Curtailing Vulture Funds in Low-Income Sovereign Debt Litigation:

American and British Legislative Responses

*Eloy A. Peral**

The wielding of official might by Western governments to influence developing country private debt restructuring is nothing new in the modern age. From the proverbial gunboats to the Brady Plan,[1] this exercise of power has ranged from armed conflict to the sponsorship of "quasi-voluntary" sovereign debt restructurings[2] and the enactment of incentives to spur debt reduction among private creditors.[3] Central to the history of sovereign debt defaults and restructuring has been the transformation of sovereign immunity[4] from an absolute immunity to a qualified immunity, which prevails today in the United States and the United Kingdom.[5] This change has had a significant impact on sovereign debt litigation and consequently on the sovereign debt market. Consistent with this history, the United States has been active in exerting its foreign policy machinery to influence the disposition of sovereign debt litigation in U.S. courts.[6]

The erosion of sovereign immunity in the United Kingdom and the United States, combined with the diversification of sovereign debt-holders from bank syndicates (which were the standard during the 1980s) to bondholders today, have created what are pejoratively referred to as "vulture funds."[7] Official U.S. reaction toward these funds has been muted in comparison with that of the British government.[8] The historical reasons for official involvement in private sovereign debt restructuring, particularly the attempt to manipulate the viability of sovereign debt litigation, are varied, complex, and disputed.[9] Regardless of one's viewpoint, it is clear that the post-Cold War consensus among the industrialized world has been to implement, via international financial institutions, debt relief initiatives for the most economically deprived nations, which are largely located in Sub-Saharan Africa.[10] These debt relief initiatives have collided with the rise of sovereign debt enforcement through litigation in American and British courts.[11] Official participation in sovereign debt crises has been characterized by the pushing and prodding of relevant parties in order to reach desired outcomes. Despite restricted sovereign immunity, until recently bright-line prohibitions on the enforcement of sovereign debt by secondary market actors have been resisted.[12]

Regardless of one's viewpoint, it is clear that the post-Cold War consensus among the industrialized world has been to implement, via international financial institutions, debt relief initiatives for the most economically deprived nations, which are largely located in Sub-Saharan Africa.

In the U.K., enactment of the Debt Relief (Developing Countries) Act 2010[13] (Debt Relief Act) emerged as a result of the confluence of the forces described above. The swift passage of the Debt Relief Act was the product of a sustained campaign by non-governmental organizations (NGOs) directed toward Members of Parliament (MPs) in the British government.[14] Prior to the introduction of the Debt Relief Act in Parliament, several pieces of legislation, including a bill in the U.S. House of Representatives,[15] a (now defunct) bill in the U.K. House of Commons,[16] and a public consultation[17] issued by Her Majesty's (HM) Treasury[18]—the precursor to the Debt Relief Act[19]—represented the continuum of solutions to the perceived problem. Generally, all three proposals and the Debt Relief Act limit the amount creditors are permitted to recover defaulted "poor" country debt in national courts. However, the scope of applicability and potential impact of each piece of legislation—notably what level of poverty qualifies a country for protection and the mon-

* Eloy A. Peral is a 2010 graduate of the American University Washington College of Law. Eloy received a Bachelor of Arts at New York University, where he majored in Economics and Politics. He served on the 2009-2010 Business Law Brief Executive Board as an Articles Editor. Eloy would like to thank Professor Anna Gelpern for her comments on the initial draft of the article and the Business Law Brief staff for their efforts in preparing the article for publication.

etary limits on recovery—vary dramatically. The growing urge to curtail vulture funds, as manifested in these legislative acts, came to the surface after *Donegal International Ltd. v. Republic of Zambia*,[20] where a hedge fund purchased Zambian trade debt owed to Romania since 1979 and sued to enforce the debt in U.K. courts.[21]

Donegal and the introduction of these legislative proposals have paralleled an outcry from government officials and civil society over vulture fund "profiteering" from debt enforcement against the poorest countries.[22] The overarching public policy aim of these legislative proposals is to support multilateral debt relief programs, such as the Heavily Indebted Poor Countries (HIPC) initiative, a debt relief initiative that received broad support from the international community and that is designed to minimize the impact of excessive public sector debt on domestic poverty reduction programs.[23] But in the wake of the *Donegal* case, little attention has been paid to anti-vulture fund legislative proposals that ignore any adverse impact some imbalanced provisions may have on the same countries purported to benefit from the legislation. Many international actors continue to frame the issue in terms of morality[24] and have not considered whether such radical approaches to curtailing low-income sovereign debt enforcement could increase the cost of borrowing for such countries or eliminate the market. More fundamentally, these entities either ignore a country's *ability* to pay or conflate it with the country's *willingness* to pay.[25] In addressing the problems unveiled by *Donegal*, do these legislative proposals go too far and perhaps impair multilateral initiatives to aid impoverished, highly-indebted countries? And will these legislative proposals really contribute to the ability of low-income countries to cope in the current economic climate?

This article aims to provide a framework in which to discuss these issues. In addition, it analyzes the three proposals and the enacted Debt Relief Act. Part I explains the facts of the *Donegal* case. Part II discusses how the original legislative proposals incorporate and seek to address the problems revealed by *Donegal*. Part III begins by explaining the international aid programs that provide the country classifications used by these proposals to determine which countries receive protection, then analyzes each legislative proposal and the enacted Debt Relief Act. Part IV offers a general critique of overly broad anti-vulture fund legislation that is motivated more by populist sentiment than by efforts to guard the integrity of multinational debt relief programs.

I. DONEGAL INTERNATIONAL LTD. V. REPUBLIC OF ZAMBIA

In 2007, Donegal International Ltd., a special-purpose vehicle based in the British Virgin Islands and incorporated by Delaware-based Debt Advisory International LLC, sued Zambia in U.K. court to recover more than $55 million[26] in connection with official debt assigned to Donegal by its original holder, Romania.[27] The debt was owed on a credit agreement originated in 1979 to finance Zambia's acquisition of agricultural machinery from Romania.[28] Starting in 1992, Romania and Zambia began trying to restructure that debt.[29] In 1997, Debt Advisory International offered to purchase the debt from Romania, suggesting a 90% discount.[30] After an offer from Zambia to buy back the debt for an 89% discount through the World Bank's Debt Reduction Facility,[31] Romania assigned the debt to Donegal in 1999 for $3.2 million, an 89% discount.[32] After failed negotiations between Zambia and Donegal,[33] in 2003 Zambia concluded a settlement agreement with Donegal, which included a broad waiver of Zambia's sovereign immunity,[34] and under which Zambia agreed to pay $15 million plus additional interest payments.[35] The agreement provided that upon default Zambia would be liable for the full amount of principal and interest due under the original agreement.[36] At the recommendation of Zambia's Task Force on Corruption, established to investigate misappropriation of public funds under a previous president, Zambia suspended payment under the settlement agreement.[37] Despite concluding, *inter alia*, that Donegal provided misleading information to courts in three countries, that Donegal's actions in obtaining confidential information about the validity of the debt from government officials was unlawful, and that the interest rate provisions in the settlement agreement were penal, the English High Court found Zambia liable for the debt.[38] However, in a later decision, a judge reduced Donegal's $55 million claim and awarded Donegal a judgment of just over $15 million plus interest.[39] *Donegal* has been criticized for failing to "set down clear guidelines for how to assess damages due to default on sovereign debt purchased on the secondary market," thus causing uncertainty as to secondary market holders' legal entitlement to repayment.[40]

Although unusual partly due to the low proportion of HIPC debt held by private creditors,[41] sovereign debt claims brought by assignees are not unique.[42] Liberia, Republic of the Congo, Uganda, Honduras, and Sierra Leone have all been the target of lawsuits.[43] Recently, London's High Court awarded two Caribbean-based investment funds over $18 million due to Liberia's nonpayment of a $6 million loan issued by U.S.-based Chemical Bank in 1978.[44] The award was the enforcement of a 2002 New York court $18 million judgment.[45]

II. AFTER *DONEGAL*—PUBLIC POLICY FIXES

Other than inspiring general distaste for the enforcement of the debt of a country classified among the world's poorest countries, Donegal's efforts to enforce the full value of the debt was seen as counteracting multilateral debt relief initiatives available only to low-income countries, notably the HIPC Initiative.[46] In 2005, Zambia became eligible for $2.5 billion in debt relief,[47] which represented a 62.6% reduction in its public debt.[48] The link between debt relief for low-income countries and poverty reduction and development has been the bedrock of multilateral debt relief initiatives.[49] Debt relief is viewed as crucial to the freeing-up of resources for health and education that are essential for development and the end of extreme poverty.[50] The aftermath of *Donegal* generated numerous concerns and policy prescriptions for limiting the ability of vulture creditors to enforce low-income countries' sovereign debt through litigation.[51] These public policy goals have been expressed in legislative responses and the surrounding debate. However, the weight given to each specific policy consideration has varied considerably among the proposals.

The link between debt relief for low-income countries and poverty reduction and development has been the bedrock of multilateral debt relief initiatives.

First, some view the enforcement of HIPC debt in national courts, despite long-established commitment by the international community to debt relief, as transferring the benefits of debt relief from its intended beneficiaries, the low-income countries, to vulture funds. All three original legislative proposals give this concern considerable weight. For example, the House of Representatives' Stop VULTURE Funds Act (U.S. Vulture Act)[52] has likened low-income sovereign debt judgments to preferential payments[53] from multilateral creditors to vulture creditors.[54]

Second, limits on low-income sovereign debt recovery may perhaps ameliorate the collective action and free-rider problems (also called holdout problems)[55] posed by the prospects of litigating enforcement where the HIPC Initiative and the Debt Reduction Facility are voluntary and no applicable insolvency regime exists.[56] The Debt Reduction Facility, administered by the World Bank, provides grant funding to eligible countries—namely those eligible for assistance from the International Development Association (IDA)[57]—to buy back, at a deep discount,[58] the debts owed to external commercial creditors.[59] The HM Proposal describes the problem as follows:

> Debt relief under the HIPC Initiative is voluntary. . . . However, before entering HIPC, the market value of all creditors' debts is often much below the nominal value of the debt: the debtor country is expected to be unable to meet all of its repayment commitments and the expected return on holding that debt is therefore correspondingly low. For companies in this position, insolvency law generally provides for all creditors to realise a loss and to be repaid an equal proportion of the sums owing to them. No binding insolvency procedures exist for governments that are unable to pay their debts. *This leads to a free-rider problem*: one creditor can refuse to participate in the necessary debt reduction. Once others have reduced their claims by the necessary amount, and the debtor country's ability to repay recovers, the creditor that held out can pursue their [sic] debt claims for full value, at the expense of the debtor country – and, indirectly, at the expense of the other creditors.[60]

The potential for an international insolvency regime for sovereign debt has been the subject of several debates. However, such an insolvency regime would not effectively address the debt burdens of low-income countries because private creditors represent a small fraction of these countries' public debts.[61] Most of the creditors are other governments and public institutions.[62] For the same reasons, the inclusion of collective action clauses in low-income sovereign debt agreements would not address these problems.

Third, much of what has driven the debate on vulture funds is the disdain for the secretive nature of the funds, a sentiment that has only intensified with the global financial crisis. There are two strands of this view. One states that profiting off poor countries is simply immoral.[63] The other frames the issue in terms of promoting accountability and transparency and fighting corruption.[64] The discomfort with vulture funds' secrecy pervaded the debate surrounding the introduction of the House of Commons Developing Country Debt (Restriction of Recovery) bill (Keeble Bill)[65] and is clearly expressed as a finding in the U.S. Vulture Act.[66] Low-income countries such as Zambia, with weak governmental institutions and histories of political and economic exploitation and corruption, are especially vulnerable to private actors seeking improper influence. Problems of non-transparency in the secondary market for sovereign debt are addressed by the disclosure requirements in the Keeble Bill and U.S. Vulture Act. Feeding off the current political climate, these disclosure requirements have been suggested as a vehicle for financial regulatory reform.[67] The facts found by the *Donegal* court illustrate the basis for these concerns.[68] Lastly, a consideration not examined in *Donegal* is the extent to which payment of adverse judgments in connection with sovereign debt litigation exacerbates the social and economic conditions of countries such as Zambia. This question will be briefly examined in Part IV.

III. LEGISLATION

This section describes the structures and features of the four pieces of legislation that are the subject of this paper: the enacted Debt Relief Act, the Keeble Bill, the U.S. Vulture Act, and the predecessor to the Debt Relief Act, HM Treasury Consultation. Although all four endeavor to limit the amount that certain creditors may recover on defaulted low-income sovereign debt, their scope and potential impact vary substantially. In this respect, enactment of the Debt Relief Act represents a victory for proponents of balanced measures against the threat vulture funds pose to multilateral debt relief initiatives. Although the Keeble Bill is now largely irrelevant due to enactment of the Debt Relief Act, its provisions serve as an analytical counterpoint to the Debt Relief Act. Furthermore, by revealing its radical provisions, the Keeble Bill should serve as caution to the anti-vulture fund debate in other countries.

The core features of the proposals include: (1) indicators to determine whether a country qualifies for protection; (2) the height of the recovery ceiling; (3) a determination of whether the prohibitions apply to new borrowing; and (4) disclosure requirements. In addition, the proposals each have their own unique features. All four proposals rely, to different extents, on World Bank country classifications to determine what sovereign debt is covered. The World Bank and its branches use these classifications to determine whether a country qualifies for certain assistance and debt relief programs.[69] The Keeble Bill extended its protections to IDA-eligible countries and "low and middle income" countries. The U.S. Vulture Act covers a class of IDA-eligible countries further limited by its own set of criteria.[70] Consistent with its underlying public policy, the Debt Relief Act only applies to HIPC-eligible countries.[71]

A. World Bank Country Classifications

The IDA provides interest-free, deeply concessional loans (known as credits) and grants for "programs that boost economic growth, reduce inequalities, and improve living conditions."[72] Two criteria are used to determine which countries can access IDA resources: (1) relative poverty, defined as gross national income (GNI) per capita below an established threshold;[73] and (2) "lack of creditworthiness to borrow on market terms and therefore a need for concessional resources to finance the country's development program."[74] "Blend countries" are those that are eligible for IDA assistance but sufficiently creditworthy to borrow from the International Bank for Reconstruction and Development (IBRD).[75] Non-blend countries are ineligible for assistance from the IBRD.[76] Currently, seventy-nine countries are eligible for IDA assistance, including Zambia.[77] Notably, India, a blend country and an emerging global economic power, is eligible for IDA assistance.[78]

The HIPC Initiative, complemented by the Multilateral Debt Relief Initiative,[79] aims to alleviate the burden that excessive levels of debt payments impose on the ability of poor countries to provide poverty reduction programs.[80] To be available for debt relief, a country must be IDA-eligible, "face an unsustainable debt situation even after the full application of traditional debt relief mechanisms," and "have a proven track record in implementing strategies focused on reducing poverty and building the foundation for sustainable economic growth."[81] Once a country is eligible for the HIPC Initiative there are two stages to gaining debt relief—decision point and completion point.[82] To reach decision point a country must have a satisfactory record of poverty reduction and must have achieved macroeconomic stability.[83] Once a country reaches decision point, official creditors begin to provide debt relief, although they maintain the right to revoke.[84] At decision point, the International Monetary Fund (IMF) and World Bank agree with the country on triggers that the country must meet to complete the initiative.[85] Once the triggers are met, completion point is reached and the Paris Club and participating creditors cancel their debt in proportion to the common reduction factor.[86] The common reduction factor is the "proportion of a country's debt which all creditors will need to cancel in order to bring the debt to a sustainable level."[87] Currently, twenty-eight countries have reached completion point, seven countries have reached decision point, and five countries remain potentially eligible for HIPC debt relief.[88] Lastly, the debt reduction facility complements the debt reduction goals of IDA and the HIPC Initiative.[89]

B. The Keeble Bill

The Keeble Bill, if enacted, would have had the most pronounced impact on primary and secondary sovereign debt markets. The Keeble Bill would have barred courts from awarding a "creditor of the defaulted debt of a Low or Middle Income country the right to recover in excess of the maximum recovery amount . . . ."[90]

"Low or Middle Income Country" was defined as "any country whose income group is classified as low income, lower middle income, or higher middle income" by the IBRD and the IDA.[91] Consequently, the Keeble Bill was applicable to 144 countries, including the BRIC countries[92] and other emerging economies such as Chile, Argentina, Turkey, and Mexico, and emerging European countries like Latvia, Poland, Lithuania, and Romania.[93] Currently, the maximum amount a creditor can collect on covered debt is the amount paid for the debt plus the lower of 8% as calculated from the date the debtor acquired the interest[94] and the interest rate under the sovereign debt agreement.[95] Moreover, any amount recovered in U.K. courts must have been "reduced by a sum equal to any amounts recovered from *other actions* related to the same defaulted debt."[96]

Under the Keeble Bill, before commencing an action in the U.K. to recover "any amount of defaulted sovereign debt," a creditor "must make an application to, and receive the consent" of a U.K. court.[97] The disclosure requirements needed in the consent applications[98] would therefore have imposed additional costs on creditors seeking payment of defaulted sovereign debt that fell outside the Keeble Bill's coverage.[99]

The Keeble Bill's limit on recovery was intended to apply to "a business carrying on business in the United Kingdom" and to British citizens who successfully recover in foreign courts or through some dispute resolution procedure in excess of the maximum recovery amount.[100] In such a case, the debtor country or interested party would have standing to force the creditor to "repay to the debtor country the amount that exceeds the maximum recovery amount."[101] Lastly, there is no indication from the text of the Keeble Bill that its provisions would not have applied to debt originated after its enactment, i.e., to new borrowing. In addition, the Keeble Bill did not expressly exclude original creditors from its provisions.[102]

C. U.S. Vulture Act

The U.S. Vulture Act would make "sovereign debt profiteering," whether direct or indirect, illegal not only for any U.S. citizen, but also for anyone operating in the United States.[103] "Sovereign debt profiteering" is defined as:

> any act by a vulture creditor seeking, directly or indirectly, the payment of part or all of defaulted sovereign debt of a *qualified poor country*, in an amount that exceeds the total amount paid by the *vulture creditor* to acquire the interest of the vulture creditor in the defaulted sovereign debt (excluding any amount paid for attorneys' fees or other fees and costs associated with collection), *plus 6 percent simple interest* per year on the total amount, calculated from the date the defaulted sovereign debt was so acquired, but the term does not include the purchase or sale of such a debt, or the acceptance of a payment in satisfaction of the debt obligation, without threat of, or recourse to, litigation.[104]

Thus, the maximum amount that would be recoverable is the amount paid by the creditor to acquire an interest in the debt, plus 6% interest, calculated from the date the debt was acquired. Furthermore, as is evident from the final clause of the definition, the U.S. Vulture Act implicitly exempts consensual negotiations from its prohibitions, unless there is a threat of litigation.[105] Parties found to willfully engage in sovereign debt profiteering would be "fined an amount equal to the total amount sought by the person through sovereign debt profiteering."[106]

The legislation defines a "vulture creditor" as "any person who directly or indirectly acquires defaulted sovereign debt *at a discount to the face value of the obligation so acquired* . . . ."[107] Thus, the U.S. Vulture Act would not apply to original lenders and trade creditors. Furthermore, the U.S. Vulture Act would not apply when a secondary creditor acquires the debt at face value.[108]

The U.S. Vulture Act covers debt of "qualified poor countries." Under the Act, a qualified poor country includes those eligible for assistance from the IDA, but not from the IBRD.[109] Additionally, the county must not be deemed to: "engage in pattern of gross violations of internationally recognized human rights" as defined by the Foreign Assistance Act of 1961; have "an excessive level of military expenditures;" provide support for acts of international terrorism; or fail to cooperate with the United States on international narcotics control matters.[110] The first prong of the definition would extend the qualified poor country status to approximately forty-seven countries.[111] It is uncertain to what extent the second prong of the definition would narrow the group of countries covered by the U.S. Vulture Act. Currently, Sudan is the only IDA-eligible country that has been designated as a sponsor of international terrorism by the State Department.[112] In 2010, six IDA-eligible countries were among those identified by President Barack Obama, pursuant to requirements in the Foreign Relations Authorization Act, as major drug transit or major illicit drug-producing countries.[113] Several more were highlighted in the State Department's 2009 Country Reports on Human Rights Practices because of U.S. concerns about human rights abuses.[114]

Like the Keeble Bill, the U.S. Vulture Act would require disclosure of specified information before suing in U.S. courts to recover qualified defaulted debt.[115] The disclosure requirements are substantially similar to the disclosure requirements in the Keeble bill.[116] However, these fairly onerous disclosure requirements are inapplicable unless the sovereign at issue is a qualified poor country.[117]

The U.S. Vulture Act grants standing to "interested parties" to contest the furtherance of litigation that violates the Act.[118] Lastly, like the Keeble Bill, there is no indication from the language of the U.S. Vulture Act that its prohibitions are limited to debt originated before the date of enactment.

D. HM Treasury Proposal

Of the three original proposals, the HM Treasury Proposal was the most tailored to advance and protect the goals of multilateral debt relief embodied in the HIPC Initiative. In its rebuttal to opposition consultation responses, the British government concluded that its proposals were "tightly targeted . . . at a fixed, historical stock of debt" and that "an extension beyond the HIPC Initiative would be unjustified and harmful."[119] Notwithstanding the uncertainty as to which IDA-eligible, non-blend countries would be exempted from the U.S. Vulture Act under that bill's definition of qualified poor countries,[120] the HM Proposal covered the smallest number of countries out of the three original legislative proposals. The HM Proposal also relied on the HIPC Initiative terms to determine the maximum recoverable amount.[121] The HM proposal favored applying a Common Reduction Factor[122] on "traditional terms," i.e., 67%.[123] Thus, under the HM Proposal's preferred method, the maximum recoverable amount would be 67% of the face value of the debt. Second, the HM Proposal cautiously disfavored applying recovery limits to original creditors,[124] new borrowing,[125] and debts contracted after decision point.[126] Furthermore, the proposed legislation would have applied only to existing judgments that had yet to be enforced.[127]

Additionally, the HM Proposal differed from the Keeble Bill in two other important respects. First, it opposed the imposition of disclosure requirements as a prerequisite to litigation because the requirements would impose "additional procedur[al] and transaction cost[s]" and would be "insufficient to be a robust deterrent."[128] Second, the HM Proposal supported granting courts discretion to vary the terms of the law if they consider it just and equitable to do so.[129]

E. Debt Relief (Developing Countries) Act of 2010

As noted above, the Debt Relief (Developing Countries) Act of 2010 (the Act), in general, codifies the HM Proposal. The Act provides that the amount of a "qualifying debt" or any cause of action relating to a qualifying debt is the "relevant proportion" of the amount that would otherwise be recoverable under the terms of the qualifying debt or cause of action.[130] The Act defines a "qualifying debt" as the debt of a country "to which the [HPIC] Initiative applies" or of those countries that are potentially eligible for the HIPC Initiative.[131] A "potentially eligible Initiative country" is a country that has been identified by the IMF and World Bank as eligible for debt relief under the HIPC Initiative, but has yet to reach decision point.[132] A country to which the HIPC Initiative applies is a country currently receiving HIPC debt relief, i.e., a country categorized as "post-decision point" or "post-completion point."[133] Whether a country is eligible or potentially eligible may affect the amount recoverable. The Act excludes from the definition of "qualifying debt" those debts incurred after commencement of the Act and debts contracted after a country's decision point has been reached.[134] Once the Act took effect, forty countries were eligible or potentially eligible for HIPC debt relief.[135] Furthermore, the Act precisely defines "debt."[136] Much of this was included in order for the Act's terminology to conform with the terms used by the World Bank and IMF when determining which debts are covered by the HIPC Initiative. For example, the Act generally excludes "short-term" debts and trade debt from coverage.[137]

The maximum recoverable amount, i.e., the "relevant proportion" under the Act, may turn on whether the debt being enforced is that of a country "to which the [HIPC] Initiative applies" or a "potentially eligible [HPIC] Initiative country." For countries currently eligible for HIPC debt relief, the "relevant proportion" is 67%—the traditional common reduction factor—and, if applicable, a "topping up" of assistance to further reduce the common reduction factor, divided by the amount of the debt before the reduction.[138] Accordingly, the maximum a creditor could recover from covered debt would be 67% of its face value. The "relevant proportion" for debts of a potentially eligible HPIC Initiative country is 67%.[139] The amount recoverable under agreements that reduce the debtor's obligations through a rescheduling or compromise agreement is limited to the amount that would have been recoverable if no such agreement had been made, i.e., if a compromise or refinancing agreement would otherwise entitle the creditor to an amount that exceeds the "relevant proportion" by which the amount recoverable would be reduced.[140] In addition, the limit on recovery only applies to domestic and foreign judgments and arbitral awards given prior to the Act taking effect.[141] The Act expressly applies the limits on recovery to those causes of action related to "qualifying debts," such as damages claims.[142]

The Act materially departs from the original HM Proposal in several ways. First, the Act does not authorize courts to vary the terms of the law if they consider it just and equitable.[143] In fact, the government ultimately agreed with the detractors of such a provision, stating that "it would be difficult for courts to apply in the absence of precedent . . . and would remove the legal certainty and clarity provided by [the] legislation."[144] Second, in order for sovereign debtors to avail themselves of the Act, the debtor must "make an offer to compromise the proceedings on comparable Initiative terms."[145] This provision does not apply to proceedings to enforce domestic judgments awarded before commencement of the Act.[146] Third, the Act includes a sunset clause whereby the Act would expire one year after commencement unless it were extended, either for another year or permanently, by order of HM Treasury with statutory approval by each House of Parliament.[147] The sunset amendment was proposed as a way to allow the bill to proceed while assessing whether its provisions increased the risk premium on qualifying debt.[148] Fourth, the Act exempts enforcement of foreign judgments and arbitral awards if their enforcement would be inconsistent with European law or an obligation of the United Kingdom.[149] Lastly, and most significantly, there is no indication in the Act that non-trade, original creditors are excluded from the Act's provisions. This would seem to be an extraordinary provision that would significantly increase the risk premium on qualifying debt. This risk is mitigated, however, as qualifying debt incurred after the Act takes effect would not be affected.

F. Potential Adverse Side Effects and Design Flaws

1. Moral Hazard—Here We Go Again

When discussing sovereign debt and financial crises, moral hazard is perennially used to challenge robust government action to stem the causes and effects of the spread of distressed debt. The U.S. Vulture Act, by failing to exclude new lending from its coverage, may be especially vulnerable to attacks on the grounds that it generates moral hazard among covered sovereign debtors. It should be noted, however, that the proposals do not simply seek to enact incentives to influence the substance of low-income sovereign debt litigation. When forum-shopping for a favorable litigation environment is limited,[150] often the optimal choice for covered sovereign debtors holding distressed debt may be to default.[151] When drawing the line between covered and non-covered countries, failing to make the distinction between the highly impoverished and indebted, such as Zambia, and developing countries that are not IDA-eligible would seriously exacerbate the moral hazard problem. Ecuador's recent declaration of default and subsequent buy-back at a heavy discount illustrates the potential risk.[152] The Debt Relief Act expressly addresses the problem of increasing moral hazard by exempting debts contracted after decision point and those originated after enactment from the Act's protections.[153]

Such legislation would increase the risks of covered debt in the secondary market and may directly affect the primary market as well in the case of legislation, such as the U.S. Vulture Act, that does not exclude new lending.

2. The Secondary Market and the Theoretical Costs of Borrowing

Economic reasoning suggests anti-vulture fund legislation may increase the cost of borrowing for covered sovereign debtors. An active secondary market in sovereign debt, of which vulture funds are prominent participants, is "a fundamental feature of sovereign borrowing and lending."[154] Such legislation would increase the risks of covered debt in the secondary market and may directly affect the primary market as well in the case of legislation, such as the U.S. Vulture Act, that does not exclude new lending.[155] The unnecessary distortion that the U.S. Vulture Act creates (and any other proposals modeled after it and the Keeble Bill) does not stop there. Under the U.S. Vulture Act, recovery on covered debt is capped by the price paid for the debt plus 6%, rather than by HIPC terms, as in the Debt Relief Act.[156] This means that, under the U.S. Vulture Act and similar proposals, otherwise identical debts may entitle holders to different repayments simply because the debts were bought and sold at different times.[157] This is an attack on the fair treatment of creditors of equal seniority, the prevention of which is a core public policy aim of insolvency law.[158]

Moreover, the effects on the secondary market are also likely to indirectly influence the primary market for covered debt.[159] Limiting the contractual right to recover on defaulted debt would decrease the amount for which original creditors can sell the debt on the secondary market—i.e., the recovery value—thereby potentially increasing interest rates for the debtors.[160] The resulting reduction in liquidity in the primary and secondary market for covered debt[161] by potentially increasing the burden of servicing debt would be contrary to the goals of the HIPC Initiative.[162]

3. Why It Matters

A fundamental question (perhaps *the* fundamental question) in the debate concerning anti-vulture legislation is the extent to which payments pursuant to judgments or settlement agreements affect the economic growth of low-income nations and direct limited resources away from crucial public services. Somewhat surprisingly, there is a dearth of economic studies investigating this question. The conditions facilitating Africa's "poverty trap," however, have received constant attention and study.[163] Unlike other developing countries, low-income countries such as Zambia face overwhelming public health challenges, such as the high proportion of individuals affected by HIV/AIDS in African populations.[164] Therefore, the marginal effect of one dollar redirected from public health programs to paying sovereign debt judgment is much higher than the effect on other non-IDA developing countries. Indeed, this rationale is the cornerstone of the HIPC Initiative. A cursory review of the current picture on sovereign debt litigation suggests that such litigation does have the potential to be disastrous for low-income countries. At the end of 2007, awards on sovereign debt claims ranged from 0.5% of the debtor's GDP to 49% of the debtor's GDP, as in the case of Liberia.[165] The recent enforcement in London High Court by vulture funds of over \$18 million in Liberian debt amounted to 5% of Liberia's 2009 budget.[166] Liberia is a country still reeling from the aftermath of a civil war between 1989 and 2003, a country that ranks 208th in per capita income, above only Democratic Republic of Congo and Burundi.[167]

IV. CONCLUSION

In light of the existing international commitment to poverty reduction[168] and debt relief, anti-vulture fund legislation motivated by a desire to punish an amorphous group of "vulture" investors could contribute little and detract much. Anti-vulture fund legislation that is not carefully calibrated to advance the goals of debt relief while minimizing the adverse effects that may result from tampering with credit markets, such as a reduction in liquidity, will be counter-productive. The British Parliament succeeded in striking the right balance: a product of informed and reasoned debate. If the U.S. Congress decides to move forward with anti-vulture legislation in the future, the Debt Relief Act and its surrounding debate should serve as a model.

The Debt Relief Act should provide several guiding principles. First, punitive legislation is unproductive. Selecting civil fines as the remedy, rather than directly empowering defendants, is at best an inelegant and inefficient solution to the problem and is at worst disingenuous. Second, legislators should design anti-vulture fund legislation that aims to accomplish their stated

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goal: to prevent investors from redirecting the benefits of multilateral debt relief programs, principally the HIPC Initiative, away from recipient countries and toward secondary market investors. Imposing an arbitrary recovery ceiling, as the U.S. Vulture Act does, not only seems unfair as it would lead to the same debts having different values merely based on when they were bought, but has no relationship with the HIPC Initiative. BLB

Endnotes

1 *See generally* Lex Rieffel, Restructuring Sovereign Debt: The Case for Ad Hoc Machinery 150–51 (2003) (explaining the main features of the Brady Plan, namely the conversion of Latin American countries' bonds into new bonds after defaults by those countries in the 1980s and the corresponding impact on commercial banks involved in lending to those countries).

2 Lee C. Buchheit, *You'll Never Eat Lunch in This Conference Room Again*, 11 Int'l Fin. L. Rev. 11, 11 (1992) (describing the paradoxical terms that were commonplace during the sovereign debt restructurings of the 1980s).

3 *See* Louis A. Pérez, Jr. & Deborah M. Weissman, *Public Power and Private Purpose: Odious Debt and the Political Economy of Hegemony*, 32 N.C. J. Int'l L. & Com. Reg. 699, 722–33 (2007) (examining the many statutes and regulations designed to shape sovereign debt restructurings involving private creditors).

4 *See* Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602–11 (2006) (codifying in U.S. law the extensive protections afforded to sovereign nations against litigation in other jurisdictions). According to *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), the FSIA is the sole basis for obtaining jurisdiction over foreign sovereigns in U.S. courts; however, *Samantar v. Yousef*, 130 S. Ct. 2278 (2010), indicates immunity is also conferred by preexisting common law. The FSIA codifies international law's modern definition of sovereign immunity, which states immunity should be "restricted" to acts of a foreign state that are sovereign or governmental in nature, rather than commercial in nature or normally associated with private persons. The traditional exceptions to sovereign immunity are: waiver by the sovereign; activity deemed to be commercial rather than governmental in nature; property taken in violation of international law; tortious act or omission under the home jurisdiction's laws; and contractual assent to arbitration.

5 *See generally* Federico Sturzenegger & Jeromin Zettelmeyer, Debt Defaults and Lessons From a Decade of Crises (2006) (chronicling the rise of private party litigation against sovereigns for commercial activity related to sovereign debt transactions); Argentine Republic v. Weltover, 504 U.S. 607 (1992) (holding Argentina's sale of bonds qualified as commercial activity, and therefore its default on the bonds created a direct effect on U.S. bondholders sufficient to trigger a cause of action).

6 *See, e.g.*, Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 519–20 (2d Cir. 1985) (involving the application of the Act of State doctrine, which was discussed in Brief for United States as Amicus Curiae Supporting Plaintiff-Appellant, *Allied Bank Int'l*, 757 F.2d 516).

7 *See* Press Release, HM Treasury, Legislation to Ensure Effective Debt Relief for Poor Countries (July 21, 2009) (defining vulture funds, generally, as investment funds that purchase distressed or defaulted debt at a discount and then seek to make a profit on the debt by reselling the debt, negotiating a settlement with the debtor, or litigating the defaulted debt for face value).

8 *See, e.g., Zambia Loses 'Vulture Fund' Case*, BBC News (Feb. 15, 2007), http://news.bbc.co.uk/2/hi/6365433.stm [*hereinafter* BBC News Zambia]; *see also* Written Ministerial Statement by Mr. Gordon Brown, C. of the Exchequer to the House of Commons (May 10, 2007), http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070510/wmstext/70510m0001.htm ("I deplore the activities of so-called vulture funds that seek to profit from debts owed by the poorest countries in the world . . . .").

9 *See, e.g.*, Perez & Weissman, *supra* note 3, at 701 (arguing the "United States has used bank loans in the world system as a dominant facet of imperialism"); *see also* Joseph Kraft, The Mexican Rescue 1–24 (1984) (explaining the prevailing view at the time of the Mexican crisis was that not responding to the crisis would destabilize Mexico and thus adversely affect U.S. interests).

10 Eduardo Borensztein & Ugo Panizza, *The Costs of Sovereign Default* 7 (Int'l Monetary Fund, Working Paper No. 238, 2008) (highlighting the Brady Plan's creation of a sovereign debt bond market for least developed countries in Latin America and Africa).

11 *See generally* George Weisz, Nancy A. Schwarzkopf & Mimi Panitch, *Selected Issues in Sovereign Debt Litigation*, 12 U. Pa. J. Int'l Bus. L. 1 (1991) (providing a history of sovereign debt litigation and the conflicts with alternative approaches to debt alleviation).

12 Philip J. Power, Note, *Sovereign Debt: The Rise of the Secondary Market and its Implications for Future Restructurings*, 64 Fordham L. Rev. 2701, 2723–44 (1996) (detailing sovereign defenses to debt enforcement under the IMF Articles of Agreement and state codification of customary international law).

13 Debt Relief (Developing Countries) Act, 2010, c. 22 (U.K.).

14 *See, e.g., End the Vulture Culture*, Jubilee Debt Campaign, http://www.jubileedebtcampaign.org.uk/?lid=2893.

15 Stop VULTURE Funds Act, H.R. 2932, 111th Cong. (2009); *see* discussion *infra* Part III.

16 Developing Country Debt (Restriction of Recovery) Bill, 2009, H.C. Bill [91] (U.K.); *see* discussion *infra* Part III.

17 Public consultation in Commonwealth countries is a regulatory process that serves a similar function as the notice and comment procedure under U.S. state and federal administrative law. *See generally* Delia Rodrigo & Pedro Andrés Amo, Org. for Econ. Co-operation & Dev., Background Document on Public Consultation, http://www.oecd.org/dataoecd/4/43/36785341.pdf.

18 HM Treasury, Ensuring Effective Debt Relief for Poor Countries: Consultation on Legislation 2009–10 [hereinafter HM Treasury Consultation]; *see also* discussion *infra* Part III.

19 The Government, represented by Economic Secretary to the Treasury Ian Pearson, indicated that it supported the Bill and assisted in the preparation of its explanatory notes. *See* Debt Relief (Developing Countries) Bill Research Paper, H.C. Research Paper 10/17 at 32 (2010).

20 [2007] EWHC (Comm) 197 (Eng.).

21 *See, e.g.*, 6 May 2009, Parl. Deb., H.C. (2009) 175 (statement of Ms. Sally Keeble) [hereinafter Keeble statement] (noting the *Donegal* case as illustrative of "profiteering" that the Developing Country Debt (Restriction of Recovery) Bill is meant to address); *see also* Michael Waibel, *An Elusive Quest: After the* Donegal *Case, Compensation for Sovereign Defaults Remains Uncertain*, 26 Int'l Fin. L. Rev. 32, 32 (2007) ("[T]he case has generated considerable controversy, due to perceived abuse of the HIPC Initiative.").

22 *See* BBC News Zambia, *supra* note 8 (quoting Jubilee Debt campaigner Caroline Pearce, "Profiteering doesn't get any more cynical than this. Zambia has been planning to spend the money released from debt cancellation on much-needed nurses, teachers and infrastructure. This is what debt cancellation is intended for, not to line the pockets of businessmen based in rich countries.").

23 For more information on the HIPC Initiative, see *infra* Part III.

24 *See, e.g.*, Ndangwa Noyoo, *Deriving Maximum Social Benefits from Debt Relief: A Case of Zambia*, 9 Afr. ViewPoint (2009); *see also The Basics About Debt*, The Jubilee Debt Campaign, http://www.jubileedebtcampaign.org.uk/?lid=98 (asserting that "[d]ebts should be cancelled because they are unjust in terms of their origin, and also because they worsen poverty").

25 *Cf.* Paolo Mauro, Nathan Sussman & Yishay Yafeh, Emerging Markets and Financial Globalization: Sovereign Bond Spreads in 1870–1913 and Today (2006) (arguing that international political pressures cause British and American holders of sovereign debt bonds to view willingness to pay as a more important factor than, or proxy for, ability to pay).

26 Throughout, dollar amounts are in U.S. dollars.

27 *Donegal I*, [2007] EWHC (Comm) 197 [1], [6], [23]-[24].

28 *Id.* at [6].

29 *See* Waibel, *supra* note 21, at 32.

30 *Id.*

31 *See infra* notes 43–44 and accompanying text (describing the World Bank Debt Reduction program).

32 *Donegal,* [2007] EWHC (Comm) at [2], [6], [91]–[114].

33 *See* Waibel, *supra* note 21, at 32 ("In 2001, Donegal proposed an immediate cash settlement at 37%, about $30 million. Zambia responded with a 10% offer consistent with comparable treatment under the HIPC initiative, which Donegal called completely unacceptable.").

34 *See id.*

35 HM Treasury Consultation, *supra* note 18, at 15.

36 *See id.*

37 *See* Statement, Honorable Vernon J. Mwaanga, M.P., Minister of Information and Broadcasting and Official Government Spokesperson, Statement on the Donegal Case (Mar. 13, 2007), http://www.mibs.gov.zm/index.php?option=com_content&task=view&id=168&Itemid=142 (last visited Jan. 19, 2011).

38 Waibel, *supra* note 21, at 33 (citing *Donegal,* [2007] EWHC (Comm) 397).

39 *Donegal,* [2007] EWHC (Comm) 397 at [6] (reducing also Donegal's costs by one-third due to dishonest evidence presented to the court by Donegal witnesses and reinstating narrower freezing relief).

40 Waibel, *supra* note 21, at 33.

41 *See* Anna Gelpern, *Odious, Not Debt,* 70 Law & Contemp. Probs. 81, 82 (2007).

42 *See* Otaviano Canuto & Reza Moghadam, Int'l Monetary Fund, Heavily Indebted Poor Countries and Multilateral Debt Relief Initiative – Status of Implementation 19 n.32 (2009), *available at* http://www.imf.org/external/np/pp/eng/2010/091410.pdf (stating that based on an internal survey there were about fifty-four cases filed by commercial creditors against twelve HIPCs over the past decade, but not distinguishing between claims brought by original creditors and those brought by secondary creditors); *see also* Jonathan C. Lippert, *Vulture Funds: The Reason Why Congolese Debt May Force a Revision of the Foreign Sovereign Immunities Act,* 21 N.Y. Int'l L. Rev. 1 (2008) (describing cases in U.S. courts brought by vulture funds against Democratic Republic of the Congo).

43 *See* Canuto & Moghadam, *supra* note 42, at 62.

44 *See Funds Win on Liberia's 1978 Debt,* BBC News, http://news.bbc.co.uk/2/hi/africa/8380117.stm (last updated Nov. 26, 2009) [*hereinafter* BBC News Liberia Debt].

45 *See id.*

46 *See* Olufunmilayo B. Arewa, *Vultures, Hyenas, and African Debt: Private Equity and Zambia,* 29 Nw. J. Int'l L. & Bus. 643, 645 (2009).

47 *See* Int'l Monetary Fund, IMF Country Report No. 05/137: Zambia: Enhanced Initiative for Heavily Indebted Poor Countries—Completion Point Document (2005).

48 *See* Arewa, *supra* note 46, at 644 (discussing how Zambia has also negotiated a loan reduction arrangement with the Paris Club, an informal group of largely developed world creditor countries).

49 *See, e.g.,* HM Treasury Consultation, *supra* note 18, at 11 ("Debt relief contributes to poverty reduction and development for low income countries by reducing the unmanageable burden of debt that many had built up in the decades to the 1990s.").

50 *See id.* ("Debt relief frees up resources for these priorities – for example, countries that have benefited from relief have raised average spending on health and education from 7 per cent to 9 per cent of Gross Domestic Product and now spend on average six times more on them than they do on debt service. There is also some evidence that countries that have received relief benefit on average from an improved macroeconomic position, with higher economic growth and lower inflation.") (internal footnote omitted) (citing IMF and World Bank studies).

51 *See* Anne O. Krueger, Int'l Monetary Fund, A New Approach to Sovereign Debt Restructuring (2002), Ashley Seager & James Lewis, *How Top London Firms Help Vulture Funds Devour Their Prey,* The Guardian, Oct. 17, 2007, at 27 ("Liberal Democrat international development spokesperson Lynne Featherstone says that Mr. Brown has the power to do more. 'He needs to legislate and make it illegal to use London's high court for this. One wants the law firms to come to the conclusion this is a dirty business they don't want to be involved in.'"), and *Vulture Fund Threat to Third World* (BBC Newsnight television broadcast Feb. 14, 2007), *transcript available at* http://www.gregpalast.com/vulture-fund-threat-to-third-world (last visited Jan. 24, 2011).

52 H.R. 2932, 111th Cong. (2009).

53 This term refers to transactions made shortly before an entity files for protection within the insolvency system that frustrate the distribution scheme set forth in the applicable insolvency law. William Warren & Daniel Bussel, Bankruptcy 349–98 (7th ed. 2006). Under U.S. bankruptcy law, the trustee (or debtor-in-possession) may, in certain circumstances, undo certain of these pre-bankruptcy transactions and recover the payments for the benefit of the estate. Once recovered, the transferred property becomes part of the bankruptcy estate and may be distributed to creditors under a liquidation plan or a restructuring plan. 11 U.S.C. §§ 547, 550(a) (2006).

54 *See* H.R. 2932, § 2(8)-(9).

55 *See* Sturzenegger & Zettelmeyer, *supra* note 5, at 62–65 (describing the collective action problems that exist in sovereign debt litigation and describing the major sovereign debt cases as illustrative).

56 *See* Arttu Makipaa, *Bankruptcy Procedures for Sovereign Debtors* 34 (Jan. 23, 2003) (unpublished M. Econ. thesis, Universität Heidelberg), available at http://archiv.ub.uni-heidelberg.de/volltextserver/frontdoor.php?source_opus=3432 (listing voluntary measures that failed without insolvency regimes and recovery limitations).

57 *See* discussion *infra* Part III.

58 *See, e.g.,* Press Release, Government of the Republic of Liberia, Liberia Slashes USD $1.2 Billion Commercial Debt (Apr. 16, 2009), *available at* http://www.emansion.gov.lr/press.php?news_id=1143 (announcing Liberia's buying back, through the Debt Reduction facility, of $1.2 billion from foreign commercial creditors at a discount of nearly 97% of its face value).

59 *See Economic Policy and Debt – Frequently Asked Questions,* The World Bank, http://go.worldbank.org/EC1HARMX90 (last visited Jan. 24, 2010) [*hereinafter* World Bank FAQ] (describing the Debt Reduction Facility and the problems of collective action and shifting benefits to vulture funds).

60 HM Treasury Consultation, *supra* note 18, at 14; *see also Vulture Funds in the Sovereign Debt Context,* Afr. Dev. Bank, http://www.afdb.org/en/topics-sectors/initiatives-partnerships/african-legal-support-facility/vulture-funds-in-the-sovereign-debt-context.

61 *See* Gelpern, *supra* note 41, at 82.

62 *See id.*

63 *See supra* note 23 and accompanying text.

64 *See, e.g.,* Keeble statement, *supra* note 21 (explaining that the bill has four main provisions: stopping excessive profiteering, introducing accountability, ensuring greater transparency, and combating corruption).

65 Developing Country Debt (Restriction of Recovery) Act 2009, 2009, H.C. Bill (U.K.).

66 H.R. 2932, 111th Cong. § 2(14) (2009) ("To be effective . . . in an area affecting the foreign relations of the United States, national legislation is required that will mandate the public disclosure of relevant information concerning the acquisition, ownership, and consideration provided by creditors in obtaining . . . interests in the defaulted sovereign debt of poor countries.").

67 *See* Keeble statement, *supra* note 21 (explaining that a principal aim of the bill was to regulate hedge funds, a much needed regulatory reform highlighted by the "under-regulation of various financial markets actors" revealed by the recent economic crisis).

68 *See* Waibel, *supra* note 21, at 32–33.

69 Data: How we Classify Countries, The World Bank, http://data.worldbank.org/about/country-classifications (last visited Jan. 24, 2011).

70 *See* H.R. 2932 § 6(a) (requiring the U.S. Department of the Treasury to maintain lists of IDA-eligible countries, but also listing other restrictions on eligibility, such as recognition of human rights, level of military expenditures, involvement with terrorists, and failure to cooperate with U.S. narcotics authorities).

71 *See* Debt Relief (Developing Countries) Act 2010 c. 22(1)(6).

72 *See What is IDA?,* The World Bank, http://go.worldbank.org/ZRAOR8IWW0 (last visited Jan. 24, 2010).

73 In FY 2010 the threshold is $ 1,135. *How IDA Resources are Allocated,* The World Bank, http://go.worldbank.org/F5531ZQHT0 (last visited Jan. 24, 2010).

74 *Id.*

75 *See id.* The following are currently blend countries: Cape Verde, Zimbabwe (inactive), Papua New Guinea, Armenia, Azerbaijan, Bosnia-Herzegovina, Georgia, Uzbekistan, Dominica, Grenada, St. Lucia, St. Vincent and the Grenadines, India, Vietnam, Bolivia, and Pakistan. *Id.* In addition, countries designated as "small island economies"

are exempted from the per capital GNI threshold requirement. *What is IDA?*, *supra* note 72.

76 *See IBRD – Frequently Asked Questions*, THE WORLD BANK, http://go.worldbank.org/YX2261GMX0 (last visited Jan. 24, 2011).

77 *Id.*; *see also IDA Graduates*, THE WORLD BANK, http://go.worldbank.org/PSTVR12110 (last visited Jan. 24, 2011) (listing countries that have "graduated" from IDA assistance).

78 *See Country and Lending Groups*, THE WORLD BANK, http://data.worldbank.org/about/country-classifications/country-and-lending-groups (last visited Jan. 24, 2011).

79 *See generally Debt Relief and Development*, THE WORLD BANK, http://go.worldbank.org/KNZR2IIQG0 (last visited Jan. 24, 2011).

80 HM TREASURY CONSULTATION, *supra* note 18, at 11.

81 *IBRD – Frequently Asked Questions*, *supra* note 76.

82 *Debt Relief and Development*, *supra* note 79.

83 *See id.* (announcing that the requirements a country must meet at decision point include a poverty reduction strategy and debt burden indicators above specific HIPC Initiative thresholds).

84 *Id.*

85 *See id.* (interpreting the completion point triggers to be a series of measurable goals necessary to complete the HIPC Initiative).

86 *See id.* (explaining the common reduction factor "is calculated to bring the country's debt [back] to 150 percent of exports (or in certain cases 250 percent of fiscal revenues)").

87 HM TREASURY CONSULTATION, *supra* note 18, at 12.

88 *Heavily Indebted Poor Countries (40 Countries)*, THE WORLD BANK, http://go.worldbank.org/4IMVXTQ090 (last visited Jan. 24, 2011).

89 *See* discussion *supra* Part II.

90 Developing Country Debt (Restriction of Recovery) Bill, 2009, H.C. Bill [91], art. 2 (U.K.).

91 *Id.* art. 1.

92 BRIC is an acronym for Brazil, Russia, India, and China. *BRIC*, INVESTOPEDIA, http://www.investopedia.com/terms/b/bric.asp (last visited Jan. 24, 2011).

93 *See Country and Lending Groups | Data*, THE WORLD BANK, http://data.worldbank.org/about/country-classifications/country-and-lending-groups (last visited Jan. 24, 2011).

94 *See Judgments Act 1838*, LEGISLATION.GOV.UK, http://www.legislation.gov.uk/ukpga/Vict/1-2/110 (last visited Oct. 28, 2010) ("Every judgment debt shall carry interest at the rate of *[8] percent per annum* from such time as shall be prescribed by rules of court until the same shall be satisfied . . . .") (emphasis added).

95 As defined by the Keeble Bill, the maximum recovery amount equaled:

> (a) *the amount paid by a creditor to acquire the interest the creditor has in the defaulted sovereign debt* (excluding any legal fees or other fees and costs associated with collection); *and*
>
> (b) *interest*, calculated as simple interest only, on the amount the creditor paid to acquire the interest in the defaulted sovereign debt, from the date the creditor acquired rights over the defaulted sovereign debt, *and at an interest rate which is the lower of—*
>
> (i) the interest rate in the loan agreement for the sovereign debt; or
>
> (ii) the interest rate set in accordance with section 17 of the Judgments Act 1838 (c. 110).

Developing Country Debt (Restriction of Recovery) Bill, 2009, H.C. Bill [91] art. 3 (U.K.) (emphasis added).

96 *Id.* (emphasis added).

97 *Id.* art. 4.

98 The disclosures in the consent application included, *inter alia*, the amount paid by all persons who would receive a financial benefit of more than 1% from the recovery proceedings; information on the creditor's business including, for example, accounts for the previous financial year; and a statement that the creditor, or any of its agents, has not improperly influenced any of the debtor's government officials in connection with acquisition of the debt. *Id.* art. 6(a)–(i).

99 Considering the broadness of the sovereign debt covered by the Keeble Bill, it appears that in practice the disclosure requirements would have never applied to non-covered sovereign debt, as the Keeble Bill only excluded "high-income economies" from its provisions. *Compare id.* at [91], cl. 1 ("'Low or Middle Income country' means any country whose income group is classified as *low income, lower middle income or higher middle income* by the International Bank for Reconstruction and Development and the International Development Association.") (emphasis added), *with Country and Lending Groups*, *supra* note 93 (categorizing all countries as either low income, lower middle income, higher middle income, or high income).

100 H.C. Bill [91] art. 9.

101 *See id.*

102 The Keeble Bill could have been interpreted to apply only to secondary market creditors and not original creditors, because it referred to the amount the creditor "paid" to acquire the interest in defaulted sovereign debt. However, this is not the only conceivable construction. Lenders "pay" for the stream of interest payments under loan agreements or such other consideration that may be agreed upon. If original lenders were seen as covered under the Keeble Bill, the amount "paid" by the creditor to acquire the interest in the debt could be based on the net present value of the debt at time of its origination. This interpretation and valuation would be a complicated task for anyone. In any case, whether the Keeble Bill applied to original lenders would have been of little practical consequence. It is hard to envision when a lender would receive more from enforcing a debt obligation through litigation than receiving their consideration under the loan agreement.

103 Stop VULTURE Funds Act, H.R. 2932, 111th Cong. § 4(a) (2009).

104 *Id.* § 3(4) (emphasis added).

105 *Id.*

106 *Id.* § 4(b).

107 *Id.* § 3(4) (also excluding the U.S. government, or any of its agencies, foreign states, and international financial institutions from the definition).

108 *See id.*

109 Thus, blend countries, those are eligible for both IDA and IBRD assistance, would not be covered by the U.S. Vulture Act. *See supra* notes 75–76 and corresponding text.

110 *Id.* § 6(a). These additional requirements would allow the Secretary of the Treasury to maintain a list of those states meeting the parameters for qualified poor country status. *See id.* § 3(9) ("The term 'qualified poor country' means a foreign state identified on the list maintained by the Secretary of the Treasury under section 6(a)(2).").

111 *Country and Lending Groups*, *supra* note 93 (arriving at forty-seven by taking the sixty-three countries eligible for IDA aid and subtracting the sixteen blend countries).

112 *Compare State Sponsors of Terrorism*, U.S. DEP'T. OF STATE, http://www.state.gov/s/ct/c14151.htm (last visited Jan. 24, 2010), *with Country and Lending Groups*, *supra* note 93.

113 Determination No. 2010-16, Major Illicit Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2011, 75 Fed. Reg. 67,019 (Nov. 1, 2010) (reiterating the requirements of section 706(1) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-28 (2002), and identifying Afghanistan, Haiti, Honduras, Laos, Myanmar, and Nicaragua as major illicit drug transit or major illicit drug producing countries).

114 *See* U.S. DEP'T OF STATE, 2009 HUMAN RIGHTS REPORT (March 11, 2010), *available at* http://www.state.gov/g/drl/rls/hrrpt/2009/frontmatter/135936.htm (listing countries that raise concerns because of human rights issues during times of conflict, including the IDA-eligible Afghanistan, Myanmar, Democratic Republic of the Congo, Nigeria, Sri Lanka, and Sudan, and because of general discrimination against vulnerable minority groups, which included the IDA-eligible Uganda).

115 *See* H.R. 2932 § 5(b).

116 *Compare id.* § 5, *with* Developing Country Debt (Restriction of Recovery) Bill, 2009, H.C. Bill [91] (U.K.).

117 *See* H.R. 2932 § 5(b)(1)–(3).

118 *See id.* § 5(d) ("If it appears to a court in or of the United States that an action brought in the court constitutes, or is in furtherance of, sovereign debt profiteering, the court shall, on its own initiative or at the request of any interested party, promptly dismiss the action.").

119 HM TREASURY, ENSURING EFFECTIVE DEBT RELIEF FOR POOR COUNTRIES: A RESPONSE TO CONSULTATION ¶ 2.27 (2010).

120 *See supra* notes 115–120 and corresponding text.

121 *See* HM TREASURY CONSULTATION, *supra* note 18, at 25 ("One legislative approach would be to make HIPC Initiative terms the binding reference point for commercial creditors.").

122 *See supra* note 86 and corresponding text (explaining the Common Reduction Factor).

123 *See* HM Treasury Consultation, *supra* note 18, at 25.

124 *See id.* at 27 ("Again, the clearest abuses of the debt relief process . . . [do] not correspond to the situation of original creditors. Legislation . . . could include an exemption for original creditors. However, it is open to question whether the distinction . . . is justifiable.").

125 *See id.* at 22.

126 *See id.* at 28 ("The HIPC Initiative does not expect creditors to provide debt relief on debts contracted after a country reaches Decision Point.").

127 *See id.* at 29 ("It is unusual to alter the effect of judgments already given, but the Government considers there are pressing public policy reasons for taking that approach in this case.").

128 *Id.* at 28; *see* HM Treasury Response to Consultation, *supra* note 119, ¶ 2.72 (asserting that disclosure requirements are not needed to serve the proposal's principle aim of ensuring creditors do not recover in excess of the debt relief offered to countries participating in the HIPC Initiative).

129 HM Treasury Consultation, *supra* note 18, at 27.

130 Debt Relief (Developing Countries) Act, 2010, ch. 22 (U.K.).

131 *Id.* § 1(3) (requiring, further, that the debt be "external" and "public or publicly guaranteed"). The Act's definitions of "external" and "public or publicly guaranteed" are based on those used by the World Bank and IMF when determining which debts are covered by the HIPC Initiative. Debt Relief (Developing Countries) Act, Explanatory Notes, c. 22 ¶ 14 (2010).

132 Debt Relief Act, ch. 22, § (1)(6); *see* Part III(a) for an explanation of stages of the HIPC Initiative.

133 Debt Relief (Developing Countries) Act, Explanatory Notes, 2010, c. 22, ¶ 4 (categorizing countries that are eligible or potentially eligible for the HIPC Initiative).

134 Debt Relief Act, ch. 22, § 1(3).

135 Debt Relief (Developing Countries) Act, Explanatory Notes, 2010, ch. 22, ¶ 4. Several countries, such as Bhutan, Laos, Nepal, and Sri Lanka, have met the HIPC eligibility criteria but have opted not to take part in the Initiative. H.C. Research Paper no. 10/17, *supra* note 19.

136 *See* Debt Relief (Developing Countries) Act, ch. 22, § 2.

137 *Id.* § 2(3)(b); *see id.* § 2(4) (defining "short-term debt"); *see also id.* § 2(3)(a) ("'[D]ebt' does not include a liability to pay for goods or services that arose on the delivery of goods or the provisions of services.").

138 *Id.* § 4(2); *see* Debt Relief (Developing Countries) Act, Explanatory Notes, 2010, ch. 22, ¶¶ 22–25.

139 Debt Relief Act, ch. 22, § 4(3).

140 *Id.* § 3(2)–(7).

141 *Id.* § 5(1).

142 *Id.* § 3(1); Debt Relief (Developing Countries) Act, Explanatory Notes, 2010, ch. 22, ¶ 16.

143 *Compare* Debt Relief Act, ch. 22, *with* HM Treasury Consultation on Legislation, *supra* note 18, § 4.12.

144 HM Treasury Response to Consultation, *supra* note 119, ¶ 2.63. Interestingly, it was not creditor interests that opposed giving courts this equitable power, but NGOs concerned with how "courts renowned for being creditor-friendly, such as the U.K.," would exercise this power. H.C. Research Paper no. 10/17, *supra* note 19, at 26.

145 Debt Relief Act, ch. 22, § 6(1); *see id.* § (2) (defining "comparable Initiative terms"); *see also* Debt Relief (Developing Countries) Act, Explanatory Notes, 2010, ch. 22, ¶ 30 (specifying the discount rate applied in association with the HIPC Initiative is the relevant Commercial Interest Reference Rate, as published by the OECD and explaining the requirement's purpose: to encourage the debtor to participate in negotiations).

146 Debt Relief Act, Explanatory Notes, ¶ 30.

147 Debt Relief Act, ch. 22, § 9; *see* Debt Relief Act, Explanatory Notes ¶ 36 (explaining the sunset clause); *see also* Debt Relief (Developing Countries) Bill: Committee Stage Report, H.C. Research Paper 10/26 (2010) (providing excerpts from the Committee debates on the bill that explain the sunset clause was one of the only amendments added to the bill during Committee deliberations).

148 *See* Committee Stage Report, *supra* note 148, ¶ 3.8.

149 Debt Relief Act, ch. 22, § 7(1); *see also id.* § 7(2) (listing several types of foreign judgments that are *per se* excluded under the Act).

150 Of course, the possibility of forum-shopping may influence sovereign debtor behavior if there are fora without anti-vulture fund legislation and other creditor-favorable rules. The Debt Relief Act and the other three legislative proposals mitigate the risk of forum-shopping by applying their reductions in the amount a creditor may recover to foreign judgments and arbitral awards. Because of this limited restriction, it seems that a qualifying country could nearly eliminate the risks presented by forum-shopping by having all of its off-shore assets solely within British jurisdiction.

151 *See* Power, *supra* note 12, at 2718 n.90 ("Because secondary market prices of sovereign debt inevitably decrease following a default, a country contemplating a buy-back of its debt has an incentive to default in order to benefit from the lower purchase price."); *see also* Horacio T. Liendo III, *Sovereign Debt Litigation Problems in the United States: A Proposed Solution*, 9 Or. Rev. Int'l L. 107, 131 (2007) (introducing the concept of "strategic defaults" by sovereign borrowers).

152 Lee C. Buchheit & G. Mitu Gulati, *The Coroner's Inquest: Sovereign Documentation Must Strengthen Trustee Responsibilities and Prevent States from Buying Debt They Have Defaulted On*, Int'l Fin. L. Rev., Sept. 2009, at 22 (arguing that Ecuador's default in 2008 and subsequent buy-back at 65% of face value was motivated by "domestic politics, not financial necessity").

153 *See supra* Part III(e); *see also* HM Treasury Consultation, *supra* note 18, at 22.

154 H.C. Research Paper no. 10/17, *supra* note 19, at 6.

155 *See* Power, *supra* note 12, at 2711–13.

156 *See* discussion *supra* Part III(c).

157 H.C. Research Paper no. 10/17, *supra* note 19, at 26.

158 *Id.*

159 Trade Ass'n for the Emerging Mkts. (EMTA), EMTA Submission in Response to HM Treasury – Ensuring Effective Debt Relief for Poor Countries: Consultation on Legislation, 9-15 (Oct. 9, 2009), *available at* www.emta.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=3623.

160 *See id.* at 9–10 ("Limiting the rights of holders in due course would, among other things, merely increase the loss incurred by the original creditor by reducing its backstop recovery.").

161 *See id.* at 13 (arguing that the supply of credit would fall as a result of enactment of the HM Proposal).

162 *See id.* at 14 ("Thus restricting market access of low income countries will condemn them to permanent dependency on concessional aid and cripple their economic growth and development.").

163 *See generally* Jeffrey D. Sachs et al., Ending Africa's Poverty Trap, 1 Brookings Papers on Econ. Activity 117 (2004) (describing Africa's "unique" development crisis and the conditions that led to this crisis).

164 Cent. Intelligence Agency, *Country Comparison: HIV/AIDS Adult Prevalence Rate*, World Factbook, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2155rank.html (last visited Jan. 24, 2011) (ranking Zambia seventh in the world with an estimated adult infection rate of 15.2%).

165 Int'l Monetary Fund, Heavily Indebted Poor Countries (HIPC) Initiative and Multilateral Debt Relief Initiative (MDRI) – Status of Implementation ¶ 38 (2009).

166 Ansu Konneh, *Liberia Government 'Unable' to Repay Debt Owed to Vulture Funds*, Bloomberg, Nov. 27, 2009, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=abex_7CuVGrg; *see also* BBC News Liberia Debt, *supra* note 43.

167 *Gross National Income Per Capita 2009, Atlas Method and PPP*, The World Bank, Sep. 27, 2010, http://siteresources.worldbank.org/DATASTATISTICS/Resources/GNIPC.pdf.

168 For example, the UN Millennium Development Goals are perhaps the broadest and most ambitious poverty-fighting program ever. *See* http://www.unmillenniumproject.org.