owed the restructured (and now defaulted) payments, contemplated arranging financing through a third-party settlement. *See also* Erik Schatzker et al., *Banks Said to be Forming Argentine Debt Buyer Group*, BLOOMBERG (Aug. 8, 2014), <https://www.bloomberg.com/news/articles/2014-08-07/banks-said-to-be-arranging-argentine-debt-buyer-group>.

commented on aspect of the Argentina litigation may well have been even more stress-inducing for its high officials. Again using sovereign debt collection to put at risk ostensibly private wealth, NML petitioned a district court in Nevada to allow discovery into 123 shell companies organized for Lázaro Báez, an Argentinian businessman who had been accused of laundering at least \$65 million for high government officials.¹¹⁸ The companies were Nevada entities incorporated through a local affiliate of the Panamanian law firm Mossack Fonseca,¹¹⁹ which later became famous as the face of the global Panama Papers scandal surrounding the use of shell companies and holding structures to facilitate money laundering and tax evasion for high-flying and often powerful clients.¹²⁰

Lázaro Báez first came to light through an investigation by Argentinian television journalist Jorge Lanata, who produced an April 2013 series titled *La Ruta del Dinero K* (or “The K Money Route”) that alleged the existence of shady financial dealings between Báez and the Kirchner presidential family.¹²¹ In particular, the investigation claimed that Báez’s construction company, founded shortly before the 2003 election of Néstor Kirchner as president, was awarded public works contracts in exchange for paying for (but not occupying) rooms in hotels owned by the Kirchners.¹²² The resulting official investigation, headed by Argentinian prosecutor José María Campagnoli, reported that Báez laundered \$65 million in state funds through 150 Nevada corporations. Upon submitting the report to the country’s National Supreme Court of Justice, Campagnoli was promptly removed from office.¹²³

118. See, e.g., Linette Lopez, *Check Out This Crazy Argentine Propaganda Poster With an American Judge’s Head on a Vulture’s Body*, BUS. INSIDER (Aug. 13, 2014), <https://www.businessinsider.com/argentina-judge-griese-propaganda-poster-2014-8>.

119. The court found that the Nevada corporation M.F. Corporate Services was both Mossack Fonseca’s agent and its alter ego in Nevada, granting the court specific and general jurisdiction to order discovery. See *NML Capital, Ltd. v. Republic of Argentina*, No. 14-cv-492, 2015 WL 1186548, at *13-14 (D. Nev. Mar. 16, 2015). Mossack Fonseca originally denied any relation between itself and these Nevada companies, although the International Consortium of Investigative Journalists seems to have obtained e-mails indicating the firm’s efforts to actively hide the association. See, e.g., Llewellyn Hinkes-Jones, *Clients of Mossack Fonseca: A U.S. Court Review*, BLOOMBERG (May 25, 2016), <https://news.bloomberglaw.com/business-and-practice/clients-of-mossack-fonseca-a-u-s-court-review>.

120. For more on this investigation by the International Consortium of Investigative Journalists, see generally BASTIAN OBERMAYER & FREDERIK OBERMAIER, *THE PANAMA PAPERS: BREAKING THE STORY OF HOW THE RICH AND POWERFUL HIDE THEIR MONEY* (2016).

121. The series used as its hook the question of how the Kirchners’ wealth increased from \$1.4 million to \$14.1 million, according to government filings, since they entered into power. See, e.g., Linette Lopez, *Paul Singer’s Next Trick Could Make the Argentine Government Way Angrier than the Time He Took Its Boat*, BUS. INSIDER (Aug. 15, 2014), <https://www.businessinsider.com/singer-after-kirchner-funds-2014-8>.

122. *NML Capital, Ltd.*, 2015 WL 1186548, at *1.

123. *Id.* at *2. This investigation also alleged the existence of a second money laundering scheme involving another Argentine businessman, Cristobal López, also using Nevada corporations. *Id.* at *3.

Ever vigilant, NML subpoenaed the corporations in Las Vegas, arguing that they were likely those mentioned in the Campagnoli report. The Nevada corporations all had the same registered agent, M.F. Corporate Services, which in turn had one employee, one client—Mossack Fonseca—and one owner, a Panamanian company also ultimately run by Mossack Fonseca. Upon subpoena, another Mossack Fonseca-affiliated individual responded on behalf of all of the entities, admitting that none of them possessed their own operating agreements or regularly conducted business within 100 miles of Las Vegas.¹²⁴ M.F. Corporate Services' one employee indicated that she received all of her directions from employees of Mossack Fonseca.¹²⁵ On this basis, NML suggested that there was sufficient evidence to propound discovery on these companies, given their links to Báez. Explicitly claiming that the allegedly private funds were in fact public, it noted that “If Báez is convicted of embezzlement, any funds traceable to the embezzlement scheme would be property of Argentina available to satisfy NML’s judgements against Argentina.”¹²⁶ Judge Cam Ferenbach, of the U.S. District Court of Nevada, agreed to discovery, finding in several opinions “reasonable suspicion to believe that the Kirchners and Báez are or were in possession of Argentina’s assets and that Báez controls entities in Nevada that possess information regarding those assets.”¹²⁷ The court further highlighted the principle in both U.S. and Argentinian law that thievery cannot result in title to the property stolen and found sufficiently reasonable suspicion, at least in the context of allowing discovery, to believe that “Báez, López [another businessman in similar circumstances], and their companies may be thieves.”¹²⁸

At the same time as these Nevada cases unfolded, and concurrent with the Argentine debt saga’s final years, Argentinian prosecutors launched a number of criminal investigations into these events.¹²⁹ Indeed, as part of

124. *Id.* at *2.

125. *Id.* at *4.

126. Lopez, *supra* note 118 (quoting court submissions by NML). The court papers omit the accent in Báez’s name but I have included it here.

127. *NML Capital, Ltd.*, 2015 WL 1186548, at *7; *see also* *NML Capital, Ltd. v. Republic of Argentina*, 2014 WL 3898021, at *5-6 (D. Nev. Aug. 11, 2014).

128. *NML Capital, Ltd.*, 2015 WL 1186548, at *8. In addition, Judge Ferenbach agreed to make additional information from the case publicly available, particularly in response to a motion by Jorge Lanata—the journalist behind *La Ruta del Dinero K*—to unseal the deposition testimony of M.F. Corporate Services’ single employee. *NML Capital Ltd. v. Republic of Argentina*, No. 14-cv-492(RFB), 2015 WL 727924, at *9 (D. Nev. Feb. 19, 2015). He stated that NML’s action was significantly important to the public, and averred that the matters could not be litigated in secret, as it would limit the public’s understanding of the court’s final decision. *Id.* at *7. Interestingly, the court also noted, “It requires no citation to authority to recognize that transparent credit markets are integral to public health and safetyThe public’s interest in maintaining a healthy and transparent bond market, therefore, strongly outweighs [the opposing parties’] private interests.” *Id.* at *8.

129. While these investigations continued, their future is currently uncertain given Kirchner’s late 2019 election to the Vice Presidency and the February 2020 death of one of the key judges involved in the prosecutions. *See, e.g., Argentina: Citan a la expresidenta Cristina Fernández de Kirchner a*

the litigation in Nevada, NML provided an expert report detailing nine criminal investigations ongoing that connected the Kirchners, Báez, López, and their companies.¹³⁰ Vulture fund representatives were certainly delighted to help publicize these allegations, which amplified their efforts to seize assets or, in the alternative, squeeze or embarrass Argentina into a profitable settlement. And, unlike in the case of Congo-Brazzaville, where ousting a longstanding (if still embarrass-able) autocrat seemed unlikely, Argentina has remained a democracy, albeit imperfect, since the end of military rule in 1983. Sufficient public pain combined with sufficient suspicion of inordinate corruption in the political elite might help bring about a change in administration, if not the capitulation of the current administration. This was hardly lost on President Cristina Fernández de Kirchner, and the disparaging comments went in both directions, with Kirchner taking opportunities to deride the “vultures” and denounce their efforts to destroy the country. Kirchner and her allies also directed particular anger at Judge Griesa of the SDNY, calling him “senile”—a statement that can’t have helped the country’s case in his courtroom—and featuring him on posters as a vulture who “wants your house, your job and your food.”¹³¹

Ultimately, the holdout litigation did outlast Kirchner’s presidency. In late 2015, Kirchner lost in the elections to the newly assembled Cambiemos (“Let’s Change”) political coalition, led by Mauricio Macri, who stated his intention to take Argentina in a different economic direction, including through a settlement with the holdout creditors. And although none of the facts or legal theories underpinning the case had changed, Judge Griesa then lifted the injunction on Argentina making payments to other cooperating/exchange creditors, noting that “everything had changed.”¹³² Indeed, Macri was a centrist businessman who intended to institute reforms more in line with the preferences of

declaración indagatoria, CNN ESPAÑOL (Aug. 1, 2018), <https://cnnespanol.cnn.com/2018/08/01/argentina-citan-a-la-expresidenta-cristina-fernandez-de-kirchner-a-declaracion-indagatoria/>; Daniel Pilotti, *Judge Who Pushed Graft Cases Against Ex-President of Argentina Dies*, N.Y. TIMES (Feb. 4, 2020), <https://www.nytimes.com/2020/02/04/world/americas/argentina-bonadio-kirchner.html>.

130. *NML Capital, Ltd.*, 2015 WL 1186548, at *7.

131. “Griesa quiere tu casa, tu trabajo, y tu comida.” See Lopez, *supra* note 118. For recommendations on more considered ways to default on sovereign debt, see Odette Lienau, *How to Default on Sovereign Debt*, WORLD ECON. F. (June 2, 2015), <https://www.weforum.org/agenda/2015/06/how-to-default-on-sovereign-debt/>.

132. This was achieved in part through the innovative use of a “conditional vacatur,” which suspended the injunctions so long as Argentina met certain conditions, such as repealing the so-called “Lock Law” which prevented the government from making higher payouts to holdout creditors than to other, cooperating creditors. See, e.g., Benedict Mander, *How Argentina Pulled Off a Deal in Creditor Impasse*, FIN. TIMES (Dec. 5, 2016), <https://www.ft.com/content/88a56580-a2c5-11e6-aa83-bcb58d1d2193>.

domestic and international business.¹³³ While the population initially seemed to allow the new government breathing room, the lack of improvement eventually resulted in unhappiness across the political spectrum, with unions and social activists protesting greater austerity while some in the business community calling the government merely “Kirchnerism with good manners.”¹³⁴ The economy continued to struggle with unimpressive growth, a currency crisis, and a conflict-of-interest scandal in the presidential inner circle (exposed, again, by Jorge Lanata of *La Ruta del Dinero K*).¹³⁵ And Argentina returned to the IMF in May 2018 after losing access to international debt markets despite the vulture fund settlement, receiving the largest loan package (at \$57.1 billion) in the IMF’s history in September 2018.¹³⁶ But after that the currency fell, inflation remained problematically high, and the austerity measures associated with the IMF package, which rested on overly optimistic economic projections, harmed Macri’s popularity.¹³⁷ In October 2019, in the midst of increased poverty and yet another looming debt crisis, Argentines voted Macri out, with Cristina Kirchner elected as Vice President to serve under the presidency of Alberto Fernández.¹³⁸ The new Minister of Economy,

133. For example, upon taking office, Macri proposed laws that encouraged tax evaders to repatriate their assets (for a discounted tax payment) to attract foreign direct investment. His general move to austerity included the elimination of gas and other subsidies, with poverty levels initially rising under his administration. Nathaniel Parish Flannery, *How Serious Are Argentina’s Economic Problems?*, FORBES (Dec. 19, 2016), <https://www.forbes.com/sites/nathanielparishflannery/2016/12/19/5534/#68bc7cd874a2> (Interview with Erasmo Mema). Although general poverty rates initially seemed to stabilize, certain demographic segments continued to struggle, as indicated by an 8% rise in childhood poverty to 48% in the year ending in June 2018, according to a study by the Catholic University of Argentina. *See Study: Nearly Half of Argentina’s Children Live in Poverty*, TELESUR (June 28, 2018), <https://www.telesurenglish.net/news/Study-Nearly-Half-of-Argentinas-Children-Live-in-Poverty-20180628-0022.html>.

134. Benedict Mander, *Macri’s Reform Agenda Under Strain in Argentina*, FIN. L. TIMES (May 31, 2018), <https://www.ft.com/content/57eded86-5f61-11e8-9334-2218e7146b04>.

135. *Id.*

136. Uki Goñi, *Argentina Gets Biggest Loan in IMF’s History at \$57bn*, GUARDIAN (Sept. 27, 2018), <https://www.theguardian.com/world/sep/26/argentina-imf-biggest-loan>.

137. *See, e.g.*, Agustino Fontevicchia, *Cambios Must Change: Argentina’s Macri Needs a Radical Paradigm Shift*, FORBES (June 13, 2018), <https://www.forbes.com/sites/afontevicchia/2018/06/13/cambios-must-change-argentinas-macri-needs-a-radical-paradigm-shift/#c6f73c340554>; *Argentina’s Economic Woes*, ECONOMIST (May 10, 2018), <https://www.economist.com/finance-and-economics/2018/05/10/argentinas-economic-woes>; *Argentina’s Crisis: Where Did It All Go Wrong for Macri?*, AL JAZEERA, (May 26, 2019), <https://www.aljazeera.com/programmes/countingthecost/2019/05/argentina-crisis-wrong-macri-190525092513291.html> (noting that inflation stands at 54.7%).

138. *See, e.g.*, Sebastián Lacunza, *Argentine Voters Reject Austerity, Return Kirchner and the Peronistas to Power in Presidential Election*, WASH. POST (Oct. 27, 2019), https://www.washingtonpost.com/world/the_americas/argentina-presidential-election-as-south-americans-protest-austerity-argentines-put-it-to-a-vote/2019/10/27/023f1260-f68d-11e9-b2d2-1f37c9d82dbb_story.html. The implications of this for investors remain unclear, although it appears that bondholders are, for now, waiting to see what the Fernández presidency will bring. *See* Kenneth Rapoza, *Argentina’s Bonds: Good Luck Figuring This One Out*, FORBES (Nov. 7, 2019),

Martín Guzmán, very quickly stated that Argentina will need “substantial relief” as it structures nearly \$70 billion in debt with international bondholders.¹³⁹

In the meantime, the settlement with Argentina proved extremely lucrative for the litigating holdout creditors. Elliot Management, through NML Capital, ultimately pocketed at least \$2.28 billion in the settlement, estimated to be 10 to 15 times its original investment, effectively earning 101% interest per year.¹⁴⁰ The bonds had a face value of \$617 million but had been purchased at a steep discount for about \$117 million.¹⁴¹ Argentina did not have enough liquidity to settle the claims so, enabled by the expiration of the SDNY injunctions and the country’s return to global credit markets, it funded the payout in part by issuing international debt.¹⁴² One can only hope that the debt restructuring negotiations launched in late 2019 do not lead to yet another cycle of debt default and protracted litigation, though the historical precedent for the country and its relationship with international capital markets is hardly encouraging.

It should be fairly clear from the preceding discussion that the two creditor entities at the center of the Congo and Argentina litigations are among the most antagonistic of sovereign debt vulture funds—a moniker that arguably already denotes an unseemly degree of aggression. Indeed, many in the sovereign debt world find little to like about these financial entities. They are heavily criticized for shunning and then interfering with the collective debt restructuring processes in which others participate, thus placing greater financial burden on both fellow creditors and on the debtor country’s population in order to maximize their own profits. Yet, at least from the perspective of the asset recovery world, there appears to be some benefit. As the two cases suggest, the tenacity of these funds may help to uncover and publicize the existence and mechanisms of corrupt

<https://www.forbes.com/sites/kenrapoza/2019/11/07/argentinas-bonds-good-luck-figuring-this-one-out/>.

139. Hugh Bronstein & Eliana Raszewski, *Argentina Needs ‘Substantial’ Relief in \$70 Billion Debt Talks, Economy Minister Says*, REUTERS (Mar. 12, 2020), <https://www.reuters.com/article/us-argentina-economy-guzman-exclusive/exclusive-argentina-needs-substantial-relief-in-70-billion-debt-talks-economy-minister-says-idUSKBN20Z1EE>.

140. Julie Wernau, *How Elliott Earned Billions on Argentine Bonds at 101% Interest*, WALL ST. J.: MONEYBEAT, (Mar. 3, 2016), <https://blogs.wsj.com/moneybeat/2016/03/03/how-elliott-earned-billions-on-argentine-bonds-at-101-interest/>. It is unclear whether this amount is gross profit or net of litigation and enforcement costs. Regardless, it is clearly substantial.

141. This number was based on an analysis of court records conducted by Martin Guzman, as of writing the Argentinean Minister of Economy but at the time a researcher at Columbia University Graduate School of Business and a frequent writer on sovereign debt issues. See Renae Merle, *How One Hedge Fund Made \$2 Billion from Argentina’s Economic Collapse*, WASH. POST, (Mar. 29, 2016), <https://www.washingtonpost.com/news/business/wp/2016/03/29/how-one-hedge-fund-made-2-billion-from-argentinas-economic-collapse/>.

142. Bob Van Voris & Katia Porzeczanski, *Argentina Debt Injunction to be Lifted in Blow to Hedge Funds*, BLOOMBERG (Feb. 19, 2016), <https://www.bloomberg.com/news/articles/2016-02-19/argentina-bonds-judge-says-he-will-lift-injunctions-on-debt-iku9ykz3>.

transnational asset flows. They also shed light on and perhaps raise questions about the dual role of banks working on both sides of the sovereign debt/private wealth intersection and also the use of shell corporations in circumscribing funds as ‘personal.’ If, as I suggest, global financial norms and practices have tended to allow state rulers to capture the benefits of unchecked rule without its perils, vulture funds have perhaps re-introduced a valuable element of risk. The question, of course, is whether this value ultimately is sufficient to outweigh the very high costs that these funds impose—particularly on the citizens of sovereign debtor states.

IV. CAPTURING BENEFITS FOR THE INTERNATIONAL FINANCIAL ARCHITECTURE

Borrowing country officials rightly view an inability to pay sovereign debt with some anxiety. And if the state’s ruling elites have used their positions to enrich themselves at the expense of the solvency or effective administration of the country itself, they should ideally feel an even greater degree of trepidation. Yet, even in cases of grand corruption, the underlying population generally bears the brunt of any restructuring measures while elites themselves can continue to live in ill-gotten luxury. In this article, I have argued that the norms and rules at the intersection of sovereign debt and private wealth have effectively enabled this disconnect and exacerbated problematic dynamics of global indebtedness and financial crisis. Elites have been able to augment a country’s treasury through sovereign borrowing practices that blur the lines between the public and the private, in which creditors lend with few questions asked and other market actors and supportive courts have largely required repayment regardless. And, perhaps even more than in centuries past, ruling officials have much to gain personally from such over-borrowing: the international norms surrounding private wealth have generally provided mechanisms for hiding assets without care for their origins—designating such assets as ‘personal’ and unavailable for easy recovery by the sovereign state or its creditors.

So-called vulture funds have in several recent cases targeted this specific intersection, placing in jeopardy ostensibly private funds when debtor country elites have not respected the borders between private and public. In doing this, they raise the possibility of a private debt collection mechanism that could—over time and if expanded—mitigate a market failure in global finance, helping to rein in sovereign over-borrowing, at least to the extent that it is exacerbated by the mismatched interests, risks, and rewards of government officials and their constituents. One major question, then, is *how* positive an externality is this? Is it such a benefit to

the global financial system that we should give vulture funds freer rein, instead of targeting their actions through reform proposals for the international financial architecture, as is more commonly the case? How should we conceive of the positive and negative together, and are there mechanisms by which they could be separated out?

In this final section, I argue that, despite its potential benefits, the vulture funds' strategy depends on a fundamentally flawed global framework, such that ultimately any recommendation of this approach becomes untenable. I also briefly suggest that certain of these benefits could be captured by alternative frameworks and strategies, in conjunction with a clarification of which principles should guide sovereign lending, debt recovery, and private wealth protection. At the most ambitious level, the asset collection strategies pioneered by these cases could be included in any future sovereign bankruptcy regime, although the practical ramifications of such an inclusion would have to be considered carefully. At an intermediate level, I highlight how guidelines and principles that would mitigate this market failure could be adopted more broadly and eventually incorporated into court decisions and even into the practices of organizations such as the IMF. In addition, provisions for this kind of asset recovery could possibly be included in existing contractual mechanisms for sovereign debt or even in separate private law actions, though again the practicalities and ramifications for debt restructuring would be complicated to say the least. Although each of these reform approaches would require greater study and elaboration, these preliminary suggestions raise the possibility of capturing some of the benefits of the vulture fund approach with fewer of the detriments.

A. Encouraging Vulture Funds as a Corrective? A Benefit Built on Flaws

Recent efforts by official entities to curb grand corruption and facilitate the return of stolen assets to their countries have had mixed success, to say the least.¹⁴³ On both the corruption exposure and the recovery front, the self-interested efforts of vulture funds have in some cases been more effective. Frustrated by these disappointing outcomes, asset recovery scholars such as Jason Sharman have gone so far as to suggest that vulture funds simply be welcomed as key players in this effort, even if they retain all the recovered funds. Sharman has noted, "If a vulture fund takes someone corrupt to court and strips them of \$100m then it doesn't make the victim country any richer but it provides some accountability and a deterrent. Other would-be criminals think: well even if I escape my own government, there are these firms that will come after my

143. This is presented more fully in the discussion of private wealth norms in Part II.B. above.

money no matter where it is in the world.”¹⁴⁴ He suggests that this ‘baptists and bootleggers’ coalition, while not especially morally satisfying, might in the long run be more effective at curbing corruption through a strong deterrent effect.¹⁴⁵

The proposal is intriguing, and it is certainly the case that vulture funds bring a perspective that other creditors may lack. In the Congo-Brazzaville case, consensually restructuring creditors seemed to present the country and its leaders as a shining ray of light in the darkness cast by Argentina and other debtors.¹⁴⁶ And it is hardly surprising that the French bank BNP Paribas played the key role as the lead bank in Congo’s lauded restructuring negotiations. The bank seems to have a long history with both Congo-Brazzaville and its ruling Sassou-Nguesso family. For the country, the bank’s sovereign debt department has put together plain vanilla loans and led the charge on restructuring when required. It has also helped to arrange secured financing mechanisms involving Congolese oil, including the prefinancing arrangements that resulted in its being sued in a U.S. RICO case.¹⁴⁷ And the ruling family seems to have availed itself of BNP Paribas’s private client services, with the bank allegedly holding private accounts and facilitating the purchase of luxury real estate in Paris in ways that ultimately attracted the attention and ire of French anti-bribery authorities.¹⁴⁸ Relatively uniquely (or at least vocally) among creditors, Kensington International called out Congo’s leaders as worthy of scorn.

However, the recommendation to welcome vulture funds more openly into the asset recovery and anti-corruption project looks at only one side of the international economic story. While this project is certainly important, the vulture fund strategy depends on what many consider a failing in the underlying financial architecture—the absence of something like a sovereign bankruptcy regime. This connection is clear to the many advocates of a sovereign bankruptcy equivalent (myself included), clear to

144. See David Batty, *Make Profit Motive an Ally in Corruption Fight, Says Offshore Expert*, GUARDIAN (June 2, 2016), <https://www.theguardian.com/business/2016/jun/02/profit-motive-venture-capital-ally-corruption-fight-jason-sharman>.

145. For initial responses to this proposal, see, e.g., *id.* (noting that Transparency International doubted using the profit motive in this way and expressed the view that assets recovered should be returned to the underlying population). Indeed, jurisdictions that participate in asset seizures related to corruption frequently may keep the assets for themselves. See also, e.g., Nick Squires, *San Marino Seizes \$19m from Congo Dictator Who Spent \$100,000 on Crocodile Shoes*, TELEGRAPH (Sept. 12, 2019), <https://www.telegraph.co.uk/news/2019/09/12/san-marino-seizes-19m-congo-dictator-spent-100000-crocodile/>.

146. See Richards, *supra* note 105, at 298.

147. See text associated with notes 79-86 *supra*.

148. These cases continued well past this earlier struggle with Kensington. See, e.g., Chine Labbé & Bate Felix, *French Court Orders Seizure of Properties Tied to Congo President’s Family*, REUTERS (Sept. 29, 2015), <https://www.reuters.com/article/us-france-congo-corruption/french-court-orders-seizure-of-properties-tied-to-congo-presidents-family-idUSKCN0RT2HL0150929>.

creditors that have opposed moves in this direction, and clear to courts dealing with sovereign debt issues. In Kensington's case against Congo-Brazzaville, the Second Circuit highlighted precisely this point:

The Congo argues that, because it does not have funds to pay all of its debts, taking judicial notice that the Congo may nevertheless pay this debt is error. In other words, the Congo claims that it is unwilling to pay its debts in the name of restructuring its entire debt portfolio, and thus "paying Kensington or other similarly situated individual creditors would have the perverse effect of encouraging the Congo's other creditors to litigate their claims in hopes of securing a windfall, rather than participating in an equitable restructuring process." While it may be in the Congo's interest to seek a global settlement . . . the Congo does not squarely dispute [that it] has sufficient funds to pay here. This is not a bankruptcy proceeding.¹⁴⁹

The absence of a bankruptcy regime for sovereigns—which would force even an unwilling creditor into a collective process in which it too must share in the burden of restructuring—is precisely what allows vulture funds to make such significant profits.¹⁵⁰ Thus, encouraging vulture funds in their asset recovery efforts would, it seems, require the maintenance of the current, highly problematic approach to sovereign debt. Indeed, supporting an asset recovery framework against the backdrop of a flawed underlying sovereign debt structure could serve to entrench that structure and further strengthen the actors that rely upon and benefit from it.

Of course, holdout litigation remains the exception in sovereign debt cases, and there is some disagreement about the broader risks and effects of such litigation for the system more generally. Collecting against the assets of foreign states is a notoriously difficult project and not for the

149. See *Kensington Int'l Ltd. v. Congo*, 461 F.3d 238, 244 (2d Cir. 2006) (denying appeal from order to post security for plaintiff costs on the basis that order is not appealable under the collateral order doctrine).

150. Of course, these funds also make significant profits as purchasers of distressed debt in the context of U.S. Chapter 11 corporate bankruptcy proceedings. For different takes on this phenomenon, see, among others, Paul M. Goldschmid, *More Phoenix than Vulture: The Case for Distressed Investor Presence in the Bankruptcy Reorganization Process*, 2005 COLUM. BUS. L. REV. 191, 191-267; Richard D. Thomas, *Tipping the Scales in Chapter 11: How Distressed Debt Investors Decrease Debtor Leverage and the Efficacy of Business Reorganization*, 27 EMORY BANKR. DEVS. J. 213, 213-53 (2010). This active domestic bankruptcy-based investing strategy undermines the claim sometimes made that a sovereign bankruptcy framework would necessarily shut down secondary markets. However, it is perhaps a question of magnitude: There could be some decrease in the liquidity of sovereign debt markets and some increase in borrowing costs—an outcome that might not be so bad given the mixed consequences of readily available and relatively inexpensive capital in sovereign debt markets historically. For one consideration of the seemingly endless capacity of countries and creditors to make poor financial decisions, see, for example, CARMEN M. REINHART & KENNETH S. ROGOFF, *THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY* (2011).

faint of heart. It is true that older international laws and norms of sovereign immunity have been eroded by the Foreign Sovereign Immunities Act in the United States and by its relatives in other jurisdictions. These shifts have made the assets of sovereign states recoverable under certain circumstances, including if they are used in the course of commercial relations.¹⁵¹ And, in contemporary sovereign loan contracts, states routinely waive their claim to immunity for the purposes of allowing creditor recovery on these contracts, making it even more possible to render judgments against them and their assets.¹⁵² Still, actually converting these judgments into funds without the state's acquiescence remains difficult. There is the problem of discovering where the assets related to a sovereign's commercial activity might be, although this difficulty has been softened somewhat in the U.S. context by (yet) another line of cases associated with NML's litigation against Argentina.¹⁵³ And there is the additional challenge of successfully seizing those assets, particularly if they are not located in a jurisdiction that is relatively more accessible and amenable to creditors.

This difficulty is one central reason why, most of the time, most creditors to sovereign states rely on the standard, if highly imperfect, processes of credit rationing and restructuring to manage their exposure to risk and maximize their chances of a reasonable return on investment. If a state has difficulty meeting its debt payments (at least its external debt payments), it will now generally meet with creditor representatives to attempt to arrange payments in a way that better accords with its payment capacity. The IMF and other major financial actors will almost certainly become involved, and of course the political voice and economic requirements of domestic constituents play (or should play) a central role. In this interplay of consensus, financial pressure, and power politics, the contours of most sovereign debt restructurings can mimic the dynamics of out-of-court restructurings for any other entity—though without, of course, the background threat of bankruptcy that encourages collective action in the domestic corporate context, for example.

The commentary surrounding the likely long-term impact of vulture fund litigation has thus gone both ways. Felix Salmon, a widely read and highly regarded commentator on sovereign debt, expressed a concern held by many in the field at the height of the Argentina debt litigation—namely that vulture fund actions and the subsequent court decisions were a

151. *See* 28 U.S.C. § 1605(a)(2) (2018). This commercial activity exception now is understood to include sovereign debt transactions, although originally this was less certain. A key decision here was *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992).

152. *See, e.g., Kensington Int'l Ltd.*, 461 F.3d at 243.

153. *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134 (2014) (holding that the FSIA does not immunize Argentina from post-judgment discovery of information sought by creditor in regard to extraterritorial assets).

“disaster” and that the Second Circuit and the Supreme Court “should be held responsible for the fallout.”¹⁵⁴ On the other side, an analyst at Moody’s Credit Rating Agency has argued that, despite all the hand-wringing, sovereign debt holdout litigation is fairly infrequent and perhaps does not warrant such concern.¹⁵⁵ Hans Humes of Greylock Capital, another investor very active in distressed sovereign debt though not itself a holdout or “vulture” as I have defined it, similarly suggested that Argentina’s concerns about settling with holdouts were misplaced. He noted, “virtually no other financial institution has the appetite or ability to litigate like Elliott. In my estimate, the chance of anyone litigating for, and winning equal terms, is nil.”¹⁵⁶ Indeed, Bloomberg has called Paul Singer, the notoriously and uniquely aggressive founder of Elliott Management, “the world’s most feared investor.”¹⁵⁷ But a more recent empirical study has kept the conversation alive, demonstrating that creditor lawsuits have become increasingly common over the last four decades and that legal developments have strengthened creditors and restricted access to capital markets.¹⁵⁸

In any case, although the frequency of holdout litigation is of course important—and might have bearing on how to weigh the problems of vulture fund litigation against its possible positive externalities—frequency alone is not a sufficient metric. Even if this type of litigation is relatively rare, the argument that low frequency necessarily implies low import

154. Felix Salmon, *Hedge Fund vs. Sovereign: How U.S. Courts are Upending International Finance*, FOREIGN AFF. (June 24, 2014), <https://www.foreignaffairs.com/articles/united-states/2014-06-24/hedge-fund-vs-sovereign>.

155. ELENA DUGGAR ET AL., MOODY’S INV’RS SERV., THE ROLE OF HOLDOUT CREDITORS AND CACS IN SOVEREIGN DEBT RESTRUCTURINGS (2013), https://www.moodys.com/research/moodys-holdout-creditors-have-not-been-an-obstacle-to-sovereign-pr_270542. See also Laura Alfaro, *Sovereign Debt Restructuring: Evaluating the Impact of the Argentina Ruling*, 5 HARV. BUS. L. REV. 47 (2015) (suggesting that incentives for holdout litigation are limited and that the court responses to Argentina are unlikely to be replicated in the future).

156. Hans Humes, *Who to Blame for Argentina’s Disastrous Default? Its Lawyers, Of Course*, GUARDIAN (Aug. 20, 2014), <https://www.theguardian.com/world/2014/aug/20/argentina-debt-default-lawyers-court-pay-clause>. This comment more specifically addressed concerns that particular clauses in Argentina’s bond contracts might result in additional creditor claims. The loan clauses themselves were “Rights Upon Future Offers” or RUFO clauses, which might have allowed other creditors to sue for a similar outcome if any party was made a better offer in the future—a mechanism akin to an MFN (Most Favored Nation) clause. Humes has in other contexts criticized the actions of vulture funds, noting that they “hold the system hostage.” Greg Palast, *Vultures’ Prey on Liberia’s Debt*, BBC NEWS (Mar. 2, 2010), http://news.bbc.co.uk/2/hi/programmes/world_news_america/8546628.stm.

157. Nabila Ahmed et al., *The World’s Most Feared Investor*, BLOOMBERG (Aug. 7, 2017), <https://www.bloomberg.com/graphics/2017-elliott-management/> (calling Singer “aggressive, tenacious, and litigious to a fault”). For more context on Paul Singer in particular, see Sheelah Kolhatkar, *Paul Singer, The Doomsday Investor*, NEW YORKER (Aug. 20, 2018), <https://www.newyorker.com/magazine/2018/08/27/paul-singer-doomsday-investor>.

158. Julian Schumacher, Christoph Trebesch, & Henrik Enderlein, *Sovereign Defaults in Court* (ECB Working Paper No. 2135, 2018), <https://ecb.europa.eu/pub/pdf/scpwps/ecb.wp2135.en.pdf?afa9da3641f789eb6395b49f3e1850b69>.

hardly follows. As is commonly pointed out in law school classrooms, though frustratingly difficult to operationalize and study empirically, the shadow of the law and the threat of litigation likely resolve many more disagreements than do actual court cases. And even if seasoned participants may consider such litigation to be less fruitful in the future—industry insiders note that Paul Singer himself has pulled back—young and optimistic ‘wannabe’ sovereign debt vultures could still maintain this problematic dynamic, even if they lose their investors’ money.¹⁵⁹ It would be entirely reasonable for debtor governments that have witnessed the struggles of countries beset by litigating creditors to sidestep the pain and capitulate to terms less favorable to the underlying population. Anecdotally, it appears that this has been the response of some countries to the Argentina litigation in particular.¹⁶⁰ Such a dynamic might lead a greater number of creditors to resist write-downs, particularly if the trend seems to be toward states folding earlier in the face of credible litigation threats. This could in turn undermine the likelihood of consensual restructurings and exacerbate country debt problems in the long run.

Of course, developments in sovereign debt contracts themselves, including the incorporation of model contract clauses published by the International Capital Markets Association (ICMA, a key industry group for internationally-oriented investors), should help somewhat. The greater emphasis on collective action clauses (CACs) and aggregated collective action clauses (or super-CACs) in sovereign debt contracts, both in Europe and in the United States, might eventually alleviate some of the difficulty around holdouts and creditor cooperation in restructuring.¹⁶¹ In addition, the ICMA model contract terms include a new version of the infamous *pari passu* clause, the more recent iteration of which effectively rejects the approach adopted by the SDNY in the Argentina litigation.¹⁶²

159. In private conversation, industry insiders suggest that Paul Singer himself has pulled his funds back from sovereign debt holdout litigation, particularly with the recent retirement of senior portfolio manager Jay Newman and the tightening of bond contract language.

160. For example, Eric LeCompte, Executive Director of the debt cancellation advocacy group Jubilee USA Network, has said there are signs that some countries are more likely to agree to unfavorable terms than previously. Renae Merle, *How One Hedge Fund Made \$2 Billion from Argentina's Economic Collapse*, WASH. POST (Mar. 29, 2016), <http://www.washingtonpost.com/news/business/wp/2016/03/29/how-one-hedge-fund-made-2-billion-from-argentinas-economic-collapse/>. My own sense from listening to debtor country representatives at sovereign debt conferences and roundtables supports this concern as well.

161. For analysis of this trend, see, for example, W. Mark Weidemaier & Mitu Gulati, *A People's History of Collective Action Clauses*, 54 VA. J. INT'L L. 51, 95 (2013); Catalin Stefanescu, *Collective Action Clauses in International Bond Contracts and Their Effect on Spreads at Issuance*, (Eur. Fin. Mgmt. Assoc. Paper, 2016), https://efmaefm.org/0EFMAMEETINGS/EFMA%20ANNUAL%20MEETINGS/2016-Switzerland/papers/EFMA2016_0442_fullpaper.pdf

162. See INT'L CAPITAL MKTS. ASS'N, STANDARD AGGREGATED COLLECTIVE ACTION CLAUSES (“CACs”) FOR THE TERMS AND CONDITIONS OF SOVEREIGN NOTES (2014); INT'L CAPITAL MKTS. ASS'N, STANDARD *PARI PASSU* PROVISION FOR THE TERMS AND CONDITIONS OF

But a significant portion of the outstanding global sovereign debt stock does not include these updated contract terms. And, of perhaps even greater concern, some evidence suggests that an increasing share of sovereign debt is now not in the form of general bond obligations but rather through loans backed by collateral such as future commodity reserves or other key income-generating assets, and therefore is likely to be more difficult to restructure.¹⁶³ As such, just as in other market areas, shifts in investor practice and contract structure may sidestep the contractual or regulatory fixes designed for the holdout crises of an earlier era.

An additional weakness or vulnerability in the vulture fund sub-strategy targeting ostensibly private wealth lies in its internal inconsistency. Vulture funds, in uncovering and claiming ill-gotten ‘private’ wealth in order to maximize collection on their sovereign debt claims, may loudly bemoan corruption and the havoc that it wreaks. The substance and style of this strategy, including the accompanying public relations efforts, rest on a widely professed view that high-level, high-money kleptocracy is unacceptable. Both the arguments and the atmospherics imply that there is a clear divide between public and private financial flows, and that the improper and illicit conversion of the former into the latter should not be tolerated.

But to the extent that funds meant for a country like Congo-Brazzaville have been diverted, does that throw into question the validity of the vulture funds’ debt in the first place? Although of course not all sovereign debt is tainted in this way, some portion of sovereign debt was originally borrowed under highly questionable circumstances by regimes with rulers known to be self-dealing, to say the least. Yet creditors in general tend to deny that corruption or oppression in a borrowing country should have any bearing on the validity of their debt claims. Instead they tend to insist on a background rule of complete debt repayment, falling in line with the historical unwillingness to openly adopt something like an odious debt approach, noted in Part II.A above. At least for many courts today, particularly given that the doctrine of odious debt has not been

SOVEREIGN NOTES (2014), <https://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/Primary-Markets/primary-market-topics/collective-action-clauses/>. For a helpful overview on these model clause changes, see Anna Gelpern, *A Sensible Step to Mitigate Sovereign Bond Dysfunction*, PETERSON INST. FOR INT’L ECON (Aug. 29, 2014), <https://www.piie.com/blogs/realtime-economic-issues-watch/sensible-step-mitigate-sovereign-bond-dysfunction>.

163. See, e.g., INT’L MONETARY FUND, MACROECONOMIC DEVELOPMENTS AND PROSPECTS IN LOW-INCOME DEVELOPING COUNTRIES 52-53 (2018) (noting the greater use of collateralized loans in certain countries and expressing concern that the extent of such collateralization is unknown by IMF country teams); Deborah Brautigam & Jyhjong Hwang, *Eastern Promises: New Data on Chinese Loans in Africa, 2000-2014*, (Johns Hopkins Sch. of Advanced Int’l Studies, China Africa Research Initiative Working Paper 4, 2016) (suggesting that up to one third of lending by new creditors in lower income developing countries may involve collateral).

widely accepted, a challenge to the vulture funds' debt claims would be difficult to argue as a legal matter. Even if an 'unclean hands' defense might have applied to the original creditors, over time such debt may have been repackaged as Brady Bonds, perhaps transferred on the secondary market, and then restructured again under the auspices of an IMF agreement. One could argue that these transformations have sufficiently cleansed (shall we say laundered?) the debt of any original taint it may have borne.¹⁶⁴ Nonetheless, it seems problematic that creditors can profit from criticizing and prying open a web of shell companies partially designed to cover and facilitate the same corruption that they insist remains irrelevant to their debt claims. Such a tension contravenes the broad spirit of legal estoppel, even if estoppel's particular doctrinal contours might be hard to apply. It certainly sullies the air of moral superiority (relative to Bono and Kofi Annan, for example) that these funds occasionally exude. And, beyond a failure of argumentative coherence and aesthetics, this tension also renders the vulture fund's private-asset recovery approach vulnerable to normative and doctrinal change going forward. If broader norms in favor of responsible sovereign lending or an odious debt doctrine were eventually adopted, then the validity of the distressed debt claims underpinning this asset recovery approach could be undermined, thus undoing its possible positive externalities as well.

B. Considering Alternatives: Bankruptcy, Conditionality, and Private Enforcement

While turning to vulture fund asset recovery as a partial private corrective to global market failure does have an allure, the foregoing discussion suggests that there is much to detract from this scheme. Still, it is worth asking whether the benefits of such an approach might be captured in other ways. For example, could asset recovery of the sort conducted by these funds be folded into a sovereign bankruptcy system? What would be the risks involved of explicitly taking this route? Which elements could be adopted outside of a statutorily-based restructuring framework? This section briefly considers several of these possibilities—not so much as firm recommendations, but rather as a broad invitation to further thinking along these lines.

164. I leave aside for now the degree to which such arguments could in fact be made in various courts of law, though I would be sympathetic to the efforts.

1. *Sovereign Bankruptcy and Asset Recovery*

To begin with, would it be possible to incorporate recovery of improperly siphoned public assets into the content of reform proposals for the international financial architecture, including any potential sovereign bankruptcy regime? Sovereign debt restructuring reform proposals have tended to focus on the major collective action problem at the center of resolving debt crises, in particular the difficulty of pressing all of a state's creditors into a single forum for discussion and agreement.¹⁶⁵ As a result, these frameworks have highlighted the importance of imposing a standstill or stay on creditor litigation, ensuring inter-creditor equity, and providing a forum for creditors and the sovereign debtor to formulate a plan of repayment. Perhaps due to this emphasis, one notable element of many domestic bankruptcy regimes has not made it into sovereign bankruptcy proposals: namely, the set of provisions allowing for asset maximization and asset recovery.¹⁶⁶ But asset recovery provisions could reasonably receive greater prominence in sovereign debt reform efforts going forward.

To take the U.S. example, a range of provisions in the Bankruptcy Code allow the Trustee in Bankruptcy (or the post-petition Debtor in Possession or 'DIP,' standing in the trustee's place) to recover assets of the debtor that have been improperly transferred during a period of time prior to the filing of the bankruptcy petition. These transfers might be undone under theories of preferential transfer, in which the debtor transferred assets to or for the benefit of a creditor that allowed the creditor to obtain more than it would have under a hypothetical liquidation.¹⁶⁷ Or transfers

165. Perhaps the most famous among these is the proposal by Anne Krueger for an IMF-based Sovereign Debt Restructuring Mechanism (SDRM). *See, e.g.*, Anne Krueger, First Deputy Managing Dir., Int'l Monetary Fund, Speech Before the Bretton Woods Committee Annual Meeting: Sovereign Debt Restructuring and Dispute Resolution (June 6, 2002). For other proposals, *see, e.g.*, LEE C. BUCHHEIT ET AL., COMM. ON INT'L ECON. POLICY & REFORM, REVISITING SOVEREIGN BANKRUPTCY (2013); Christoph G. Paulus, *A Resolvency Proceeding for Defaulting Sovereigns, in COLLECTIVE ACTION CLAUSES AND THE RESTRUCTURING OF SOVEREIGN DEBT* 181 (Bauer et al. eds., 2013); Kunibert Raffer, *Applying Chapter 9 Insolvency to International Debts: An Economically Efficient Solution with a Human Face*, 18 WORLD DEV. 301, 301-11 (1990).

166. Unsurprisingly, domestic bankruptcy regimes have served as significant models for proposals for a sovereign debt restructuring system—sovereign bankruptcy proposals are sometimes referred to as a Chapter 11 for countries (referencing the chapter of the U.S. Bankruptcy Code under which major corporations generally restructure their debt) or sometimes a Chapter 9 (referring to municipal bankruptcies). *See generally* sources cited in note 165, among others. In a similar spirit, the World Bank Stolen Asset Recovery Initiative has recently published a report on the possibility of using pre-existing (domestic) insolvency systems in cross-border asset recovery efforts. JEAN-PIERRE BRUN & MOLLY SILVER, STOLEN ASSET RECOVERY INITIATIVE, GOING FOR BROKE: INSOLVENCY TOOLS TO SUPPORT CROSS-BORDER ASSET RECOVERY IN CORRUPTION CASES (2019), <https://star.worldbank.org/sites/star/files/going-for-broke.pdf>.

167. These preferential transfer provisions are provided for by Section 547 of the U.S. Bankruptcy Code. The oil prepayment scheme at the center of the Congo-Brazzaville RICO scheme discussed above comes to mind as a possible application.

could be challenged under theories of subjective fraud, in which the debtor transfers assets with the intent to hide, hinder, or delay recovery—a provision that might be relevant for corruption concerns. Yet another avenue is provided by theories of constructive fraudulent transfer, in which subjective intent is not an issue but the debtor transferred the asset without receiving reasonably equivalent value in return, so long as the transfer either occurred while the debtor was insolvent or rendered the debtor insolvent.¹⁶⁸ The specifics of each of these provisions—the time frame or statute of limitations on transfers, possible exceptions, difficulty of asset valuation, and likely inapplicability of a liquidation analysis, among many others—would have to be significantly recalibrated for a sovereign state context. Still, a narrower asset recovery procedure, to be taken on a more collective basis and designed to benefit not only creditors but also the country as a whole, could be proposed and discussed more intensively.

Of course, one significant paradox in incorporating such asset recovery efforts into a sovereign bankruptcy regime is that their very existence might make the actual use of any such bankruptcy process less likely. To the extent that asset recovery powers are lodged with a creditor committee or creditor representative, or perhaps in an office akin to that of a bankruptcy trustee or administrator, the officials of a distressed sovereign debtor country might be more wary of the framework altogether. Assuming the same background level of corruption that exists today, such officials might reasonably worry that they themselves, or their family members and close associates, could become the targets of such recovery efforts.¹⁶⁹ But leaving any such decisions to the sovereign country itself—acting in a DIP-type fashion in this arena—could run into significant problems as well. On the one hand, it is possible that the officials in charge of the restructuring would decline to use these provisions altogether, choosing instead to use sovereign bankruptcy only to solve creditor collective action problems. But there might also be the opposite risk that officials could (mis)use the recovery provisions in a politicized manner, targeting political opponents in ways similar to the (alleged) misuse of some domestic anti-corruption campaigns. Including any such provision in a sovereign bankruptcy framework might thus offer significant benefits but would also require careful thought, including an attentiveness to the likely political dimensions on the ground in debtor countries.

168. For these fraudulent transfer provisions, see Section 548, and the Code also allows for the incorporation of actions that would be allowable under state law.

169. This dynamic is not necessarily unique to sovereign debtors, of course. Lynn LoPucki, for example, has characterized the Chapter 11 debtor's bankruptcy attorney as a "Trojan horse"—brought in to save the day only to turn on those who have opened the gates. Lynn M. LoPucki, *The Debtor's Lawyer as Trojan Horse*, reprinted in *THE LAW OF DEBTORS & CREDITORS* 768-770 (Elizabeth Warren et al. eds., 7th ed. 2014).

2. *Alternative Private Possibilities*

The establishment of a sovereign bankruptcy-type mechanism would, I believe, offer a significant improvement over current debt restructuring processes—even if primarily as a background inducement to out-of-court restructuring. Unfortunately, to date such a far-reaching global reform has been difficult to press through, and its prospects are not promising in the near future. As such, variations on the current private-law approaches deserve consideration as well.

One range of possibilities would involve working within the corners of sovereign lending documents. For example, the original sovereign loan contracts could establish that the rights of debt collection and asset recovery lie exclusively with a bondholder or lending consortium trustee, and that recovery must be done on behalf of creditors collectively—either in house or perhaps outsourced to asset recovery specialists in exchange for a portion of the proceeds. This would be a variation or extension of the collective action clauses now included in most sovereign bond contracts, though explicitly applied to decisions about debt collection rather than changes in substantive lending terms. To support this further, drafters could include provisions to specify that any independent or rogue creditor recovery made outside of this process would have to be shared pro rata with other creditors in the same class (perhaps net of reasonable recovery expenses). Of course, this addresses the creditor collective action problem in international finance but perhaps under-incentivizes the type of aggressive and private-wealth targeted asset recovery that is one of the possible benefits of vulture funds. As such, drafters could also explicitly state that any recovered funds that have been improperly claimed as ‘private assets’ through corruption could be kept by the recovering creditors, with other more visible and easily discoverable public assets available only for collective recovery efforts.¹⁷⁰ One could imagine numerous variations on these themes, depending on the incentive structure the contracting parties aimed to construct through the lending documents.¹⁷¹

Another set of possibilities might involve allowing other entities or groups to more closely track the strategies of the vulture funds themselves. For example, would it be possible to establish a non-profit vulture fund to purchase discounted debt on the secondary market and then take advantage of creditor status and discovery rules to uncover suspected

170. I would like to thank Ian Ayres for raising the possibility of this partition approach.

171. Of course, it is hard to imagine a corrupt regime willingly signing such loan documentation. A cleanly administered forward-looking regime might be more likely to agree, and pressure could also be brought to bear by international lending institutions or private creditor groups, assuming a broader shift in international norms. Incorporating this into standard/recommended contract language at the level of ICMA could also help.

corruption and recover assets?¹⁷² Could other types of civil society groups attempt to engage in recovery actions analogous to veil-piercing—generally an equitable remedy pursued by creditors? We seem to work with a background assumption that citizens of a given country are something akin to shareholders (if they are characterized as anything at all), who are the residual claimants in any debt restructuring and thus are properly subjected to austerity-type measures. But might the citizens of certain regimes be recharacterized as involuntary creditors, more in line with tort creditors, given that their subjection to those regimes can hardly be understood as voluntary? This could launch a line of private law actions with asset recovery ramifications, brought by citizen groups themselves.

Or perhaps we could imagine something along the lines of a suit alleging the breach of a duty of loyalty by officials, with an associated effort to recover funds and the imposition of a constructive trust or equitable lien. Of course, this assumes that the relevant court recognizes such a duty to exist in the international context, and that an equitable remedy is appropriate. Perhaps if something like the UNCTAD Principles on Responsible Sovereign Lending and Borrowing were more explicitly adopted, as I encourage below, or if they were understood to be part of emerging customary international law, such an approach could gain traction. Of course, this immediately raises questions of jurisdiction and appropriate forum, among many other issues. It is also unclear who would have standing to sue government officials for any such breach. The most obvious representative of the underlying population would be the government itself—clearly a non-starter. Could we imagine a sub-group of citizens or a non-governmental organization acting on behalf of the population as a whole? This raises thorny problems of appropriate representation—perhaps not intractable, but exceedingly difficult nonetheless. And if this route were deemed plausible, could such a sub-group or non-profit be based outside of the country, given the obvious difficulties of being based in-country while suing the officials of an oppressive regime? The questions of representation would become thornier still in such a context. It is no accident that these paragraphs are heavily punctuated by question marks; the possibilities are intended more as thought experiments than as concrete proposals. But such avenues could be worked through more carefully, and they have the virtue of

172. Such a fund would need to purchase a sufficiently significant portion of debt to remain in play rather than simply be paid off, of course. This raises questions of whether the investment in support of the public good might not be better spent elsewhere (perhaps more directly in the debtor country), though presumably at least some portion of recovered funds would go to help the population of the targeted country itself. This also has the problem of depending upon a fundamentally flawed international system, like the vulture funds themselves.

avoiding the further entrenchment of a deeply problematic international financial architecture.

I should emphasize here that these potential mechanisms do not, in and of themselves, necessitate the distribution of recovered funds in any specific way. Such funds could be allocated to the recovering creditors, to an independently administered fund for the benefit of the debtor state population, to the sovereign state itself (depending on the connection of the targeted private assets to the administration in power, presumably), or any number of combinations. Ideally some (or all) of the recovered funds should benefit the debtor state population, given that the most vulnerable among the state's citizens will almost certainly struggle under the austerity measures that accompany a sovereign debt crisis.¹⁷³ This goal would then need to be balanced against the desire to incentivize recovery efforts by those entities capable of undertaking them.

3. Evolving Principles and IMF Conditionality

If part of the foundation for the current market failure lies in the intersecting norms and practices of sovereign debt and private wealth, one obvious step in the right direction would be to improve those norms more directly.¹⁷⁴ In other words, rather than (or in addition to) addressing problematic incentives at the back end through debt collection and asset recovery, we would ideally change the practices up front. There is no need to reinvent the wheel on this front—indeed, many hours and many reams of paper have been dedicated to the conceptualization and operationalization of such improvements. But it is worth reiterating here how valuable a broad-based endorsement of such principles and procedures from both private and public sector actors could be.

On the sovereign debt side, the central goal is to ensure that funds borrowed in a sovereign state's name actually benefit (or least are intended to benefit) the underlying state population. And, relatedly, any debt that results from egregiously poor lending decisions would ideally be much more difficult to collect on, thus limiting the likelihood that creditors—and loan underwriters—would have any interest in such loans in the first

173. This of course raises questions about the processes by which such funds should be administered, including who would represent the underlying population if not the (possibly corrupt) government itself.

174. Perhaps it goes without saying, but consistency and the merging of risk and reward are not themselves the principal goals. While risk and reward may have gone together for Edward III of the fourteenth century, the political practice that underlined this consistency was of course absolute monarchy itself (aside from the limitations of the Magna Carta of 1215). The benefits of shifting away from absolutist government override, certainly in my view, the benefits of consistency in sovereign debt. As such, another mechanism must be found that comports with a broader commitment to the public good, which would generally include the collective self-determination of a country's population.

place. Of course, it is difficult to define and draw lines around ‘poor lending decisions’ and identify ‘sovereign benefit.’ I have argued elsewhere that part of the confusion and dysfunction lies in the fact that there is uncertainty about who even constitutes the ‘sovereign’ in the sovereign debt arena, given the multiple theories of sovereign statehood that exist in international relations, international law, and political theory.¹⁷⁵ For now, it is enough to encourage a broader endorsement of the UNCTAD Principles on Promoting Responsible Sovereign Lending and Borrowing, mentioned above, which support the idea that sovereign debt should have a more substantial connection to the borrowing country’s people and greater respect for that country’s underlying constitutional framework and secondary laws. Aligning lending decisions—and debt enforcement outcomes—with these ideas could help to shift the tenor and impact of sovereign borrowing. Similarly, on the private wealth side, more work can be done on improving the implementation of the UN Convention Against Corruption and the OECD Anti-Bribery Convention and also on globalizing and broadening state-level laws covering bank transparency and, perhaps, “unexplained wealth.”¹⁷⁶

One supportive and significant norm shift would be to improve the transparency of sovereign lending and borrowing. Currently there is no system in place that provides information that is usable by a borrowing countries’ citizens, by creditors broadly, and by international organizations and other monitors. Indeed, as the 2016 Mozambique debt crisis highlights, it is entirely possible for a country to amass direct and guarantor debt at a large enough scale that it causes a national crisis, all without the awareness of central government debt managers, the IMF, or the country’s citizens.¹⁷⁷ In order to maximize the success of any such transparency endeavor, a set of principles or guidelines would need to support the provision of information that is comprehensive, as to both the

175. See LIENAU, *supra* note 13, at 1-19, 226-40. In this writing I espouse, and continue to espouse now, what could be called a rule-of-law or constitutionally-based theory of sovereignty, at least for sovereign debt purposes.

176. For a helpful overview of enforcement challenges in the OECD Anti-Bribery Convention, see, e.g., Rachel Brewster, *The Domestic and International Enforcement of the OECD Anti-Bribery Convention*, 15 CHI. J. INT’L L. 84, 84-109 (2014). For the difficulties and risks involved in using unexplained wealth laws and other non-conviction-based asset forfeiture in anti-corruption efforts, see Mat Tromme, *Waging War Against Corruption in Developing Countries: How Asset Recovery Can be Compliant with the Rule of Law*, 29 DUKE J. COMP. & INT’L L. 165, 165-233 (2019).

177. In 2016, Mozambican officials admitted to a range of secret sovereign debts that had no apparent benefit to the state and had been unknown to the public, the IMF, or other creditors. The disclosure resulted in a suspension of IMF lending, a debt default, an economic crisis, and a range of corruption and fraud indictments. See, e.g., Paul Wallace, *U.S. Probe and Credit Suisse Lawsuit Roil Mozambique Tuna Bonds*, BLOOMBERG (Mar. 6, 2019), <https://www.bloomberg.com/news/articles/2019-03-06/u-s-probe-and-credit-suisse-lawsuit-roil-mozambique-tuna-bonds>; Gabriele Steinhäuser & Matthieu Wirz, *Mozambique Fraud Trial Begins as Voters Go to the Polls*, WALL ST. J. (Oct. 15, 2019), <https://www.wsj.com/articles/mozambique-fraud-trial-begins-as-voters-go-to-the-polls-11571165412>.

type and the terms of the debt, and also accessible to all interested stakeholders. Ideally this would be through a centrally maintained and easily searchable global database where both creditors and debtors would register (and thus make cross-checkable) sovereign loans. The 2019 Institute of International Finance (IIF) Voluntary Principles for Debt Transparency offer an encouraging statement in the right direction but fall significantly short of this goal.¹⁷⁸ Much more work remains to be done in order to promote greater monitoring, both externally and more importantly internally, of how much a country borrows and how those funds ultimately are used.

Of course, each of these sets of principles and practices, assuming they were substantively sound, would be more effective if they were internationally legally mandatory and backed by clear enforcement measures. But even if this outcome seems unlikely, interested jurisdictions or parties could still think creatively about incorporating even voluntary principles at various enforcement points. For example, to the extent that a jurisdiction like New York State or the United Kingdom hoped to encourage greater compliance with transparency principles, legal and political decisionmakers could make sovereign debt contracts unenforceable in court if the transaction were not timely included in the applicable registry. At a private law level, such a registration requirement could also be included in the legal terms of debt instruments themselves going forward, which would bind not only all parties to the original agreement but also their assignees. Similar provisions could be fashioned in support of the UNCTAD Principles or other guidelines.

Even more effective at an enforcement level would be for bilateral creditors and international financial institutions—including the World Bank and particularly the IMF—to incorporate such principles into their own lending procedures. Although the IMF purports to avoid politically tinged decisions (and, unfortunately, thus far has declined to host a sovereign debt transparency database), it of course has not shied away from loan conditions that can significantly restructure the economics and thus the politics of a borrowing country. Laying aside for now the effectiveness of such measures in the past, the IMF's forays into supporting good governance certainly provide an opening for it to

178. INST. OF INT'L FIN., VOLUNTARY PRINCIPLES FOR DEBT TRANSPARENCY (2019), <https://www.iif.com/Publications/ID/3387/PageID/3387/Voluntary-Principles-For-Debt-Transparency>. For an overview of the shortcomings of these principles and an outline for a more effective approach, see UNCTAD COMMENT ON THE IIF DRAFT VOLUNTARY PRINCIPLES FOR DEBT TRANSPARENCY (2019), https://debt-and-finance.unctad.org/Documents/IIF_Principles_debt_transparency_UNCTAD_10_May_2019.pdf, on which I served as a consultant. For an additional helpful overview of important elements for sovereign debt transparency, see Anna Gelpern, *About Government Debt . . . Who Knows?*, 13 CAP. MKTS. L.J. 321 (2018).

embrace guidelines on debt transparency and responsible lending. This could work through its ongoing engagement with borrower country sovereign debt management offices—though of course such direct targeting might be complicated if part of the problem lies with ‘bad actors’ in the countries themselves. Perhaps even more effectively, the IMF could incorporate such guidelines into its “lending into arrears” (LIA) policies, by which it decides how, when, and how heavily to lean on borrower countries to come to terms with private creditors as a condition for IMF lending. Although the IMF has long been deeply concerned with the impression that it insures or “bails out” private lenders through its LIA practices,¹⁷⁹ its implicit support—or withdrawal of support—for private sector agreements through the LIA policy could provide one pressure mechanism: To the extent that a creditor or credit instrument failed to comport with transparency or responsible lending guidelines, a country’s decision not to come to terms with that creditor would not impact the IMF’s decision on whether or not to lend into arrears (i.e. lend despite the fact that the country had remaining debts outstanding and un-dealt with).¹⁸⁰

If a vulture fund-based strategy for partially addressing overzealous and poorly allocated sovereign borrowing is problematic, as I contend above, unfortunately there are no ideal solutions. A clear, uncomplicated, timely, and politically palatable fix is the global finance equivalent of a unicorn. The conceptual path dependence in both the sovereign debt and private wealth arenas remains strong, as do the interests arrayed in favor of the status quo. Still, the pathologies of the current system are deep enough to deserve sustained scholarly and policy attention. Each of the alternative approaches I suggest here invite further reflection, and they are of course not mutually exclusive: We should simultaneously improve and better enforce relevant guidelines and principles, think through possible private sector innovations, and establish a background international statutory

179. For a relatively early consideration of this concern, see, e.g., Timothy Lane & Steven Phillips, *Moral Hazard: Does IMF Financing Encourage Imprudence by Borrowers and Lenders?* (Int’l Monetary Fund, Econ. Issues No. 28, 2002). For additional overviews of the problem and dynamic, see also NOURIEL ROUBINI & BRAD SETSER, *BAILOUTS OR BAIL-INS? RESPONDING TO FINANCIAL CRISES IN EMERGING ECONOMIES* (2004); Lucio Simpson, *The Role of the IMF in Debt Restructurings: Lending into Arrears, Moral Hazard and Sustainability Concerns*, (UNCTAD G-24 Discussion Paper Ser. No. 40, 2006).

180. The precise textual location of any shift in the IMF’s LIA policy is frustratingly opaque, with, for example, relevant policy changes or derogations placed in a footnote to a report or policy appendix. I thank Yan Liu, Assistant General Counsel to the IMF, for making this explicit in an April 2019 conversation. A helpful overview and example of a textually buried LIA policy that addresses disputed claims is presented in Matthias Goldmann, *A Holistic Approach to Odious Debt: Preventing Loan Pressing and Corruption in Mozambique and Beyond 19* (May 2019) (unpublished manuscript) (on file with author). For an earlier and more general overview and critique of the IMF’s LIA policy, see Lee C. Buchheit & Rosa M. Lastra, *Lending into Arrears—A Policy Adrift*, 41 INT’L LAW. 939 (2007).

mechanism as well. The scale and scope of the problem calls for every kind of triangulation.

V. CONCLUSION

In recent memory, certain heads of state have felt secure in the notion that their personal funds and treasures are cordoned off in a private arena, separate and safe from the claims of creditors to the sovereign debtor state that they control. This has held true even if the officials obtained those luxuries only by siphoning away the wealth of the state itself. This circumstance should, perhaps, be understood as a historically particular situation—present today but contingent nonetheless. In other historical contexts, in which the ‘sovereign’ was both a country and an individual, unfettered control over sovereign territory included not just personal benefits but also more explicit personal risk.

In this article, I have argued that the background rules and norms of contemporary global finance enable this unlinking of the risk and reward of unchecked sovereign rule in ways that doubly impoverish debtor state populations. On the sovereign debt side, our collective failure to more tightly characterize and enforce the appropriate relationship between a public entity and its individual officials results in easier access to borrowed funds, which can contribute to an artificially high debt load. On the private wealth side, our relatively strict protection of the realm of the personal—and our insufficient willingness to soften certain of its borders—enables the disappearance of public funds into private accounts and privately controlled corporations. This combination almost certainly increases sovereign debt burdens while drawing away funds that could be used for repayment—a dynamic that likely deepens financial crises and worsens any austerity measures that result.

If we tend to overlook this intersection between the worlds of sovereign debt and private wealth, recent vulture fund asset recovery efforts have helped to shed light on this shaded corner of international economic relations. These strategies, which I suggest arise in part from historical shifts in both underlying market structure and narratives around good governance, expose problematic financial links too often left under-examined. Although there are public benefits to this greater visibility, I argue that these vulture fund practices depend on a flawed background framework, such that ultimately this approach fails as a potential private corrective. Still, the approach encourages a closer look at alternative mechanisms that might capture this upside, including possible asset recovery procedures in sovereign bankruptcy, modified private law tactics, and improved substance and enforcement for the principles guiding sovereign debt and private wealth. Some combination of these reforms

could help to unwind the current system's double impoverishment of borrower state populations.

Paying closer attention to the dynamics raised in this article also points to a number of deeper questions within global finance—questions that encourage both a look backward to how today's norms and practices developed and a harder look forward to how they should be resolved conceptually and institutionally. At the heart of the overlap between state debt and 'personal' wealth are larger questions about how legal forms and fictions divide the public from the private at the upper echelons of the international arena: How are the lines drawn between public entities like countries, municipalities, or state instrumentalities on the one hand, and private individuals who may hold positions of institutional power on the other? How do these actors intersect with and work through other non-natural structures that can obscure the flow of assets and effectively construct wealth as 'private,' such as corporations, trusts, and foundations? Does the line-drawing differ across various areas of, and historical moments in, transnational economic activity and regulation? And how have the players involved conceived of or used such ambiguity? To the extent that pathologies arise from these entanglements, what are the possible conceptual and legal correctives? Can the market in these intersecting arenas be self-correcting and, if so, when? The relationship between sovereign debt and private wealth is a perennially uncomfortable subject—for government officials, financial actors, and international institutions alike. And, of course, this discomfort is overshadowed by the real hardship of people in countries squeezed by both significant debt payments and the siphoning of public funds away from socially beneficial uses. Disentangling these threads in global finance would help to rationalize international capital flows in ways that promote the collective well-being of debtor state populations and improve global welfare writ large.

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