AFRODAD

AFRICAN FORUM AND NETWORK
ON DEBT AND DEVELOPMENT

HUMAN RIGHTS-BASED APPROACH TO INTERNATIONAL INVESTMENT ARBITRATION

IN THE CONTEXT OF SOVEREIGN DEBT

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ACRONYMS

AFRODAD	African Forum and Network on Debt and Development
AfCFTA	African Continental Free Trade Area
AfDB	African Development Bank
AU	African Union
BIT	Bilateral Investment Treaty
BEE	Black Economic Empowerment
CSO	Civil Society Organisation
Covid-19	Coronavirus Disease 2019
DSSI	Debt Service Suspension Initiative
EAC	East African Community
ECOWAS	Economic Community of West African States
FEMNET	African Women's Development and Communication Network
G20	Group of Twenty
HRBA	Human Rights-Based Approach
HRBRA	Human Rights Baseline Risk Assessments
HRIA	Human Rights Impact Assessment
ICSID	International Centre for Settlement of Investment Disputes
IFIs	International Financial Institutions
IMF	International Monetary Fund
ICC	International Chamber of Commerce
IIA	International Investment Arbitration
IHR	International Human Rights
ISDS	Investor-State Dispute Settlement
LCIA	London Court of International Arbitration
NGO	Non-Governmental Organisation
SADC	Southern African Development Community
SDIA	Sovereign Debt Investment Arbitration
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
WB	World Bank

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Executive Summary

Sovereign debt investment arbitration represents a complex intersection of economic policy, legal frameworks, and human rights, with significant implications for gender equality, particularly within the African context. This executive summary highlights key findings, recommendations, and future research directions on these critical issues. The intersection of sovereign debt policies and human rights reveals significant challenges. Sovereign debt often leads to austerity measures that can adversely impact human rights by reducing access to essential services, increasing poverty, and exacerbating inequalities. Women and marginalised groups are disproportionately affected by these economic pressures. Investment arbitration typically prioritises investor protection, sometimes at the expense of human rights considerations. This focus can lead to increased financial pressures on states, which may result in additional austerity measures, further undermining human rights protections and exacerbating socioeconomic disparities. In Africa, high levels of sovereign debt and diverse investment treaties interact with human rights in multifaceted ways. Regional frameworks, such as the Pan-African Investment Code, and ongoing reforms aim to integrate human rights and sustainable development considerations into economic policies. Notable cases, such as those involving Zimbabwe and South Africa, illustrate the tensions between investor rights and human rights, with recent reforms seeking to address these challenges.

The Report provides some proposed policy options such as-

The intersection of sovereign debt, investment arbitration, and human rights presents a complex and multifaceted landscape that significantly impacts global economic and social dynamics. Sovereign debt, often accompanied by stringent economic measures like austerity, can undermine human rights by reducing access to essential services and exacerbating social inequalities. Concurrently, investment arbitration typically prioritises investor protection, which can sometimes come at the expense of human rights, founded on legal frameworks with limited regard for human rights considerations. However, there is a discernible shift towards integrating human rights and sustainable development provisions into new treaties and agreements. This summary provides an overview of the key findings related to the nexus between sovereign debt, investment arbitration, and human rights, with a particular focus on the African context. It highlights the critical roles played by various actors, including governments, creditors, and the international community, and outlines collaborative strategies aimed at addressing these challenges. By examining these elements, the summary aims to offer a comprehensive understanding of the current landscape and suggest pathways for more equitable and human rights- respecting approaches in sovereign debt and investment arbitration.

- Sovereign debt often necessitates economic measures such as austerity, which can negatively impact human rights by diminishing access to essential services and exacerbating poverty and inequality. The prioritisation of debt servicing over human rights obligations can undermine the ability of governments to fulfil their human rights commitments.

- Investment arbitration generally prioritises investor protection, which can sometimes come at the expense of human rights. Arbitration awards can increase financial pressures on states, leading to further austerity measures that may compromise human rights protections.

- Many investment treaties focus predominantly on investor rights with minimal regard for human rights considerations. However, there is a growing trend towards integrating sustainable development and human rights provisions into new treaties and agreements.

- Human Rights Impact Assessments (HRIAs) and Human Rights Baseline Risk Assessments (HRBRAs) are crucial for embedding human rights into sovereign debt and investment arbitration. HRIAs evaluate potential human rights impacts, aiming to address issues before they arise and align with international norms, while HRBRAs establish a baseline to guide effective risk management.

- Both offer significant benefits in promoting human rights, yet they face challenges such as high resource demands and resistance from traditional practices. Together, they support a more comprehensive and rights-respecting approach to economic policy and decision-making.

- High sovereign debt levels in African countries often restrict their capacity to invest in social services. Debt burdens frequently lead to austerity measures that disproportionately affect vulnerable populations.

- Incorporating feminist and gendered considerations into SDIA is essential for ensuring equitable outcomes. Feminist approaches examine how debt and investment policies impact different genders, aiming to address inequalities and promote gender justice. By integrating these considerations, SDIA processes can better account for the diverse needs and experiences of all genders, ensuring that policies do not disproportionately disadvantage women or marginalised groups.

- Despite the benefits of fostering gender equity, challenges include overcoming entrenched biases and integrating gender perspectives into traditional frameworks. Together, these considerations advance a more inclusive and fair approach to economic decision-making and policy implementation.
- African nations have diverse investment treaties, many of which emphasise investor protection. However, there are ongoing reforms aimed at incorporating human rights and sustainable development into these agreements, as exemplified by initiatives like the Pan-African Investment Code.
- Cases involving countries such as Zimbabwe and South Africa highlight the tensions between investor rights and human rights. South Africa's recent revisions to its BIT reflect a shift towards better balancing these interests.
- Current regional efforts such as AfCFTA and debt relief programmes, along with legal reforms, demonstrate Africa's commitment to addressing debt and investment challenges while considering human rights.
- Governments play a crucial role in managing debt, regulating investment frameworks, and safeguarding human rights. They face the challenge of balancing economic needs with the imperative to uphold human rights obligations.
- Creditors influence debt sustainability and economic policies through the conditions they impose on loans and the restructuring processes. Their role in shaping the terms of debt and investment agreements is significant.
- International organisations, NGOs, and regional bodies contribute to shaping policies and practices related to debt and investment. Their collaborative efforts include debt relief initiatives, human rights advocacy, and capacity-building programmes.
- Emerging investment treaties and model agreements can increasingly incorporate provisions for human rights and sustainable development, aiming to balance investor protection with social responsibility.
- Technical assistance and training programmes support countries in managing debt, reforming legal frameworks, and incorporating human rights considerations into investment agreements.
- Civil society organisations play a vital role in advocating for human rights and monitoring the impacts of debt and investment policies. Their efforts contribute to accountability and the development of more equitable practices.

Effective strategies to address these challenges include human rights and gender equality clauses in investment treaties to ensure that economic policies do not undermine these principles; facilitate fair and transparent debt relief and restructuring processes that consider the socio-economic impacts on vulnerable populations and promote transparency in debt and investment decision-making and ensure public engagement, particularly for women and marginalised communities, among others. Addressing the complex relationship between sovereign debt, investment arbitration, and human rights—particularly gender impacts—requires concerted efforts from governments, creditors, and the international community. By integrating human rights considerations into economic policies, fostering collaboration, and pursuing targeted research, it is possible to promote a fair and sustainable global economy that upholds and respects human rights.

1 Introduction

Current trends in international investment arbitration (IIA) highlight a shift towards balancing investor protection with public policy goals, such as human rights and environmental sustainability, in response to criticisms of power imbalances and legitimacy concerns in investment agreements.[1] Consequently, there is growing scrutiny and demand for reform of investor-state dispute settlement (ISDS) mechanisms, with calls for greater transparency and the incorporation of sustainable development principles.[2] International investment arbitration which was originally designed to provide legal protection for direct investments, but now poses significant challenges to the principle of state immunity as defined by the United Nations Convention on Jurisdictional Immunities of States and Their Property.[3] Creditors strategically use investment arbitration to enforce sovereign debt obligations under foreign investment law, often leading to human rights implications, as arbitration tribunals frequently overlook these considerations in their rulings, thereby exacerbating human rights abuses.[4] Moreso, investment arbitration can deter creditors from engaging in genuine debt restructuring efforts, delaying the orderly resolution of a sovereign debt crisis, which can ultimately trigger financial and economic crises and undermine national economies.[5]

Primarily the study aims to scrutinise the multifaceted impact of investment arbitration on sovereign debt within the African context, with a particular focus on the resultant human rights issues and debt sustainability. By employing a human rights-based approach, the study seeks to critically analyse how a human rights approach can be formulated and implemented to sovereign debt investment arbitration to mitigate potential human rights abuses in debt restructuring. The study aims to provide a comprehensive background on current affairs in Africa, examining the likelihood and risks of African countries' involvement in sovereign debt investment arbitration, and exploring the opportunities that such arbitration might present. To achieve its intended aims, an in-depth analysis of salient human rights issues, a feminist perspective, regional perspectives and what an ideal human rights impact assessment framework should look like will be undertaken to highlight the socio-economic dimensions often overlooked in these restructuring and legal contentions.

Some of the key questions addressed by the research include the nexus and key factors influencing the outcomes of sovereign debt investment arbitration and their impact on human rights and development objectives in debtor countries; the main challenges and risks associated with sovereign debt investment arbitration for African countries; and the opportunities presented by investment arbitration and how African countries can leverage them. The study will also examine the roles of various actors, including governments, creditors, and the international community, and how African countries can utilise international and regional frameworks to mitigate risks and protect human rights while promoting sustainable development.

The significance of this study lies in its potential to offer a nuanced understanding of the intersection between sovereign debt, investment arbitration, and human rights in Africa. By advocating for a balanced approach that safeguards human rights, women's rights, economic stability and development,

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1 Camille Martini, 'Balancing Investors' Rights with Environmental Protection in International Investment Arbitration: An Assessment of Recent Trends in Investment Treaty Drafting' (2017) 50(3) *Intl Lawyer* 529.

2 *Id.*

3 Mark Feldman, 'State-Owned Enterprises as Claimants in International Investment Arbitration' (2016) 31(1) *ICSID Rev-FILJ* 24.

4 Stephen J Choi, Mitu Gulati, and Eric A Posner, 'The Evolution of Contractual Terms in Sovereign Bonds' (2012) 4(1) *J Legal Analysis* 131.

5 Chizoba Uchenna Obi, *Foreign Law Court Enforcement and Delays in Sovereign Debt Restructuring* (Doctoral Thesis, University of Glasgow 2019).

the research aims to provide actionable insights and propose solutions and mitigation choices for future investment treaties and debt agreements. This holistic analysis will be grounded in qualitative methods, including literature review, case analysis, and policy analysis, to comprehensively address the multifaceted challenges and opportunities presented by sovereign debt investment arbitration in Africa.

2. Conceptual Framework and Literature Review

The conceptual framework of state immunity, as articulated in the United Nations Convention on Jurisdictional Immunities of States and their Property, establishes a foundational principle that sovereign states cannot be subjected to the jurisdiction of foreign courts without their consent.[6] This principle, deeply rooted in the doctrine of sovereign equality and respect for state sovereignty, is critical in maintaining international order and diplomatic relations. Husserl remarks that foreign law by itself is incapable to operate outside the boundaries of its own territory.[7] Okeke also observes that historically, state immunity evolved alongside the development of sovereign debt and international finance, with the 19th century embracing the doctrine of absolute immunity, shielding states from legal actions in foreign courts.[8] However, the increasing involvement of states in commercial activities led to the adoption of a more restrictive approach, as codified in the 2004 UN Convention.[9] Recent trends, however, indicate a gradual erosion of state immunity, particularly in cases involving sovereign debt. Creditors are increasingly resorting to investment arbitration to bypass state immunity and enforce debt repayments directly. This shift poses significant challenges and undermines the protective function of state immunity, exposing states to legal challenges that can have significant financial and economic repercussions.[10] This phenomenon is way worse for African nations grappling with sovereign debt crises and the associated legal and financial complexities

The advent of international investment arbitration is challenging the principle of state sovereignty, particularly in cases involving sovereign debt and state-owned assets.[11] Originally international investment arbitration was designed to provide legal protection to investors by allowing them to bring claims directly against states for breaches of investment treaties.[12] For this reason, investment arbitration was supposedly designed to foster a stable and predictable investment climate by offering a neutral forum for resolving disputes.[13] However, its application has expanded beyond its original purpose, with creditors using it to enforce sovereign debt obligations, creating significant fiscal and developmental challenges, especially in the protection of fundamental human rights and women's rights.[14] Several landmark cases have shaped the landscape of investment arbitration in the context of sovereign debt.

6 Yevgen Popko, 'Development of the State Jurisdictional Immunity Institution in Private International Law' (2023) *Legal Horizons* 52. See also, Sevrine Knuchel, 'State Immunity and the Promise of Jus Cogens' (2010) 9 *NW UJ Intl Hum Rts* 149.

7 Gerhart Husserl, 'Public Policy and Ordre Public' (1938) 25 *Virginia LR* 37, 66.

8 Edward Chukwuemeke Okeke, *Jurisdictional Immunities of States and International Organizations* (OUP 2018).

9 United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not yet in force) UNGA Res 59/38 (16 December 2004).

10 August Reinisch, 'Comments on a Decade of Italian Case Law on the Jurisdictional Immunity of International Organizations' (2009) 19(1) *The Italian Yearbook of International Law Online* 101, 101-111.

11 Julien Chaisse and Dini Sejko, *Investor-State Arbitration Distorted: When the Claimant Is a State* (Springer Singapore 2016) 1-30

12 *id*

13 Rob Howse, 'International Investment Law and Arbitration: A Conceptual Framework' in *International Law and Litigation* (Nomos Verlagsgesellschaft mbH & Co. KG 2019).

14 M V C Ozioko and Ikenga KE Oraegbunam, 'Foreign Investment, Human Rights and National Development: A Jurisprudential Approach' (2019) 3 AJLHR 1.

For example, in *Abaclat & others v. Argentina*, relying on the Czech Republic and Greece BIT (1991) and Cyprus and Greek BIT (1992) related to a situation where the government changed the terms of sovereign bonds after they were issued, without the agreement of all bondholders.[15] The changes allowed new terms to be imposed on all bondholders if a supermajority agreed to them. This occurred during Greece's 2012 sovereign debt restructuring. The bondholders successfully used arbitration to claim compensation for debt restructuring measures taken by Argentina.[16] Similarly, in *Poštová Banka v. Greece*, creditors sought redress for losses incurred during Greece's debt restructuring but the investors were not successful owing to the stricter interpretation of investment by the tribunal that effectively excluded sovereign debt from the realms of investment under the ICSID Convention and relevant BIT.[17] Waibel strongly notes that these cases set important precedents and highlight the growing intersection between investment arbitration and sovereign debt disputes.[18] Similarly, Nakajimi notes that financial crises often lead indebted countries to restructure their external debt, prompting creditors to pursue "holdout" litigation or arbitration to recover the full value of their bonds. While investor-state arbitration is an effective tool for creditors, it can disrupt orderly debt restructuring by encouraging other creditors to follow suit.[19]

From a feminist perspective, the intersection of state immunity and international investment arbitration brings to light significant gendered implications. Sibeko and Issacs, note that the allocation of state resources to satisfy arbitration awards often leads to austerity measures that disproportionately affect women and marginalised communities, who are more reliant on public services.[20] Likewise Aren, Kidane, Polonskaya note that the governance structures of arbitration bodies are frequently dominated by male arbitrators, leading to decisions that may not fully consider the social and economic impacts on women.[21] A study on the London Court of International Arbitration (LCIA) report indicated that 48 per cent of the LCIA arbitrators appointments are women. However, female arbitrators appointed by parties stand at 21 per cent in 2023, a 2 per cent slightly higher than 19 per cent in 2022.[22] This finding indicates that female arbitrators are underrepresented in appointments made by parties compared to their overall presence within the arbitration, underscoring the importance of incorporating feminist principles into the reform of international investment arbitration to ensure a more equitable approach. A feminist gendered analysis thus provides a critical framework for examining the nuanced impacts of sovereign debt investment arbitration. Gendered and feminist perspectives highlight how economic policies, and legal processes can disproportionately affect women and marginalised groups. By incorporating feminist principles, this study seeks to uncover the hidden dynamics and consequences of debt arbitration that traditional analyses might overlook, thereby broadening the understanding of these issues and proposing more inclusive and equitable solutions.

In Africa, countries face significant sovereign debt challenges, with many nations struggling to service their debt obligations amid economic instability and external pressures.[23] Several African countries are

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15 ICSID Case No. ARB/07/5.

16 *id*

17 ICSID Case No. ARB/13/8.

18 Michael Waibel, *Sovereign Defaults before International Courts and Tribunals* (Cambridge University Press 2011) 120.

19 Kei Nakajima, 'An Elusive Safeguard with Loopholes: Sovereign Debt and Its "Negotiated Restructuring" in International Investment Agreements in the Age of Global Financial Crisis' (2017) 2016(3) International Review of Law 3.

20 Busi Sibeko and Gilad Isaacs, 'The Cost of Austerity: Lessons for South Africa' (2019) 2 *Institute for Economic Justice Working Paper Series*. 5-25.

21 Marie-Louise F Aren, 'The Brazilian Cooperation and Facilitation Investment Agreement in the International Investment System: Crucial Lessons for Global South Countries in Triangular *Cooperation' (2021) IFP Research Cohort Papers,* 87-105; Won L. Kidane, *The Culture of International Arbitration* (Oxford University Press 2017) 153-176; Ksenia Polonskaya, 'Diversity in the Investor-State Arbitration: Intersectionality Must Be a Part of the Conversation' (2018) 19(1) *Melbourne Journal of International Law* 259, 259-298.

22 LCIA Annual Casework Report 2023, 3.

23 Maureen Were, *Emerging Public Debt Challenges in Sub-Saharan Africa* (2024/36 WIDER Working Paper, 2024) 1-3.

at high risk of debt distress, underscoring the urgent need for effective debt management strategies.[24] The challenges related to state immunity and sovereign debt are particularly pronounced. This is shown by the fact that the continent has witnessed a surge in investment arbitration cases, many of which involve some disputes over sovereign debt restructuring.[25] African states often face difficulties in balancing the need to attract foreign investment with the imperative to maintain sovereign control over their economic policies. This is further complicated by the legacy of colonialism and the inequities entrenched in the global financial system, which often leave African nations vulnerable to predatory lending and exploitative investment practices.[26] The recent case involving Zambia's sovereign debt crisis is emblematic of these challenges, where the state's attempts to restructure its debt were met with arbitration claims that undermined its efforts to stabilise the economy, with a strong impact on human rights.[27]

Human rights considerations are often overlooked in investment arbitration decisions, with tribunals primarily focusing on contractual and financial aspects. This oversight can lead to rulings that exacerbate human rights violations, particularly in debtor countries. Cases such as *Bernhard von Pezold v. Republic of Zimbabwe* illustrate the adverse human rights impacts of arbitration decisions, highlighting the need for a more balanced approach that integrates human rights into the arbitration process.[28] From the case, the ICSID Convention transformed the dynamics of international arbitration by enabling non-state actors, such as private investors, to bring claims directly against states. Articles 53, 54, and 55 of the Convention, incorporated into domestic laws like Malaysia's ICSID Act 1966, ensured that arbitral awards are binding, enforceable, and immune to appeal for sovereign states, except as provided under ICSID rules. This framework restricts states' ability to invoke sovereign immunity to avoid arbitration or enforcement in favour of investor protection.[29] The Von Pezold family dispute with Zimbabwe, underscores socio-economic challenges. Zimbabwe's land reform program, central to the dispute, led to reduced agricultural productivity, food insecurity, unemployment, and economic instability, disproportionately affecting rural populations. While the ICSID framework empowers investors protection, it can equally adversely constrain states' ability to implement public interest reforms. This raises critical questions about balancing investor rights with sovereign authority to pursue socio-economic justice and sustainable development.[30]

Despite the extensive literature on state immunity and investment arbitration, gaps remain in understanding the gendered implications of these legal processes, particularly in the context of African countries. Existing studies often overlook the intersection of gender, human rights, and sovereign debt arbitration, necessitating further research to address these critical dimensions and contribute to more equitable legal frameworks. The nexus between state immunity, international investment arbitration, and sovereign debt management is thus fraught with complexities, particularly for African countries. These nations must navigate a legal landscape where the erosion of state immunity through arbitration

24 International Monetary Fund, *Sub-Saharan Africa: Navigating a Long Pandemic, Opening Remarks at Press Briefing on Regional Economic Outlook- Abebe Aemro Selassie, Director, African Department, IMF Washington, DC April 15, 2021* (IMF, 2021). https://www.imf.org/en/News/Articles/2021/04/15/sp041521-opening-remarks-by-abebe-aemro-selassie [accessed 4 August 2024].

25 Generally, The LCIA's 2023 report reveals that while Western Europe remains the dominant source of parties in LCIA arbitrations, Africa has experienced the most significant growth. African parties doubled from 4% in 2022 to 8% in 2023. Mauritius and Nigeria are the leading African contributors, and North African parties also increased from 5% to 8%. See FN 22 above at 5-16. See also, https://www.addleshawgoddard.com/en/insights/insights-briefings/2023/africa/international-arbitration-africa/.

26 Gorden Moyo, 'Introduction: Entrapment of Africa in an Asymmetrical Global Economy' in *Africa in the Global Economy: Capital Flight, Enablers, and Decolonial Responses* (Springer Nature Switzerland 2024) 1-19.

27 Andrea Shalal, Rachel Savage, and Jorgelina Do Rosario, 'IMF, World Bank See Progress on Debt Relief as Zambia Poised to Sign Deal' *Reuters* (12 October 2023).

28 ICSID Case No ARB/10/15.

29 See, https://jusmundi.com/en/document/decision/en-bernhard-von-pezold-and-others-v-republic-of-zimbabwe-judgment-of-the-high-court-of-malaya-at-kuala-lumpur-monday-27th-november-2023

30 Pablo Leandro Ciocchini and Stefanie Khoury. "Investor State Dispute Settlement: Institutionalising" Corporate Exceptionality".(2018) 8 (6*) Oñati Socio-legal Series* 976-1000.

could exacerbate their financial vulnerabilities, leading to a cycle of debt dependency and economic instability. Recent developments, such as the case of *von Pezold* have highlighted the ongoing tensions between state immunity and the enforcement of arbitral awards. In this case, the tribunal's decision to uphold the investor's claim against Zimbabwe, despite the state's assertion of immunity, reflects a broader trend towards limiting state immunity in favour of protecting investor rights. Addressing these challenges requires a multifaceted approach that includes reforming international investment law to better protect the sovereignty of states, integrating gendered considerations into arbitration processes, and fostering greater cooperation among African countries to resist exploitative practices and assert collective agency in the global financial arena.

3. Substantive Analysis of Key Issues

The interaction between sovereign debt, investment arbitration, and human rights in Africa is shaped by a complex interplay of current affairs and legal frameworks. Many African countries are grappling with severe debt crises, driven by global economic uncertainties, fluctuating commodity prices, and the impact of crises like the COVID-19 pandemic.[31] These high debt levels strain national budgets, limiting spending on essential social services and affecting human rights such as access to healthcare and education. Political instability and governance challenges further complicate debt management and arbitration efforts, with unstable governments often struggling to protect human rights during negotiations.[32] Many African civil society organisations like AFRODAD, PALU, FEMNET among others, are advocating that government policies incorporate human rights-compliant approaches to debt and arbitration.[33]

The legal framework governing sovereign debt in Africa is influenced by both domestic laws and international agreements.[34] While domestic legal protections for human rights vary, international investment treaties often prioritise investor rights over sovereign interests, leading to conflicts in arbitration cases. The rise of BITs and the use of arbitration mechanisms like the International Centre for Settlement of Investment Disputes (ICSID) have exposed African nations to significant financial liabilities and legal vulnerabilities.[35] These legal developments have led to the erosion of state immunity, with arbitration awards often forcing African states to divert resources from critical social services to satisfy creditor demands. International financial institutions (IFIs) like the IMF and World Bank further complicate the situation by imposing conditions on debt restructuring that can limit the policy autonomy of African states.[36] Historical examples, such as the negative impact of structural adjustment programmes, highlight the long-lasting challenges posed by such conditions. Recent regional initiatives, including the African Continental Free Trade Area (AfCFTA) and the African Union's Agenda 2063, aim to enhance economic integration and sustainable development. However, their success in addressing sovereign debt issues depends on African states' ability to navigate the complex legal landscape of international finance while balancing investment needs with the protection of state sovereignty and human rights.

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31 Samuel O Oloruntoba, Back to the Well? Untangling the New Debt Accumulation, COVID-19 and Social Crisis in Africa (United Nations 2022).

32 Anna Gelpern, 'Banks, Governments, and Debt Crises' in Great Decisions (Foreign Policy Association ed, 2011) 49-60.

33 Idah Knowles, African Feminist Macroeconomic Academy The Audacity to Disrupt FEMNET Report, 5-48 https://femnet.org/wp-content/uploads/2022/10/AFMA-Report-2022_Optimised.pdf .

34 Muhammad Bello, The Place of Socio-Economic Rights in Sovereign Debt Governance (PhD diss, University of the Free State 2020).

35 (ICSID Case No. ARB/10/15)

36 Gorden Moyo, *Africa in the Global Economy- Capital Flight, Enablers and Colonial Responses* (Springer, 2024) 41-59

3.1 Evolution and Impact of International Investment Arbitration on Sovereign Debt in African Countries

International investment arbitration related to sovereign debt has seen significant developments that have deeply impacted African countries. Historically, the 1970s and 1980s marked a shift from the doctrine of absolute sovereign immunity to a more restrictive approach.[37] This allowed creditors to pursue claims against states involved in commercial activities, including borrowing, thereby opening the door for investment arbitration in sovereign debt disputes. The 1990s witnessed a surge in BITs which often included arbitration clauses that permitted investors to bring claims directly against states. The establishment of ICSID further facilitated such disputes. The early 2000s saw high-profile cases, such as the Argentine debt crisis, where bondholders invoked BITs to seek compensation, underscoring the role of investment arbitration in sovereign debt matters.[38]Recent years have seen an expansion of arbitration cases related to sovereign debt, particularly during the 2010s, when disputes arose from instances like the Greek debt restructuring during the Eurozone crisis.[39] These cases highlighted the complex interplay between investment arbitration and sovereign debt restructuring. In the 2020s, increasing scrutiny of the investment arbitration system has led to reform efforts aimed at addressing concerns about fairness and the impact on state sovereignty, particularly in debt management. Discussions at forums such as UNCITRAL and ICSID reflect these concerns. Simultaneously, the AfCFTA and ongoing negotiations for its investment protocols represent Africa's efforts to create a unified framework that balances investor protection with the need to safeguard economic stability and policy space. African countries' involvement in sovereign debt investment arbitration is primarily driven by their increasing reliance on international capital markets and private creditors, moving away from traditional multilateral lenders like the IMF and World Bank.[40] This shift has exposed African nations to new legal and financial risks. The nature of this involvement often stems from arbitration as a preferred dispute resolution mechanism when a sovereign state defaults on its debt obligations. BITs and investor-state dispute settlement (ISDS) provisions in these agreements allow private investors, including bondholders, to initiate arbitration against sovereign states for alleged breaches. Additionally, many sovereign debt contracts, particularly those involving Eurobonds, include arbitration clauses that mandate dispute resolution through international forums such as the International Chamber of Commerce (ICC) or the LCIA.[41]

In addition, while the ICC, the Permanent Court of Arbitration (PCA), ICSID play a pivotal role in shaping the global dispute resolution landscape, however it is difficult to say the benefit of these institutions apply to African investment dispute resolution. African countries often face significant disenfranchisement within these platforms due to structural and systemic biases.[42] These institutions, predominantly governed by frameworks developed in and for advanced economies, frequently disregard the socio-economic and legal peculiarities of African states.[43] This imbalance is further exacerbated by limited representation of African arbitrators and legal practitioners, as well as procedural costs that disproportionately burden resource-constrained states. Consequently, African countries are often

37 Maryam Jamshidi, 'The Political Economy of Foreign Sovereign Immunity' (2022) 73 Hastings LJ 585.

38 M J Luque Macías, 'The Politicisation of International Legal Instruments Protecting Foreign Investment in Latin America Through States' Articulation of Sovereign Rights' in *Re-Politicising International Investment Law in Latin America through the Duty to Regulate Paradigm* (Springer International Publishing 2021) 23-104.

39 Guiseppe Bianco, 'The Bitter End of Sovereign Debt Restructurings: The Abaclat v. Argentina Arbitration and the Eurozone Crisis' (2013) 40 *Legal Issues of Economic Integration* 4.

40 Jonathan Heard & Emmanuel T. Laryea. "Export Credit Agencies, International Investment Law and the Spectre of Unsustainable Developing Countries' Debts." *African Journal of International and Comparative Law* 29, no. 4 (2021): 612-643. See also, Michael Waibel, "Opening Pandora's box: sovereign bonds in international arbitration." American Journal of International Law 101.4 (2007): 711-759.

41 Ilias, Bantekas, "Sovereign Debt Denunciation and Unilateral Insolvency under International Law: When Is It Lawful? (2023) 46 *Hastings Int'l & Comp. L. Rev.* 127.

42 Peter Brett and Line Engbo Gissel, Africa and the Backlash Against International Courts (Bloomsbury Publishing 2020) 3-15

43 Emma Aisbett and others, Rethinking International Investment Governance: Principles for the 21st Century (2018) 111-121

disadvantaged in investor-state disputes, where the legal rules and principles applied prioritise corporate interests over sovereign policy objectives, particularly in areas such as environmental protection and public welfare.[44] Addressing these inequities is essential to ensuring that these platforms foster fairer outcomes and reflect the diverse realities of their global stakeholders.

The likelihood of African countries becoming increasingly entrapped in sovereign debt investment arbitration is influenced by several factors. High debt levels, exacerbated by economic shocks, global financial crises, and the economic aftermath of the past COVID-19 pandemic among other factors exponentially increase the risk of default and subsequent arbitration claims. The trend of borrowing from private sector creditors, who are more inclined to resort to arbitration, further heightens this risk. Economic instability, often driven by political turmoil, fluctuating commodity prices, and macroeconomic challenges, also contributes to the vulnerability of African countries.[45] Along the same line, the legal environment plays a critical role through the presence of favourable legal frameworks, including BITs and arbitration-friendliness of courts, which can encourage creditors to pursue arbitration, whereas weaker legal systems may push them to seek arbitration in international forums.

3.2 Analysis of Challenges, Risks, and Strategies to Navigate Sovereign Debt Arbitration in African Countries

African countries face a complex set of challenges and risks in the context of sovereign debt arbitration. The legal and procedural hurdles, coupled with the erosion of sovereign immunity, present significant challenges to their ability to defend against claims effectively. The potential impact on national sovereignty and reputation further complicates the situation. Financial, enforcement, and political risks add layers of vulnerability that can undermine economic stability and governance.

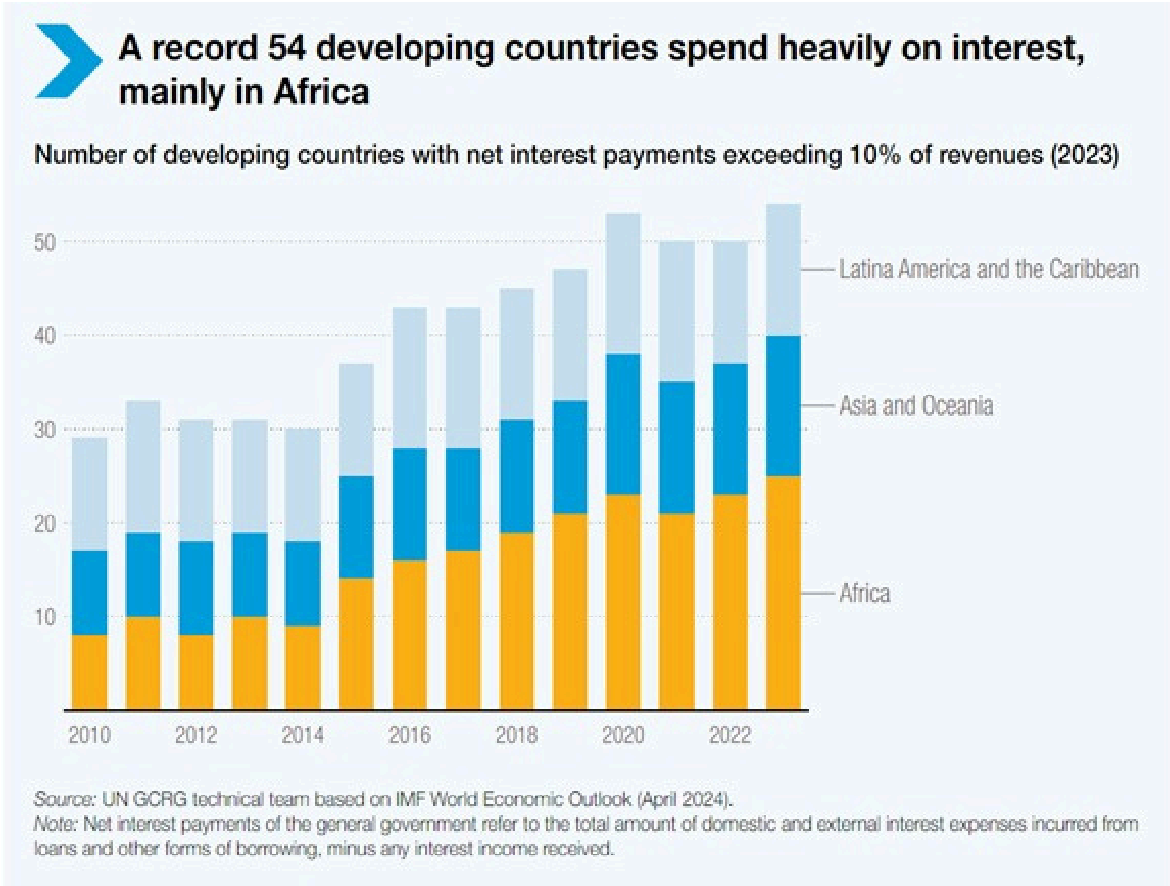
High Debt Levels and Sustainability*:* Many African countries have accumulated substantial sovereign debt, often resulting from a combination of external borrowing and domestic fiscal pressures.[46] This high debt burden makes it challenging for these countries to meet their debt obligations, leading to concerns about debt sustainability. When countries struggle to service their debts, they may face legal disputes with creditors, including private investors and hedge funds holding their bonds. Investment arbitration becomes a relevant tool for these creditors to seek redress, potentially leading to arbitral awards that further strain the countries' financial resources.

44 Id at 91-110

45 Rexford Abaidoo & Elvis Kwame Agyapong. "Institutional framework, macroeconomic instability and financial markets: perspective from emerging economies." (2024) *Journal of Economic and Administrative Sciences* (2024).

46 Ifeanyichukwu Azuka Aniyie. "Beyond traditional models: a focus on alternate pathways for managing Africa’s sovereign debt." (2024) *Politikon* 1-17.

Figure 1: **Africa's debt servicing cost compared to other developing regions**



Source: UNCTAD & IMF [47]

From the graph above, Africa's net interest debt servicing costs alone exceed over ten per cent of its revenues in the world.

Limited Access to Financial Markets: African countries often have limited access to international financial markets due to perceived higher risks associated with investing in these regions.[48] This limitation forces them to rely on borrowing from a smaller pool of lenders, often at higher interest rates. When disputes arise with these creditors, investment arbitration can escalate the situation, resulting in costly legal battles and potential arbitral awards that exacerbate the financial constraints of these countries.

Adverse Economic Conditions: Economic volatility, including fluctuations in commodity prices, political instability, and external shocks like states of emergency from political fragile situations significantly impact African economies. These adverse conditions can lead to defaults or restructuring of sovereign debts.[49] Creditors may resort to investment arbitration to recover their investments, seeking compensation for perceived breaches of investment agreements. The threat of arbitration and potential awards can deter African countries from pursuing necessary debt restructuring, fearing the financial and reputational repercussions. Likewise, IFIs like the IMF and the World Bank often offer more stringent conditions on borrowing countries.[50] These conditions may inadvertently strain domestic economies

47 https://unctad.org/publication/world-of-debt

48 Kiel Institute for the World Economy, Sovereign Debt in Africa: Large Interest Rate Differences Across Creditors (2 May 2023) https://www.ifw-kiel.de accessed 8 August 2024.

49 Mikhail Andreev et al. "Commodity cycles and financial instability in emerging economies." (2024) *Annals of Finance*1-31.

50 Charles Chidi Eleonu, Historical Perspective of International Monetary Fund and Economic Development in Third World: Nigeria (2019) 24 (12) *IOSR Journal Of Humanities And Social Science* 24-32

and exacerbate social and economic inequalities. In cases where countries fail to comply with these conditions or face disputes with private investors over these measures, investment arbitration can become a mechanism for resolving these conflicts. However, the financial outcomes of such arbitrations can impose additional burdens on already struggling economies.

Legal, Financial and Reputational Risks: The complexities of investment arbitration, including legal fees, procedural costs, and the risk of adverse awards, present significant challenges for African countries.[51] These nations often lack the legal expertise and financial resources to effectively navigate arbitration proceedings. Consequently, they may face disproportionate disadvantages in arbitration cases, leading to unfavourable outcomes that further complicate their debt management efforts. Sovereign debt arbitration presents a web of intricate legal and procedural challenges. These include the interpretation of investment treaties, the application of sovereign immunity doctrines, and the enforcement of arbitral awards.[52] Many African nations lack the necessary legal expertise and financial resources to navigate these complexities effectively. The interpretation of investment treaties often requires specialised legal knowledge, which may not be readily available within a country's legal infrastructure. Moreover, the procedural aspects of arbitration, such as the choice of arbitrators, the applicable law, and the venue, add layers of complexity that can be daunting for states with limited experience in international arbitration.

The mere involvement in arbitration can tarnish a country's reputation on the international stage, particularly within financial markets which impacts the cost of capital. African counties embroiled in arbitration may be perceived as a higher risk, leading to increased borrowing costs and reduced access to future financing. This reputational damage can be long-lasting, affecting not only the state's ability to raise funds but also its attractiveness as a destination for foreign direct investment. The stigma associated with being a 'sovereign bad debtor' can have enduring consequences, making it more difficult for the country to recover economically. The financial liabilities arising from adverse arbitral awards pose a substantial risk to African countries. These awards can involve significant sums of money, potentially running into billions of dollars, which can exacerbate a country's existing fiscal challenges. The financial burden of paying damages, legal fees, and arbitration costs can contribute to a debt spiral, where the state is forced to borrow more to meet its obligations, leading to further indebtedness. This scenario can severely strain public finances, diverting resources away from critical areas such as healthcare, education, and infrastructure.

Sovereignty and Policy Space: Investment arbitration can limit the policy space available to African governments by imposing constraints on their ability to regulate and implement public policies.[53] When arbitration awards favour investors, they can undermine sovereign decisions related to debt restructuring, fiscal policies, and socio-economic development. This limitation on policy space can hinder the countries' efforts to address their debt challenges comprehensively and sustainably. Traditionally, sovereign states have been protected by the doctrine of sovereign immunity, which prevents them from being sued in foreign courts without their consent. However, in the realm of investment arbitration, particularly where states have waived their immunity in debt contracts, this protection is increasingly being eroded.[54] African countries that have agreed to such waivers may find themselves exposed to adverse arbitral awards. These awards can lead to enforcement actions against state assets, which can be particularly damaging if those assets are vital to the country's functioning or economic stability. Arbitral awards can have far-reaching implications for a nation's sovereignty. When an arbitration tribunal mandates policy changes, asset seizures, or imposes financial penalties, it can

51 Gabriel Bottini and others, 'Excessive Costs and Recoverability of Costs Awards in Investment Arbitration' (2020) 21(2-3) *J World Investment & Trade* 251.

52 Kei Nakajima, *The International Law of Sovereign Debt Dispute Settlement* (2022, CUP) 169-234 By Kei Nakajima

53 Dominic Npoanlari Dagbanja, *The Investment Treaty Regime and Public Interest Regulation in Africa* (OUP 2022) 191-263

54 Ilias Bantekas, 'Sovereign Debt Denunciation and Unilateral Insolvency under International Law: When Is It Lawful?' (2023) 46 *Hastings Int'l & Comp L Rev* 127.

significantly undermine a state's ability to govern autonomously.[55] For African countries, this can mean the imposition of austerity measures or other economic policies that may not align with their developmental goals or the priorities of their citizens. Such interventions can weaken the state's authority and its capacity to implement policies that reflect its national interests and the will of its people.

Socio-Political and Human Rights Risks: The outcomes of arbitration proceedings can have profound political and social repercussions. Where arbitral awards necessitate austerity measures, public sector layoffs, or cuts to social services, they can provoke widespread public dissatisfaction and unrest. Adverse arbitral awards can weaken a government's legitimacy and stability.[56] Likewise, where a country is ordered to pay substantial damages, it may face public backlash, especially if the award is publicly perceived as unfair, which may affect the public perceiving the government as weak. This can lead to political unrest, protests, and challenges to the current administration, while damaging international relations and the country's global reputation. Large arbitration awards can strain national budgets, particularly in developing countries. For example, Argentina's 2000s economic crisis led to a sovereign debt default, with creditors seeking legal redress. In 2012, a US court ruled in favour of these creditors, demanding full payment, including interest.[57] This caused significant domestic unrest due to the financial strain and austerity measures, leading to political instability and changes in government. The economic and political fallout also affected Argentina's international relations, highlighting the complex risks of sovereign debt management and investment arbitration. The political fallout and human right abuses from adverse arbitral awards can thus have lasting impacts on a country's stability and development.

3.3 Impact of Sovereign Debt Arbitration on State Immunity

The trend of international investment arbitration has significantly impacted the principle of state immunity, especially in the context of sovereign debts. Traditionally, state immunity provided a shield for sovereign states against the jurisdiction of foreign courts and tribunals, safeguarding them from lawsuits and the enforcement of judgments.[58] However, the rise of international investment arbitration, particularly under bilateral investment treaties (BITs) and multilateral agreements such as the ICSID Convention, has increasingly subjected sovereign states to the jurisdiction of international arbitral tribunals. This shift has diminished the traditional notion of absolute state immunity, evolving towards a more restrictive approach where states can be held accountable for breaches of their investment obligations. One of the key impacts is the erosion of the principle of absolute immunity in favour of restrictive immunity, which distinguishes between sovereign acts (*jure imperii)* and commercial acts (*jure gestionis*).[59] In the realm of sovereign debt, many disputes arise from the latter, where states engage in borrowing activities akin to commercial transactions. As a result, some international investment arbitration tribunals like *Re: Abaclat* have often asserted jurisdiction over disputes involving sovereign debts by expanding sovereign debt into the realm of investments using the ICSID rules, especially Article 25, thus challenging the traditional protective shield of state immunity.[60] In this case, the tribunal ruled that sovereign bonds held by Italian bondholders qualified as "investments" under Article 25 of the ICSID Convention. The majority found that the bonds provided an economic contribution to

55 *id*

56 *id*

57 Matthew Aleshire, *The Global Sovereign Debt Architecture and International Relations: Causes, Outcomes, and Implications of Argentina's 2001 Debt Default* (M.AThesis, TheAmerican UniversityofParis 2020)21-40.

58 Azab Alaziz Alhashemi, 'State Immunity in International Investment Disputes: Role of State Immunity in Resolving Investment Disputes and Adjudication Implications' (2023) 16 *J Pol & L* 46.

59 Frauke Heidemann*, An International Law Perspective on Harry Potter: Explaining Core Principles of International Law by Testing Their Relevance in the Wizarding World* (Springer Nature 2024).27-32; Katherine Reece Thomas, *'Defining a "State" and the Role of the Commercial Activity Exception' in The Commercial Activity Exception to State Immunity* (Edward Elgar Publishing 2024) 105-131.

60 *Supra* note 15. See also *supra* note 17 at paras 300-305

Argentina by injecting capital, involved the bondholders assuming repayment risks, and had a defined maturity period, meeting the long-term nature of investments. Adopting a broad interpretation, the tribunal emphasised aligning ICSID's jurisdiction with the evolving nature of international investments, focusing on the economic reality of the transaction rather than its legal form. This decision has allowed private investors, including bondholders, to pursue claims against sovereign states, potentially leading to awards against them. The dissenting arbitrator- Professor Georges Abi-Saab however held that sovereign bonds should not qualify as investments under the ICSID Convention because they are financial instruments lacking a direct contribution or territorial nexus to the host state. Expanding ICSID jurisdiction to include bonds risks overreach, diverging from the Convention's intended focus on fostering genuine investment relationships.[61] This dissenting opinion became the majority decision in *Re: Postova Banka*, where the tribunal rejected the claim that Greek sovereign bonds qualified as an investment under Article 25 of the ICSID Convention.[62] It ruled that the bonds, acquired through secondary market transactions, lacked a direct contribution to Greece's economy, a territorial link, and a substantive relationship with the state beyond contractual terms. This decision reflects a narrower interpretation of "investment," emphasizing tangible contributions to the host state compared to the Abaclat case that adopted a much wider definition.

Furthermore, the enforcement of arbitral awards against sovereign states has also challenged the principle of state immunity. Once an arbitral award is rendered, investors seek to enforce it against the assets of the sovereign state. This enforcement process can bypass the protections of state immunity, particularly when assets located in foreign jurisdictions are targeted. Article 26 of the Vienna Convention on the Law of Treaties, which upholds the principle of *pacta sunt servanda* (agreements must be kept), and Article 27, which states that a state cannot invoke its domestic law to justify failure to fulfill an international obligation, have been interpreted to permit international arbitration against states in certain circumstances, including sovereign debt disputes in ISDS. This interpretation allows international arbitration to override domestic law, thereby undermining state immunity, particularly in cases involving national sovereignty. This creates a conflict between upholding state sovereignty and facilitating access to arbitration for resolving investment disputes.[63] Meanwhile, the Vienna Convention on Diplomatic Relations (1961) reinforces state sovereignty and the immunity of diplomatic representatives.[64] However, both conventions are inadequate for addressing investment arbitration, as they create tension between protecting state sovereignty and accommodating the growing trend of international investment dispute resolution. Various national courts have upheld this approach, allowing the seizure of non-diplomatic assets of states to satisfy arbitral awards.[65] This development signifies a critical shift in the balance between protecting sovereign prerogatives and ensuring accountability and recourse for private investors. The implications of these changes are profound. On one hand, the increased accountability of states in international investment arbitration promotes a fairer and more predictable investment climate, which can enhance investor confidence and potentially stimulate

61 Georges Abi-Saab , Abaclat and Others v. Argentina Dissenting Opinion, Georges Abi-Saab 1-19, 34-117. https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C95/DC5313_en.pdf. Abi-Saab also critiques that the majority's approach in handling jurisdictional and procedural requirements deviates from prevailing principles of international law, particularly regarding proper interpretation methods and adherence to established jurisdictional and admissibility norms. Abi-Saab opines that the decision lacks alignment with fundamental international legal principles.

62 Supra, note 17 at para 337-371. See, International Centre for Settlement of Investment Disputes (ICSID) Convention, Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159. https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf

63 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

64 Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95. The Convention generally upholds state immunity, but its provisions are do not explicitly prevent investment arbitration against states as its provisions accommodates bypassing immunity through ICSID and BIT mechanisms. The Convention serves more as a protective tool for diplomatic agents rather than directly protecting states from international investment disputes or arbitration outcomes.

65 Alhashemi, *note* 51.

economic growth. On the other hand, the erosion of state immunity raises concerns about the sovereignty and financial stability of states, particularly developing countries that may face numerous arbitration claims. These states may find themselves vulnerable to significant financial liabilities, which can exacerbate their sovereign debt crises and undermine their ability to provide essential public services.

African countries face a multitude of challenges in managing sovereign debt, many of which intersect significantly with the dynamics of investment arbitration which may affect exercise of absolute immunity.[66] The foremost challenges include high debt levels, limited access to financial markets, adverse economic conditions, and external pressures from international financial institutions. These issues are compounded by the legal complexities and financial risks associated with investment arbitration.

4. What Opportunities are Present in Sovereign Debt Arbitration

Sovereign Debt Arbitration present a myriad of opportunities as outlined below.

- *Development of Precedents Favourable to Sovereign States*

Sovereign debt investment arbitration could offer African countries the opportunity to contribute to the development of international legal precedents that can benefit other sovereign states.[67] By successfully defending against claims or achieving favourable settlements, African nations can influence the interpretation of key legal principles, such as sovereign immunity, public policy exceptions, and the standards of treatment under investment treaties. African states can engage in strategic litigation by working with experienced legal teams to carefully select and defend cases that have the potential to set favourable precedents. By focusing on cases with broad implications, countries can shape international legal norms in ways that protect their interests and those of other developing nations. Additionally, collaborating with other states facing similar challenges can strengthen the position of African countries in arbitration proceedings. Collective efforts through regional organisations like the African Union (AU) or alliances with other Global South countries can lead to more coherent and powerful advocacy in arbitration forums.

- *Enhancing Legal and Institutional Capacity*

Engagement in sovereign debt arbitration may lead to creating opportunities for the development of stronger legal and institutional frameworks within African countries, similar to the sovereign debt crises of the 2000s precipitating sovereign debt restructuring legislations in Belgium, France and others.[68] The experience gained from arbitration cases can lead to the establishment of specialised legal departments, better-trained government officials, and the creation of more robust arbitration laws and policies. African countries should invest in comprehensive capacity-building programmes focused on international arbitration, sovereign debt management, and investment law. This can include establishing partnerships with international legal institutions, offering scholarships for advanced legal studies, and conducting regular training sessions for government officials and legal practitioners. Governments can

66 Livia Hinz, 'International Investment Agreements and Sovereign Debt: An Empirical Analysis' (2023) 18(3) Capital Markets L J 365, https://doi.org/10.1093/cmlj/kmad011.

67 Nayla Comair Obeid and Stavros Brekoulakis (eds), *The Plurality and Synergies of Legal Traditions in International Arbitration: Looking Beyond the Common and Civil Law Divide* (Kluwer Law International BV 2024).

68 Simon Hinrichsen, et al, Designing Sovereign Debt Legislation: Learning from the Comparative or Experience (2024) 1-38 Available at SSRN: https://ssrn.com/abstract=4802614 http://dx.doi.org/10.2139/ssrn.4802614

also create or strengthen domestic institutions responsible for managing sovereign debt and handling arbitration cases. This may involve setting up sovereign debt units within finance ministries, establishing national arbitration centres, and developing databases of legal precedents and best practices.

- *Promoting Stronger Transparency and Accountability in Debt Management*

Sovereign debt arbitration proceedings often require detailed disclosure of the terms and conditions of debt agreements, which can shed light on practices that may not have been fully transparent.[69] This can lead to greater accountability in the negotiation and management of sovereign debt, ultimately resulting in more sustainable borrowing practices. African countries can use the scrutiny that comes with arbitration to drive reforms in how sovereign debt is negotiated and managed. This includes adopting more transparent procurement processes, ensuring that debt agreements are subject to legislative approval, and implementing rigorous oversight mechanisms. Governments can also engage civil society organisations, the media, and the public in discussions about sovereign debt management. By fostering greater awareness and involvement, countries can build broader support for sustainable debt policies and ensure that future borrowing aligns with national development priorities.

- *Negotiating More Favourable Debt Terms*

The potential or ongoing threat of arbitration can provide leverage in negotiations with creditors.[70] African countries may be able to use this leverage to negotiate more favourable debt terms, such as lower interest rates, extended repayment periods, or debt restructuring agreements that are more aligned with their economic realities. Governments should proactively engage creditors to renegotiate debt terms before disputes escalate to arbitration. By demonstrating a willingness to meet obligations while highlighting the economic challenges they face, African countries can often secure more favourable terms that reduce the likelihood of default and subsequent arbitration. African countries can also leverage international platforms and initiatives, such as the G20's Common Framework for Debt Treatments, to advocate for more equitable debt restructuring solutions. By aligning with global efforts to address unsustainable debt, countries can gain additional support in negotiations.

- *Contributing to Global Discourse on Sovereign Debt and Development*

Involvement in sovereign debt arbitration places African countries at the centre of global discussions on sovereign debt, development, and economic justice. This presents an opportunity to shape the discourse and advocate for reforms that reflect the unique challenges faced by developing nations.[71] African countries can position themselves as thought leaders in the field of sovereign debt by participating in international conferences, publishing research, and contributing to global policy debates. By sharing their experiences and perspectives, they can influence the development of more just and equitable international financial systems. Through regional and international organisations, African countries can advocate for reforms to the international arbitration system, including calls for greater transparency, fairness, and the consideration of social and economic impacts in arbitration decisions.

- *Leveraging Arbitration for Economic and Financial Innovation*

Sovereign debt arbitration can also serve as a catalyst for economic and financial innovation. African countries can use the lessons learned from arbitration to explore new financial instruments, debt management strategies, and investment models that are better suited to their development needs.

69 *id*

70 Calliope Makedon Sudborough, 'Mediating Sovereign Debt Disputes' in *Mediating Sovereign Debt Disputes* (Springer International Publishing 2023) 123-153.

71 Maria Oluyeju and Olufemi Oluyeju, 'Normative Framework for the Regulation of Holdout Creditors inthe Sovereign Debt Market' (2023) *1 Intl Community L Rev* 1. 277-312.

Governments can explore the creation of financial instruments that reduce the risks associated with traditional debt, such as climate-resilient bonds. These instruments can offer more flexibility in repayment and align debt servicing with economic performance or environmental sustainability. African countries can adopt innovative debt management practices that prioritise long-term sustainability over short-term gains. This includes developing comprehensive debt sustainability frameworks, integrating debt management into broader development planning among other measures.

5. Human Rights Issues in Sovereign Debt Investment Arbitration

Sovereign debt investment arbitration serves as a mechanism primarily concerned with resolving disputes between sovereign states and private creditors. However, the outcomes of such arbitrations can have profound implications for the protection and realisation of human rights within debtor nations.[72] The intersection of sovereign debt arbitration and human rights encompasses complex legal, economic, and social dimensions, highlighting the need for a more holistic understanding of the consequences that these arbitrations can have on a country's populace. Among the most significant impacts of arbitration awards on human rights is the potential imposition of severe financial obligations on debtor states. These obligations often necessitate the implementation of austerity measures and other economic policies that can adversely affect the population's human rights.[73] Most often than not, economic and social rights are particularly at risk, as awards requiring debtor states to repay large sums of money may compel governments to divert funds away from essential public services such as healthcare, education, and social welfare. This diversion of resources can result in violations of the right to an adequate standard of living, the right to health, and the right to education, thereby undermining the well-being of the population.

Furthermore, the obligation to repay sovereign debt can significantly hinder a state's ability to pursue its development agenda, thereby affecting the collective right to development. For many African countries, the need to comply with arbitration awards can limit their capacity to invest in critical areas such as infrastructure, economic growth, and poverty alleviation. This restriction ultimately impedes long-term development goals, trapping countries in a cycle of debt that stifles progress and perpetuates underdevelopment.[74] The rights of vulnerable populations are also disproportionately impacted by the adverse effects of austerity measures through cuts to social programmes and public sector employment often hit the most marginalised groups the hardest, including women, children, and the elderly. These measures can exacerbate existing inequalities and undermine the protection of the rights of marginalised communities, leading to a deepening of social and economic disparities. The intersection of sovereign debt arbitration and human rights thus requires careful consideration to ensure that the pursuit of financial obligations does not come at the cost of the fundamental rights and well-being of the people within debtor nations.

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72 Juan Pablo Bohoslavsky, Francisco Cantamutto and Lucas Castiglioni, 'Human Rights Due Diligence by Corporate Creditors in Sovereign Debt Restructurings – A Great Missing Link' (2023) 8(2) *Business and Human Rights* J 213.

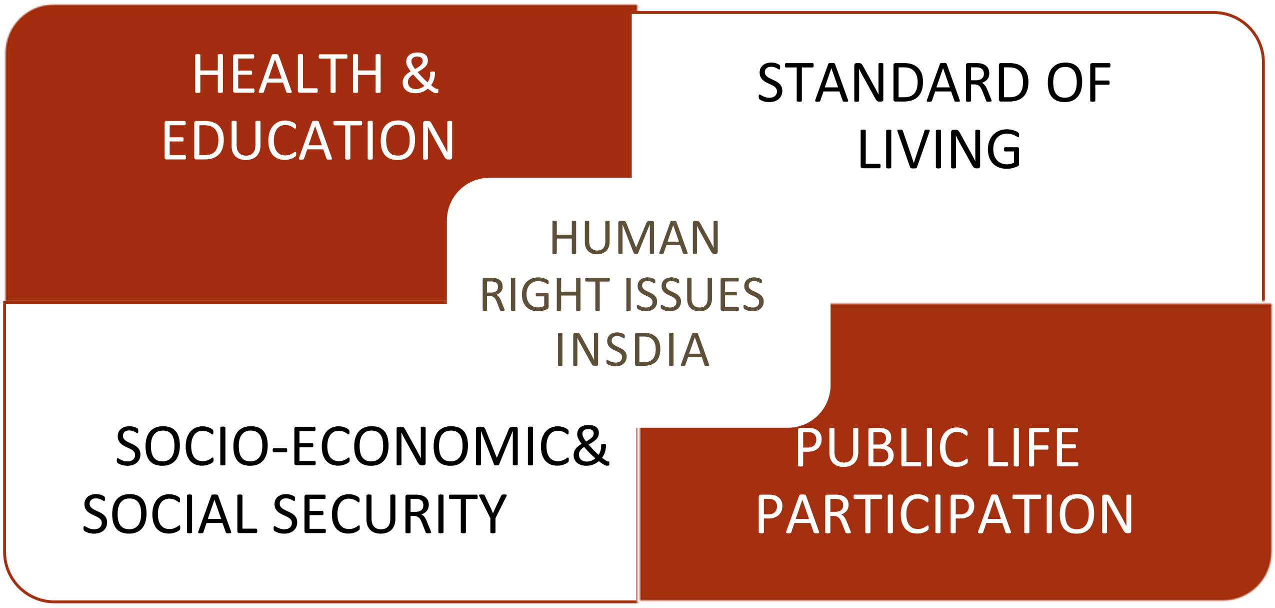
73 Margot E Salomon, 'The Trojan Horse of Sovereign Debt' (2024) 15(1) Transnational Legal Theory 1.

74 Ikejiaku, Brian-Vincent, 'International Law and Sustainable Development: Grounds for Cancellation of Africa Debts' (2023) 16(2) *Law and Development Review* 385.

5.1 Key Human rights concerns in Sovereign Debt Arbitration

The UN International Covenant on Economic, Social and Cultural Rights, the African Charter and national Human Rights legislations are the major international, regional and national frameworks on human rights.[75] Together, these legal documents set the standard for human rights in Africa. Sovereign debt investment arbitration can raise significant human rights concerns, often due to the inherent tension between enforcing investment protections and upholding economic, social, and cultural rights. This dynamic has far-reaching implications, particularly for vulnerable populations in debtor nations.

Figure 2: **Most Affected Human Rights inSovereign Debt Investment Arbitration**



Right to Adequate Standard of Living

Article 11 of the ICESCR ConventionandArticle 14 of the African Charter provides for the right to adequate standard of living and propertyrespectively. Arbitration awards or settlements that mandate substantial financial compensation canseverelystrain a country's budget. This financial pressure often leads to cuts in essential public servicessuchashealthcare, education, and social welfare programmes. These reductions can undermine therighttoanadequate standard of living, particularly for vulnerable populations who rely heavily on theseservices.[76]Furthermore, in an effort to meet financial obligations arising from arbitration claims, governmentsmay resort to implementing austerity measures. These measures typically involve reducingpublicexpenditure and increasing taxes, actions that disproportionately impact low-income andmarginalised groups, thereby further eroding their standard of living.

[75] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217; Constitution of the Federal Republic of Nigeria (1999) Cap. C23 LFN 1999; Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) Government Gazette
378 (No. 17678); Constitution of Kenya, 2010 (Rev. 2017)

[76] Muhammad Bello, Re-Imagining Sovereign Debt in International Law through the lens of Socio-Economic Rights.(Pretoria University Law Press, 2024) 88-135

Right to Health

Article 12 of the ICESCRConvention recognizes the right of everyone highest attainable standard of physical and mental health.and Article 16 of the African Charter provides for the right to health, mental and physical well-being.The financial burdens imposed by arbitration awards can significantly limit the resources availableforhealth services, which in turn affects the availability and quality of healthcare for the population.[77]Thissituation can lead to reduced access to essential medical services and treatments, compromisingthe right to health. Additionally, the necessity to divert funds to satisfy arbitration claims mayhinder investments in health infrastructure, resulting in inadequate health facilities, insufficient medical supplies, and diminished healthcare accessibility. Such outcomes are particularly detrimentalinregions where healthcare systems are already under strain.

Right to Education

Article 13 and 14 oftheICESCR and Article 17 AfricanCharter recognize the right of everyone to education. Similar tothehealthcare sector, substantialarbitration settlements or financial penalties can lead to reductions ineducation budgets. This financialshortfall may result in decreased funding for schools, lower qualityofeducation, and limited accesstoeducational resources and opportunities, all of which can negativelyimpact the right to education.[78]Furthermore, economic constraints often force governments to scalebackor eliminate educational programmes and initiatives, including those aimed at improving educationaloutcomes for disadvantagedgroups. The erosion of these programmes can have long-term detrimentaleffects on social mobilityandequality.

Right to Socio-Economic, Cultural and Social Security

Article 9, 11 and 15 of the ICESCR and Article 22 AfricanCharter provides for the right to economic and social security for the individual. Arbitration-relatedfinancial strains frequently lead to cuts in social security programmes, including unemployment benefits, pensions, and social assistance. These cuts can leave individuals and families without crucial support, making it difficult for them to meet basic needs, thereby exacerbating poverty and inequality. Vulnerable populations, such as the elderly, disabled individuals, and low-income families, are particularly affected by reduced social security spending, which undermines their right to social protection and further entrenches social disparities.

Right to Participate in Public Life

Article 1(1) of the ICESCR and Article 13 African Charter recognizes the right to self-governance and participation in public life. Equally, Articles 3 and 25 of the International Covenant on Civil and Political Rights (ICCPR) provides for political rights and the right to participate in public life.[79] The financial pressure resulting from arbitration settlements may reduce the government's capacity to engage in meaningful public consultations and participatory processes. This diminished capacity can weaken the public's ability to influence decisions related to debt management and economic policies, thereby affecting democratic governance.[80] Furthermore, the focus on arbitration and financial settlements may overshadow other important governance issues, leading to a reduction in transparency and accountability in the management and allocation of public resources. This lack of public involvement and oversight can erode trust in governmental institutions.

7 *id*

id

7 UN General Assembly, International Covenant on Civil and Political Rights, United Nations, Treaty

7 Series, vol. 999, p. 171, 16 December 1966,

80 *id*

5.2 Challenges and Case Studies: Human Rights Implications of Sovereign Debt Investment Arbitration

Addressing human rights within the framework of investment arbitration presents numerous challenges. The traditional investment arbitration system primarily focuses on safeguarding investor interests, often to the detriment of broader human rights considerations. One significant challenge lies in the use of ISDS mechanisms, which are commonly invoked in sovereign debt disputes.[81] These mechanisms are designed to protect investor rights under BITs or free trade agreements, but they typically fail to account for the human rights obligations of states or the potential human rights impacts of arbitration awards. This narrow focus on investor protection can exacerbate human rights violations, particularly in contexts where states are forced to adopt measures that compromise the well-being of their populations to satisfy arbitral decisions.

Another challenge is the lack of human rights considerations in arbitral decisions. Arbitration tribunals often prioritise the enforcement of contractual rights and the protection of investor expectations over the social and economic rights of affected populations.[82] This legalistic approach can lead to decisions that disregard the broader social and economic consequences of arbitration awards, thereby perpetuating human rights abuses. Furthermore, the confidentiality and lack of transparency that characterise arbitration proceedings exacerbate these issues. The secretive nature of these proceedings limits public scrutiny and the involvement of affected communities, preventing the full consideration of human rights impacts and hindering accountability. Without transparency, it becomes difficult to ensure that arbitration outcomes are aligned with human rights standards. Several legal precedents and case studies have highlighted the human rights implications of sovereign debt investment arbitration as *Table*s 1 and
2 show.

Table 1: Case Study - Argentina Debt Crisis of 2001
The Argentine debt crisis of 2001 serves as a poignant example. Following its economic collapse, Argentina defaulted on its debt and subsequently faced multiple arbitration claims under the ISDS mechanism, particularly at the ICSID. Foreign bondholders argued that Argentina's debt restructuring measures violated their rights under BITs. The austerity measures Argentina implemented to comply with these arbitration awards had severe social impacts, including increased poverty, unemployment, and a decline in access to essential services. The ICSID tribunals largely upheld the claims of investors, reinforcing the primacy of investor rights over the human rights concerns raised by Argentina. However, these cases also sparked global debates about the need to reform the ISDS system to better balance investor protection with human rights obligations.

Bantekas (2023).[84]

81 Flavia Marisi, *Rethinking Investor-State Arbitration*. (Springer, 2023) 20-45.
82 Feria-Tinta, Monica, 'Public Interest in Investment Arbitration: The Rapid Ascent of Human Rights, Labour Law and Environmental Law' in *Reimagining the International Legal Order* (Routledge 2024) 277-298.
83 Illias Bantekas, "Party Autonomy Limitations in Sovereign Loan Contracts?" (2023) 24 *UC Davis Bus*. Illias

84 Bantekas, "Party Autonomy Limitations in Sovereign Loan Contracts?" (2023) 24 *UC Davis Bus*.

Table 2: Case Study - Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (2009)

The case of Ecuador and the Chevron arbitration illustrates the tension between investment arbitration and human rights. Ecuador faced an arbitration claim by Chevron under the US-Ecuador BIT, related to environmental damages and the enforcement of a domestic court judgment against Chevron. The arbitration tribunal ruled in favour of Chevron, ordering Ecuador to pay substantial damages. This decision raised significant human rights issues, particularly concerning the right to a healthy environment and the rights of indigenous communities affected by Chevron's activities in the Amazon. The tribunal's decision, which prioritised Chevron's investment rights, was criticised for undermining Ecuador's ability to enforce its environmental laws and protect the rights of its citizens. This case is often cited as an example of how investment arbitration can conflict with the enforcement of human rights, particularly in the context of environmental protection and indigenous rights. It has sparked calls for greater integration of human rights considerations into the arbitration process.

Source: PCA Cases

The Argentine case demonstrated how austerity measures imposed to satisfy arbitral awards led to severe social impacts, while the Chevron arbitration illustrated the conflict between investment rights and environmental and indigenous rights. These examples emphasise the urgent call for integrating human rights considerations into the arbitration process to ensure a more balanced and equitable approach to resolving sovereign debt-related disputes.

5.3 Nexus Between Sovereign Debt, Investment Arbitration, and Human Rights

The intersection of sovereign debt, investment arbitration, and human rights presents a complex and multifaceted issue, particularly evident in regions like Africa where socio-economic and legal contexts introduce unique challenges and opportunities. This nexus can be understood through several dimensions.

Sovereign debt obligations frequently lead to austerity measures and economic reforms imposed by IFIs, which can have significant human rights implications. In many cases, these measures involve cuts in public spending, reductions in social services, and reductions in public sector employment. Such austerity policies disproportionately affect vulnerable populations, potentially leading to violations of economic, social, and cultural rights. For example, in numerous African countries, debt-related austerity has resulted in reduced funding for essential services like healthcare and education. This has exacerbated poverty and inequality, further undermining the right to an adequate standard of living.[86] Likewise, investment arbitration often arises when investors seek compensation from states for alleged breaches of investment agreements. These disputes can involve substantial financial claims, and the resulting arbitration awards can significantly impact a state's capacity to meet its human rights obligations.

The enforcement of such awards can place additional economic strain on already indebted nations, potentially leading to further austerity measures. Moreover, arbitration proceedings typically concentrate on protecting investor rights, with limited consideration given to the broader social and

[85] PCA Case No. 2009-23. https://pca-cpa.org/en/cases/49/
[86] Debt Justice, 'Colonialism and Debt: How Debt is Used to Exploit and Control' (2022) accessed 20 August 2024

human rights implications of the awards. This narrow focus can exacerbate human rights challenges in debtor countries. The legal frameworks that govern investment arbitration, including BITs and multilateral investment agreements, often prioritise investor protection over a state's ability to regulate in the public interest.[87] This prioritisation can create tensions between the need to attract foreign investment and the obligation to protect human rights. There is an increasing recognition of the necessity to balance these interests, with some contemporary investment treaties incorporating provisions that acknowledge human rights, sustainable development, and the state's regulatory space.[88] Despite this progress, such provisions remain relatively rare, and many existing treaties continue to favour investor rights over human rights considerations.

6. Feminist Gendered Analysis in Sovereign Debt Investment Arbitration

A feminist gendered analysis of sovereign debt investment arbitration delves into how the mechanisms and outcomes of arbitration processes impact women and gender minorities. This approach examines the intersection of gender, economic power, and international law, revealing how the traditionally gender-neutral frameworks of arbitration can perpetuate or exacerbate gender inequalities.

6.1 Gendered Impacts of Sovereign Debt and Economic Policies

Sovereign debt crises and the resulting arbitration proceedings often lead to austerity measures and economic reforms that disproportionately affect women and gender minorities.[89] The impacts of these measures can be examined from various perspectives. Economically, women are frequently overrepresented in low-paying, informal, and precarious employment sectors. Austerity measures that involve cuts to public sector jobs, social services, and welfare programs disproportionately harm women, who rely more heavily on these services due to their socio-economic positions. For instance, reductions in funding for healthcare and education can increase the unpaid care burden on women, limiting their economic opportunities and perpetuating cycles of poverty. Additionally, feminist economists highlight the concept of social reproduction, which includes unpaid care work, domestic labour, and community activities crucial for societal functioning.[90] During debt crises and following arbitration awards, the increased pressure on public services often leads to a rise in unpaid labour, disproportionately shouldered by women. This unpaid labour is rarely factored into economic analyses despite its essential role in maintaining the social fabric. Furthermore, the impact of sovereign debt arbitration varies based on intersecting identities such as race, class, and ethnicity, etc among women. For example, indigenous women and women from marginalised racial groups may face compounded disadvantages due to both structural inequalities and specific policies enacted to meet debt obligations.

6.2 Gender-Blindness in Arbitration Proceedings

Sovereign debt investment arbitration typically operates within a legal framework that does not account for gender-specific impacts.[91] The gender-neutral language used in arbitration treaties and proceedings

[87] Abayomi Okubote, "The Investment Treaty Regime and Public Interest Regulation in Africa." (2024): 182-188.

[88] Ladan Mehranvar, et al, 'How the International Investment Law Regime Undermines Access to Justice for Investment-Affected Stakeholders' (2024) *SSRN* 4702705. 1-10

[89] Sylvia Walby, 'Gender and the Financial Crisis' (2009) Paper for UNESCO Project on Gender and the Financial Crisis, Lancaster University 2. 1-33; Bettio, Francesca, 'Women, Men and the Financial Crisis: Seven Lessons from Europe' (2012) 2 European Gender Equality Law Review 4.

[90] María Nieves Rico, 'Life Sustainability and Debt Sustainability: Care in the Centre' in Feminism in Public Debt (Bristol University Press 2024) 185-196.

[91] Lisa Stifler, 'Debt in the Courts: The Scourge of Abusive Debt Collection Litigation and Possible Policy Solutions' (2017) 11 Harvard Law & Policy Review 91.

can obscure the differential effects of debt and economic policies on men and women. Investment treaties and arbitration rules are often drafted without considering gendered impacts.[92] For instance, arbitration panels may focus on the legality of debt restructuring or contract enforcement without addressing how these actions affect women differently. This gender-blind approach reinforces existing gender inequalities embedded in international economic relations. Additionally, arbitration panels generally lack gender expertise, which leads to decisions that overlook or underestimate the impact of their rulings on women and gender minorities. The absence of gender-disaggregated data and gender impact assessments in arbitration processes further exacerbates this issue, making it challenging to identify and address gender-specific harms in these arbitration proceedings.

Table 3: Case Study - Gendered Impact Assessments in Argentine and Jamaican Debts of the 2000s - The Feminisation of Poverty
While sovereign debt investment arbitration cases rarely address gender issues directly, their impacts are evident in several high-profile cases. Argentina's debt crisis and subsequent arbitration claims under the International Centre for Settlement of Investment Disputes (ICSID) led to significant austerity measures. These measures, including cuts to public services, social welfare programs, and public sector employment, disproportionately affected women. The reduction in social services increased the unpaid care burden on women, limiting their participation in the formal economy and leading to a decline in women's employment rates. This case illustrates how gender-blind economic policies and arbitration awards can exacerbate gender inequalities. Source: UN ECLAC

6.3 *Impact of Sovereign Debt Investment Arbitration on Gender*

The effects of sovereign debt investment arbitration on gender are multifaceted and can be deeply entrenched in the socio-economic fabric of debtor countries. Arbitration outcomes can perpetuate or exacerbate gender inequalities in several ways.

Public sector cuts resulting from arbitration awards often lead to significant reductions in employment, where women are disproportionately represented.[94] These cuts not only diminish women's economic participation but also reduce their access to social services essential for gender equality. The erosion of social services due to arbitration can lead to the privatisation of essential services such as water, healthcare, and education. Women, particularly those from low-income households, are disproportionately affected by reduced accessibility and increased costs of these services. This erosion exacerbates existing gender inequalities and undermines women's rights to health, education, and a decent standard of living. Additionally, economic crises triggered by sovereign debt defaults and subsequent austerity measures can lead to increased gender-based violence.[95] Financial stress, unemployment, and reduced access to social services can heighten the risk of domestic violence and exploitation. The weakening of social safety nets due to arbitration outcomes can also limit resources

92 Andrea K Bjorklund et al, 'The Diversity Deficit in International Investment Arbitration' (2020) 21(2-3) *The Journal of World Investment & Trade* 410, 410-440.

93 https://repositorio.cepal.org/server/api/core/bitstreams/7240b533-118e-4a31-8e29-6495d099f5d1/content ; https://www.cepal.org/en/pressreleases/debt-owed-women-we-must-break-statistical-silence-and-progress-toward-care-society

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95 Diane Perrons. *Is Austerity Gendered?* (John Wiley & Sons, 2021) 10-25.
Verónica Serafini Geoghegan and Montserrat Fois, 'Women, Debt and Gender Inequalities' (2021) *Latindadd* https://www.latindadd.org/wp-content/uploads/2021/09/Mujeres-deuda-y-desigualdad- Final_English.pdf accessed 20 August 2024

available to support survivors of gender-based violence. Lastly, debt-related arbitration outcomes may force governments to retract or underfund gender equality policies and programs. Initiatives aimed at reducing the gender wage gap, supporting women's entrepreneurship, or combating gender-based violence may be deprioritised in favour of meeting debt obligations.

Table 4: Case Study - Jamaica's Debt Crisis and Link to Gender-Impact Austerity Measures
Jamaica's debt crisis in the 2010s resulted in severe austerity measures as part of debt restructuring agreements. Although not directly linked to investment arbitration, the economic policies implemented had significant gendered impacts. Women, who were disproportionately represented in the public sector and dependent on social services, faced increased economic hardships. The austerity measures led to cuts in healthcare, education, and social protection programs, exacerbating gender inequalities and increasing the unpaid care burden on women. Source: UN ECLAC

7. Human Rights-Based Approach In Sovereign Debt Investment Arbitration

There is a growing call for the integration of human rights considerations into debt relief and restructuring processes. This approach advocates for ensuring that debt solutions do not compromise human rights and that they contribute to sustainable development and social justice. Additionally, there is increasing support for the development of international standards and mechanisms that incorporate human rights impacts into debt-related decisions and arbitration. Such standards would promote a more balanced approach that respects both investment protections and human rights, ensuring that economic policies do not come at the expense of fundamental human rights.[97] A Human Rights-Based Approach (HRBA) to sovereign debt investment arbitration aims to integrate human rights principles into the arbitration process to ensure that outcomes do not infringe upon the rights of affected populations by conducting a Human Rights Baseline Risk Assessments.[98] This approach seeks to balance investor rights with the broader social, economic, and cultural rights of people within debtor nations.

7.1 Core Elements of a Human Rights-Based Approach

An ideal HRBA for SDIAs should be founded on several key principles and elements that shape the design, implementation, and evaluation of policies and processes in Human Rights Baseline Risk Assessments:

- **Participation**: Ensuring that affected populations, including marginalized and vulnerable groups, have a meaningful role in the arbitration process is fundamental. This involves their active participation in decision-making and access to relevant information throughout the proceedings.

96 *Supra* note 94.

97 Dakota Anton, Malaika Nduko and Adeyinka Olaleye, *A Human Rights-Based Approach to Debt and Climate Justice* (University of Essex Human Rights Centre Clinic in partnership with the International Network for Economic, Social and Cultural Rights (ESCR-Net) 30 June 2023).

98 Ilias Bantekas, 'The Public Interest Perspective of International Courts and Tribunals' (2021) 38 *Arizona Journal of International and Comparative Law* 61.

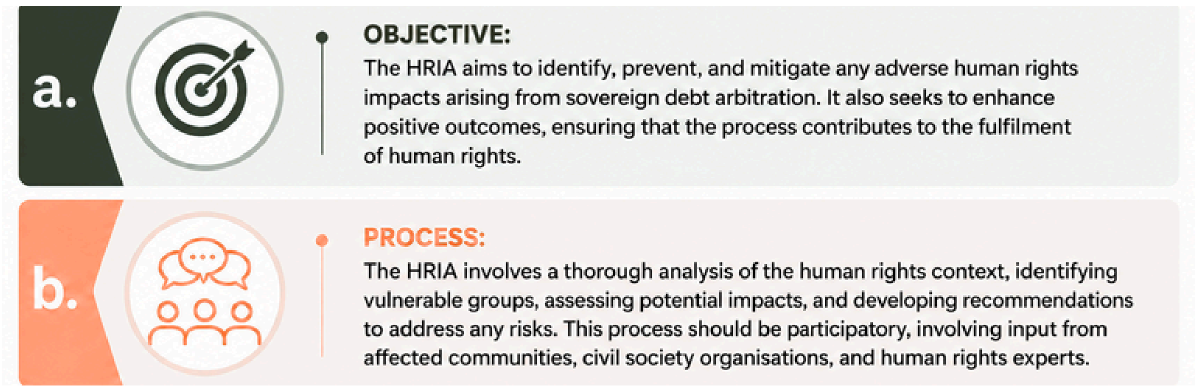
- **Accountability**: Establishing mechanisms to hold both states and investors accountable for their actions is crucial. This ensures that all parties respect, protect, and fulfil human rights obligations throughout the arbitration process.
- **Non-discrimination and Equality**: Addressing and preventing discrimination in the arbitration process and its outcomes is essential. This involves ensuring that the rights of all individuals, regardless of gender, race, ethnicity, or socio-economic status, are upheld and protected.
- **Empowerment**: Strengthening the capacity of individuals and communities to understand and claim their rights, and to participate effectively in the arbitration process, is a critical component of the HRBA.
- **Legality**: Ensuring that all arbitration proceedings and outcomes are consistent with international human rights standards and obligations is fundamental to the HRBA.

Also, the UN Guiding Principles on Business and Human Rights (UN GPBHR) offer a framework for ensuring that private creditors and financial institutions uphold human rights in their lending practices and arbitration proceedings.[99] Applicable key principles include the State Duty to Protect Human Rights (Principles 1 and 2), which mandates states to regulate financial actors and ensure policies are aligned with human rights obligations, and the Corporate Responsibility to Respect Human Rights (Principle 11), requiring private creditors to avoid infringing on human rights and address adverse impacts linked to their activities. Principles such as Human Rights Due Diligence (Principle 17) compel creditors to assess and mitigate the human rights implications of loan agreements and arbitration decisions, while Principle 22 emphasizes remediation where adverse impacts occur. In arbitration, creditors should be required to demonstrate adherence to these principles, ensuring disputes and debt restructuring do not undermine socio-economic rights or exacerbate inequalities, particularly for marginalized groups. These principles call for robust safeguards, accountability mechanisms, and remedies that align lending and arbitration practices with human rights, fostering transparency, equity, and sustainable development.

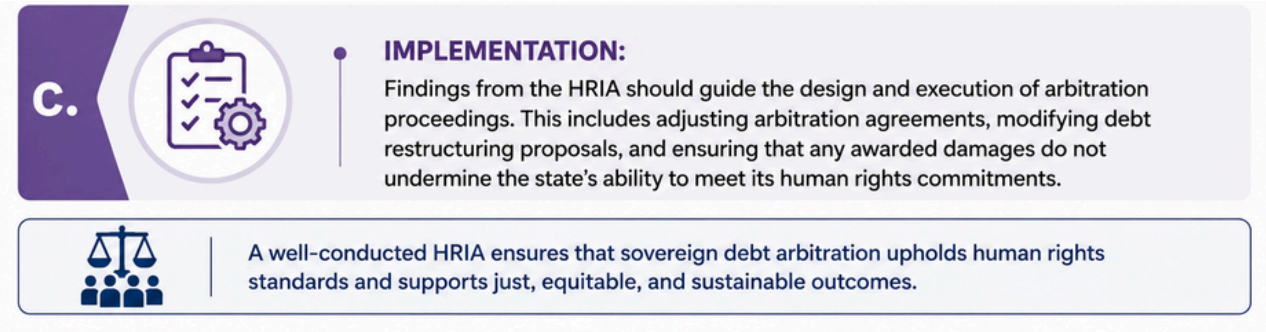
A robust HRBA serves as a crucial foundation for developing an effective Human Rights Impact Assessment (HRIA) toolkit. The HRBA systematically identifies and evaluates potential human rights risks associated with SDIAs. This comprehensive analysis highlights areas where human rights may be adversely affected, providing critical insights that inform the subsequent design of the HRIA toolkit. The toolkit, in turn, leverages the HRBA principles to develop tailored assessment methodologies and indicators that can accurately measure and mitigate human rights impacts. By integrating the principles from the HRBA, the HRIA toolkit can support a targeted and context-specific approach to SDIA human- rights consideration, enhancing its effectiveness in safeguarding human rights in SDIA and related negotiations and Human Rights Baseline Risk Assessments.

7.2 Human Rights Impact Assessment (HRIA)

The Human Rights Impact Assessment (HRIA) is a vital tool within the HRBA framework. It evaluates the potential and actual impacts of arbitration proceedings and outcomes on the human rights of affected populations:



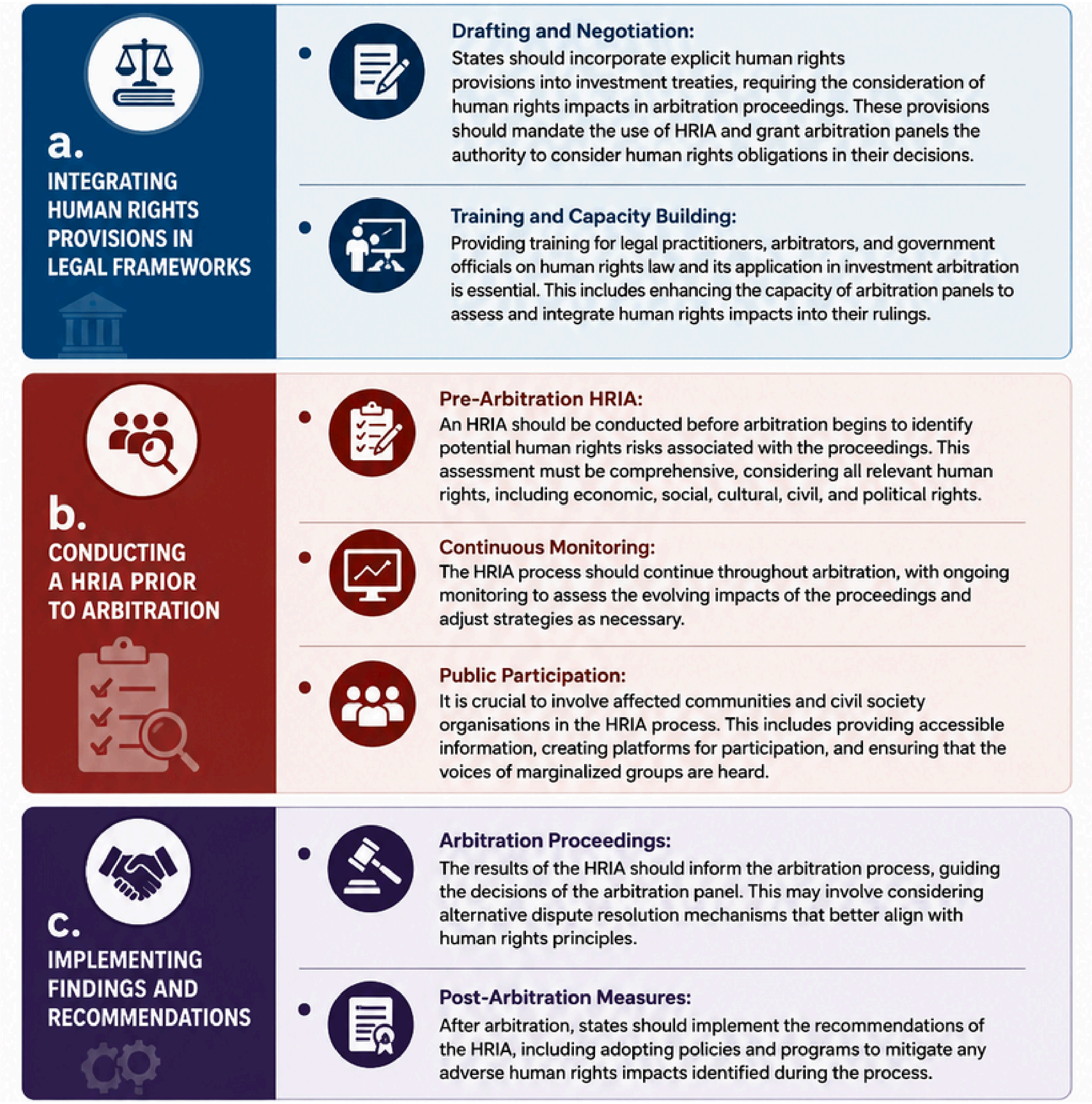
99 United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (UNHRC, 2011) UN Doc A/HRC/17/31. The UN GPBHR outline the corporate responsibility to respect human rights, the state duty to protect against abuses by third parties, and the need for access to effective remedies for affected individuals.



7.3 Design and Implementation of Human Rights Impact Analysis

Creating and implementing a HRIA involves a systematic process to identify, assess, and address the potential human rights impacts of policies. The preliminary steps involve several critical actions. First, clearly outlining of the HRIA by specifying the particular policies, projects, or activities to be assessed, and define the objectives, such as identifying potential human rights impacts and ensuring adherence to relevant national, regional and international human rights standards. Afterwards, identifying all relevant stakeholders, including affected communities, rights holders, and experts, and engaging in early consultations to gather diverse perspectives and a comprehensive understanding of potential impacts will follow. Finally, collecting both quantitative and qualitative data to inform the standards of the HRIA tool kit becomes relevant. These preliminary steps are crucial for setting a solid foundation for a thorough and effective HRIA.

After the preliminary steps have been concluded, the next steps would include-



7.4 Analysis of Opportunities, Challenges, and Navigation Strategies of a HRBA & HRIA

Implementing a HRBA & HRIA into sovereign debt investment arbitration and agreements presents both notable opportunities and significant challenges. Some of the opportunities present for incorporating this approach and analysis for human rights include ensuring its alignment with international norms, which enhances the legitimacy of arbitration outcomes. By integrating human rights considerations, the HRBA & HRIA ensures that decisions contribute to sustainable development and social justice, thereby reinforcing the credibility and fairness of the process. Additionally, incorporating human rights into arbitration can enhance public trust, reducing social tensions and garnering broader support for debt restructuring efforts. This approach also allows for the early identification and mitigation of potential human rights risks, preventing adverse impacts and ensuring that arbitration outcomes do not exacerbate existing inequalities or undermine fundamental rights.

Nonetheless, some challenges associated with implementing an HRBA are significant and multifaceted. There may be considerable resistance from legal practitioners, arbitrators, and investors who are accustomed to traditional arbitration frameworks that prioritise investor rights over human rights. Overcoming this resistance will require sustained advocacy, targeted training, and the development of new legal norms that better incorporate human rights considerations. Moreover, conducting comprehensive HRIAs and implementing an HRBA demand substantial resources, including financial, technical, and human capacity. This can be particularly challenging for debtor nations, especially in the Global South, which may struggle to mobilise the necessary resources. Lastly, the HRBA necessitates balancing the often-conflicting interests of different classes of creditors and investors, states, and affected populations. Striking this balance can be particularly challenging when investor and creditor demands clash with the imperative to protect human rights, requiring careful negotiation and compromise.

8. Regional Analysis: Interaction of Sovereign Debt, Investment Arbitration, and Human Rights in Africa

African countries grapple with substantial sovereign debt, often accrued through loans from international financial institutions, bilateral creditors, and commercial lenders.[100] The debt burden has

100 AfDB, Annual Meetings 2024: old debt resolution for African countries – the cornerstone of reforming the global financial architecture, 15th May, 2024 https://www.afdb.org/en/news-and-events/annual-meetings-2024-old-debt-resolution-african-countries-cornerstone-reforming-global-financial-architecture-70791 accessed 22 August 2024

been exacerbated by external shocks, such as fluctuations in commodity prices, global financial crises, and the economic repercussions of the COVID-19 pandemic. To service this debt, many nations have implemented austerity measures that have had severe social consequences, including heightened poverty, diminished access to essential services, and growing inequality. These impacts are especially pronounced in regions where public spending is crucial for delivering basic services. Equally, Africa's legal landscape is diverse, with significant variation in the legal frameworks governing investment and debt. Many African nations are parties to numerous BITs that often include clauses enabling investors to initiate arbitration against the state. These BITs typically prioritise the protection of foreign investment with limited consideration of human rights. Consequently, arbitration tribunals often focus on investor interests, sometimes at the expense of the state's ability to fulfil its human rights obligations. However, there is a notable movement towards revising investment treaties in Africa to better align investor protection with public policy objectives, including human rights. For example, the Pan-African Investment Code by the African Union, seeks to provide a comprehensive framework that integrates sustainable development and human rights considerations.

Several high-profile investment arbitration cases involving African countries highlight the tensions between sovereign debt, arbitration, and human rights. For instance: The ICSID case of *Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe* involved Dutch farmers who claimed that Zimbabwe's land reform programme violated their investment rights under the Netherlands-Zimbabwe BIT.[101] The tribunal awarded compensation to the investors, but the case raised significant human rights concerns regarding land rights and the rights of indigenous populations. Faced with challenges under BITs related to its Black Economic Empowerment (BEE) policies, South Africa also has terminated several BITs and developed a new domestic investment framework that emphasises the state's right to regulate in the public interest, including for human rights considerations.[102] Recent developments in Africa indicate a growing awareness of the need to integrate human rights considerations into sovereign debt management and investment arbitration: Developments such as the AfCFTA is poised to transform investment and trade across the continent.

The investment protocol under the AfCFTA promotes sustainable development and respect for human rights, reflecting broader development goals for the continent and stronger discussions from a debt sustainability perspective at that level.[103] Likewise, initiatives such as the G20's Debt Service Suspension Initiative (DSSI) have offered temporary relief to some African countries. However, the long-term sustainability of debt remains a concern, with ongoing discussions about the need for more comprehensive debt restructuring that takes human rights impacts into account. Several African countries are revising their investment laws and BITs to better align with their development objectives and human rights obligations. For example, Nigeria's new Model BIT includes provisions that emphasise sustainable development and allow for the consideration of public policy objectives in arbitration proceedings.[104] Nigeria's revised approach to international investment agreements focuses on several key areas. It introduces circumscribed National Treatment (NT) and Most-Favoured-Nation (MFN) clauses to better manage foreign investments and ensures BITs align with sustainable development goals by addressing issues such as the environment, human rights, health, labour, safety, and others into the investment treaty. The approach aims to preserve Nigeria's regulatory autonomy, balance investor rights and obligations, and include temporary safeguards. It also incorporates investment facilitation provisions for greater transparency and support, emphasises dispute prevention, and establishes a Joint Implementation Committee for monitoring and mediation. Additionally, pre- conditions and safeguards will be introduced to regulate access to ISDS and limit unrestricted arbitration

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101 (ICSID Case No. ARB/05/6)

102 Azwimpheleli Langalanga, *Imagining South Africa's Foreign Investment Regulatory Regime in a Global Context* (South African Institute of International Affairs 2015). 1-10

103 The Protocol on Investment (POI or Protocol) to the Agreement Establishing the African Continental Free Trade Area (AfCFTA) adopted on February 18/19, 2023,

104 Patience Okala Ajuma, Nigeria's New Approach to International Investment Agreements: Innovation, Refinement and Coherence (paper presented at the AfAA 2nd Annual International Arbitration Conference, 15-16 April 2021, 27 April 2021).

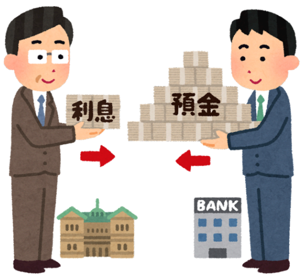
exposure.[105] Together, these past and current happenings all have regional implications for the future and trajectory of SDIA in Africa and its human rights considerations.

9. Role of Various Actors in Sovereign Debt Investment Arbitration

a. Governments

Governments play a pivotal role in sovereign debt investment arbitration. Governments are tasked with negotiating debt terms, managing public debt, and implementing policies to ensure debt sustainability. Effective debt management is essential for minimising default risk and managing relations with creditors. Also, government as principal actors establish and enforce the legal frameworks governing investment agreements and arbitration processes. This includes drafting and negotiating BITs, national investment laws, and arbitration rules. As such, Governments have a responsibility to uphold human rights, ensuring that economic policies and arbitration outcomes do not undermine these rights. Policy decisions, such as economic reforms and austerity measures, can influence arbitration outcomes and are subject to challenge in arbitration processes.

b. Creditors



Different Creditors, including bilateral and multilateral institutions, significantly impact sovereign debt dynamics. Creditors provide essential capital for development but impose conditions that can affect debt sustainability and economic policy. Their involvement in negotiating loan terms and investment agreements includes provisions related to arbitration. Also, creditors play a crucial role in debt restructuring processes, including debt relief initiatives and negotiations, influencing a country's ability to address debt sustainability and human rights concerns.

Special group creditors such as the Paris Club creditors, can play a pivotal role in leveraging the inclusion of human rights considerations in SDIA. As a significant forum for debt restructuring, the Paris Club has the capacity to incorporate human rights conditions into its debt relief and restructuring frameworks. By adopting and enforcing human rights-related criteria as part of their debt restructuring agreements, Paris Club creditors can drive improvements in debtor countries' policies and practices. This approach would not only align debt relief initiatives with international human rights standards but also incentivise debtor nations to prioritise human rights in their economic policies. Furthermore, by setting a precedent for integrating human rights considerations, Paris Club creditors can influence other creditors and financial institutions to adopt similar standards, thereby fostering a more holistic approach to debt sustainability that respects and promotes human rights. This proactive stance could enhance the overall effectiveness of debt relief efforts and contribute to more equitable and sustainable development outcomes.

c. *International community*

The international community, including organisations, NGOs, and other stakeholders, influences sovereign debt investment arbitration. International Bodies like the United Nations influence global debt policies and investment practices, through providing technical assistance, financial support, and policy advice, and influencing international norms. Likewise, NGOs and Civil Society are already making great strides advocating for human rights and sustainable development, highlighting the impacts of debt and investment policies on vulnerable populations, and engaging in research, awareness-raising, and advocacy. Organisations such as AfSDJN, Jubilee, FEMNET, AFRODAD to mention a few are at the forefront of some of the relevant improvements and awareness creation in the public. Regional

105 *id*

organisations, such as the African Union and the African Development Bank (AfDB), including the African Legal Support Facility (ALSF) as part of the AfDB provide technical assistance, work on managing sovereign debt, and investment within the regional context, promoting cooperation and frameworks that focus on development and human rights. These organisations can leverage on existing collaborative strategies such as the Common Framework and other to drive human right and other public interest incorporation into SDIA, relying on Pan-African Investment Code and the UNCTAD Investment Policy Framework for Sustainable Development provide guidelines for integrating human rights and sustainability into investment agreements.

10. Policy Recommendatins

The following recommendations are made to integrate gender perspectives and human rights protections into sovereign debt and investment processes to facilitate more equitable and inclusive outcomes that foster sustainable development across Africa.

a) *Incorporating stronger human right responsibilities for HBRA on Key Actors*

To ensure human rights considerations are provided for, it is recommended that every key actor in the sovereign debt dispute resolution sphere be obligated with stronger responsibilities to the protecting human rights and prevent abuse via SDIA. First, African national governments as primary duty bearers under many international and African human rights conventions, should prioritise the integration of human rights protections into national sovereign debt management strategies and investment agreements. As actors responsible for negotiating debt terms, managing public debt, and ensuring debt sustainability Governments should incorporate specific human rights provisions from the African Charter and IHR conventions into BITs, national investment laws, and arbitration rules. Comprehensive HRBA and HRIA should precede sovereign debt agreements and investment negotiations to identify socio-economic risks to vulnerable communities. Also, African nation government should start facilitating public engagement in debt related making decision-making processes through referendums through the debt office for the development of debt and investment policies, allowing diverse perspectives to inform decision-making. Equally important is the provision of clear and accessible information about debt agreements and investment treaties. This includes offering disaggregated data on the impacts of economic policies to human rights to ensure that all stakeholders, including those from underrepresented groups, are well-informed. By promoting transparency and making relevant information readily available, informed public discourse could ultimately lead to more equitable and responsible public decision making on sovereign debt agreements.

Private creditors and financial institutions as key actors must also be held accountable for respecting human rights and gender equality in sovereign debt and investment agreements. Financial institutions should be required to conduct human rights due diligence and assessment as part of their lending processes, ensuring that their investments do not negatively impact or violate human rights. This should be incorporated into lending protocols and agreements, ensuring that creditors proactively address gender-based human rights impacts. In line with the UN Guiding Principles on Business and Human Rights, creditors must adopt a corporate responsibility to respect gender rights, take steps to prevent harm, and provide remedies where violations occur.

At the regional level, organisations such as the African Union, the African Development Bank and its African Legal Support Facility should leverage existing frameworks, such as the Pan-African Investment Code, to strengthen the integration of human rights considerations into sovereign debt and investment agreements. By promoting technical assistance and regional cooperation, these organisations can enhance the capacity of African nations to manage sovereign debt in ways that respect and protect human rights. Along the same line, the international community, including the UN, can take the tall order of once and for all developing a specific international legal framework for human rights in SDIA through a UN multilateral framework on debt. Additional laws that can serve as guidance on incorporating the human rights component – The UN Convention, UNHRC's Guiding Principles on

Foreign Debt and Human Rights, international norms, compacts and resolutions. Also, NGOs and civil society organisation should continually mount pressure and facilitate indirect bill sponsors for human rights in sovereign debt processes should raise awareness of debt impacts on vulnerable populations. On the international treaty-making sphere, government treaty negotiators when negotiating Investment treaties and debt agreements should incorporate specific provisions to align with human rights and gender equality principles. These agreements should explicitly include treaty provisions under investor public duty clauses that require adherence to gender equality, non-discrimination, and human rights protections. Sovereign debt agreements and investment negotiations should be preceded by comprehensive HRIA to identify the socio-economic risks and steps taken to protect the interest of host country populace.

In this regard, jurisprudence in the West Indies, Panama and Ecuador that integrates human rights considerations into debt policies can be adopted as useful reference for HRIA and HRBA in SDIA. Political accountability in the incorporation of human rights into environmental impact and sustainability assessments is critical to ensure that these human rights frameworks achieve their intended goals of equity, justice, and sustainable development. Governments and corporations must be legally bound to integrate human rights into environmental and sustainability assessments. Clear legal mandates can create enforceable standards, such as those outlined in international human rights treaties or national constitutions. Implementing these measures, political accountability can be used to ensure the incorporation of human rights into environmental impact and sustainability assessments goes beyond mere symbolism to using more practical, enforceable measures to safeguard the dignity, livelihoods, and well-being of all individuals, particularly those most vulnerable to environmental and social harm in SDIA.

b) Clarity on what Investment is by ICSID and other investment tribunals

To prevent the misuse of investment definition in the ICSID Convention by investors, it is crucial for the ICSID to provide clarity as was done in the on whether sovereign debt qualifies as an "*investment*" under the ICSID Convention. Sovereign debt disputes have increasingly become a point of contention in international arbitration, with investors seeking to invoke ICSID jurisdiction based on debt instruments issued by sovereign states. However, the ICSID Convention itself does not explicitly address the status of sovereign debt in this context, leaving room for ambiguity and inconsistent interpretations. As a result, many sovereign states and investors face uncertainty when determining whether sovereign debt falls within the scope of the Convention's protections and dispute resolution mechanisms. This uncertainty could undermine confidence in the ICSID system and lead to inconsistent decisions in future cases. To address this issue, the ICSID should issue a formal interpretation or an advisory opinion clarifying the inclusion of sovereign debt as an investment under the ICSID Convention. This could involve a comprehensive review of existing case law, treaties, and scholarly perspectives on the matter. Additionally, ICSID could organise consultations with its contracting states, international legal experts, and stakeholders, including representatives from financial institutions and sovereign debt holders, to evaluate whether sovereign debt instruments should be considered investments in the context of the Convention. Furthermore, ICSID could propose specific amendments to the Convention or create new guidelines to provide a clearer framework for resolving disputes involving sovereign debt. This initiative would promote legal certainty, facilitate more predictable outcomes in arbitration cases, and ensure the ICSID's continued role as a central institution in resolving international investment disputes.

c) Recommendation for the Establishment of a Pan-African Human Rights-Based Approach Protocol or Policy Guideline for Sovereign Debt

A key recommendation is for the African Union to establish a Pan-African Human Rights-Based Approach and Assessment for sovereign debt, developed as a standalone policy guideline and a protocol under the AfCFTA Agreement framework. This protocol should require all African states to adopt human rights considerations through mandating Human Rights Baseline Risk Assessments when negotiating and signing investment agreements, particularly those involving sovereign debt. The Pan-African HRBA protocol and policy guidelines should be a binding framework that mandates the incorporation of Human Rights Baseline Risk Assessments at the investment negotiation stage. These assessments would evaluate potential human rights risks arising from debt-related agreements and ensure that creditors and investors adhere to human rights standards. The protocol should provide a clear mechanism for ensuring compliance, including the development of guidelines for conducting Human Rights Baseline Risk Assessments, criteria for identifying affected vulnerable groups, and mechanisms for public participation and accountability throughout the process. The AU would be responsible for coordinating the development and implementation of this HRBA, working closely with regional economic communities (RECs) such as ECOWAS, SADC, and EAC to tailor the protocol to sub-regional contexts and challenges.

The Pan-African HRBA protocol could further be operationalized by a dedicated body, potentially under the oversight of the AU, which would act as an enforcement and review mechanism. This body would be responsible for monitoring the integration of human rights provisions into debt agreements, conducting post-signing assessments, and ensuring compliance with human rights standards during the arbitration and debt restructuring processes. The protocol should be activated at the earliest stage of debt negotiations and binding arbitration to ensure that human rights considerations are integrated from the outset. Additionally, it should include strong enforcement measures, including sanctions for non- compliance and accessible avenues for affected populations and civil society to seek redress. By embedding the human rights assessments into sovereign debt agreements, this protocol would help protect African populations from potential adverse impacts of IIAs while promoting a more sustainable and equitable approach to economic growth and development across the continent.

d) *Integrating Gender Perspectives and Strengthening Human Rights in Debt and Investment Policies & Agreements*

To foster equitableandinclusivesovereigndebt and investment arbitration processes, it is crucial for national governmentsinAfricatointegrategender perspectives in reinforcing human rights protections. This begins with developing gender-sensitive policies, which involves embedding gender considerations intodebtmanagementstrategies and investment agreements and conducting gender impact assessmentstoaddressthespecificneeds of women and marginalised groups. Ensuring that women and marginalisedcommunitiesareactively included in economic planning and decision-making processes is essentialforfosteringmorerepresentative and inclusive policy development. Equally, there should be bi-annualevaluationofthegendered impacts of debt policies by the department of women affairs and the departmentoffinance.Additionally, governments must create platforms for the active inclusion of womenandmarginalizedcommunities in economic planning, debt negotiations, and investment decision-makingprocesses.Thiscan be achieved by designing consultation mechanisms that guarantee women'svoicesareheardandtheir economic interests are represented in sovereign debt and investment agreements.Furthermore,national debt law frameworks should be strengthened to include specific bindinggenderequalityprovisions, ensuring that sovereign debt agreements and investment treaties alignwithinternationalhuman rights standards and promote gender equality.

To create a women-centredHumanRights-Based Approach, national governments should establish or strengthen agencies dedicated to overseeing the integration of gender perspectives in debt and investment policies. Theseagenciesshouldconduct gender impact assessments, offer expert advice, and ensure that sovereign debtagreementsuphold women's rights. Additionally, women's rights groups and civil society organizationscanbeinvitedto contribute in the design, negotiation, and evaluation of debt and investment agreementstoincorporate gender-responsive policies and provide necessary oversight. Also, regular capacity-buildingprograms should also be introduced to increase women's participation in economic decision-making, particularly in debt management and investment negotiations. Clear monitoring and enforcement mechanisms are crucial to ensuring that gender equality provisions are upheld throughout the process, allowing for independent audits and judicial review to ensure compliance. By implementing these targeted actions, African governments and other relevant stakeholders can create more inclusive and equitable debt and investment processes, fostering sustainable development and gender equality across the continent.

12. Conclusion

The interplay between sovereign debt, investment arbitration, and human rights presents significant challenges and opportunities for advancing equitable economic development in Africa. Sovereign debt policies and investment arbitration can adversely affect human rights and gender equality, as austerity measures often disproportionately impact women and marginalised groups by reducing access to essential services and exacerbating inequalities. Investment arbitration, focusing on investor protection, may overlook these human rights concerns, potentially deepening socio-economic disparities. Regional dynamics in Africa are shaped by high debt levels and diverse investment treaties, interacting with human rights in complex ways. Efforts like the Pan-African Investment Code and ongoing reforms aim to address these issues while promoting sustainable development and human rights. Key actors — including governments, creditors, and the international community—each play critical roles. Governments must balance debt management with human rights obligations, creditors should incorporate human rights considerations into their practices, and the international community must support frameworks that uphold these rights.

Effective strategies for mitigating risks and enhancing opportunities include integrating human rights provisions into investment agreements, supporting debt relief and restructuring initiatives, and fostering transparency and public participation. Recommendations for governments include incorporating gender perspectives into debt and investment policies, strengthening human rights protections, and enhancing public transparency. Creditors should include human rights clauses in agreements and support fair debt restructuring. The international community should develop guidelines for integrating human rights into economic policies and support civil society advocacy. Future research should explore the gender- specific impacts of sovereign debt, assess human rights-based approaches, and investigate regional frameworks and technological changes. Addressing these complexities is crucial for achieving fair and sustainable economic outcomes. Integrating human rights into debt and investment frameworks, alongside collaborative efforts among key actors, can help promote a more just and inclusive global economy.

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AFRICAN FORUM AND NETWORK
ON DEBT AND DEVELOPMENT

Contact

Head Office
31 Atkinson Drive, Hillside,
Harare, Zimbabwe
+263 242 778531/6,
+263 2912751-4
info@afrodad.org