VULTURE FUNDS IN-DEPTH

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INTRODUCTION

This presentation[1] will be concerned with providing a general idea of the main features of the vulture fund phenomenon. Initially, vulture funds were private equity or hedge funds that invested in the debts of dying entities at low rates. Their action then consisted in suing these entities for profit. They widened the scope of their action to sovereign States and in particular invested in highly indebted poor countries (HIPCs), buying their debt and then engaging into legal action against them before the courts of other States, such as the United States, the United Kingdom and France.

Thus, vulture funds have been defined by the International Monetary Fund (IMF) as: "companies which buy up the debt of poor nations cheaply when it is about to be written off and then sue for the full value of the debt plus interest [dating back to the original date of the loan] – which might be ten times what they paid for it"[2]. The term "vulture funds" is used as a metaphor to compare the investors to vultures preying on poor debtor countries.

The issues raised by this phenomenon are of a dual nature: they are expressed in terms of *legality* and in terms of *morality*. Courts of law seized with the matter of vulture funds have had to comply by the terms of loan agreements, which resulted in judgements in favour of these investors. This is the

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[1] Cet article fait suite à une communication effectuée en février 2011 à l'Eastern Africa Regional on International Commercial Law organisé par la Pan African Lawyers Union.
[2] As quoted by: MEIRION Jones, "Vulture Funds Threat to Third World – How Corporations Continue to Rape the World's Poor", *BBC Newsnight*, 14 February 2007, available at: <http://www.informationclearinghouse.info/article17070.htm>, as accessed on 3 February 2011.

legality branch. This, however, was done to the detriment of poor countries in debt distress and triggered a debate over the *morality* of such action, as the diverted funds were initially intended for development and this perpetuates economic inequalities[3].

In the late 1990s, international financial institutions (IFIs), such as the IMF and the World Bank introduced initiatives to write off debts of HIPCs, as they deemed these debts to undermine chances of development in these countries[4]. The phenomenon of vulture funds was fuelled by such initiatives, since countries benefiting from these debt cancellations thus had money to pay other debts.

To fully understand the vulture funds phenomenon, it will be necessary to first provide an overview of the main features and contextual elements of vulture funds (I.). A broad picture of the case law landscape will then be drawn to illustrate how the legal side of the question of vulture funds is exploited by creditors and interpreted by courts (II.). This will naturally lead to describing loan agreements and clauses that parties to loan agreements – and in particular poor countries – should include in order to fight off the phenomenon of vulture funds (III.). In addition to measures taken by contractors, States have started to enact legislation to outlaw vulture funds' practices. In particular, the landmark UK legislation will be analysed (IV.). Finally, initiatives on the international plane – those of IFIs (V.) and other entities and States (VI.) – will be exposed to complete the landscape of vulture funds.

I. - Overview of the Vulture Funds Issue

A. - Historical Background of Vulture Funds

The vulture funds phenomenon originated with the Latin American debt crisis in the 1980s, when countries started to borrow directly from commercial banks, generating high interest rates, coupled with a variable rate.

A tightening of the US Federal Reserve shortly thereafter caused an increase of interest rates such that indebted countries found themselves unable to repay their debts. In March 1989, a plan, known as the

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[3] FARRY Lawrence, *When Globalisation Fails: Vulture Funds and Sub-Saharan Africa's Debt Crisis*, UCLA Centre for American Politics and Public Policy Political Science, 2007.

[4] RAFFER Kunibert, *La fin de la discrimination indue à l'encontre des débiteurs ? Commentaires relatifs aux propositions du FMI sur le mécanisme de restructuration de la dette souveraine.* Document de synthèse soumis à l'examen du G24, 31 janvier 2002, < http://homepage.univie.ac.at/kunibert.raffer/g24-fran.pdf >.

"Brady Plan"[5] was launched. It consisted of converting syndicated bank loans to securitised bonds, offered to the public and the proceeds of which were used to repay the country's debt.

Nevertheless, this led to broadening the scope of investors with varying interests. Some, such as hedge funds, asked for immediate repayment. In the mid-1990s, significantly-sized investors started to buy these countries' debts and successfully engaged in legal action for recovery against these States, with interests and costs. They obtained up to five times the amount of original debts. Litigating creditors are mostly located in tax havens, the United States and the United Kingdom[6]. Specific cases illustrating this phenomenon will be provided in Chapter 2 of the presentation.

B. - Legal Principles Exploited by Vulture Funds

As purchasers of a debt, vulture funds are secondary owners of these debts. In debt purchase, all characteristics attached to the debt are transmitted to the secondary owner. Therefore, secondary owners of the debt have a legal right to repayment. This was affirmed by US courts in a 1997 judgement in the case *Pravin Banker Associates Ltd* v. *Banco Popular del Peru*[7]. It was also confirmed by the UK courts in the *Donegal* versus *Zambia* case, in which the judgement was given in favour of Donegal, despite the very poor condition of Zambia[8].

Although these funds and the judgements have been described as immoral, some have argued in favour of vulture funds. Vulture funds, according to Felix Salmon[9], are a necessity to the financial market. They are distressed-debt funds that encourage investors to invest in HIPCs, as they provide an alternative means to litigation against a sovereign State: instead of suing for debt recovery, they will sell the bond to distressed-debt funds. This allows avoiding discouragement in investing in HIPCs, which cannot survive without debt.

C. - Debt Management and Vulture Funds

1. Debt Management in Indebted Countries

Lawsuits by vulture funds against indebted countries are fuelled by debt positions in these countries. The IMF and World Bank have defined debt management as: "the process of establishing and

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[5] After the name of its instigator: US Treasury Secretary Nicholas Brady.
[6] SEAGER Ashley, LEWIS James, "How Top London Law Firms Help Vulture Funds Devour their Prey", *The Guardian*, 17 October 2007.
[7] *Pravin Banker Associates Ltd* v. *Banco Popular del Peru*, 109 F.3d 805. 65 *USLW* 2640 (2nd Circuit 1997).
[8] *Donegal International Ltd* v. *Republic of Zambia and Anor*, [2007] *EWHC* 197.
[9] SALMON Felix, "In Defence of Vulture Funds", 24 February 2007, available at http://www.felixsalmon.com/2007/02/in-defense-of-vulture-funds /, as accessed on 7 February 2011.

executing a strategy for managing the government's debt in order to raise the required amount of funding, achieve its risk and cost objectives and to meet other sovereign debt management goals the government may have set, such as developing and maintaining an efficient market for government securities"[10].

If "debt management practices increase the vulnerability of the economy to economic and financial shocks, […] these risks can be readily addressed by relatively straightforward measures, such as by lengthening the maturities of borrowings and paying the associated higher debt servicing costs […], by adjusting the amount, maturity, and composition of foreign exchange reserves, and by reviewing criteria and governance arrangements in respect of contingent liabilities"[11].

Sound public debt management can be achieved through regulation of policy and control and analysis of the debt. This requires a strong institutional apparatus and human, as well as financial resources.

2. Debt Cancellation and Vulture Funds

Debt cancellation initiatives allow poor indebted States to start afresh and allocate resources to developing their country. In 1996, shareholders at the IMF and World Bank have created the highly indebted poor countries initiative, designed to alleviate impoverished countries of their debts and in 2005, the Multilateral Debt Relief Initiative (MDRI) was launched to enhance the efforts towards debt cancellation[12].

Debt cancellation initiatives and the raise of vulture funds are linked. Indeed, vulture funds have had a tendency to target countries benefitting from debt cancellation, as this frees money to pay other debts[13].

For instance, in the Zambia case described further, the lawsuit was introduced as Zambia was about to obtain debt relief from the World Bank, the IMF and the African Development Bank. It was condemned to pay to Donegal over a third of the money it was due to save as a consequence of the debt relief initiative[14].

Additionally, according to an IMF-IDA (International Development Association) report in 2006, the "total reported claims under litigation amounted to about US$ 1.9 billion, and [were] about 22%

[10] IMF and World Bank, "Guidelines for Public Debt Management", 9 December 2003, available at: http://siteresources.worldbank.org/INTDEBTDEPT/Resources/PDMGuidelines20031209.pdf, as accessed on 7 February 2011.
[11] *Ibid*.
[12] Jubilee USA Network, "Vulture Funds and Poor Country Debt: Recent Developments and Policy Responses", *Briefing Note 4*, April 2008.
[13] GAW Tamara, "Vulture Funds: the Hidden Enemy", *Policy Brief*, TransAfrica Forum, June 2008.
[14] FARRY Lawrence, *When Globalisation Fails: Vulture Funds and Sub-Saharan Africa's Debt Crisis*, UCLA Centre for American Politics and Public Policy Political Science, 2007, p. 16.

higher than the total HIPC initiative debt relief to be provided by creditors"[15]. This illustrates the fact that vulture fund operations undermine, as well as feed from, debt relief.

Nevertheless, these findings must be mitigated in as much as, in most cases, it has been observed that "vulture funds are attaching and trying to be paid out of assets that were stolen and hidden by the rulers of some mineral-rich countries in Africa whose principal objective is to enrich themselves and their clan and cronies"[16].

II. - Case Law Trends on Vulture Funds

This Chapter will focus on providing the main features of some landmark cases in vulture funds litigation in several chosen countries.

A. - Facts and Figures of Lawsuits

In the settlement of vulture funds, recourse to litigation is not a necessity. Indeed, it is one of the three options available to the debtor country. It can pay the fund its debt, negotiate alternative settlement, or fight the case in the courtroom[17]. Alternatives are preferable, as vulture funds have means to employ far greater legal resources. The problem is that vulture funds seek to avoid negotiations in favour of lawsuits[18].

In 2007, the IMF reported that 46 litigating creditors had filed suits against HIPCs, with 25 receiving judgement in their favour and a large number being settled before reaching the courts[19].

According to the IMF, HIPC countries facing the largest number of lawsuits by private creditors in 2007 were the Republic of Congo, Cameroon and Uganda, pursued by 8, 7 and 6 creditors respectively[20].

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[15] IDA and IMF, "Heavily Indebted Poor Countries (HIPC) Initiative and Multilateral Debt Relief Initiative (MDRI) – Status and Implementation", 21 august 2006.

[16] Debt Advisor International LLC, "Putting the Problem of 'Vulture Funds' into Perspective", UNCTAD Debt Management Conference, 20 November 2007.

[17] FARRY Lawrence, *When Globalisation Fails: Vulture Funds and Sub-Saharan Africa's Debt Crisis*, UCLA Centre for American Politics and Public Policy Political Science, 2007.

[18] *Ibid*.

[19] *Ibid*; Jubilee USA Network, "Vulture Funds and Poor Country Debt: Recent Developments and Policy Responses", *Briefing Note 4*, April 2008, p. 2; IMF, "Heavily Indebted Poor Countries (HIPC) and Multilateral Debt Relief Initiative (MDRI) – Status of Implementation", *IMF Report*, 21 August 2006.

[20] Jubilee USA Network, "Vulture Funds and Poor Country Debt: Recent Developments and Policy Responses", *Briefing Note 4*, April 2008, p. 3; GUEYE Coumba Fall, VAUGEOIS Michel, MARTIN Matthew, JOHNSON Alison, "Negotiating the Debt Relief Initiative and Beyond", *Publication no. 11*, Debt Relief International Ltd, February 2007, pp. 67-69. Available at www.hipc-cbp.org/files/en/open/Publications/Pub11_June07.pdf, as accessed on 10 February 2011.

B. - Presentation of Some Vulture Funds Lawsuits

1. The Case of Zambia and Donegal in the UK

In 1979, Zambia borrowed $ 15 million from Romania to purchase agricultural supplies. Twenty years later, this debt, with interest, amounted to roughly $ 30 million. After it became clear that Zambia would be unable to repay, Romania and Zambia agreed to several consecutive agreements on debt reduction. They were about to agree on the debt to be sealed off for $ 3 million, when Donegal International Ltd offered Romania $ 3.28 million for the debt. Donegal, a subsidiary to Washington DC-based Debt Advisory International, is registered in the British Virgin Islands.

Donegal and Zambia signed a settlement agreement according to which Zambia was to pay back 33% of the principal amount of the debt in the total amount of $ 14.8 million in 36 monthly instalments. After Zambia stopped paying its debt, upon finding some irregularities in terms in prior handling of the debt, Donegal freezed Zambia's assets in the UK. In 2005, Donegal filed a lawsuit against Zambia for the full amount of the debt with interest and costs. The claim amounted to $ 55 million.

On 24 April 2007, the UK Courts ruled in favour of Donegal. They ordered Zambia to pay $ 15.4 million in addition to legal costs. It must be highlighted that the Court was sensitive to Zambia's arguments. It criticised the "dishonest" allegations of the accusation and in particular those of Michael Sheehan, Donegal's principal shareholder. It thus rejected the damages Donegal demanded for the delayed pay-back[21].

This case was a trigger for UK's decision to take action against vulture funds through legislation beneficial to HIPCs.

2. The Case of Democratic Republic of Congo v. FG Hemisphere in the US

In 1980 and 1986, the DRC and its national electricity company entered into loan agreements with the Yugoslav company Energoinvest. By the late 1980s, despite the guarantee provided on the $ 37 million debt by the government, the national company and the government defaulted on payment for $ 18 million.

In 2003, the International Chamber of Commerce adopted two arbitral awards in favour of Energoinvest for US$ 18.43 million and $ 11.725 million plus 9% interest and full legal costs. This was confirmed in 2004 and 2005 by the US District court for the District of Columbia. Energoinvest

[21] MIANZENZA Aimé D., « Des fonds d'investissement et des fonds vautours – Revue des positions actuelles sur la lutte contre les fonds vautours », *Finance internationale*, 7 mai 2010, pp. 12-13. Available at http://www.cesbc.org/developpement_durable/economie/des_fonds_d'investissement_et_des_fonds_vautours.pdf, as accessed on 11 February 2011.

sold the interests in the arbitral award and judgements to FG Hemisphere. In 2007, a US court condemned the DRC to pay $ 104 million to FG Hemisphere.

Subsequently, FG Hemisphere tried to assume control of DRC assets worldwide. In January 2009, a South African tribunal authorised FG Hemisphere to seize for 15 years the benefits of the national electricity company on electricity sale in South Africa. This should amount to $ 105 million. In February 2010, a Hong Kong Court gave FG Hemisphere the right to seize the $ 350 million sum the China Railway company was to pay a Congolese public company. In March 2009, the DC Court held that the DRC should pay penalties to FG Hemisphere, starting $ 5,000 a week and doubling every four weeks up to $ 80,000 a week for failing to produce information sought by FG Hemisphere.

3. Overview of Some Other US Cases

In South America in the years 1998-2002, the Argentinean government became unable to service its debts. In 2001, EM Ltd acquired some of its debts at a 70% discount on their real value. EM Ltd then sued Argentina before US courts for full value and interests. The New York district court held that Argentina should pay $ 725 million to EM Ltd[22].

Similarly, in 2000, the South Manhattan district court condemned Peru to pay Elliott Associates no less than $ 58 million for an initial debt of $ 20.7 million, acquired at $ 11.4 million[23]. Elliott Associates had refused to take part in the debt restructuration process for Peru and had sought to obtain amicable solutions several times.

4. The Winslow Case in France

After obtaining a favourable judgement before the High Court of Justice in London in 1996 against the Government of Cameroon, Winslow Bank and Trust Company Ltd sought to seize Cameroon's assets in France, by filing a lawsuit before the French courts against the National Hydrocarbons Company.

In 2007, the French courts held themselves competent to hear a case against a foreign State entity for the first time[24]. They held that $ 50 million were to be seized on the company's account for Winslow Bank. This is a clear message that no immunity would be provided to debtor States, even in the case of vulture funds.

[22] MIANZENZA Aimé D., « Des fonds d'investissement et des fonds vautours – Revue des positions actuelles sur la lutte contre les fonds vautours », *loc. cit.*, pp. 10-11.

[23] *Elliott Associates, LP* v. *Banco de la Nacion and the Republic of Peru*, 194 F.3d 363, 2nd Circuit, 1999.

[24] Cass., Civ. 1ère, 14 novembre 2007, *Winslow B & T Company Ltd c. Société nationale des hydrocarbures*, n° 04-15.388, Revue critique de droit international privé, 2008/2, pp. 303-310, note Mathias AUDIT.

5. Cases in Belgium

In 2000, as a result of the US court judgement in favour of Elliott Associates against Peru, Elliott Associates sought an injunction to prevent Peru from paying other creditors first from Belgian courts, as Peru's repayment plan was to be conducted by the Belgian clearing bank Euroclear[25]. The Belgian court made a particular reading of the *pari passu* clause, beyond insolvency or bankruptcy cases, to include any case in which payment is made to all other outstanding creditors. This reading is different to that of the UK's interpretation of *pari passu* clauses[26].

In 2004, Belgian courts ruled in favour of Kensington International Ltd for the seizure of twice € 12 million allocated by the Belgian cooperation to the Congolese Republic[27]. This case was the direct trigger for the introduction of the Belgian Bill that will be discussed below.

III. - Key Provisions of Loan Agreements Affecting Relationships with Vulture Funds

A. - The Main Features of Loan Agreements and How to Use Them

This section will be dedicated to providing an overview of the main features of loan agreements and how States should read them carefully. Loan agreements are contracts whereby the rights and obligations of a creditor and a borrower are set with regard to a specific loan. These developments will follow the categorisation offered by the guidelines set by Devi Sookun in his Handbook on how to "Stop Vulture Fund Lawsuits".

There exist several types of loan agreements: standard contracts, used by such institutions as the World Bank, the IMF and the African Development Bank[28], with clauses that appear non negotiable; and contracts that are more flexible and generally used by vulture funds and the clauses of which should be examined and negotiated with caution by the borrowing State.

The structure of loan agreements is as follows: preamble and definitions provisions to provide an idea of introductory concepts and broad intentions of the parties; a description of the operation that forms the object of the agreement; that is, the mutual obligations of the parties; default clauses, legal provisions and clauses of conditions precedent, that will form the bulk of the discussion in this section, as they are the main avenue for vulture funds' actions.

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[25] *Elliott Associates v. Peru, LP General Docket No. 2000/QR/92*, Brussels Court of Appeals, 8th Chamber, 26 September 2000; 12 F. Supp. 2d 328 (SDNY 1998).

[26] SOOKUN Devi, *Stop Vulture Funds Lawsuits: A Handbook*, Commonwealth Secretariat 2010, p. 36.

[27] MIANZENZA Aimé D., « Des fonds d'investissement et des fonds vautours – Revue des positions actuelles sur la lutte contre les fonds vautours », *loc. cit.*, p. 22.

[28] For an example of such contract, see: http://www.afdb.org/fileadmin/uploads/afdb/Documents/Legal-Documents/30774810-EN-NEW-GENERAL-CONDITIONS-ADB-SOVEREIGN.PDF, as accessed on 4 February 2011.

1. Applicable law clauses

These seek to determine in advance the law which will be applicable to the loan agreement and its execution. Parties tend to favour the law of States such as the UK and the US, as they will be developed enough to cover in-depth and in a balanced way the subject-matter of the agreement.

Recently, the UK has passed a Bill relating to vulture funds and other such initiatives have been introduced in the US, France or Belgium, as will be exposed in Chapter 4. This is important, as the borrowing State will have to be careful in the choice of applicable law to ensure that its rights are protected by it[29].

2. Protective clauses

In this second category feature 'conditions precedent', 'negative pledge clauses', '*pari passu* clauses' and 'collective action clauses'. 'Conditions precedent' are conditions provided for in the loan agreement which, when they have been met, trigger the validity of the contract or the disbursement of funds by the creditor. These clauses are important as legal consequences stem for them. This is why States should seek legal advice before agreeing to them.

'Negative pledge clauses' are included to provide security to the creditor. They aim at prioritising their claim with regard to other creditors of the State. This clause can be negotiated by States as a counterpart for a lower interest rate.

'*Pari passu* clauses' provide that all creditors should be equally treated. This prevents States from favouring the payment of a creditor rather than another in case of bankruptcy or insolvency. It defeats the pursuing of debt restructuring by the State towards the creditor.

On the other hand, 'collective action clauses' are more favourable to the State, as they allow the restructuring of a country's debt, as long as a majority of creditors agree to it. This clause defeats the previous two types of clauses. States should favour it above the other two.

3. Change of circumstances clauses

These clauses enable the non-defaulting party to stop performing its obligations if the defaulting party is unable to perform its obligations, because of an event that can be internal or external to it: it can be linked to the non- or part-performance by the defaulting party of its obligations or to the occurrence of an event amounting to such a default.

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[29] RAFFER Kunibert, « La fin de la discrimination indue à l'encontre des débiteurs ? – Commentaires relatifs aux propositions du FMI sur le mécanisme de restructuration de la dette souveraine », *loc. cit.*, p. 7.

Potentially, such a clause can contain a grace period allowing the defaulting party to redress the default. This type of clause can be beneficial to the State if it includes events such as natural disasters. They can also be detrimental to the State in the instance where part-performance is considered a default. Also, the State should make sure that reasonable time is provided for to redress the default.

B. - Negotiations towards Contractual Additions

Negotiations should not merely be understood as pre-contractual. Indeed, they can happen at any stage, as it has been explained earlier that the vulture fund activity is conducted in several steps. It can and should be done when preparing the original loan agreement and when the vulture fund buys the debt. It should also be done before litigation to avoid its costs and potentially disastrous effects.

In the course of negotiation, contractual terms should be closely analysed, as they are what the courts will interpret to come to conclusions in their judgements. For this legal experience and assistance at all stages is a prerequisite. The clauses exposed above should be, according to whether they are beneficial or detrimental to the Debtor State, respectively either included or excluded. In addition, clauses such as '*assignment clauses*', which provide that the contract may only be assigned to creditors willing to participate to the HIPC or other similar initiatives, should be included.

To be efficient, negotiations have to be organised by a team and all steps must be observed, from the analysis of the issues to the implementation and review. These steps most States concerned by vulture funds overlook or do not have enough legal and technical resources to follow[30].

For instance, the Zambian case showed the necessity for loan agreements to be submitted to Parliamentary approval before being entered into by the finance ministry[31]. Thus, procedures within the debtor countries should be strengthened, so as to enhance their security. Additionally, more transparency is necessary.

[30] SOOKUN Devi, *Stop Vulture Funds Lawsuits: A Handbook*, Commonwealth Secretariat 2010, pp. 55-60.

[31] Jubilee Zambia, "Vulture Funds and Debt Relief – The Immoral Tactics of Vulture Funds: the Case of Zambia – 'What They Are and What Can You Do about It?'", February 2007.

IV. - Towards Legislative Action against Vulture Funds

A. - Solutions in the UK System

On 8 April 2010, the British Parliament adopted a law restricting and prohibiting lawsuits by vulture funds in UK courts. The Act is entitled *Debt Relief (Developing Countries) Act*[32]. Its aim is to prevent vulture funds from ignoring debt relief initiatives for HIPCs.

This Act is therefore rather limited in scope, since it only concerns countries listed as HIPCs by the IMF and World Bank; that is 40 countries in total. Additionally, this law only limits the amounts vulture funds can claim in court[33]. This Act sought to find a balance between the need for the protection of HIPCs and the interests of creditors.

It has been suggested that the UK add an exception to State immunity waivers in Chapter 33 of the *State Immunity Act 1978*, for cases relating to vulture funds[34].

Additionally, hedge funds have accepted to be registered[35].

B. - Solutions in the US System

The approach of the US towards vulture funds is ambiguous. Elliott Associates, the biggest vulture fund, is run by Paul Singer, billionaire donor to President Bush and presidential hopeful Rudi Giuliani[36]. Thus there has been strong lobbying in support of vulture funds[37].

Nevertheless, a first Bill was introduced in 2008 to "stop very unscrupulous loans transfers from underprivileged countries to rich, exploitative funds"[38]. It never made it into law.

Another Bill has been introduced on 18 June 2009 by congresswoman Maxine Waters before the House of Representatives, with an aim to stop vulture funds[39]. This proposition, very similar to the

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[32] *Debt Relief (Developing Countries) Bill 2009-2010*, available at: http://www.legislation.gov.uk/ukpga/2010/22/contents?view=plain, as accessed on 2 February 2011.

[33] MIANZENZA Aimé D., « Des fonds d'investissement et des fonds vautours – Revue des positions actuelles sur la lutte contre les fonds vautours », *loc. cit.*, p. 23.

[34] RAFFER Kunibert, « La fin de la discrimination indue à l'encontre des débiteurs ? – Commentaires relatifs aux propositions du FMI sur le mécanisme de restructuration de la dette souveraine », *loc. cit.*, p. 8.

[35] MIANZENZA Aimé D., « Des fonds d'investissement et des fonds vautours – Revue des positions actuelles sur la lutte contre les fonds vautours », *loc. cit.*, p. 21.

[36] SEAGER Ashley, LEWIS James, "How Top London Law Firms Help Vulture Funds Devour Their Prey", *The Guardian*, 17 October 2007.

[37] MIANZENZA Aimé D., « Des fonds d'investissement et des fonds vautours – Revue des positions actuelles sur la lutte contre les fonds vautours », *loc. cit.*, p. 23.

[38] *Stop Very Unscrupulous Loans Transfers from Underprivileged Countries to Rich, Exploitative Funds Act*, 1st August 2008, HR 6796.

[39] *Stop Vulture Funds Act*, 18 June 2009, HR 2932.

UK Act, still has not been adopted. It would enable vulture funds to recover only the purchase price plus a 6% interest.

The scope of the Bill is limited, in as much as it would concern countries that can borrow from the international development association; that is the World Bank concessional loan facility; but it would exclude countries that would be eligible for International Bank for Reconstruction and Development (IBRD) loans and countries committing gross human rights violations or engage in terrorist activity support[40].

Several alternative solutions can be envisaged in the US system. A first solution would be to enact law to make vulture funds-purchased debts unenforceable before US courts. This would prevent vulture funds contracting after the law's entry into force to sue the debtor country for its debt before US courts. Such a law could be justified on the ground that vulture funds undermine debtor States' sovereignty; or on the odious debt doctrine, according to which debts incurred during a corrupt regime and unbeneficial to the people in whose name it was undertaken are illegitimate[41].

A second approach could be to forcibly purchase the debts from vulture funds and write them off. This would be done at the original amount of purchase by the vulture fund, plus a standard yearly interest. This would be a form of belated and temporary debt relief[42].

Side solutions such as a "rapid response legal technical assistance facility"[43] could be imagined to provide HIPCs with the necessary legal tools to fight off vulture funds.

Increasing transparency in vulture fund activity could also be a solution, as it would significantly reduce it. Purchase, sale or litigation of sovereign debt should be publicly filed with the US treasury[44]. This was already initiated, as the Obama administration filed a project for the regulation of hedge funds, providing for their registration and some kind of supervision[45].

The *Foreign Corrupt Practices Act* (FCPA) should also limit vulture fund activity. This Act, nevertheless, is not properly enforced[46].

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[40] MARGOLIS Adrienne, "Clipping Vultures' Wings", International Bar Association, not dated, available at http://www.ibanet.org/Article/Detail.aspx?ArticleUid=706e20b7-d800-4efd-a69d-ff1ec9efa5e2, accessed on 12 February 2011.

[41] FARRY Lawrence, *When Globalisation Fails: Vulture Funds and Sub-Saharan Africa's Debt Crisis*, UCLA Centre for American Politics and Public Policy Political Science, 2007, p. 19.

[42] *Idem*. Jubilee USA Network, "Vulture Funds and Poor Country Debt: Recent Developments and Policy Responses", *Briefing Note 4*, April 2008, p. 3.
Available at http://www.jubileeusa.org/fileadmin/user_upload/Resources/Policy_Archive/408briefnotevulturefunds.pdf, as accessed on 11 February 2011.

[43] FARRY Lawrence, *op. cit.*, p. 20.

[44] Jubilee USA Network, "Vulture Funds and Poor Country Debt: Recent Developments and Policy Responses", *Briefing Note 4*, April 2008, p. 3.

[45] MIANZENZA Aimé D., « Des fonds d'investissement et des fonds vautours – Revue des positions actuelles sur la lutte contre les fonds vautours », *loc. cit.*, p. 21.

[46] MARGOLIS Adrienne, "Clipping Vultures' Wings", International Bar Association, not dated.

In addition, the US legislation on the protection of insolvent debtors could be applied to sovereign debtors. This was done once by the 2nd Circuit Appeals Court of New York – later reversed – in favour of Costa Rica. In that case, the judge, after evoking a Canadian case, declared the actions of Costa Rica conform to the law and policy of the US. In particular, the US rose that it was 'in conformity with the spirit of the law' and 'recognised by all civilised nations' and 'given the circumstance, the very essence of international courtesy'[47]. This shows that a simple shift in US policy could allow US courts to apply the legislation on the protection of insolvent debtors to sovereign debtors[48].

C. - Solutions in the French System

A "proposition de loi" was made on 2nd August 2007 before the National Assembly to fight off vulture funds[49]. It provides that no condemnation can be pronounced or judgement given effect to against a debtor who contracted a loan with a view of engaging a lawsuit against the debtor, rather than speculating on the market value and evolution of the loan. It prevents vulture funds from using the French system to validate judgements obtained before foreign courts. It also limits the amount vulture funds can claim: it is limited to the purchase price, rather than the original amount of the debt plus interest.

The French Assembly has not legislated on this proposition, as yet.

D. - Solutions in the Belgian System

Belgium was the first country to take meaningful legislative action against vulture funds. A law was passed on 31 January 2008 to prevent the seizure or selling of public funds destined for international cooperation, especially with regards to vulture funds. This law contains only one article, which provides that funds and goods destined for Belgian international cooperation and public help for development cannot be seized or sold[50]. This law was approved by the Belgian Parliament quickly and unanimously.

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[47] RAFFER Kunibert, *loc. cit.*, pp. 8-9.
[48] *Idem*.
[49] *Proposition de loi visant à lutter contre l'action des fonds financiers dits « fonds vautours »*, presented to the National Assembly by LE FUR Marc, 14 September 2007.
[50] Kingdom of Belgium, *Document législatif n° 4-482/2*, Senate of Belgium, 2007-2008 Session, 15 January 2008; VIVIEN Renaud, « Dette odieuse et fonds vautours: vers une application concrète du concept de dette odieuse », 16 February 2007, Liège-Belvaux. Available at http://www.cadtm.org/IMG/pdf/Dette_odieuse_et_fonds_vautours_par_Renaud_Vivien.pdf, as accessed on 11 February 2011.

Additionally, a Resolution on the cancellation of debts of least developed countries was adopted by the Belgian Senate in March 2007[51]. This Resolution requests that the Belgian government conduct an audit on the odious aspect of Belgian loans to these developing countries. An odious debt is defined by this Resolution as a debt contracted by an undemocratic government, the sum of which has not been used for the benefice of the local population and the creditor of which awarded it with full knowledge of the previous two elements.

V. - Role of IFIs in the Action against Vulture Funds

A. - The HIPC Initiative

With the increasing number of countries becoming unable to pay off their debts, IFIs and regional banks recognised the need for debt reduction initiatives to be developed. The HIPC initiative was established with that purpose in 1996.

Nevertheless, the "HIPC debt resolution scheme was too weak in ensuring and protecting expected benefits", as it was voluntary rather than mandatory for creditors[52]. Moreover, the process was imperfect, as it introduced an unresolved contradistinction between the HIPC deal to cancel debts and the contractual terms of *pari passu*, providing for equal treatments of all creditors[53].

Additionally, it is important to highlight that HIPC initiatives have no legal force in individual countries unless they are passed into laws within these countries[54]. Therefore, national action remains a prerequisite for international action to be enforced.

B. - The Debt Reduction Facility Initiative

In July 1989, the World Bank created a Debt Reduction Facility (DRF) providing funding to governments to buy back – at a discounted rate – the debts owned to external commercial creditors[55]. It has recently purchased private debts of countries, thus eliminating debt vulnerable to vulture

[51] Kingdom of Belgium, *Document législatif n° 3-1507/6*, Senate of Belgium, 2006-2007 Session, 27 March 2007.
[52] Jubilee Zambia, "Vulture Funds and Debt Relief – The Immoral Tactics of Vulture Funds: the Case of Zambia – 'What They Are and What Can You Do about It?'", February 2007.
[53] *Ibid*.
[54] GUEYE Coumba Fall, VAUGEOIS Michel, MARTIN Matthew, JOHNSON Alison, "Negotiating the Debt Relief Initiative and Beyond", *Publication no. 11*, Debt Relief International Ltd, February 2007.
[55] Jubilee USA Network, "Vulture Funds and Poor Country Debt: Recent Developments and Policy Responses", *Briefing Note 4*, April 2008, p. 4.

funds[56]. The World Bank should push this programme one step further, by establishing a "trust fund to finance grants for legal assistance and commercial debt buy-backs for an expanded number of impoverished, indebted countries with at-risk debt"[57].

C. - The African Legal Support Facility Initiative

The African Development Bank established an African Legal Support Facility for HIPCs. This facility will provide these countries with legal and technical assistance, much needed in the case of vulture funds' activities. Legal teams will help HIPCs engage in equitable negotiations to prevent such activity[58].

VI. - Initiatives by Other Actors

Some additional initiatives have been introduced. In 1998, Norway advocated for 100% debt cancellation. In 2000, the UN adopted the Millennium Development Goals, with the intention of eradicating poverty throughout the world. It was recognised that these would not be achieved without debt relief. In 2005, the G8 summit decided to cancel debt up to $ 40 billion and 100% for eligible HIPCs.

In 2007, the Paris Club was created[59]. It is an informal group constituted of States committed towards helping sovereign debtor countries. These countries have pledged to respect the HIPC debt cancellation process[60]. Although China is not part of the Paris Club and has not bound itself to the HIPC conditions, it is committed to providing debt relief to most African countries it operates in.

Finally, the Jubilee Debt Campaign came to existence in 2000-2001 and has managed to fuel international will to write off debt of indebted countries. It has been active in several countries, including the USA and the UK[61].

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56 *Idem*.
57 *Idem*.
58 MIANZENZA Aimé D., « Des fonds d'investissement et des fonds vautours – Revue des positions actuelles sur la lutte contre les fonds vautours », *Finance internationale*, 7 mai 2010, p. 20.
59 www.clubdeparis.org.
60 Jubilee USA Network, "Vulture Funds and Poor Country Debt: Recent Developments and Policy Responses", *Briefing Note 4*, April 2008, p. 3.
61 www.jebileedebtcampaign.org.uk.

CONCLUSION

The phenomenon of vulture funds feeds itself from several factors. These include, amongst others, mismanagement and corruption in indebted countries, imbalanced loan agreements, mismanagement in, and poor communication between, potential creditors and insufficiently complete debt relief initiatives. If vulture funds have been able to prosper before national courts in several countries, this has become more difficult, thanks to new legislation in the countries of litigation and legal aid provided to indebted States in the negotiations of loan agreements. Lessons from the extensive case law seem to have been drawn.

Nevertheless, if the fight against vulture funds is a necessity to lighten HIPCs from their debt burden, this must not go too far. A risk of waiving the possibility for vulture funds to introduce lawsuits against sovereign States is that these States may start systematically putting forward their immunity or the fragility of their population as a justification to not service their debts. Therefore, solutions should be developed more upstream, directly to the source, to prevent such situations of indebtedness towards a large number and variety of creditors in the future.

Some have advocated for an international court to be established to deal with vulture funds. In order for this to be considered, strong international regulations should be developed by IFIs and international organisations, as well as via international treaties to create a set of law applicable before such a court. In the meantime, *fora* should be organised to bring legislation and case law trends of countries of litigation closer to each other.