Guest Editors’ Foreword

The present special issue is a cooperation of the *Yale Journal of International Law* and the United Nations Conference on Trade and Development (UNCTAD). It emerged from UNCTAD’s work on sovereign debt workouts, specifically from its Working Group on a Sovereign Debt Workout Mechanism (2013 to 2015). Both editors were involved in this working group; Juan Pablo Bohoslavsky as a staff member of UNCTAD and Matthias Goldmann as an external expert. The working group developed a Roadmap and Guide for Sovereign Debt Workouts, published in 2015.¹ It proposes an incremental approach to sovereign debt workouts that relies on the continuous, progressive development of sovereign debt restructuring practice. This work has inspired the adoption of Basic Principles for Sovereign Debt Restructuring by the United Nations General Assembly in September 2015.²

The special issue assembles papers that elaborate, reflect on, and critically scrutinize the incremental approach to sovereign debt restructuring. The foreword by UNCTAD’s Stephanie Blankenburg and Richard Kozul-Wright explains the political and economic rationale behind this approach and how it was inspired by the work that UNCTAD has undertaken in this field for decades. The paper by Juan Pablo Bohoslavsky and Matthias Goldmann sets out the legal foundations of the incremental approach. As the political momentum that would be necessary to adopt an international treaty governing sovereign debt workouts is currently lacking, the incremental approach explores the possibility of further developing current practice in line with legal principles that have emerged from progressive developments in debt restructuring practice in reaction to the crises of the last decades.

Key among them is the principle of sovereign debt sustainability. Debt sustainability is a global concern today. This is evidenced by significant institutional, procedural and substantive innovations in the way in which sovereign debt is treated. Among them is the generalized conviction that debt sustainability cannot come at the expense of human rights enjoyment. The rise in holdout litigation does not contradict this finding, as it has been countered by a strong policy response. The incremental approach is not only unique because it overcomes the binary structure of a debate juxtaposing statutory, institutional and contractual, market-based approaches to improve the current debt restructuring framework. Rather, the incremental approach puts law and legal theory right at the center of the debate about sovereign debt that in the last decades has been dominated by economic thinking. It thereby claims that markets, including markets for sovereign debt, must be embedded in other social fields and therefore require regulation. The incremental approach is thus opposed to the idea of markets as spontaneous orders. However, given that our

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knowledge is limited, market regulation that proceeds continuously and in small steps does not need to be less successful in its effort to avoid crises and solve collective action problems than grand proposals for institutional design.

Hence, the incremental approach does not imply that there is no need for further reform. Rather, reform is a continuous process. Things will not take a turn for the better without intervention. In a meticulous autopsy of the recent Argentinean, Greek, and Ukrainian debt crises, Anna Gelpern’s contribution, carves out the need for reform and develops policy proposals to that end.

A number of contributions analyse the potential of the incremental approach by exploring improvements that might be made in current practice in line with specific legal principles. Odette Lienau argues that international debt deals need to be legitimate. This presupposes, among other things, a high level of acceptance of the legal framework of debt restructuring processes, the inclusion of relevant stakeholders in the negotiations, and a set of accepted substantive standards. The impartiality of institutions charged with the debt sustainability analysis or dispute resolution is also crucial. Matthias Goldmann explores the potential of good faith—a well-established general principle of law—to guide debt resolution negotiations. He argues that debtor states and creditors are under a good faith duty to enter into negotiations in case of a crisis, and that good faith further prevents the arbitrary exercise of voting rights, as well as abusive holdout litigation. Michael Riegner studies the intricate issue of the indicators used for debt sustainability analyses. What appears to be a very technical issue at first sight turns out to be highly political. He therefore holds that the selection and application of indicators needs to respect principles like sustainability, transparency, ownership, as well as human rights and social protection.

Two further articles are devoted to the issue of human rights. Juan Pablo Bohoslavsky argues that economic inequality is both a result of, and contributor to, economic crises. A vicious spiral involving economic inequality and financial crises that puts human rights at great risk. Debt management and debt restructuring practices therefore need to take inequality into account. Daniel Bradlow proposes a mechanism for holding private creditors accountable for human rights violations in the context of debt restructurings. He analyses how various international soft law instruments, especially the United Nations’ Guiding Principles on Business and Human Rights, might contribute to improving the practice of sovereign debt restructuring.

The special issue concludes with a sobering analysis of the institutional framework by Jan Klabbers. He offers an explanation of why there is no international organization for the resolution of sovereign debt crises. International organizations usually draw their legitimacy and appeal from their functional, supposedly apolitical character. The distributive effects of sovereign debt restructuring make a functional justification of a hypothetical international restructuring organization less credible. In his view, it therefore seems unlikely that an international institution will be charged with the task of sovereign debt restructuring, as their democratic legitimacy is notoriously under-developed.

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Britta Redwood and Jayoung Jeon, and the editors in charge of the special issue, Daniel Hessel and Tasnim Motala. We are deeply indebted to them for their extraordinary and hard work on the articles. The special issue would not be the same without their extremely helpful and critical readership and editorial work. We are also grateful to UNCTAD for lending its support to this special issue, its cooperation in the process of its creation, and its permission to publish some of the research papers that inspired the work of the UNCTAD Working Group. Last but not least, we thank the authors for their time and ideas.

This special issue is intended to present a space for dissemination and discussion of ideas related to sovereign debt. The *Yale Journal of International Law* has hosted the forum to provide a venue for this important discussion at a time in which policy-makers, academics and citizens are grappling with these issues first-hand. While the Journal has provided some editorial insight, the Articles contained herein represent the stylistic proclivities of the authors, and diligence surrounding the accuracy of the sources they rely upon has been entrusted to them. The special issue reflects the timeliness and importance of sovereign debt sustainability and the *Yale Journal of International Law* seeks primarily, with this special issue, to provide a discussion space for the authors in these pages and a resource for those around the world interested in their exchange.

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Juan Pablo Bohoslavsky and Matthias Goldmann