



# THE AFRICAN DEBT CRISIS AND THE PERILS OF INTERNATIONAL ARBITRATION

PAPER IV OF THE  
AFRICAN SOVEREIGN  
DEBT JUSTICE PAPER SERIES  
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# FOREWORD

Welcome to the second paper in the African Sovereign Debt Justice Network Paper Series. The African Sovereign Debt Justice is a coalition of citizens, scholars, civil society actors and church groups committed to exposing the adverse impact of unsustainable levels of African sovereign debt on the lives of ordinary citizens.

The African Sovereign Debt Justice Paper Series has four primary goals:

- I. To provide insightful and highly accessible analysis of key sovereign debt issues;
- II. To create awareness about and elevate public attention to the sovereign debt crisis;
- III. To contribute significantly to the menu of reform options for the sovereign debt crisis;
- IV. To promote and build capacity among African academics on sovereign debt issues.

The African Sovereign Debt Justice Network is delighted to have been able to work with the experts to produce this paper series. This paper series, written against the background of the ongoing sovereign debt crisis, has been exacerbated by the COVID19 pandemic. AfSDJN believes there continues to be pathways towards reforming many aspects of the global financial architecture and we hope that this series will speak authoritatively to the types of challenges involved in definitively addressing the sovereign debt crisis.



# THE AFRICAN DEBT CRISIS AND THE PERILS OF INTERNATIONAL ARBITRATION

Stratos Pahi<sup>1</sup>

## 1. Introduction

In 2013 and 2014, three Mozambican state entities borrowed over two billion US dollars to finance a fishing and maritime project. Over one billion of the loans, however, were kept secret – both from the public and from the Parliament, which under Mozambique’s law was required to approve such borrowing. When the secret loans were eventually revealed, an independent audit found that hundreds of millions of dollars were unaccounted for; United States prosecutors alleged that Mozambican officials conspired with bankers to steal the cash; and the International Monetary Fund (IMF) cut off support to the African nation, sending its currency and economy into collapse.<sup>2</sup>

In a pair of decisions issued in 2019 and 2020, Mozambique’s constitutional council declared the secret debt illegal.<sup>3</sup> This might have been a boon to the country’s effort to restructure its debt and reset its economy. But the debt contracts at issue were not governed by Mozambican law or subject to Mozambique’s judicial system. They were instead subject to English law and English courts. Moreover, the supply contracts for the supposed maritime project – which according to Mozambique were central to the fraudulent scheme – were subject to Swiss law and a dispute settlement procedure known as international arbitration.<sup>4</sup> The international tribunals constituted according to this procedure will play a key role in determining

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<sup>2</sup> The Economist, “A \$2bn loan scandal sank Mozambique’s economy,” Aug. 24, 2019, <https://www.economist.com/middle-east-and-africa/2019/08/22/a-2bn-loan-scandal-sank-mozambiques-economy>. See also Denise Namburete, “How Public Interest Litigation Led to Invalidation of Illegal Mozambican Debt,” AfronomicsLaw, Aug. 4, 2020, <https://www.afronomicslaw.org/2020/08/04/how-public-interest-litigation-led-to-invalidation-of-illegal-mozambican-debt/>.

<sup>3</sup> See Republic of Mozambique, Constitutional Council, Decision No. 5 /CC/ 2019 of June 3, available at <https://drive.google.com/file/d/1IS4-Cas5-C34nCRPLVudhWNsUwDvqjph/view>; Republic of Mozambique, Constitutional Council, Decision No. 7 / CC / 2020 of May 8, available at [https://www.afronomicslaw.org/sites/default/files/pdf/2020.05.08%20Decisao%20Conselho%20Constitucional%20\(EN\).pdf](https://www.afronomicslaw.org/sites/default/files/pdf/2020.05.08%20Decisao%20Conselho%20Constitucional%20(EN).pdf).

<sup>4</sup> See Daniel Bradlow, “Prudent Debt Management and Lessons from the Mozambique Constitutional Council,” AfronomicsLaw, Aug. 5, 2020, <https://www.afronomicslaw.org/2020/08/05/prudent-debt-management-and-lessons-from-the-mozambique-constitutional-council/>; Reuters, “Mozambique court declares void two loans in ‘hidden debt’ scandal,” May 12, 2020, <https://www.reuters.com/article/us-mozambique-debt/mozambique-court-declares-void-two-loans-in-hidden-debt-scandal-idUSKBN220301>.

Mozambique's liability in the secret debt scandal.<sup>5</sup> This raises the broader question: *What role, if any, should the largely private procedure of international arbitration have in resolving public debt disputes?*

This article applies a cost-benefit analysis and concludes that international arbitration has little to no role to play in such disputes, even assuming completely legal and legitimate debt. Notably, this conclusion is not predicated on the criticism that is commonly directed toward international investment arbitration – including that it is biased against States or impedes regulation in the public interest.<sup>6</sup> Instead, it assesses international arbitration on its own terms. It accepts that international arbitration may present certain benefits with respect to other transactions – including strengthened enforcement, confidentiality, and finality. But it concludes that those same benefits become liabilities in the context of sovereign debt.

The import of this conclusion extends beyond Mozambique's present dispute. Even before the COVID-19 pandemic, several countries in sub-Saharan Africa were in a state of debt distress, including Eritrea, the Gambia, Mozambique, the Republic of Congo, Somalia, Sudan, South Sudan, and Zimbabwe.<sup>7</sup> The pandemic has “dramatically” worsened that condition.<sup>8</sup> On the continent, only Botswana has a credit rating above junk status.<sup>9</sup> Annual interest payments now surpass public health expenditures in Angola, Ghana, Gabon and Zambia – the latter of which has already defaulted on its debt.<sup>10</sup> An abundance of liquidity generated by central banks, together with interventions by the IMF and the G20 Nations, have to-date staved off further defaults. But there is growing concern that the tide could change quickly, and that a new wave of debt crises could be on the horizon.<sup>11</sup>

It may be too late for States to avoid international arbitration proceedings that they have already agreed to regarding existing debt. But they may still avoid international arbitration with respect

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<sup>5</sup> Though national courts may later be called on to annul or refuse enforcement of any eventual arbitral award. *See infra* notes 52-54.

<sup>6</sup> *See, e.g.,* GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2007). These critiques have led to important reform projects, including through the United Nations Committee on Trade Law (UNCITRAL). *See* UNCITRAL, Report of Working Group III (Reform of Investor-State Dispute Settlement), Thirty-Fifth Sess., UN Doc A/CN.9/935 (April 23–27, 2018).

<sup>7</sup> IMF, *The Evolution of Public Debt Vulnerabilities in Lower Income Economies*, Dec. 16, 2019, p. 13; *See also* Patrick Bolton, Mitu Gulati, and Ugo Panizza, *Debt risks in sub-Saharan Africa and beyond* in SHAPING AFRICA'S POST-COVID RECOVERY 179, 180 (Arezki, Djankov, and Panizza, eds., 2021).

<sup>8</sup> *Id.* at 187.

<sup>9</sup> Stephen Paduano, *Is Africa Headed for a Financial Crisis*, FOREIGN POLICY, Aug. 10, 2021, <https://foreignpolicy.com/2021/08/10/africa-economy-financial-crisis-covid-development-monetary-policy/>

<sup>10</sup> Bolton, et al., *supra* note 7, at 182.

<sup>11</sup> *See id.*; Bolton, et al., *supra* note 7, at 187.

to future debt issued as part of a restructuring or refinancing. This article explains why and how they should do so.

## 2. Background on Treaty and Commercial Arbitration

### A. Defining and Distinguishing Treaty and Commercial Arbitration

International arbitration refers to “a process by which parties consensually submit a dispute [to an international tribunal, whose members are] selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording each party an opportunity present its case.”<sup>12</sup> International arbitration may be used to settle disputes between States, between private actors, or a combination of each. This Article focuses on the suitability of arbitration for settling debt disputes between States and private actors. Two different types of international arbitration may be available in such disputes.

First, private creditors may use investment-treaty arbitration to enforce their debts. While their particulars may differ, investment treaties generally oblige States to protect investments in their territory that are made by nationals of the counter-party States. The main substantive guarantees investment treaties provide include protections against expropriation; unfair, inequitable or discriminatory treatment; and in some cases contractual breach.<sup>13</sup> They also typically grant covered foreign investors the right to commence arbitration directly against States and claim damages for treaty violations.<sup>14</sup> While the question is not settled, recent arbitrations suggest that these treaties – which typically cover “every kind of asset” or “all assets”<sup>15</sup> – also apply to sovereign debt.<sup>16</sup> Investment treaty arbitrations have already been brought by thousands of foreign creditors against Argentina and Greece for their recent sovereign debt restructurings.<sup>17</sup> African States are party to over 200 investment treaties.<sup>18</sup> Foreign creditors may thus be able to bring similar claims against African States in the future.

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<sup>12</sup> GARY BORN, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE* 2 (2d. ed., 2016).

<sup>13</sup> NIGEL BLACKBAY AND CONSTANTINE PARTASIDES (WITH ALAN REDFERN AND MARTIN HUNTER), *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION* 470 (6<sup>th</sup> ed., 2009) [hereinafter Redfern and Hunter].

<sup>14</sup> *Id.*, at 444.

<sup>15</sup> *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, ¶ 34 (July 11, 1997).

<sup>16</sup> See Stratos Pahiis, *BITs and Bonds: The International Economics of Sovereign Debt*, 115 AM. J. INT’L L. 242, 244 (2021).

<sup>17</sup> See *id.*

<sup>18</sup> See UNCTAD Investment Policy Hub, *International Investment Agreements by Country*, at <https://investmentpolicy.unctad.org/international-investment-agreements/by-economy>.

Second, private creditors may use international commercial arbitration to enforce their debts. International commercial arbitration differs from investment treaty arbitration in at least three important ways. First, unlike investment-treaty arbitration in which State consent to arbitration is established by an international treaty, State consent to commercial arbitration is established by a contractual agreement directly between the State and investor.<sup>19</sup> Second, a contractual agreement to arbitrate a dispute can be invoked to preclude adjudication of the same matter by national courts.<sup>20</sup> Investment treaty arbitration, on the other hand, does not generally preclude parallel national court proceedings (or even commercial arbitration proceedings) over the same dispute.<sup>21</sup> Third, whereas treaty arbitration is concerned with the violation of substantive treaty provisions, commercial arbitrations typically involve claims of contractual breach. Relatedly, whereas the applicable law in treaty arbitrations is the treaty itself, the applicable law in commercial arbitrations is often defined by the contract and may be the State's domestic law or foreign law.<sup>22</sup>

In practical terms, these differences mean that commercial arbitration can be more tailored than investment-treaty arbitration. States can decide, on an investment-by-investment basis, to consent to arbitration with specific investors, based on the particulars of each investment. Because, as explained above, the consent to arbitration established in investment treaties may extend to “every kind of asset” or “all assets” – and because this coverage is generally understood to create mandatory rules which cannot be contracted out of – treaty arbitration does not offer the same flexibility.<sup>23</sup>

## **B. The Advantages of International Arbitration**

The above differences notwithstanding, international commercial and treaty arbitration offer similar advantages in the resolution of disputes between States and investors.

### **I. Stronger Enforcement**

A fundamental function of both forms of international arbitration is to strengthen the enforceability of commitments. Stronger enforceability allows States to make commitments – contractual or otherwise – upon which foreign investors can rely on. This, in theory, reduces

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<sup>19</sup> This agreement can be made prior to or after a dispute arises.

<sup>20</sup> See Convention on the Recognition and Enforcement of Arbitral Awards art. II, June 10, 1958, 21 U.S.T. 2517, 333 U.N.T.S. 38 [hereinafter New York Convention].

<sup>21</sup> See Katia Yannaca-Small, *Parallel Proceedings*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 108, 114 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

<sup>22</sup> Redfern and Hunter, *supra* note 13, at 465.

<sup>23</sup> See Julian Arato, *A Private Law Critique of International Investment Law*, 113 AM J. INT'L L. 1, 25 (2019).

the risk for foreign investors, which should both increase the supply of foreign capital and reduce its costs to the State.<sup>24</sup>

International arbitration strengthens enforcement in four ways. First, it allows parties to choose a governing law that cannot be unilaterally amended by the State. In the case of investment-treaty arbitration, the treaty establishes substantive obligations that have the status of international law and cannot be changed unilaterally by any one State. In the case of commercial arbitration, the State and investor can agree to apply foreign law, which is also out of reach of the host State. Second, international arbitration insulates investors from facing disputes in the domestic courts of the host State. Instead, disputes are decided by international arbitration tribunals, whose members are typically appointed jointly by both the State and investor.<sup>25</sup> This protects the process from State interference and bias against both the State and foreign claimant.

Finally, international arbitration awards are subject to global enforcement regimes that make them more easily enforceable than either domestic or foreign judgments. International arbitration awards may be enforced pursuant to either the ICSID or New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The ICSID Convention requires that each of its 153 Contracting States enforce ICSID awards “as if [they] were a final judgment of a court in that State.”<sup>26</sup> Likewise, the New York Convention requires its 161 members to recognize and enforce arbitral awards except in “narrow” and limited exceptions.<sup>27</sup> By contrast, the enforcement of foreign judgments depend upon bilateral or less comprehensive multilateral treaties, or, absent that, local law, which often makes enforcement difficult.<sup>28</sup>

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<sup>24</sup> See Alan O. Sykes, *The Economic Structure of International Investment Agreements with Implications for Treaty Interpretation and Design*, 113 AJIL 482, 491 (2019); Born, *supra* note 12, at 9.

<sup>25</sup> Born, *supra* note 12, at 129.

<sup>26</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 54(1) Mar. 18, 1965, 17 UST 1270, 575 UNTS 159 (entered into force Oct. 14, 1966) [hereinafter ICSID Convention].

<sup>27</sup> See, e.g. *Int'l Trading & Indus. Inv. Co. v. Dyncorp Aerospace Tech.*, 763 F. Supp. 2d 12, 20 (D.D.C. 2011) (Because “the New York Convention provides only several narrow circumstances when a court may deny confirmation of an arbitral award, confirmation proceedings are generally summary in nature.”); *Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57, 64 (D.D.C. 2013) (“The party resisting confirmation bears the heavy burden of establishing that one of the grounds for denying confirmation in Article V applies.”).

<sup>28</sup> GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL LITIGATION IN UNITED STATES COURTS* 1074 (6th ed. 2018).

Domestic judgments, on the other hand, can be thwarted by resistance from the State and its judiciary.<sup>29</sup>

## II. Other Procedural Benefits of International Arbitration

There are several other procedural advantages commonly attributed specifically to international commercial arbitration. These include that international commercial arbitration (i) allows the parties to keep the dispute and result confidential, thereby protecting sensitive business secrets; (ii) results in final awards that are not subject to appeal; (iii) is decided by expert arbitrators instead of generalist judges; (iv) prioritizes party autonomy and procedural flexibility; (v) is less costly and takes less time; and (vi) provides a single centralized and neutral forum.<sup>30</sup>

Notably, because investment treaty arbitration does not preclude parallel proceedings in a national court (or commercial arbitration), these procedural advantages cannot be ascribed to investment treaty arbitration. The procedures of investment arbitration, as appropriate as they may (or may not) be for resolving investment disputes, offer no procedural economy relative to national court litigation, only potential duplication and additional litigation costs.

Moreover, even with respect to commercial arbitration, some of these advantages have been called into question or can be achieved through other means. For example, the claim that arbitration is less costly and takes less time than court proceedings may be true with respect to some disputes, but not others.<sup>31</sup> Additionally, a single centralized forum can often be achieved through agreement to an exclusive forum selection clause. Still, judging by its popularity, the other advantages of international arbitration make it attractive to parties, including States, conducting business across borders.<sup>32</sup>

### 3. The International Arbitration of Sovereign Debt Disputes

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<sup>29</sup> See Rodrigo Olivares-Caminal, *Litigation Aspects of Sovereign Debt* in DEBT RESTRUCTURING 389, 392 (Olivares-Caminal et al., eds., 2011).

<sup>30</sup> Born, *supra* note 12, at 7-13.

<sup>31</sup> *Id.* at 12-13.

<sup>32</sup> See Born, *supra* note 12, at 14-16.



Paradoxically, the main advantages attributed to international arbitration in other contexts become disadvantages in the context of sovereign debt.

### A. Stronger Enforcement Increases Costs

First, stronger enforcement of sovereign debt contracts is likely to increase costs for States and investors. This is paradoxical because sovereign debt contracts are notoriously difficult to enforce.<sup>33</sup> There is no international sovereign bankruptcy mechanism that allows States to discharge or restructure their debts when they are unable to pay.<sup>34</sup> However, where sovereign debt is governed by the debtor State's domestic law, the State can unilaterally change their law to make the debt unenforceable. Domestic courts can likewise refuse to enforce the debt.<sup>35</sup> Where the debt is governed by foreign law and subject to foreign courts, limited assets located abroad and the doctrine of foreign sovereign immunity can preclude creditors from recovering.<sup>36</sup>

In this context, one may expect that a process that made it *easier* to enforce State commitments would reduce the risk and cost of investments, thus making both creditors and States (who would benefit from cheaper credit) better off. But, in fact, the opposite is true for two reasons. First, despite the difficulty faced by creditors in enforcing sovereign debt contracts, States rarely default when they are able to pay and are generally highly reluctant to default or restructure even where their debts are not sustainable.<sup>37</sup> This reluctance is attributable, at least in part, to the often severe short-term economic and political costs associated with restructuring.<sup>38</sup> It can be problematic, however, because carrying unsustainable debt creates macroeconomic costs that “can raise the eventual magnitude of the debt problem[,]...reduce the economic value of creditors’ claims,”<sup>39</sup> and thus leave both the State and creditors worse off. Moreover, [“w]hen debt restructurings do occur, they often do not

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<sup>33</sup> Sady Blanchard, *Courts as Information Intermediaries: A Case Study of Sovereign Debt Disputes*, 3 B.Y.U. L. REV. 497 (2018).

<sup>34</sup> MITU GULATI & ROBERT E. SCOTT, *THE THREE AND A HALF MINUTE CONTRACT: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN* 19 (2013).

<sup>35</sup> Olivares Caminal, *supra* note 29, at 392-393.

<sup>36</sup> *Id.*

<sup>37</sup> See, e.g., IMF, *Sovereign Debt Restructuring—Recent Developments and Implications for the Fund’s Legal and Policy Framework*, at 1, 20 (Apr. 26, 2013) [hereinafter IMF, *Sovereign Debt Restructuring*]; LEE C. BUCHHEIT, ANNA GELPERN, MITU GULATI, UGO PANIZZA, BEATRICE WEDER DE MAURO & JEROMIN ZETTELMEYER, *REVISITING SOVEREIGN BANKRUPTCY 2* (2013) [hereinafter REVISITING SOVEREIGN BANKRUPTCY].

<sup>38</sup> See Pahis, *supra* note 16, at 258-260.

<sup>39</sup> IMF, *Sovereign Debt Restructuring*, *supra* note 37, at 20.

restore debt sustainability,”<sup>40</sup> because States attempt to limit creditor losses in order to hasten a return to normal.<sup>41</sup> A consensus has thus emerged that States do not restructure too much or too often, but “too little and too late.”<sup>42</sup> In this context, as I have written elsewhere, strengthening creditor enforcement – as international arbitration does – encourages States to restructure even *littler* and even *later* than they already do. This further increases the costs of unsustainable debt and leaves both States and creditors as a whole worse off.<sup>43</sup>

Second, and relatedly, international arbitration is likely to make it more difficult for States to restructure their debt even when they choose to do so. As discussed above, in the vast majority of cases, when States do default or restructure, they do so under conditions of scarcity, where there are insufficient resources to pay all creditors in full. In such circumstances, creditors’ claims become interdependent: one creditor’s gain is another creditor’s loss. This interdependence presents a challenge to restructuring, even where creditors as a group recognize that debt restructuring is in their collective interest. That is because if some “holdout” creditors insist on full payment on their bonds, that leaves less to pay all other creditors. Even the threat of holdouts can undermine necessary restructurings because “[i]f creditors know that a ‘holdout’ can obtain full repayment conditional on a previous debt restructuring, everyone will want to be that holdout, and no one will want to restructure.”<sup>44</sup> International arbitration worsens the holdout problem by putting some creditors – *i.e.*, those whose investments are covered by the enhanced enforcement of international arbitration – in a better position to hold out than others whose investments are not. This creditor “asymmetry” can undermine the restructuring of unsustainable debt and thus lead to additional costs to States and creditors alike.<sup>45</sup> In addition, it can also increase litigation costs.

## **B. Confidentiality Prevents Accountability and Increases Uncertainty**

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<sup>40</sup> *Id.* at 15

<sup>41</sup> Revisiting Sovereign Bankruptcy, *supra* note 37, at 11-12.

<sup>42</sup> IMF, Sovereign Debt Restructuring, *supra* note 37, at 1.

<sup>43</sup> Pahis, *supra* note 16, at 256.

<sup>44</sup> FEDERICO STURZENEGGER AND JEROMIN ZETTELMAYER, DEBT DEFAULTS AND LESSONS FROM A DECADE OF CRISES 64 (2006).

<sup>45</sup> Pahis, *supra* note 16, at 251. In order to address the holdout problem, the G20 requires that debtor countries obtaining debt relief through the G20 Common Framework seek comparable relief from other bilateral and private creditors. See G20 Statement, Extraordinary G20 Finance Ministers and Central Bank Governors’ Meeting, Nov. 13, 2020.

Another often-cited advantage of arbitration – confidentiality – also becomes a disadvantage in sovereign debt disputes.<sup>46</sup> Confidentiality may be an advantage in business disputes involving trade secrets. But there should be nothing secret about sovereign debt – which is by definition owed by the *public*. Keeping sovereign debt disputes confidential can make it harder for civil society to hold government officials accountable for corruption and other bad behaviour, and thus increase the likelihood of their occurrence.

Keeping sovereign debt disputes from the public is also likely to have more direct economic costs. Like other markets, the efficiency of sovereign debt markets depends upon transparent information. *Ex ante*, at the time of borrowing, a lack of information with respect to a State’s fiscal position can make creditors less likely to invest or demand a premium in order to do so.<sup>47</sup> *Ex post*, at the time of restructuring or default, a lack of information with respect to a state’s commitments to other creditors can undermine creditor participation in a restructuring agreement.<sup>48</sup> This precise problem appears to have contributed to Zambia’s recent default. In that case, holders of Euro-denominated bonds were reluctant to agree to restructuring terms at least in part because they did not know how much Zambia committed to pay China.<sup>49</sup>

International arbitration threatens to worsen this opacity. Different arbitral institutions have different rules pertaining to confidentiality, but many provide for the confidentiality of the proceedings, documents, and awards resulting from the arbitral process, unless both parties agree to the contrary.<sup>50</sup> Awards and submissions may be subsequently made public in enforcement and annulment proceedings, depending on whether the losing party chooses to challenge the award. However, throughout the arbitral proceeding, which may last several years, the default is confidentiality.<sup>51</sup> This opacity may not only create costs *ex post*, it may also do so *ex ante*. For if States believe they can keep the adjudication of debt disputes secret

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<sup>46</sup> Treaty arbitrations are subject to relatively greater transparency than commercial arbitrations, though they are still relatively less transparent than national court proceedings, at least in London or New York. See Pahis, *supra* note 16, at 260.

<sup>47</sup> CARMEN M. REINHART & KENNETH S. ROGOFF, THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY 137 (2009).

<sup>48</sup> Anna Gelpern, Sebastian Horn, Scott Morris, Brad Parks, and Christoph Trebesch, *How China Lends: A Rare Look into 100 Debt Contracts with Foreign Governments* 25 (2021).

<sup>49</sup> *Id.*

<sup>50</sup> Born, *supra* note 12, at 205. For example, the Swiss Rules of Arbitration provide that “all awards and orders as well as all materials submitted by another party in the framework of the arbitral proceedings not already in the public domain,” shall be kept confidential “[u]nless the parties expressly agree in writing to the contrary.” Swiss Rules of International Arbitration, art. 44(1).

<sup>51</sup> Born, *supra* note 12, at 12.

via international arbitration, they may feel empowered to keep the very existence of that debt secret as well.

### **C. The Finality of Arbitration Increases Uncertainty**

The finality of awards is often cited as an advantage of international arbitration awards. Because international arbitration awards are final, neither party can drag out the process through lengthy and costly appeals. Awards may be annulled by courts in the legal “seat” of the arbitration, *i.e.* the State in which the arbitration takes place (or, in the case of ICSID arbitrations, by the ICSID Annulment Committee). But the grounds for annulment are typically limited to certain very narrow, mostly procedural, grounds.<sup>52</sup> Likewise, States are obliged to enforce international arbitration awards except in narrow and limited exceptions,<sup>53</sup> or, in the case of ICSID, “as if [they] were a final judgment of a court in that State.”<sup>54</sup>

Finality, however, also creates uncertainty costs. Because international arbitration tribunals are constituted on an *ad hoc* basis and their awards are not subject to appeal, there is no higher court to ensure the law is being applied in a principled and predictable manner. The resulting uncertainty is obviously tolerable in many situations in light of the other benefits provided by arbitration, as judged by its continued wide-spread use.<sup>55</sup> But it poses a problem of a different character in the context of sovereign default, where scarce resources mean that one creditor’s recovery impacts all other creditors. In this context, creditors can expect to incur the uncertainty costs of international arbitration, regardless of whether they avail themselves of the procedure.

### **D. Other Procedural Attributes Are of Limited Value**

The other procedural benefits associated with arbitration are likely to be of little benefit in traditional sovereign debt disputes or may be achieved through other mechanisms that avoid the above-described disadvantages. First, while expert tribunal members can add value in factually complex disputes, they are unlikely to add much value in disputes over sovereign debt, which often turn on the simple factual question of whether a debt has been paid. While there may be more legal complexity, the New York and London courts are known to “provide the certainty and predictability” as well as the “conceptual sophistication” that sovereign debt

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<sup>52</sup> See Born, *supra* note 12, at 311-312, 443. See also THE ICSID CONVENTION: A COMMENTARY 931-1023 (2d ed., 2009).

<sup>53</sup> *Supra* note 27.

<sup>54</sup> ICSID Convention, *supra* note 26, art. 54(1).

<sup>55</sup> See Born, *supra* note 12, at 14-16.



disputes require.<sup>56</sup> Second, even with its associated procedural flexibility, international arbitration is unlikely to provide any “dramatic speed and cost advantages”<sup>57</sup> over national courts, which can sometimes resolve sovereign debt disputes “within a matter of months.”<sup>58</sup> Finally, should the parties desire to insulate the law and adjudicatory forum from State interference, States can (and often do) select foreign law and foreign forums to govern and adjudicate their debt contracts. Should they wish to have a centralized dispute settlement forum and avoid parallel proceedings, they can agree to an exclusive forum selection clause. Foreign choice of law and forum selection clauses are common in sovereign debt contracts issued by emerging economies,<sup>59</sup> including in Africa.<sup>60</sup>

There nevertheless may be some exceptional circumstances where international arbitration could offer some advantages over domestic or foreign courts. For example, where debt is issued as part of a complex project entailing State and creditor obligations beyond the simple issuance and payment of the debt, an expert tribunal and procedural flexibility could add some value. Likewise, where the State views foreign courts as biased in favor of creditors, and creditors view the State’s domestic courts as biased in favor of the State, international arbitration could offer a compromise. But any such advantages should be evaluated – on a case-by-case basis – against the substantial costs discussed above.

#### 4. Conclusion and Policy Recommendations

The above analysis suggests that international arbitration is an inappropriate mechanism for the resolution of most, if not all, sovereign debt disputes. Three policy recommendations flow from this conclusion.

First, States should avoid investment treaty arbitration of sovereign debt by excluding sovereign debt from investment-treaty coverage or dramatically limiting the substantive

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<sup>56</sup> Olivares Caminal, *supra* note 29, at 391.

<sup>57</sup> Born, *supra* note 12, at 13.

<sup>58</sup> Lee C. Buchheit, G. Mitu Gulati, Ignacio Tirado, *The Problem of Holdout Creditors in Eurozone Sovereign Debt Restructurings*, Paper prepared for presentation at the European University of Cyprus (Nicosia), at 6 (Jan. 22, 2013)

<sup>59</sup> Reinhart and Rogoff, *supra* note 47, 103-105.

<sup>60</sup> Among sub-Saharan Africa States, the median amount of external sovereign debt is approximately 45% of GDP. Though much of this debt is owed to official creditors like the IMF, a significant portion is owed to private creditors. Bolton, et al., *supra* note 7, at 182, 184. *But see* Ohio Omiunu and Oludara Akanmidu, *Reflections on Nigeria v. Process & Industrial Development Limited*, 53 NYU J. INT’L L. & POL. 110, 122 (2021), available at <https://www.nyuilj.org/reflections-on-nigeria-v-process-industrial-developments-limited/> (“Having foreign forums handle cases involving sovereign states plagued by endemic corruption can create problems if those forums do not factor in the public interest considerations of the home countries that bear the brunt of the consequences of these fraudulent deals”).

protections that apply.<sup>61</sup> Investment treaty arbitration offers all of the costs but none of the benefits of commercial arbitration relative to national court proceedings, as it allows claims to be brought in parallel. Moreover, investment treaty arbitration – which applies mandatory one-size-fits-all rules to a wide range of covered investments – precludes the type of case-by-case evaluation of the costs and benefits of arbitration that sovereign debt disputes require.<sup>62</sup> In the present pandemic, scholars and policymakers have proposed the suspension of private debt enforcement proceedings and investment-treaty arbitration more generally.<sup>63</sup> The costs of investment-treaty arbitration of sovereign debt, however, are not limited to the current crisis. A more permanent response, in the form of treaty reform, is required.

Second, States should maintain a presumption against agreeing to international commercial arbitration in sovereign debt contracts. It should be considered only where the debt at issue is inseparable from a large complex project, to which an expert and neutral tribunal can add value that, on a case-by-case basis, has been determined to outweigh the substantial costs of subjecting sovereign debt to this procedure. It should not be used with respect to debt issued to fund the general treasury.

Finally, any limited case-by-case consent to the international arbitration of sovereign debt disputes should be contingent upon an agreement to make all aspects of such proceedings completely transparent – from the debt contracts at issue to the agreement to arbitrate, written submissions, hearings, and any settlement or award.<sup>64</sup> For the sake of good governance and pure economic interests, “[p]ublic debt should be public,” as should its adjudication.<sup>65</sup> The worst case scenario – for both States and creditors – is for secret debt to be adjudicated in secret.

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<sup>61</sup> For further analysis on how States can efficiently tailor treaty coverage of sovereign debt, see Pahis, *supra* note 16, at 278-279.

<sup>62</sup> See Arato, *supra* note 23, at 1, 25.

<sup>63</sup> See, e.g., Patrick Bolton, Lee Buchheit, Pierre-Olivier Gourinchas, Mitu Gulati, Chang-Tai Hsieh, Ugo Panizza & Beatrice Weder di Mauro, *Born Out of Necessity: A Debt Standstill for COVID-19*, Policy Insight No. 103, CTR. ECON. POL’Y RES. (Apr. 2020); Celine Tan, Chris Tassis, Karina Patricio, Ferreira Lima, Stephen Connelly, *Staying Claims: Debt Moratoria Beyond the Debt Service Suspension Initiative*, Afronomics, Aug. 6, 2020; International Institute for Sustainable Development, *Draft Agreement for the Coordinated Suspension of Investor–State Dispute Settlement With Respect to COVID-19- Related Measures and Disputes*, June 18, 2020.

<sup>64</sup> Unlike some of the other costly attributes described above, the confidentiality of arbitration is entirely within the control of the parties. See Born, *supra* note 12, at 203.

<sup>65</sup> Gelpert et al., *supra* note 48, at 45.





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