AFRODAD

AFRICAN FORUM AND NETWORK ON DEBT AND DEVELOPMENT

POLICY PAPER

Legal Review of Contractual Agreements on African Debt

2023

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Abbreviations

ALSF	African Legal Support Facility
CAC	Collective Action Clause
CDB	China Development Bank
CDRCs	Climate Resilient Debt Clauses
CEB	China Export-Import Bank
CSO	Civil Society Organisation
ICMA	International Capital Markets Association
IIF	Institute of International Finance
IMF	International Monetary Fund
LMA	Loan Market Association
OECD	Organisation for Economic Co-operation and Development
PIL	Public interest litigation
PPA	Power Purchase Agreement
PPP	Public-Private Partnerships
RBL	Resource-backed Loans
UNCTAD	United Nations Conference on Trade and Development
USD	United States Dollars

1 Introduction

Sovereign debt is one of the important tools for financing infrastructure and development projects. Due to the decline in foreign grants and concessional loans, African countries are increasingly using non-concessional loans, public-private partnerships (PPPs), and local and foreign currency bonds, to mobilize resources to finance development objectives.[1] However, the heavy reliance on debt has raised concerns about the sustainability of public debt accumulation, as well as the terms under which this debt is acquired. Unsustainable debt transforms debt from a necessary financial tool to a heavy burden that weighs on both governments and their populations. This burden is further compounded by the intricate web of contractual relationships and legal complexities arising from debt agreements, both of which can exacerbate the already dire economic situation. The opaque nature of some of the contracts, coupled with the lack of transparency in contracting processes exacerbate these concerns. Further, the legal complexities become more pronounced in periods of economic crisis due to the absence of an international legal framework in the current global debt architecture that regulates the process of restructuring sovereign debt, akin to a 'sovereign bankruptcy law'.[2] Consequently, part of the effect of this gap is that the existing architecture, whether by design or by accident, appears to perpetuate an imbalanced relationship between sovereign debtors and creditors.[3]

Ensuring that the outcomes of debt agreements contribute to the overall welfare and development of the sovereign debtor's population is crucial for creating a fair and inclusive debt system. Unfair and poorly structured contracts have significant and wide-ranging effects on the African continent. These debt agreements carry various risks, including hidden costs, exorbitant interest rates, and unfavourable terms that can exacerbate economic inequalities, hinder sustainable development, and impede the ability of African countries to effectively manage their debt burdens. These risks can place a heavy burden on the present generation, as well as future generations who will have to bear the consequences. As such, African governments need to navigate and mitigate the current debt-related risks, and part of this requires thinking carefully about debt contracts-how they are negotiated, the terms they contain, and how issues are resolved when they are contractual disputes or if sovereign debt restructuring is required.

1 M Masamba & M Mughogho "Balancing Concessional Finance and Debt Distress in African Middle-income Countries while Addressing Climate Action" Zenizeni Sustainable Finance (2023) https://www.zenizeni.com/post/concessional-finance-the-key-to-securing-a-resilient-future (accessed on 30 November 2023).
2 For an assessment of the challenges linked to the lack of a comprehensive legal framework for debt restructuring, see J T. Gathii (ed) "How to Reform the Global Debt and Financial Architecture" Sheria Publishing House (2023) https://www.afronomicslaw.org/index.php/category/repository/new-book-how-reform-global-debt-and-financial-architecture-edited-james-t (accessed on 17 August 2023). Also see D Bradlow & M Masamba "Sovereign debt management and restructuring in SADC: Setting the scene and asking the right question" in Bradlow D & Masamba M (eds) "Sovereign Debt Management and Renegotiation in Africa: a SADC Perspective" PULP (2022), at pages 1 – 21 https://www.pulp.up.ac.za/edocman/edited_collections/sadc_book/2021%20SADC%20Debt%20Chapter%201.pdf (accessed on 17 August 2023) and D Bradlow & M Masamba "Building back better post-COVID 19: Lessons learnt and the future of sovereign debt management and restructuring in SADC" in Bradlow D & Masamba M (eds) "Sovereign Debt Management and Renegotiation in Africa: a SADC Perspective" PULP (2022), at pages 352 – 362 https://www.pulp.up.ac.za/edocman/edited_collections/sadc_book/2021%20SADC%20Debt%20Chapter%2015.pdf (accessed on 1 August 2023).
3 D Bradlow "African debt: how to break unequal relationships in financing deals" (9 December 2022) The Conversation, available at https://theconversation.com/african-debt-how-to-break-unequal-relationships-in-financing-deals-195991 (accessed on 1 July 2023).

There is a need for more comprehensive research specifically focused on the contractual aspects of African debt arrangements. From an African perspective, two major research gaps exist in the current debt discourse on the continent, which are tackled in this paper to varying degrees:

- The need for more research that delves into the negotiation phase of sovereign debt contracts in Africa, including an understanding of the dynamics, power imbalances, and decision-making processes that occur during these negotiations.
- The need for more analysis on the effectiveness, enforceability, and potential gaps within the legal frameworks governing sovereign debt contracts in Africa. This includes assessing whether the existing contractual provisions in these agreements adequately protect the interests of African debtor governments.

In line with this, this AFRODAD policy paper focuses on debt contracts for public and publicly guaranteed debt and seeks to provide a clear understanding for civil society organisations (CSOs) working on African debt issues on the contractual nuances, complexities, and possible approaches for future debt contracts that could help them in their role of influencing the negotiation outcomes of African countries. It is motivated by the view that civil society is an important stakeholder that can influence the reform of debt contracting processes to establish a fair and transparent debt management system that promotes development and safeguards crucial public investments. This study forms part of Phase I of a larger AFRODAD initiative that aims to address the issues mentioned earlier by developing strategies, tools, and recommendations that foster better contract management, broader debt management and protect the interests of African debtor countries. This study contributes to this broader effort by examining specific aspects of the debt system that relate to legal challenges and contractual terms and seeks to provide insights and recommendations to improve fairness and effectiveness. In keeping with this goal, the research paper seeks to achieve the following:

- Examine the legal frameworks governing loan contracting processes in African countries and assess their effectiveness in protecting the interests of African governments.
- Propose strategies and policy recommendations that empower African governments during loan negotiations, strengthen their bargaining power, and foster fair and transparent debt systems that prioritize sustainable development.
- Re-imagine and suggest changes to Africa's debt architecture by adopting a broader perspective that considers the interests of African citizens.

The research paper is divided into three sections. The first section analyses the challenges within the contractual landscape, starting from the negotiation phase and extending to the overall terms of contracts. In the subsequent section, the paper offers recommendations on specific areas that civil society should prioritize when pursuing contractual reforms. Additionally, it explores the feasibility of a model loan agreement that addresses these concerns. Finally, the paper concludes.

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Unravelling the Complexities: Challenges in the African Sovereign Debt Contractual Landscape

2.1 Negotiating sovereign debt contracts: is there a problem?

Negotiating sovereign debt requires that a government navigate an intricate web of contractual agreements and a diverse array of creditors including bilateral creditors, commercial banks, bondholders and international financial institutions; each with distinct interests and expectations. The sovereign debtor needs to do so while also safeguarding its economic priorities; navigate power dynamics; and also ensure sustainable development and the well-being of its people. Beyond the interest of both sides of the transaction, the contractual terms and negotiation outcomes can also be influenced by external economic factors such as global economic conditions, investor sentiments and market conditions.

During a presentation conducted by Cleary Gottlieb Steen & Hamilton LLP and the African Legal Support Facility (ALSF), two considerations were emphasized as influential in debt negotiations:

- The negotiating power of a borrower or issuer is contingent upon their credit rating, with those possessing a higher rating having greater leverage to dictate or resist presented terms.
- Additionally, terms agreed upon in previous deals can be challenging to deviate from (they are 'sticky').[4]

For African governments, negotiations can be a complex process fraught with challenges that extend beyond the economic considerations and market considerations such as interest rate. Negotiating with multiple creditors, with unique interests, can pose a coordination challenge. Further is the question of what may be perceived as a weaker bargaining position in negotiations, arising from power dynamics which often favours creditors, especially larger lenders such as China. While there are concerns about bargaining power, African countries are increasingly showing more agency in negotiations. One example of this according to Aid Data is the loan contractual re-negotiations relating to the upgrade and expansion of the Entebbe International Airport, in which the Government of Uganda's negotiations with China Export-Import Bank (China Eximbank or CEB) highlight that borrowers have the ability to assert themselves and effectively challenge lender conditions that they deem excessively invasive.[5] In this instance, Aid Data notes that China Eximbank initially sought the authority to approve or reject spending decisions relating to the Entebbe International Airport.[6] However, in response to Uganda's objections, China Eximbank agreed to a less controlling arrangement, and instead retained the right to monitor but not control the spending decisions of the Uganda Civil Aviation Authority.[7] To Aid Data this is an example of demonstrated agency in negotiations with a large creditor.

Among the other challenges in the negotiation landscape, which also should include other stakeholders that can provide accountability like national parliament and civil society etc., includes information asymmetry and lack of transparency relating to the terms of loans that may either be opaque or unknown. This information asymmetry makes it challenging to fully grasp the implications of debt commitments. As a result, it is critical that borrowing nations advocate for and commit to provide comprehensive information disclosure, including the inclusion of disclosure mechanisms within contractual agreements and the meticulous detailing of all loan terms and conditions. A commitment to transparency will both even out the playing field and empower African debtors in negotiations by enabling informed decision-making.

4 Cleary Gottlieb Steen & Hamilton LLP and ALSF presentation by J Ho & N Kearse "Negotiating Facility Agreements and Bonds" https://www.cabri-sbo.org/uploads/files/Documents/Session-4-Negotiating-Facility-Agreements-and-Bonds.pdf (accessed on 1 July 2023).
5 B Parks, A A. Malik, A Wooley "Is Beijing a predatory lender? New evidence from a previously undisclosed loan contract for the Entebbe International Airport Upgrading and Expansion Project" (27 February 2022) https://docs.aiddata.org/reports/Uganda-Entebbe-Airport-China-Eximbank.html (accessed on 1 July 2023).
6 B Parks, A A. Malik, A Wooley, as above.
7 B Parks, A A. Malik, A Wooley, as above.

The negotiation process is undeniably impacted by a multitude of factors, making it inherently complex and unpredictable. This recognition further emphasizes the importance of negotiation expertise and capacity building for African government officials to effectively navigate complex agreements. To meet this need, the ALSF offers advisory services and capacity-building assistance to empower African governments in negotiating equitable and balanced contracts with creditors. Additionally, the ALSF helps these governments effectively protect themselves against vulture fund litigation and develop robust debt management strategies and frameworks.[8] As part of this capacity development for African governments, The ALSF Academy has provided guidance on debt negotiations broadly, including an explanation on what negotiations are, how to prepare for negotiations and how to actually conduct them.[9] Apart from emphasizing the importance of African governments being well-informed about market conditions, previous loan or bond precedents set by lenders, and the strengths and weaknesses associated with them during debt negotiations, the ALSF Academy has also offered guidance on negotiating specific aspects of loans and bonds and provides examples of these and other important clauses.[10] The ALSF Academy specifically highlights the following contractual clauses that borrowers should pay particular attention to when negotiating loans and bonds:

- **Definitions clause**: This section is undoubtedly one of the most crucial parts of any lending arrangement as it defines critical terms within the agreement. The ALSF Academy acknowledges that the heart of any conflict or its resolution often lies in the interpretation of these definitions.[11]

- **Negative Pledge Clause**: In explaining the rational of a negative pledge clause, which can be used in the context of sovereign bonds, the ALSF Academy notes that "…, bonds can benefit from a collateral or provide a guarantee. If not, they are unsecured and unguaranteed debt instruments. Therefore, there is a risk the sovereign issuer can create a security interest or grant a guarantee to increase the chances of recovery in favour of another creditor. The raison d'être of the negative pledge clause is to prevent the creation of any security interest or guarantee by the issuer in the future to avoid a worsening of the creditors' position".[12] According to the ALSF Academy, it is observed that new lenders will come to realize that the debtor is already burdened with existing debt. If these lenders decide to provide additional financing, they will not have any collateral or claim on specific assets or cash flows.[13]

- **Permitted Liens**: A lien is a legally recognized interest or ownership right over another's property, or a form of collateral or security to ensure the repayment of a debt or fulfilment of an obligation. The Negative Pledge Clause above, encompasses several exceptions, such as "permitted liens" which are specific conditions or carve-outs that allow the borrower to grant security over certain assets to secure a debt.[14] The borrower will aim to include as many of these exceptions as possible, as it provides greater flexibility in the event, they need to obtain new loans or issue additional debt.[15]

- **Pari Passu Clause**: Pari passu clauses are commonly included in bond agreements to ensure the issuer treats all bondholders equally. By including these clauses, the sovereign is prohibited from altering the ranking of unsecured, unsubordinated creditors.[16] The purpose is to maintain the existing ranking or status quo, preventing any preference or advantage given to a specific creditor or group of creditors at the expense of others.[17] This provision restricts also sovereigns from enacting legislation that would lower the legal rank of existing creditors in relation to future creditors from whom the sovereign intends to borrow.[18]

8 ALSF "Understanding Sovereign Debt Options and Opportunities for Africa" at page 6, https://africanlegalsupportfacility.com/publication/RB2ymma0.pdf (accessed on 15 July 2023).
9 ALSF Academy "Sovereign Debt – Level 2" Developed by Professor Rodrigo Olivares-Caminal, pages 124 – 128, https://alsf.academy/sites/default/files/2021-04/2020-07-23%20-%20ALSF%20Academy%20Sovereign%20Debt%20Handbook%20-%20Level%202%20-%20EN%20-%20FOR%20PUBLISHING.pdf (accessed on 1 July 2023).
10 ALSF Academy, at page 129.
11 ALSF Academy, at page 129.
12 ALSF Academy, at page 91.
13 ALSF Academy, at page 131.
14 ALSF Academy, at page 132.
15 ALSF Academy, at page 132.
16 ALSF Academy, at page 133.
17 See ICMA "New York And English Law Standard CACs, Pari Passu And Creditor Engagement Provisions (May 2015) https://www.icmagroup.org/assets/documents/Resources/ICMA-Standard-CACs-Pari-Passu-and-Creditor-Engagement-Provisions---May-2015.pdf (accessed on 15 July 2023).
18 ALSF Academy, at page 133.

- **Default Interest Clause**: Default interest is an additional interest charged with the intention of dissuading the borrower from intentionally ceasing payment of the compulsory interest amount, for instance when the borrower seeks to divert those funds towards alternative purposes. The ALSF Academy notes that "Being a borrower is hardly difficult to just say no to this clause. As borrower you should try to mitigate the impact of this provision by ensuring that you have a sufficient cure period before the default interest rate is triggered and starts to accrue."[19]

- **Cross-Default Clause**: A cross-default clause enables creditors to declare a default even if obligations are not yet due, but rather as a consequence of the debtor defaulting on a separate debt obligation. The purpose of this clause is to empower the creditor to take swift action when there is evidence of the debtor's financial condition deteriorating.[20]

- **Material Adverse Change Clause**: This clause enables the lender to terminate the agreement if a significant change arises in the borrower's financial condition, posing a risk to their ability to fulfil their financial obligations.[21]

- **Assignment Clause**: This clause pertains to the borrower's ability to assign rights or delegate payment obligations, which necessitates the approval of the lenders. The ALSF Academy highlights that the purpose of this clause is rooted in the fact that lenders have previously conducted a thorough assessment of the borrower's financial situation and have assigned a corresponding risk (interest rate) based on those conditions.[22] As such, further assignment of the obligation requires scrutiny.

- **Governing Law and Jurisdiction Clause**: Governing law clause determines the laws that will govern the interpretation and enforcement of debt obligations, and the jurisdiction clause sets out the jurisdiction that will resolve disputes if they arise. Generally, the governing law and jurisdiction are the same country. In making this choice, lenders will prefer a legal system and jurisdiction that they perceive will offer "pro-market law and jurisdiction that grants legal safety as regards the validity and enforceability of financing arrangements", and the ALSF Academy notes that this is a very delicate subject when dealing with sovereigns.[23] It is worth mentioning that the preferred governing laws are typically New York or English law. Lenders may be hesitant to accept local laws, for instance, those proposed by the Loan Market Association (LMA) African templates, which include South African, Kenyan, and Zimbabwean law as the governing law, among others.[24]

- **Amendments Clause**: The purpose of this clause is to allow for future amendments and waivers, if necessary, in the contractual agreement. Although this provision is often considered a standard clause and industry templates are available, it can still be subject to significant negotiation.[25]

19 ALSF Academy, at page 135.
20 ALSF Academy, at page 135.
21 ALSF Academy, at page 136.
22 ALSF Academy, at page 137.
23 ALSF Academy, at page 138.
24 ALSF Academy, at page 138.
25 ALSF Academy, at page 139.

In addition to capacity development, another significant aspect that can enhance negotiations is potential coordination among African debtors. It is important to highlight that the international financial system primarily favours creditors and often overlooks the needs of borrowers.[26] Development Reimagined emphasizes this point and states that:

"Creditors are more often organised through "clubs" or "committees", such as the Paris Club, which exclude the Borrower from negotiations. Subsequently, there is an urgent need to increase Borrower Coordination for countries to share experience and negotiate practices to get more out of the financial system.".[27]

One proposal for strengthening coordination and collaboration among African debtors in debt negotiations and renegotiations is the concept of a "Borrower's Club". This approach involves countries jointly taking loans and using each other's growth prospects as collateral.[28] By sharing information on contract terms with different lenders and leveraging the club, it is anticipated that borrowers can enhance their agency in negotiations.[29] Development Reimagined, the source of this idea, suggests that the loan repayments within the Borrower's Club would be small and carry low interest rates to facilitate easy payment. However, they would still be sufficient to create a "cushion" for temporary collateral.[30] To represent the borrowers' interests, a representative would be appointed on a rotational basis to engage with creditors. They note that if a project encounters challenges or repayment delays, the borrower committee would need to reach a consensus to access the temporary cushion for support. This approach is a notable feature that can strengthen and improve the contractual debt landscape in Africa.

26 Development Reimagined "Reimagining the International Finance System For Africa: The Borrowers Club" at page 3, https://developmentreimagined.com/wp-content/uploads/2023/05/DR-Borrowers-Club-Brief.pdf (accessed on 15 July 2023).
27 Development Reimagined, as above.
28 Development Reimagined, as above.
29 Development Reimagined, as above.
30 Development Reimagined, as above.

2.2 The complexities in the contractual landscape

The lack of disclosure and transparency in terms and conditions, as well as accountability for concealed debt (due to non-disclosure clauses) or unaccounted debt, is one of the main obstacles in the contractual environment. These form a major obstacle in assessing debt terms and hinders public scrutiny. Transparency is at the heart of fair negotiating and prudent borrowing, yet many contracts are shrouded in secrecy. Not only does a lack of transparency impair a country's capacity to adequately negotiate and effectively evaluate the entirety of its debt burden, but it also raises concerns about accountability and creditors' responsible lending practices. Increased debt transparency has several advantages. Accessible information on public debt enables policymakers to make informed and prudent choices that promote macroeconomic stability and debt sustainability, enabling lenders to make well-informed lending decisions, while also enabling citizens to hold their governments accountable. The opposite results in poor outcomes for the sovereign debtor population as well as reckless lending and borrowing. Mozambique's hidden debt scandal ("Tuna Bond scandal") serves as a clear example of this.[31]

In the Tuna Bond scandal, Mozambiquan state-owned enterprises secretly borrowed and issued USD 2 billion in bonds via Credit Suisse and the Russian bank VTB, with the government guaranteeing the loans and bonds. Mozambique faced economic consequences from these undisclosed loans taken by the newly established state-owned enterprises without parliamentary approval.[32] This was in violation of Mozambique's Constitution.[33] Public interest litigation (PIL) played a significant role in uncovering the hidden debt scandal, and subsequently resulted in litigation in various jurisdictions including England.[34] PIL pertains to legal proceedings commenced by persons or entities with the intention of representing the interests of the general public or a specified subset of individuals who could be impacted by a specific matter. The use of PIL is a significant mechanism for unveiling some of the contractual and other debt management irregularities in the context of sovereign debt. This situation emphasizes how crucial it is to have strong accountability procedures in place and for debt arrangements to be transparent. The lack of transparency in contract terms and inadequate accountability measures give rise to concerns about the potential misappropriation of borrowed funds and the overall fiscal well-being of nations. Mozambique's hidden debt scandal also serves as a poignant example of the complexity and legal nuances of sovereign debt contracts, that can be an extensive labyrinth of legal documents. An example of the complexity is that loan arrangements in this instance were regulated by English law and fell within the jurisdiction of English courts, additionally, the underlying supply contracts were subject to Swiss law and arbitration and yet this borrowing was unconstitutional according to the laws of Mozambique.[35]

The case of Zambia serves as another example of why debt disclosure is crucial. In this regard, Zambia, which issued its first bond in 2012 (a USD 750 10-year bond with a 5.6% yield), threatened to default on its debt in October 2020 unless bondholders granted a six-month moratorium.[36] The Minister of Finance is sited as stating that "Should Zambia fail to reach an agreement with its commercial creditors … the Republic, with its limited fiscal space, will be unable to make payments and therefore, fail to forestall accumulating arrears".[37] Despite this plea, one of the primary reasons for the creditors' resistance to a debt suspension and restructuring plan was the opaqueness of lending, specifically to China. With almost USD 6 billion in debt to Chinese lenders, Zambia in actual fact had close to twice as much Chinese debt as the previous administration had disclosed before the new regime took over in 2021. At this stage, the concerns also included secret power purchase agreements (PPAs) with outstanding arrears for more than USD 1 billion from power firms. The concerns at this point included opaque loans, deceptive bookkeeping and undisclosed electricity contracts (power purchase agreements or PPAs) with unpaid arrears of more than USD 1 billion owed to power companies.[38]

31D Bradlow "Prudent Debt Management and Lessons from the Mozambique Constitutional Council" AfronomicsLaw (Aug. 5, 2020) https://www.afronomicslaw.org/2020/08/05/prudent-debt-management-and-lessons-from-the-mozambique-constitutional-council (accessed on 11 July 2023).
32 See L Koen "The Renegotiation of Sovereign Debt Tainted by Corruption: Mozambique's 'Secret' Debt in Perspective" in Bradlow D & Masamba, M (Eds) "COVID-19 and Sovereign Debt: The Case of SADC 268-302" (2022) at pages 228 - 248.
33 See Republic of Mozambique, Constitutional Council, Case No: 05/CC/2019, Judgment, (3 June 2019).
34 D Namburete "How Public Interest Litigation Led to Invalidation of Illegal Mozambican Debt" (4 August 2020) https://www.afronomicslaw.org/2020/08/04/how-public-interest-litigation-led-to-invalidation-of-illegal-mozambican-debt (accessed on 11 November 2023).
35 G Adonu "The Case Against International Arbitration in Sovereign Debt Contexts" in Gathii, J T. (Ed) "How To Reform The Global Debt And Financial Architecture", Sheria Publishing House, at page 126 (2023) https://www.afronomicslaw.org/sites/default/files/pdf/HowtoReformtheGlobalDebt%26FinancialArchitecture.pdf (accessed on 11 November 2023).
36 Financial Times "Transparency offers way out of Zambia debt crisis - The African state and its Chinese lenders must come clean on borrowings" Financial Times (18 October 2020) https://www.ft.com/content/c4c0eb1b-9801-4054-9a49-6794997e33cb (accessed on 11 November 2023).
37 Financial Times "Zambia warns it is preparing for default - Africa's second-biggest copper producer says it cannot meet payments if creditors reject plea for delay" (14 October 2020) https://www.ft.com/content/e56c2a34-16e4-4974-9df8-a72c092c5ee2 (accessed on 11 November 2023).
38 T Moss & R I.Tanko "The Other Hidden Debt - How power contract transparency can help prevent future debt risk" IMF Public Finance Management Blog, (21 June 2022) https://blog-pfm.imf.org/en/pfmblog/2022/06/the-other-hidden-debt-how-power-contract-transparency-can-help-prevent-future-de (accessed on 11 November 2023).

The fact that many PPAs come with government guarantees is one of their pitfalls. This implies that when the utility company fails to pay its bills, the government assumes the obligations and adds them to the nation's overall debt. Subsequent cancellation or renegotiation of PPAs may not relieve the government of its obligation to pay out the investors.[39] Therefore, even while PPAs have the ability to provide much-needed financing, their contractual terms and conditions are often opaque and can hide contingent debt liabilities. This lack of disclosure raises concerns that there could be billions of hidden debts concealed within other PPAs and the absence of clear visibility into the contractual provisions (including the parties involved, the amounts owed, and the conditions attached) makes it impossible to fully understand the potential risks and liabilities associated with these agreements.[40]

Like Zambia, Ghana has also faced similar concerns regarding the debt implications of its Power PPAs and the lack of transparency surrounding the terms of these contracts. Between 2011 and 2016, the Ghanaian government signed 43 PPAs.[41] But in 2017, a new government came to power and found that these contracts had tied the nation to more electricity capacity than it really required. Consequently, the Ministry of Finance had to pay excess capacity charges amounting to approximately USD 620 million in 2019.[42] This emphasises how poorly designed and concealed PPAs may result in financial burden and inefficiency.

39 T Moss & R I.Tanko, as above.
40 T Moss & R I.Tanko, as above.
41 T Moss & R I.Tanko, as above.
42 T Moss & R I.Tanko, as above.

2.3 The legal issues that relate to the contracts themselves

Having discussed the broader issues in the contractual landscape above, and the need for transparency and accountability, it is now pertinent to explore the specific contractual provisions that raise concerns. The following section delves into these provisions in more detail, shedding light on the potential areas of concern within the contractual landscape.

a) Confidentiality clauses, disclosure requirements and the risk of unfair contractual terms (lender overreach)

Beyond the lack of standardized reporting requirements in some African countries that are grappling with hidden debt, is also the use of non-disclosure clauses and confidentiality clauses in debt contracts. These clauses aim to protect sensitive financial and strategic information, however in the context of sovereign debt, which is a public good, they restrict transparency and hinder public scrutiny. Sovereign debt is a public activity and holds significant implications for the public interest and there is a need for access to information.

In Chinese debt contracts with African debtors, non-disclosure clauses have been a source of particular concern. In the Kenya Mombasa-Nairobi Standard Gauge Railway Project, the Kenyan government entered into a USD 5 billion loan arrangements, whose documentation was only made public by Kenya's transport secretary, Kipchumba Murkomen in November 2022.[43] This project involved the construction of a 600-kilometer railway connecting the port city of Mombasa to the town of Naivasha, located 75 kilometers northwest of Nairobi. There has been criticism regarding the project, particularly on the underutilization of the infrastructure and its failure to generate the anticipated revenue or contribute to the envisioned economic development as initially advocated by its proponents.[44] When it comes to the contract itself, the agreement has been seen to not only include unfavourable terms, but the non-disclosure provisions are contrary to Kenya's procurement laws that require a transparent procurement process (see the loan agreement's confidentiality clause in Box 1 below).[45]

Box 1: Confidentiality Clause in Buyer Credit Loan Agreement between The Export-Import Bank of China and The Government of the Republic of Kenya for Kenya Mombasa-Nairobi Standard Gauge Railway Project[46]

17.7 Confidentiality The Borrower shall keep all the terms and conditions hereunder or in connection with this Agreement strictly confidential. Without the prior written consent of the Lender, the Borrower shall not disclose any information hereunder or in connection with this Agreement to any third party unless required by applicable law.

43 V Amunga "Kenyan Lawmakers Want More Details on $5B Railway Loan After Contract Partially Released" VOA News (8 November 2022) https://www.voanews.com/a/kenyan-lawmakers-want-more-details-on-5b-railway-loan-after-contract-partially-released-/6825661.html (accessed on 21 November 2023).
44 V Amunga, as above.
45 V Amunga, as above.
46 Clause 17.1 of "Buyer Credit Loan Agreement between The Export-Import Bank of China and The Government of the Republic of Kenya Represented by the National Treasury of Kenya for the Kenya Mombasa-Nairobi Standard Gauge Railway Project" (Contract No. 1410302052014210766) (21 June 2014) https://int.nyt.com/data/documenttools/Kenya-China-Docs-2/e099c795dfcc47ce/full.pdf (accessed on 21 November 2023).

Another example of a contract shrouded in secrecy is the USD 200 million loan from the China Eximbank for the expansion of Uganda Entebbe International Airport Upgrading and Expansion Project. The debt agreement also had a confidentiality clause (see Box 2 below), that impeded any review or probe even when there were concerns about the nation's possible default. Furthermore, there were rumours circulating that Uganda's only international airport had been used as collateral by the lender and could be seized in the event of a default.[47] The final unredacted version of this agreement was eventually made public in 2022 by the organisation, Aid Data. The eventual publication of the contract revealed that Entebbe Airport itself is not a source of collateral that the lender can seize in the event of default, however "CEB required its borrower to provide a fully liquid source of collateral that the lender can unilaterally seize in the event the borrower defaults on its repayment obligations".[48] Even though it turned out that the misperception about collateralisation was incorrect, things were more convoluted since there was initially secrecy on the contractual provisions. Aid Data noted this and stated that:

> **"Our analysis of the terms and conditions in the contract does not support the allegation that China engages in predatory lending. We instead find that Beijing is a shrewd negotiator who is willing to impose intrusive conditions upon sovereign borrowers to protect its balance sheet. However, Beijing's efforts to put the issue to rest were unsuccessful. It did not disclose the specific terms and conditions in the loan contract, which generated even more speculation in Uganda and around the globe… China Eximbank tried to prevent the contract from spilling into public view by imposing expansive confidentiality obligations on its borrower. But advocates of transparency and good governance need not despair: the shield of confidentiality can be pierced."[49]**

Box 2: Confidentiality clause in the Uganda/ Export-Import Bank of China Concessional Loan Agreement for Uganda Upgrading and Expansion of the Entebe International Airport Phase I Project[50]

> 8.7 The Borrower shall keep all the terms, conditions and the standard of fees hereunder or in connection with this Agreement strictly confidential. Without the prior written consent of the Lender, the Borrower shall not disclose any information hereunder or in connection with this Agreement to any third party unless required by applicable law.

47 E Shanko "Silencing African States: The Role of Non-Disclosure Clauses in Chinese Debt Contracts", Medium, https://medium.com/ra-consulting/silencing-african-states-the-role-of-non-disclosure-clauses-in-chinese-debt-contracts-c2a570577b7e (accessed on 11 November 2023).
48 E Shanko, as above.
49 B Parks, A A. Malik, A Wooley "Is Beijing a predatory lender? New evidence from a previously undisclosed loan contract for the Entebbe International Airport Upgrading and Expansion Project" (27 February 2022) https://docs.aiddata.org/reports/Uganda-Entebbe-Airport-China-Eximbank.html (accessed on 11 November 2023).
50 Clause 8.7 of "Government Concessional Loan Agreement on Uganda Upgrading and Expansion of the Entebe International Airport Phase I Project between the Government of the Republic of Uganda represented by the Ministry of Finance, Planning and Economic Development of Uganda and the Export-Import Bank of China" (31 March 2015) https://docs.aiddata.org/ad4/pdfs/Uganda_Entebbe_Loan_Agreement.pdf (accessed on 21 November 2023).

There are no internationally agreed-upon rules that define what constitutes an excessively stringent confidentiality clause. To address this, the sovereign debtors' national debt-management laws should include measures defining the minimal amount of public information required, and thereby providing clarity on the degree of confidentiality appropriate.[51] There are however several voluntary principles available that can serve as a reference point for best practices for debtors, specifically concerning transparency and disclosure matters. These include:

- Institute of International Finance (IIF) Voluntary Principles for Debt Transparency.[52]
- Organisation for Economic Co-operation and Development (OECD) Due Diligence Guidance for Responsible Business Conduct.[53]
- United Nations Conference on Trade and Development (UNCTAD) Principles on Promoting Responsible Sovereign Lending and Borrowing.[54]
- International Monetary Fund (IMF) Code of Good Practices on Transparency in Monetary and Financial Policies: Declaration of Principles.[55]

51 M Estevão; S Essl; and V Tsiropoulos "Debt Transparency And Development" International Banker (10 March 2022) https://internationalbanker.com/finance/debt-transparency-and-development/ (accessed on 21 November 2023).
52 IIF Voluntary Principles for Debt Transparency (2019), available at https://www.iif.com/portals/0/Files/Principles%20for%20Debt%20Transparency.pdf (accessed on 1 November 2023).
53 OECD Due Diligence Guidance for Responsible Business Conduct (2018), available at https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm (accessed on 1 November 2023).
54 UNCTAD Principles on Promoting Responsible Sovereign Lending and Borrowing (Amended and Restated as of 10 January 2012), available at https://unctad.org/system/files/official-document/gdsddf2012misc1_en.pdf (accessed on 1 November 2023).
55 IMF Code of Good Practices on Transparency in Monetary and Financial Policies: Declaration of Principles (adopted by the Interim Committee on 26 September 1999), available at https://www.imf.org/external/np/mae/mft/code/index.htm (accessed on 1 November 2023).

b) Collateralisation of public assets in loan contracts

Collateralisation of public assets in loan contracts refers to the practise of utilising public assets as collateral or security for loans received by governments, such as natural resources, infrastructure, or public companies. This practise is becoming more widespread among resource-rich African nations seeking funding for development programmes and infrastructure expenditures. These are known as resource backed loans (RBLs). RBLs raise concerns about the possible consequences for public welfare and sovereignty. While collateralisation may help to attract much-needed capital, it also exposes governments to the possibility of asset seizure or control by creditors in the case of default, thus jeopardising their capacity to prioritise the needs and interests of their population.

The main bilateral lenders using collateral debt arrangements with African countries are China's government banks. Specifically, the China Eximbank and China Development Bank (CDB), which together provide 76% of these loans to Africa, totalling about USD 36 billion.[56] Zimbabwe is one of the countries that has increasingly used RBLs.[57] In Zimbabwe, the platinum deposits located in Selous and Northfields were used as collateral to secure a loan of USD 200 million from China Eximbank.[58] This choice of natural resource is of significant political and social sensitivity, which may give rise to complexities if subjected to seizure.[59]

Beyond concerns surrounding the potential erosion of sovereignty resulting from lineaging sovereign assets to loan transactions, RBLs and other forms of collateralised lending encounter significant challenges concerning secrecy and undisclosed contingent liabilities.[60] This is primarily attributed to the inclusion of confidentiality clauses within these arrangements. To demonstrate the magnitude of this problem, an examination of fifty-two RBL cases in Africa revealed that only one case had contract documents publicly available, and basic information such as interest rates was identifiable in merely nineteen cases.[61]

c) Agreements may not adequately deal with unexpected events/crises – e.g., environmental disasters, financial crises etc.

Following the COVID-19 pandemic, it has become more evident that debt agreements may face challenges in adequately dealing with unexpected events or crises. Agreements are typically structured based on anticipated circumstances and assumptions about the stability of the sovereign debtor's financial situation. However, unforeseen events such as economic downturns, natural disasters, or political upheavals can significantly impact the sovereign debtor's ability to meet their obligations. In such cases, many existing debt agreements may not have provisions or mechanisms in place to address these unexpected events. This can lead to difficulties in finding appropriate solutions or renegotiating terms to accommodate the changed circumstances. To address this challenge, it is crucial for debt agreements to incorporate flexible clauses or contingency plans that allow for adjustments or modifications in the face of unforeseen events or crises. This can help ensure that the agreements remain effective and relevant, even in the midst of unexpected challenges.

An example of unexpected events impacting debt agreements is the COVID-19 pandemic. The global outbreak of the virus caused widespread economic disruptions, leading to financial hardships for many individuals, businesses, and governments. Debt agreements that were negotiated prior to the pandemic often did not account for such an unprecedented crisis. As a result, debtors faced difficulties in meeting their financial obligations, and creditors were left with the challenge of balancing their desire for repayment with the need to provide relief and support during the crisis.

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56 F Mutondoro, A Hobi, M Dhliwayo & J Chiname "Resource-backed loans, COVID-19 and the high risk of debt trap: A case study of Zimbabwe", in Bradlow D & Masamba M (eds) "Sovereign Debt Management and Renegotiation in Africa: a SADC Perspective" PULP (2022), pages 303 – 330, https://www.pulp.up.ac.za/edocman/edited_collections/sadc_book/2021%20SADC%20Debt%20Chapter%2013.pdf (accessed on 1 November 2023).

57 I M. Muriith "The Challenge of Collateralisation of Public Assets in Loan Contracts and Indentures: What Is the Way Forward?", in Gathii, J T. (Ed) "How To Reform The Global Debt And Financial Architecture", Sheria Publishing House, at page 126 (2023) at page 261 https://www.afronomicslaw.org/sites/default/files/pdf/HowtoReformtheGlobalDebt%26FinancialArchitecture.pdf (accessed on 21 November 2023).

58 I M. Muriith, as above, at page 246.

59 I M. Muriith, as above.

60 See N wa Nciko "China, Have Mercy: The Unacceptable Collaterlised Sovereign Debt Burden that the Busanga Hydropower Plant Places on the DRC" in Gathii, J T. (Ed) "How to Reform The Global Debt And Financial Architecture", Sheria Publishing House, at page 126 (2023) at pages 279 – 299 https://www.afronomicslaw.org/sites/default/files/pdf/HowtoReformtheGlobalDebt%26FinancialArchitecture.pdf (accessed on 1 November 2023).

61 I M. Muriith, as above, at page 268.

While bilateral creditors and multilateral development banks stepped in to provide temporary measures such as debt moratoriums or restructuring initiatives to address the immediate impact of COVID-19 on debt agreements, the challenge is of reaching agreement with private creditors remains. However, the pandemic highlighted the importance of incorporating provisions in debt agreements that can address future unforeseen events, ensuring that they are more resilient and adaptable to unexpected crises.

Caribbean countries have increasingly introduced natural disaster clauses in their bonds that provide temporary debt standstills during times of natural disasters.[62] These provisions, sometimes called catastrophe bonds or hurricane clauses, aim to mitigate the economic effect of natural catastrophes like hurricanes, floods, or earthquakes. These clauses essentially provide for an avenue to modify the debt terms or provide temporary relief in debt payments in the event of a pre-defined natural disaster. Grenada was the first country to include these clauses in its different debt instruments. Grenada which is extremely vulnerable to natural disasters made use of hurricane clauses in its 2015 debt restructurings, followed by Barbados in its 2018 and 2019 restructurings.[63] The hurricane clause for Grenada's bilateral debt provided a payment moratorium for the principal and accrued interest payments for 12 months, and a grace period of 6 months in the event of insured hurricanes, earthquakes and excessive rainfall.[64] The hurricane clauses for Grenada's Paris Club debt, provided a standstill triggered in the event of hurricanes for all maturities covered by the rescheduling agreement. Finally, the hurricane clause for Grenada's bonds granted payment moratoriums for the repayment of the principal and accrued interest payments for 6 and 12 months, and a grace period of 6 months in the event of insured hurricanes, earthquakes and excessive rainfall.[65]

During a natural disaster or other crisis, it is ideal for African countries to have the policy flexibility to use their limited resources to prioritize critical sectors. This however requires proactive risk management, that can be offered by well drafted catastrophe clauses. The adoption of catastrophe clauses could prove highly beneficial for African debt instruments as they provide a protection against the financial aftermath of natural disasters and other catastrophes that are predetermined in the clause. They provide immediate relief from debt obligations and thereby allow for the redirection of funds toward vital recovery efforts and other programs needed in response to a crisis. A model that can be explored for climate related catastrophes are the ICMA 2022 "Climate Resilient Debt Clauses" (CDRCs) that have been particularly designed for regions especially susceptible to the impacts of climate change, in particular low-income countries, Small Island Developing States and other developing countries.[66] The ICMA guidance on this model clause provides and extensive list of "scope countries" that are best suited to the clause, including numerous African countries including, Ivory Coast, DRC, Republic of Congo, Kenya, Ghana, Zambia, just to name a few. The CDRCs allow for the deferment of debt payments in the event of a pre-defined and severe climate shock or natural disaster. In addition to freeing up cash flow during a disaster, CDRCs could help avoid the need for a country to initiate a pre-emptive debt restructuring or suffer a costly payment default to the benefit of both borrowers and lenders.[67]

d) *Creditor co-ordination issues – Not all bond issues have Collective Action Clauses/ majority restructuring provisions, and contractual language varies*

In the absence of a standardized framework for creditor coordination, renegotiations of sovereign debt or restructurings often involve extensive discussions and compromises to accommodate the diverse interests of bondholders. This lack of coordination can prolong the restructuring process, increase transaction costs, and hinder the debtor country's ability to achieve a comprehensive and timely resolution.[68] From an African perspective, creditor coordination issues in sovereign debt restructurings present unique challenges. African countries often face a diverse group of creditors, including bilateral and multilateral lenders, commercial banks, and bondholders. Navigating between these creditors is complex, so is coordination within these creditor groups, especially bondholders.

62 S Ho & S Fontana "Sovereign Debt Evolution: The Natural Disaster Clause" Emerging Markets Restructuring Journal Issue No. 11 — Spring 2021, https://www.clearygottlieb.com/-/media/files/emrj-materials/issue-11-spring-2021/article_natural_disaster_clause_v3-pdf.pdf (accessed on 22 November 2023).
63 The Commonwealth "Introducing Hurricane Clauses: Lessons from Grenada's recent experience" (2016) at page 6, https://production-new-commonwealth-files.s3.eu-west-2.amazonaws.com/migrated/inline/Introducing%20Hurricance%20Clauses.PDF (accessed on 1 June 2023)
64 The Commonwealth, as above.
65 The Commonwealth, as above.
66 ICMA "Private Sector Working Group – Climate Resilient Debt Clauses (CRDCs) Chair's Summary" (9 November 2022) https://www.icmagroup.org/assets/Chairs-Summary-UK-Chaired-Private-Sector-Working-Group-Sub-Group-on-CRDCs.pdf (accessed on 22 November 2023).
67 ICMA, as above, page 2.
68 Anna Gelpern & Mitu Gulati, Public Symbol in Private Contract: A Case Study, 84 Wash. U. L. Rev. 1627 (2008) at 1639

The absence of collective action clauses (CACs) in some bond contracts and variations in contractual language can complicate negotiations and hinder the restructuring process. This is more so when the contractual language in debt agreements varies between different bond issues. CACs are a form of majority amendment clause that provide a supermajority vote for amendments of terms. Notably, with English law bonds a qualified majority of typically 75% of bondholders present at a duly convened meeting (with a quorum of 75%) can amend payment terms that will become binding on all bondholders, as opposed to a unanimous vote of 100%.[69] Similar super majority thresholds and quorum structures also exist in other jurisdictions.[70] Table 1 below sets out examples of voting thresholds across both series-by-series bonds and multi-series bonds.

	Menu of voting procedures		
	Series-by-Series	Aggregated	
		Two-limb	Single-limb
Voting threshold	75%(per series)	662/3%(aggregate), 50% (per series)	75%(aggregate)

Table 1: ICMA Enhanced CACs: Menu of Voting Procedures[71]

While CACs are increasingly being included in new bond instruments, a major gap is that many bond instruments still do not include aggregated or enhanced CACs that would be used across various series of bonds.[72] In fact, the IMF notes that while 95% of international sovereign bonds now include CACs, 50% do not have enhanced or aggregated CACs and holdout behaviour is still a possibility with single limb CACs.[73] This is especially so in frontier or low-income countries or with sub-sovereign debt.

e) Governing Law Clauses, Jurisdiction Clauses and the choice of dispute resolution mechanisms

Sovereign debt presents a significant challenge when it comes to choosing the most suitable dispute resolution mechanisms if disputes arise. There is now broad agreement in the international community that having effective procedures to resolve sovereign debt crises expeditiously is in the interest of debtors and creditors. The vast majority of foreign sovereign debt is governed by a handful of jurisdictions.[74] Two popular jurisdictions for the adjudication of disputes are the national courts in the United Kingdom and New York. The courts of these jurisdictions play an important role of interpreting contracts using the chosen legal system in the Choice of Law Clause.

One crucial aspect to consider is whether foreign national courts provide the best options. While foreign courts may be seen to offer impartiality and expertise in handling complex financial disputes, there are potential drawbacks to consider. These include the potential for jurisdictional issues, language barriers, and unfamiliarity with local laws and regulations. The judgments of national courts may in effect limit the debtor's ability to enact domestic policies necessary for development and deal with debt challenges in a manner that aligns with its national interests. When the jurisdiction of choice are national courts, questions arise on whether they can and should go beyond the interpretation of contracts, and really account for the unique characteristics and challenges of sovereign debt restructuring. This will require also understanding the specific economic, social, and political dynamics at play in a country. National courts have indeed played a role in exacerbating legal and regulatory ambiguity, particularly in an environment of a heightened risk of litigation.[75] These cases have also had a significant economic impact, thereby hindering debt restructuring processes.

China's laws are being increasingly important as China's role in Africa's debt landscape is becoming more and more prominent. For instance, see the governing law clause in the Kenya Mombasa-Nairobi Standard Gauge Railway Project in Boxes 3.

69 Group Of Ten 'Report of the G-10 Working Group on Contractual Clauses' (26 September 2002) at 4
70 Group Of Ten, as above.
71 IMF Policy Paper No. 2020/043 "The International Architecture for Resolving Sovereign Debt Involving Private-Sector Creditors—Recent Developments, Challenges, And Reform Options" (1 October 2020) at 23, https://www.imf.org/en/Publications/Policy-Papers/Issues/2020/09/30/The-International-Architecture-for-Resolving-Sovereign-Debt-Involving-Private-Sector-49796 (accessed on 5 June 2023).
72 See ICMA "New York And English Law Standard CACs, Pari Passu And Creditor Engagement Provisions (May 2015) https://www.icmagroup.org/assets/documents/Resources/ICMA-Standard-CACs-Pari-Passu-and-Creditor-Engagement-Provisions---May-2015.pdf (accessed on 21 November 2023).
73 IMF Policy Paper No. 2020/043, as above, at 31.
74 Group Of Ten "Report of the G-10 Working Group on Contractual Clauses" (26 September 2002) at 1
75 For a discussion on national court litigation on the pari passu clause, see WW Bratton 'Pari Passu and a distressed sovereign's rational choices' (2004) 53 Emory Law Journal 823, R Olivares-Caminal "The Pari Passu Interpretation in The Elliott Case: A Brilliant Strategy but An Awful (Mid-Long Term) Outcome?" (2011) 40:1 *Hofstra Law Review* 39 and L C. Buchheit & J S. Pam "The Pari Passu Clause in Sovereign Debt Instruments" (2004) 53 Emory Law Journal 869.

In the context of African sovereign debt, these clauses should be subject to careful consideration, because the choice of governing law can have significant implications for debt restructuring or if disputes arise and can impair the ability of debtor countries to protect their interests. In the case of the governing law clause below, raises questions on whether Chinese law as the governing law can adequality protect Kenya's interests.

Box 3: Governing Law Clause in Buyer Credit Loan Agreement between The Export-Import Bank of China and The Government of the Republic of Kenya for Kenya Mombasa-Nairobi Standard Gauge Railway Project[76]

15.1 Governing Law This Agreement and the rights and obligations of the parties hereunder shall, in all respects, be governed by and construed in accordance with the laws of China.

The choice of dispute resolution mechanism and forum should be carefully evaluated, taking into account the specific circumstances of the dispute and the parties involved, to ensure effective and efficient resolution of any conflicts that may arise. Alternative options to resolution of disputes at foreign national courts, include international arbitration or mediation. The use of international arbitration has distinct merits and drawbacks that warrant thorough consideration. One of the advantages associated with arbitration is the flexibility, a more neutral forum for resolving disputes, and greater enforcement facilitated by international agreements such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[77] However on the issue of neutrality or perceived neutrality, this should be carefully considered, as neutrality depends on the choice of the forum. In both the Kenya Mombasa-Nairobi Standard Gauge Railway Project and the Entebe International Airport Phase I Project (see Box 4 and Box 5 below), for instance, the dispute settlement body of choice is the China International Trade and Economic Arbitration Commission based in Beijing, which raised questions on how impartial and neutral resolving major disputes at this forum would be when China Eximbank is one of the parties to the agreement.

The use of international arbitration as a substitute for domestic courts has gained prominence. However, it is crucial for African governments to exercise caution about the potential negative impacts of international arbitration on transparency and accountability. In this respect, the process of arbitration, characterised by the involvement of arbitrator panels who may have limited understanding of the economic and social circumstances surrounding debt obligations, has characteristics that may be of concern to African governments and other stakeholders. Firstly, it is conducted in a confidential manner. Secondly, it typically involves a restricted number of parties, often excluding CSOs and other stakeholders. Lastly, the outcomes of arbitration may be inconsistent due to the absence of judicial precedents that could guide on how future cases may be decided, as each case is treated as unique.

Box 4: Jurisdiction Clause in Buyer Credit Loan Agreement between The Export-Import Bank of China and The Government of the Republic of Kenya for Kenya Mombasa-Nairobi Standard Gauge Railway Project[78]

15.3 Submission to Jurisdiction

Any dispute arising out of or in connection with this Agreement shall be resolved through friendly consultation. If no settlement can be reached through such consultation, each party shall have the right to submit such dispute to the China International Economic and Trade Arbitration Commission (CIETAC) for arbitration. The arbitration shall be conducted in accordance with the CIETAC's arbitration rules in effect at the time of applying for arbitration. The arbitral award shall be final and binding upon both parties. The arbitration shall take place in Beijing.

76 Clause 15.1 of "Buyer Credit Loan Agreement between The Export-Import Bank of China and The Government of the Republic of Kenya Represented by the National Treasury of Kenya for the Kenya Mombasa-Nairobi Standard Gauge Railway Project" (Contract No. 1410302052014210766) (21 June 2014) https://int.nyt.com/data/documenttools/Kenya-China-Docs-2/e099c795dfcc47ce/full.pdf (accessed on 21 November 2023).

77 See S Pahis "The African Debt Crisis And The Perils Of International Arbitration" African Sovereign Debt Justice Paper Series, AfronomicsLaw (15 October 2021) https://www.afronomicslaw.org/category/african-sovereign-debt-justice-network-afsdjn/african-debt-crisis-and-perils-international (accessed on 21 November 2023).

78 Clause 15.3 of "Buyer Credit Loan Agreement between The Export-Import Bank of China and The Government of the Republic of Kenya Represented by the National Treasury of Kenya for the Kenya Mombasa-Nairobi Standard Gauge Railway Project" (Contract No. 1410302052014210766) (21 June 2014) https://int.nyt.com/data/documenttools/Kenya-China-Docs-2/e099c795dfcc47ce/full.pdf

Box 5: Jurisdiction and dispute resolution clause in the Uganda/ Export-Import Bank of China Concessional Loan Agreement for Uganda Upgrading and Expansion of the Entebe International Airport Phase I Project[79]

> 8.5 Any dispute arising out of or in connection with this Agreement shall be resolved through friendly consultation. If no settlement can be reached through such consultation, each party shall have the right to submit such dispute to the China International Economic and Trade Arbitration Commission (CIETAC) for arbitration. The arbitration shall be conducted in accordance with the CIETAC's arbitration rules in effect at the time of applying for arbitration. The arbitral award shall be final and binding upon both parties. The arbitration shall take place in Beijing.

f) The need to incorporate new issues as a consideration during times of distress – environmental, social, governance, etc.

In recent years, there has been a growing recognition of the need to incorporate new issues, such as the environment, debt sustainability, and gender considerations, in sovereign debt contracts. Traditionally, sovereign debt agreements have focused primarily on financial aspects, such as repayment terms and interest rates. However, there is now a greater understanding that debt sustainability depends not only on economic factors but also on environmental and social factors. While on one hand, debtors need to align their borrowing practices with environmental goals and other goals from the onset of the debt relationship, it also raises the question of how these issues and their impacts feature during debt restructuring which should assess a country's ability to repay its debts without compromising its development objectives or burdening future generations. One of the significant concerns with many sovereign debt contracts is the absence of provisions for social and environmental safeguards. This becomes particularly concerning in light of the large-scale infrastructure projects that these loans often fund. Without adequate safeguards, there is a risk of adverse social and environmental impacts. The lack of these safeguards casts doubts on creditors' responsible lending practises and the possible negative effects of debt-financed projects on communities.

g) Reform seems to mainly come from international industry participants, and African perspective is also needed

Market participants play a crucial role in shaping and standardizing contractual terms and practices in the international capital markets and loan markets. Organizations like International Capital Markets Association (ICMA),[80] and the Loan Market Association (LMA)[81] develop model contracts, standard documentation, and best practices that are widely used by market participants for various financial transactions. There are both advantages and potential concerns with contractual reform being only led by market participants, with limited participation from African stakeholders. On the one hand, African countries can benefit from standardized contractual terms and practices developed by market-led initiatives that establish standardized terms and practices, which in turn can facilitate smoother transactions, reduce negotiation costs, and promote liquidity in the market. However, there are also concerns about the potential concentration of influence in the hands of market participants. Market-led reforms alone may not adequately address the interests and needs of developing country borrowers. There is a need for balanced representation and consideration of the perspectives and needs of all parties involved in financial transactions. Therefore, it is important for African stakeholders to actively participate in the development and implementation of contractual reforms to ensure that they align with the region's development goals and contribute to sustainable and inclusive growth. Collaboration between market participants, African policymakers, and regional organizations can help strike a balance between market best practice and the African perspective in contractual reform.

79 Clause 8.5 "Government Concessional Loan Agreement on Uganda Upgrading and Expansion of the Entebe International Airport Phase I Project between the Government of the Republic of Uganda represented by the Ministry of Finance, Planning and Economic Development of Uganda and the Export-Import Bank of China" (31 March 2015) https://docs.aiddata.org/ad4/pdfs/Uganda_Entebbe_Loan_Agreement.pdf (accessed on 21 November 2023).
80 International Capital Markets Association, https://www.icmagroup.org/ (accessed on 21 November 2023).
81 Loan Market Association, https://www.lma.eu.com/ (accessed on 21 November 2023).

3

Rethinking Sovereign Debt Agreements: A Civil Society Perspective on Reforming Contractual Approaches

3.1 Recommendations on key focus areas in contractual reform

A well-structured contractual framework within the sovereign debt relationship is essential for governing the interactions between debtors and creditors, in a manner that ensures fairness and transparency. By improving this framework, countries can enhance their ability to manage debt obligations, mitigate risks, and foster investor confidence. From a civil society perspective, debt contracts are not only seen as an important tool in the sovereign debt relationship, but also as a tool that raises concerns regarding their potential impact on social justice, human rights, and sustainable development. And as such, these contracts prioritize the well-being of people and the environment in addition to the adherence to financial obligations. While this paper focusses more on the contractual relationship itself, of note is the need for a multipronged approach of (1) responsible borrowing and lending practices; (2) fair and transparent negotiation processes and (3) contracts that prioritize sustainable development, social and environmental protection and that respect human rights, particularly during times of economic and social crises.

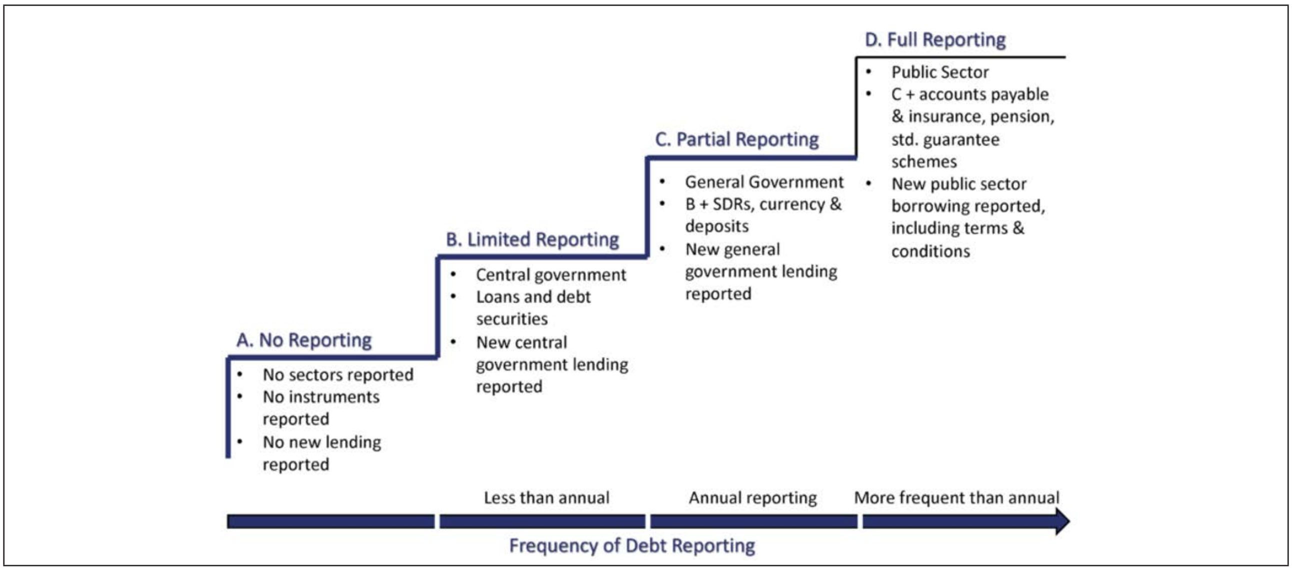
Key elements required to ensure fair and equitable debt contractual frameworks are and that should be core elements on the discourse on a model contract for sovereign debt from a CSO perspective, include:

1. **Enhanced transparency and disclosure requirements**: Transparency and disclosure are vital for promoting accountability and preventing corruption. Contracts should include provisions that mandate comprehensive and timely reporting of financial information, debt terms, and any relevant agreements or transactions. It is recommended to refrain from incorporating excessive confidentiality and non-disclosure clauses in debt contracts.[82] By abstaining from including such clauses, the focus is directed towards transparency and openness, enabling a greater level of accountability and scrutiny from the public.

   Enhancing transparency itself in the national debt management landscape may be done incrementally with more and more reporting done at different phases of the "reporting ladder" for public and publicly guaranteed debt (see Figure 1 below). This ladder takes countries from a situation where there are no published public debt reports, through to partial debt reporting, and ending at full debt reporting which is in line with best practice.[83] Notably, this reporting should also include the terms of the debt itself. This process of increasing transparency can be hindered by insufficient staff capacity, which is essential for thorough debt recording and reporting. Notably, with the lack of technical capacity in financial and legal terminology, operational risks may arise such as the incorrect recording of debt transactions, which can result in poor borrowing decisions.[84]

82 M Estevão; S Essl; and V Tsiropoulos "Debt Transparency and Development" International Banker (10 March 2022) https://internationalbanker.com/finance/debt-transparency-and-development/ (accessed on 21 November 2023).
83 M Estevão; S Essl; and V Tsiropoulos, as above.
84 M Estevão; S Essl; and V Tsiropoulos, as above.

Figure 1: Public Debt Reporting Lader[85]



2. **Binding standstills in times of distress or catastrophes**: It is crucial to incorporate provisions that allow for temporary suspensions of debt payments during periods of economic distress or unforeseen catastrophes. This can provide breathing space for countries to recover and allocate resources towards essential needs. Binding standstills in times of distress or catastrophes can be incorporated in force majeure clause and catastrophe clauses.

3. **How events of default are triggered**: There is a need to also carefully consider how contracts define events of default. The definition of events of default is important because it outlines the circumstances under which a debtor may be considered as having breached the contract, thereby allowing creditors to take appropriate actions as set out in the agreement. When defining events of default, it is important to ensure clarity, precision, and fairness. The language used should be specific and unambiguous, leaving no room for interpretation dispute. This helps to minimize potential conflicts and misunderstandings between the debtor and creditors.

4. **Collective action in modifying contractual terms**: To address the complexities of sovereign debt restructuring, it is important to include provisions that facilitate collective action among creditors through enhanced CACs or majority voting provisions. This allows for coordinated negotiations and can help prevent holdout behaviour, ensuring a more efficient and equitable resolution process. Linked to this is the need to ensure that Waiver and Amendments Clauses, that allow for modifications or exemptions to be made to the terms and conditions of the agreement, include a majority voting provision. Majority voting provisions are critical for the different debt instruments, including other forms of debt, like syndicated loans or sub-sovereign debt, which the IMF notes often lack majority restructuring provisions for payment terms.[86]

5. **Creditor engagement and participation**: Involving creditors in decision-making processes can lead to better outcomes. The model contract should encourage meaningful creditor engagement and participation, promoting dialogue and cooperation between debtors and creditors. What is also clear is that contractual innovations need to be married with other institutional changes, for instance, beyond CACs, African debtors need to establish effective communication channels with bondholders to promote dialogue and information sharing. While there is an uptake of CACs in African bonds, this should also include the enhanced CACs that allow for amendments across various issues of bonds.

85 M Estevão; S Essl; and V Tsiropoulos, as above.

86 IMF Policy Paper No. 2020/043 "The International Architecture for Resolving Sovereign Debt Involving Private-Sector Creditors—Recent Developments, Challenges, And Reform Options" (1 October 2020) at 2, https://www.imf.org/en/Publications/Policy-Papers/Issues/2020/09/30/The-International-Architecture-for-Resolving-Sovereign-Debt-Involving-Private-Sector-49796 (accessed on 5 June 2023).

6. **Fair dispute resolution mechanisms**: The inclusion of fair and impartial mechanisms for resolving disputes is essential. This ensures that conflicts arising from the contract can be addressed in a just and equitable manner, promoting trust and stability in the debt relationship. The relevant clauses that are critical here are the jurisdiction clause, governing law and dispute resolution clause that will set out the jurisdiction where disputes are resolved, how they are resolved from a procedural perspective and under which legal system the agreement will be interpreted and enforced.

7. **Social and environmental considerations**: Recognizing the impact of debt on social and environmental factors is crucial. The contract should incorporate provisions that take into account the social and environmental consequences of debt, promoting sustainable development and responsible lending practices.

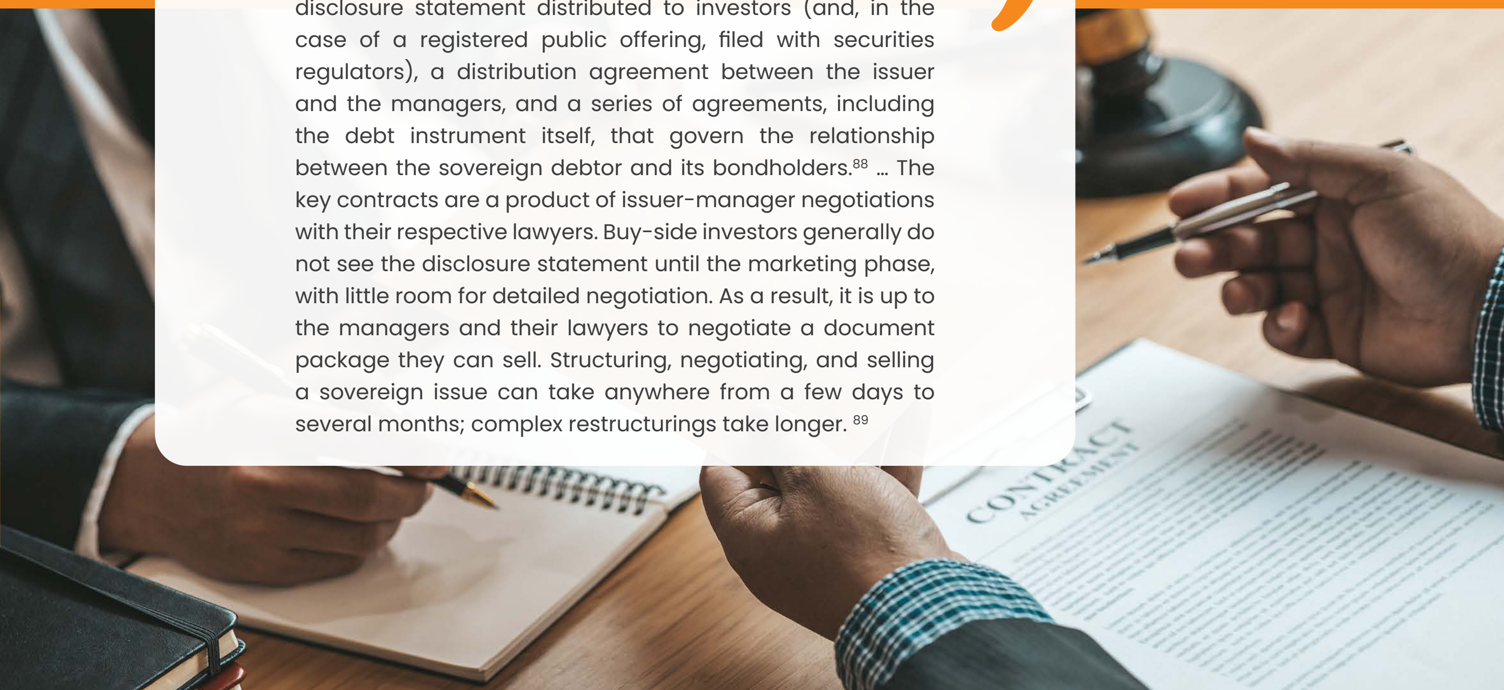
3.2 The Case for Developing Model Contracts/Contractual Clauses: Addressing the Need for an African Perspective

The development of a model contract or contractual clauses is crucial for promoting fairness, sustainability, and the protection of the interests of African countries and their populations in debt agreements. The use of standardization will provide a framework that can contribute to more equitable and beneficial debt arrangements, supporting long-term development and well-being. One key benefit of a model contract is that it establishes a standardized and transparent approach to debt agreements and a guide for negotiations. By providing consistency and clarity in negotiations, it helps reduce information asymmetry and power imbalances between debtors and creditors.[87] This can lead to more balanced and mutually beneficial outcomes. While standardization will create more efficiency, it is not meant to be a one-size-fits-all solution. It should be adaptable to the specific circumstances and needs of each African country, allowing for customization and flexibility. By taking into account the unique circumstances of each country, these contracts can be tailored to their needs and circumstances.

Responsible lending and borrowing practices are also promoted through the inclusion of provisions that emphasize debt sustainability, transparency, and accountability. This encourages both debtors and creditors to act in a responsible and sustainable manner, reducing the risk of unsustainable debt burdens and ensuring that resources are used effectively for development purposes. Moreover, a model contract or contractual clauses can incorporate best practices and lessons learned from past debt experiences. Additionally, African stakeholders can contribute to the development of innovative contractual provisions that address specific challenges faced by the continent. This may include clauses that promote responsible lending and borrowing, address climate change and environmental concerns, or prioritize investments in critical sectors such as healthcare, education, and infrastructure.

The process of developing Africa-friendly model contractual clauses or model contracts in their totality, will require identifying the key stakeholders and their roles including addressing global cooperation, ensuring inclusivity and participation, addressing legal and jurisdictional challenges of debt agreements and incorporating flexibility and customization. It will also require the buy-in of market participants, which is critical for common acceptance of an African model. One example of the process of issuing bonds in the English sovereign market, which is one of the markets of choice is as follows;

> "Sovereign bond documentation usually consists of a disclosure statement distributed to investors (and, in the case of a registered public offering, filed with securities regulators), a distribution agreement between the issuer and the managers, and a series of agreements, including the debt instrument itself, that govern the relationship between the sovereign debtor and its bondholders.[88] ... The key contracts are a product of issuer-manager negotiations with their respective lawyers. Buy-side investors generally do not see the disclosure statement until the marketing phase, with little room for detailed negotiation. As a result, it is up to the managers and their lawyers to negotiate a document package they can sell. Structuring, negotiating, and selling a sovereign issue can take anywhere from a few days to several months; complex restructurings take longer. [89]



87 See IMF Policy Paper No. 2020/043, as above, that highlights the issues of information asymmetries.
88 A Gelpern & M Gulati "Public Symbol in Private Contract: A Case Study" 84 Wash. U. L. Rev. 1627 (2008) at 1636.
89 A Gelpern & M Gulati, above at 1637.

If one adopts this approach in formulating the terms of bond instruments, it becomes crucial to incorporate contractual clauses that are widely recognized and generally accepted as standard practice within the markets. As capital markets are increasingly becoming a primary source of external financing for African economies, it becomes even more critical to ensure that the terms of bond instruments incorporate widely recognized and accepted contractual clauses. Notably, investor confidence by market participants in contractual clauses arise from the fact that these clauses have either "been used in the past and are well known (learning effects), or are widely used now and/or are expected to be widely used in the future (network effects)."[90] However the danger of this is the potential adoption of " terms that are suboptimal on their own merits just because they are well understood or widely used".[91] Understanding how reform of contractual clauses (especially of boilerplate clauses) is critical. Creating stakeholder engagement can be done through an African Working Group on Debt Agreements that can be at the core of engaging creditors and investors in the process.

While so far, market-driven standardization has been the norm, the participation of African stakeholders in the development of model contracts or clauses can help address power imbalances in debt negotiations. It allows African countries to have a stronger voice and influence in shaping the terms and conditions of their debt contracts, ensuring that their interests are adequately represented. There are however potential obstacles to the development and widespread adoption of model contracts formulated by African stakeholders. A main concern pertains to a potential lack of political will and efficient governance frameworks necessary for the development and adoption of this model approach in debt transactions. Furthermore, the absence of established frameworks for international and regional coordination and cooperation among all relevant parties to establish consensus and promote collaboration on contracts is evident. Resultantly, international market players have predominantly filled the gap in assuming the role of pioneers and initiators of reform.

Given the challenges and circumstances faced by African countries, it is essential for African stakeholders to actively contribute to the development of model contracts or clauses for debt. Governments, CSOs, and regional institutions possess valuable insights and experiences that can inform the design of these contracts. Their understanding of the social, economic, and environmental contexts of their respective countries ensures that the contracts adequately address the specific concerns and priorities of African nations.

From a public sector standpoint, an additional obstacle arises in the form of potential limitations in domestic capacity of debt management entities responsible for formulating and negotiating such agreements (both the lack of financial resources and technical expertise/capacity). Technical proficiency is required to effectively navigate the intricate legal constraints and enquiries pertaining to the complex task of balancing diverse interests and conflicting priorities. Institutions like the ALSF can play a central role in the process of capacity development of the public sector to fill this gap, and CSOs like AFRODAD are playing a role in direct capacity development and through research papers like this one.

90 A Gelpern & M Gulati, above at 1629.
91 A Gelpern & M Gulati, above at 1629.

4

Conclusion

At the core of the discussion in this paper has been that debt agreements often contain terms and conditions that favour creditors, leaving African governments with limited flexibility and reduced agency in decision-making processes. Furthermore, the legal frameworks governing loan contracting processes in African countries are not always effective in protecting the interests of African governments, leading to imbalanced power dynamics during negotiations. Addressing these issues requires concerted efforts from both borrowing nations and creditors to implement transparent and responsible lending practices, simplify contractual language, and promote flexibility in repayment terms. Additionally, strengthening governance structures, enhancing fiscal transparency of the different funding sources will contribute to creating a more resilient and equitable landscape for sovereign debt contracts in Africa. Reimagining Africa's debt structure and architecture also requires adopting a more holistic perspective that goes beyond financial considerations and takes into account social, environmental, and governance dimensions. By implementing these strategies and recommendations, African governments can regain agency in negotiate and renegotiating debt.

To address these issues, this paper has presented strategies and policy recommendations that empower African governments and strengthen their bargaining power. However, the issues associated with African sovereign debt obligations are complex and call for an all-encompassing strategy that involves cooperation. Addressing the issue of unfavourable debt agreements requires the implementation of a comprehensive and multifaceted approach. CSOs can play a crucial role in improving the regional contractual landscape by bringing diverse voices to the table and ensuring that the needs and concerns of vulnerable populations are taken into account, but they cannot do it alone. Although CSOs can play a significant role in advocating for and raising awareness about contractual and other debt issues, it is crucial to emphasize the need of cooperation and partnerships with other entities such as think tanks and academics. These collaborations are particularly necessary in the areas of debt-related research, debt monitoring, capacity building, participation in debt restructuring, relief campaigns, and PIL. These stakeholders in question have the capacity to significantly impact policymaking by reshaping discussions, reframing issues, and offering detailed analysis within the sovereign debt context. Furthermore, it is essential to build inclusive forums that facilitate dialogue and collaboration between CSOs, African governmental bodies, think tanks, academic institutions, and international organizations.

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