Legitimacy and Impartiality in a Sovereign Debt Workout Mechanism

Discussion Paper Prepared for the Fourth Session of the
UNCTAD Working Group on a Debt Workout Mechanism

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Outline

A. PRELIMINARY SUMMARY

Particularly in light of recent developments in sovereign debt litigation, there is a pressing need for discussion of more robust sovereign debt restructuring mechanisms. This paper contends that any sovereign debt workout mechanism (DWM) should embody the principles of legitimacy and impartiality, to the extent possible, in order to garner the stable and long-term adherence of international stakeholders. These two elements are important both for attracting support *ex ante*, i.e. in the initial development of any treaty, ad hoc, or soft law restructuring mechanism, and for ensuring *ex post* that a DWM is ultimately utilized by states and their creditors. These principles are particularly essential in the international arena, given the absence of a clear global enforcement mechanism and in light of the historical resistance of some states and other institutional actors to the development of a debt workout mechanism.

The first section of this background paper will introduce the key concepts of legitimacy and impartiality, laying out different schools of thought on the characteristics of a legitimate and impartial institutional order and developing a preliminary list of features appropriate for a DWM. The second section will consider the institutional and historical background of debt restructuring in light of these themes, to better understand the political and economic context of current discussions of a possible workout mechanism. Third, this paper will consider how several domestic and transnational institutions attempt to meet standards of legitimacy and impartiality, focusing especially on domestic insolvency/debt restructuring institutions and on investment treaty arbitration rules. Finally, this paper will offer preliminary recommendations for how a future DWM might instantiate the principles of legitimacy and impartiality, and will briefly assess existing proposals in light of these themes. This last section will also note several obstacles to meeting the goals of legitimacy and impartiality, and ask whether the negative effect of such impediments might be mitigated.

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B. THE KEY CONCEPTS OF LEGITIMACY AND IMPARTIALITY

This first section of the background paper will introduce the key concepts of legitimacy and impartiality, laying out different approaches to defining the characteristics of a legitimate and impartial order. It will propose a preliminary understanding that could be appropriate for thinking about legitimacy and impartiality in the DWM context, based primarily on emerging interpretations in international law and international relations.

This discussion considers impartiality to be a core factor within the more comprehensive category of legitimacy, as well a valuable principle in its own right.[2] Particularly in the context of international tribunals, impartiality and independence have been called "the most important determinant of political legitimacy at the international level," with legitimacy requiring that such tribunals "be sufficiently independent of the powerful actors that dominate the political sphere to take less powerful and minority interests into consideration."[3] Thus, although, this section considers these principles in sequence, the themes overlap and should be interpreted jointly.

B.1. Legitimacy in a DWM

Any successful DWM will have to command the respect and compliance of a multitude of stakeholders across varying national and international institutional settings. Maximizing the degree to which such stakeholders consider a DWM to be legitimate is essential to furthering its goals. However, claiming legitimacy on behalf of a particular institution, mechanism, or rule is a fraught exercise, given that the term's content can be difficult to pin down. Indeed, "legitimacy speak" has been soundly criticized by important international legal scholars for its indeterminacy and lack of substance.[4] The goal of this discussion, then, is relatively circumscribed. It does not aim to formulate a comprehensive or universal typology of legitimacy applicable across all arenas.[5] Rather, it presents a preliminary working understanding of institutional features that might render a DWM more (or less) legitimate in the current, complex global context. The final determination of which elements are ultimately included in a DWM is of course a matter to be negotiated among key global stakeholders. It involves decision-making that will necessarily be embedded within the broader goals of pragmatic feasibility, timeliness, and cost effectiveness.

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[2] The interrelated nature of these elements, in the view of the UNCTAD Working Group on a Debt Workout Mechanism, is suggested by their joint assignment for discussion in this background paper, although impartiality is listed as a standalone principle for a DWM as well. UNCTAD, Debt Workout Mechanism Framing Paper, 2 September 2013. Available at: http://www.unctad.info/upload/Framing%20Paper%2027%20August_finalwithlogo.pdf.

[3] Eyal Benvenisti & George W. Downs, "Prospects for the Increased Independence of International Tribunals," *German Law Journal*, vol. 12, no. 5, 1057-1082 (2011), 1058.

[4] James Crawford, "The Problems of Legitimacy-Speak," *ASIL Proceedings* (2004, vol. 98), 271, 271 (noting the "fuzziness and indeterminacy" of the term); see also Martti Koskenniemi has suggested that " 'Legitimacy' is not about normative substance. Its point is to avoid such substance but nonetheless to uphold a semblance of substance." Martti Koskenniemi, "Miserable Comforters: International Relations as New Natural Law," *European Journal of International Relations*, vol. 15 (2009), 395, 409.

[5] Indeed, understandings of legitimacy are necessarily variable and historically grounded. For a study of how shifts in conceptions of legitimacy ground systemic change in international society, see Ian Clark, *Legitimacy in International Society* (Oxford, 2005). Joseph Weiler suggests that forms of international law-making, including the legitimacy arguments with which they are associated, is best understood not as periodization but rather, drawing from geology, as stratification, in which sediments of past practices continue into the present. Joseph Weiler, "The Geology of International Law—Governance, Democracy and Legitimacy," *ZaöRV* 64 (2004), 547-562.

Basic Definition and Preliminary Considerations

Basic Definition

Legitimacy can be understood as *an attribute of a rule, mechanism, norm, or institution that makes it worthy of considered and voluntary compliance and/or support*. Approval and compliance result from the initial understanding of the rule or mechanism as 'legitimate,' rather than from coercion, habit, self-interest, or other possible reasons for action.[6] Part of the special virtue or power of a legitimate rule thus lies in its capacity to effectively coordinate preferences and decisions even in the absence of other bases for action. This becomes especially important in the international arena—including for a globally supported debt workout mechanism—where no supranational authority with broadly accepted powers of coercion exists. As will be discussed more fully, legitimacy may derive from the initial *source* of, ongoing *process* of, or ultimate substantive *outcome* resulting from a rule, mechanism, or institution, or from some combination of these three basic components.

The Broad Audience for Legitimacy

The importance of legitimacy as a basis for action has long been understood in the social sciences and in legal studies. For example, Max Weber formulated a definition relevant for sociological theory that states that "a norm or institutional arrangement is legitimate if, as a matter of fact, it finds the approval of those who are supposed to live in this group."[7] Thomas Franck proposed a working definition of legitimacy intended for international law and international relations, initially formulated to apply among states, as "a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process."[8] In the last several decades, questions of legitimacy have become even more central in both academic and policy writing, and scholars and activists have built upon and extended these themes.[9] In one recent influential article, Allen Buchanan and Robert Keohane emphasize that the concept of legitimacy appeals to a "common capacity to be moved by what might be called *normative reasons*," and a "complex belief" that institutions may deserve support even if they fail to maximize self-interest and also fall short of (inevitably divergent) understandings of perfect justice.[10]

Central to these formulations is the idea that conforming action is motivated by the legitimacy of the mechanism itself *through the belief or normative approval of the relevant audience*. This interactive element leads to several preliminary implications:

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[6] See, for example, Christopher A. Thomas, "The Uses and Abuses of Legitimacy in International Law," 24-29.
[7] Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, as quoted (and translated) in Lukas H. Meyer and Pranay Sanklecha, "Introduction: Legitimacy, justice and public international law. Three perspectives on the debate," in Lukas H. Meyer, ed., *Legitimacy, Justice, and Public International Law* (Cambridge University Press, 2009), 2.
[8] Thomas Franck, *The Power of Legitimacy Among Nations*, Oxford University Press (1990), 24.
[9] See, among others, Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law* (Cambridge University Press, 2010); Rüdiger Wolfrum and Volker Röben, *Legitimacy in International Law* (Springer 2008); Lukas H. Meyer, ed., *Legitimacy, Justice, and Public International Law* (Cambridge University Press, 2009).
[10] Allen Buchanan & Robert Keohane, "The Legitimacy of Global Governance Institutions," in Rüdiger Wolfrum and Volker Röben, eds., *Legitimacy in International Law* (Springer 2008), 30, 31-32.

- First, the *relevant audience for legitimacy purposes in a DWM should include all those affected* by a rule, norm, or institution—i.e. all of those normatively addressed by the rule or living in the group to which the rule or mechanism applies. This audience encompasses those without the position or power to enact or enforce rules, including citizens of countries undergoing a debt workout and small creditors who may have had minimal voice in the restructuring process.
    - This accords with one of the general goals of establishing a legitimate order, i.e. ensuring voluntary adherence by all relevant actors to the extent possible. This includes those individuals who may not have participated in either institutional design or particular restructuring processes, but who are nonetheless affected by their outcomes and who may therefore object to or impede implementation once decisions are made.

- This broader definition of the relevant audience for (and determiner of) legitimacy differs somewhat from conventional understandings of international decision-makers, and can be understood as a distinctive feature of any focus on legitimacy for a DWM. The assessment of legitimacy is not made just by those with sufficient power to compel compliance, such as the sovereign states, major creditors, or international bodies involved in high-level negotiations. It thus suggests that attention should also be paid to the likely concerns of less traditionally central individuals or groups, who are implicated in determining legitimacy but who are not usually involved in international discussions.

- The determination that a broad audience is relevant for assessing legitimacy does not mean that universal acceptance or adherence is required. For example, it is possible that certain actors will remain intransigent or obfuscating even in the face of a rule, institution, or outcome generally determined to be legitimate, in which case *opposition* might well be considered illegitimate. However, care should be taken when drawing these lines, particularly given the political import and distributional impact of claims about legitimacy or illegitimacy.

<u>Multiple Bases for Legitimacy and Impartiality</u>

Given these basic contours for understanding legitimacy, where should we look for particular features or characteristics that might enhance DWM legitimacy? This is relevant for formulating the key features of impartiality as well. One place to find these features may be traditions of international law that explicitly address questions of governance and authority. However, the fact of a broad audience for DWM legitimacy, including not only lawyers but also other decision-makers and publics, suggests that key characteristics may be found beyond legal frameworks alone. This is because different audience groups may privilege alternative approaches besides legality in assessing legitimacy.

International Law and Global Governance

To begin with, there is an important overlap between this formulation of legitimacy in the DWM context and approaches within international law and global governance that focus on the exercise of authority over broad publics. These include the traditions of *International Public Authority (IPA)*

and *Global Administrative Law (GAL)*, which pay special attention to situations in which those most affected by key decisions are not necessarily the decision-makers themselves, either directly or through clear lines of representation. Appropriately, international public law has been identified as the core legal framework for the UNCTAD initiative on a DWM, given that it implicates the coordination of public authorities in the provision of global public goods.[11] While other legal traditions exist as well (i.e. global constitutionalism), the IPA and GAL schools of thought offer frameworks that are especially pertinent.

International Public Authority: Previous research produced by members of the UNCTAD Working Group has explicitly argued that sovereign debt restructuring can be understood as an exercise of international public authority. While it is not necessary to restate those findings in full here, public authority in this framework is understood to exist when "the author of an authoritative act may claim to have acted on a legal basis entitling it to enact unilateral decisions which deeply affect individuals or communities."[12]

One key ramification of such a classification is that the act should be legitimated by satisfying the requirements of international public law. Although the authors are careful to note the absence of a clearly binding treaty to regulate the legal legitimacy of debt restructuring, and also acknowledge the absence of any objectively right understanding of 'justice,' they highlight the possibility of an "incremental emergence of legal concepts and principles" that might nonetheless be relevant.[13] In the arena of debt restructuring, they note that issues of competence, procedural fairness, review, and basic human rights should be considered.[14] Certain of these elements feature in the consideration of legitimacy presented in this background paper as well.

Global Administrative Law: A related framework for understanding authoritative global action is presented by Global Administrative Law. The approach of global administrative law is understood to involve "the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies."[15] Subjects of this area of law include formal and informal bodies that exercise "transnational governance functions of particular public significance," and which "regulate and manage vast sectors of economic and social life through specific decisions and rulemaking."[16] Key bodies and intergovernmental networks involved in sovereign debt restructuring are deeply embedded in this form of global governance, and the practices and decisions that result certainly have broad public impact. As such, sovereign debt issues may well be understood to implicate global administrative law.

As with the IPA framework, understanding sovereign debt workouts as implicating global administrative law leads to ramifications for thinking through legitimacy in this arena. In particular, GAL draws from domestic law principles to suggest that bodies and activities subject to GAL should meet adequate standards of transparency, participation, reasoned decision, and legality,

[11] UNCTAD Framing Paper, n. 2, 3.
[12] Armin von Bogdandy and Matthias Goldmann, "Sovereign Debt Restructurings as Exercises of International Public Authority," in Carlos Esposito, Yuefen Li, and Juan Pablo Bohoslavsky, ed., *Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing* (Oxford University Press, 2014), 46.
[13] Id., 53.
[14] Id., 55.
[15] Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, "The Emergence of Global Administrative Law," *Law & Contemporary Problems*, vol. 68, 15-61 (2005), 17.
[16] Id., 17.

and should also allow for effective review of resulting rules and decisions.[17] This background paper thus includes certain doctrinal features of GAL as elements that may enhance DWM legitimacy.

The Need for a Plurality of Traditions

While it is clear that the principles and practices suggested by explicitly legal frameworks should ground the approach taken here, a more comprehensive study of DWM legitimacy and impartiality must also be open to other approaches.[18] Within the larger definition of legitimacy, there are generally understood to be multiple sub-categories, including legal, moral, social, and political legitimacy.[19] Although sovereign debt workouts can be characterized as having a legal basis and implicating legal standards, they also may be understood through a social and political lens. Thus, possible features or characteristics for a legitimate rule or order should also be drawn from the social sciences and from social and political theory. This is in line with the flexible and multidisciplinary framework laid out in UNCTAD's Debt Workout Framing Paper.[20]

A plurality of approaches to legitimacy and impartiality in a DWM, including an explicit embrace of multi- or interdisciplinarity, is also important given the subjective/interactive element of legitimacy. Although this discussion paper has thus far referred to an 'audience' for legitimacy, in practice this audience is likely to be composed of multiple groups, whether the issue is the initial establishment of a transnational DWM or a particular instance of debt restructuring. These multiple groups (and different individuals within those groups) will likely have varying perspectives on the relevance and importance of one or another approach to legitimacy. For example, trained international lawyers or national courts and arbitral tribunals may appropriately be persuaded by arguments framed principally through legal legitimacy.[21] Conversely, politicians and policy officials, economists, and other social scientists—who will also play a role in the approval and use of any DWM—may feel unmoved by such argumentation, and may find assertions framed through economic-utilitarian or political understandings of legitimacy more convincing. Individual citizens, relatively distanced from disciplinarily informed understandings, will likely consider legitimacy through inchoate and general views of fairness, perhaps linked more closely to the principle of impartiality. Each of these constituencies, along with many others, are part of the broad audience for determining the legitimacy (and therefore impacting the efficacy) of a DWM.

In aiming for the broadest possible consideration and acceptance, this background paper pays special attention to emergent legal principles but also draws from a plurality of other traditions in identifying key features that might enhance DWM legitimacy and impartiality. Again, this follows the flexible and multidisciplinary approach laid out by the Framing Paper.[22]

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[17] Id., 17, 37-42.

[18] Indeed, even within international law, we see competing understandings of law and legitimacy. See, e.g., Harlan Grant Cohen, "Finding International Law, Part II: Our Fragmenting Legal Community," *NYU Journal of International Law and Politics*, vol. 44 (2012), 1049-1107.

[19] For one recent discussion that offers a helpful typology and focuses on the various uses of legitimacy in international law, see Thomas, "Uses and Abuses," n. 6.

[20] UNCTAD DWM Framing Paper, n. 2, 2.

[21] For a careful consideration of the relationship between legality and legitimacy, see generally Brunnée and Toope, *Legitimacy and Legality*, n. 9.

[22] Id., 2.

Components of Legitimacy: Source, Process, and Outcome

The preceding discussion should make clear that determining one limited set of indicators for legitimacy (or impartiality) would be overly simplistic. Indeed, for any context and historical moment, legitimacy can be understood as "a composite of, and an accommodation between, a number of other norms, both procedural and substantive."[23]

This section thus lays out key features that could contribute to this composite legitimacy. Drawing from multiple schools of thought, there are three main approaches to legitimation.[24] These correspond to three questions relevant for the formulation of a DWM:

- Source Legitimacy: How is the DWM, or particular rules associated with the DWM, to be formulated and by whom? A rule, mechanism, or institution will likely be considered more legitimate if its source and initial establishment satisfies the key values of the legitimating group(s).

- Process Legitimacy: Once the DWM is established, are the processes by which it works in line with broadly accepted procedural standards, including standards specified by emerging international law? The ongoing process or procedure through which an institution works or a rule is implemented, as distinct from either the initial development of the rule or its results, may also confer legitimacy.

- Outcome or Substantive Legitimacy: Is the DWM able to generate successful outcomes, understood in terms of substantive goals? Aside from considerations on the source or process front, an institution or rule may be considered legitimate if it generates desired outcomes. Key follow-up questions here include how to define and determine positive substantive outcomes, and also who should make this assessment.

Again, given the large and multiple audiences for DWM legitimacy, different groups may put more or less weight on particular levels/understandings of legitimacy. A DWM that is designed to satisfy the key requirements at each level should be considered most legitimate by the broadest possible audience. Of course, there may be tensions between particular legitimizing characteristics (such as maximum efficiency and broad participation), which would have to be balanced at a general institutional level and within any particular workout situation. And again, the principle of impartiality can play a role at each of these levels, particularly in relation to those features of legitimacy that implicate stakeholder participation and fair decision-making.

Source (or Establishment) Legitimacy

One central understanding of legitimacy involves a focus on how a rule, mechanism, or rule-giving institution is originally established. To the extent that this initial establishment falls in line with

[23] Ian Clark, *Legitimacy in International Society*, n. 5, 207.

[24] This organizational framework and language is selected to be relatively simple, colloquial, and appropriate for the issue area. For related typologies applied in different applications, see Vivien A. Schmidt, "Democracy and Legitimacy in the European Union Revisited: Input, Output and 'Throughput'," *Political Studies* vol. 61 (2013) 2-22; Thomas, "Uses and Abuses of Legitimacy," n. 6.

core values of the applicable audience or community, then the rule or institution should be considered more legitimate. There are several possible ways to think through DWM legitimacy at the source level.

State Consent: The classic legitimating mode in international law and global relations is state consent. In this traditional view, states are considered the key actors/creators of international law as well as their primary (and perhaps only) subjects. Their explicit contractual/transactional consent, for example in a hard law treaty or in agreeing to a particular limitation of their sovereignty, is necessary and in some cases sufficient for source legitimacy under this view. Although this approach has been soundly criticized, in particular for failing to consider the legitimacy/illegitimacy of states themselves, it remains a pertinent standard for source legitimacy in international law and global affairs.[25]

Democratic Legitimation: A central legitimating framework in many nations, which is increasingly discussed at the global level as well, is that of democracy. Here, the legitimacy of a rule, mechanism, or governance body is only achieved if it is grounded in the support and input (either directly or through representatives) of the underlying people or citizens. Such support, offered through majoritarian electoral institutions or other mechanisms, can legitimately bind even those not in favor of a particular rule. One vision of global democracy might characterize all the globe's inhabitants as citizens, and attempt to directly aggregate their voices through a mechanism that bypasses states and other intermediaries. However, this latter approach is far from workable at this point, even were it normatively desirable. A general attentiveness to the voices of individuals (rather than only states or other group entities), however, may offer some element of democratic legitimacy to a DWM.

Participatory Legitimation: Less demanding than strict democratic legitimation, this would aim for the participation of important (and potentially divergent) groups in the initial establishment of a DWM or the propagation of associated rules. This approach does not strictly specify the identity of the stakeholders or the mechanism of participation/control. However, it does mandate that a good faith effort be made to identify and involve an appropriately broad array of stakeholders through meaningful participatory mechanisms, which are likely to be representative.[26] Central to this legitimating element is the principle that participatory mechanisms should be *impartial*, i.e. not favoring or biased toward one particular group. This form of source legitimacy bears some similarity to the procedures and concerns of process/implementation legitimacy discussed below, though applied to the earlier point of DWM/rule establishment.

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[25] For criticisms of the state consent model, see Buchanan and Keohane, "The Legitimacy of Global Governance Institutions," n. 10, 35-36; von Bogdandy and Goldmann, "Sovereign Debt Restructuring," n. 12, 48. However, Benedict Kingsbury highlights the distributional ramifications of a commitment to sovereign state equality and state consent, noting that "a decline in the traditional sovereign system weakens the relationship of mutual containment between sovereignty and inequality." Benedict Kingsbury, "Sovereignty and Inequality," in *Inequality, Globalization, and World Politics*, ed. Andrew Hurrell and Ngaire Woods (Oxford: Oxford University Press, 1999), 92. And as Joseph Weiler points out, even those norms grounded in earlier ideological periods may still have some resonance today. Weiler, n. 5.

[26] Along these lines, Terence Halliday highlights the potential importance of what he calls a representative basis for the legitimacy of international organizations, which involves "persuading prospective audiences that future products of an organization have been formulated by actors that share their interests or attributes." Terence C. Halliday, "Legitimacy, Technology, and Leverage: The Building Blocks of Insolvency Architecture in the Decade Past and the Decade Ahead," *Brooklyn Journal of International Law*, vol. 32 (2006-2007), 1084.

Expertise/Authority: A final form of source legitimacy can derive from expertise or authority; i.e. if accepted authority figures play central roles in developing rules or institutions, then the rules may be considered legitimate. Classic forms of authority-based source legitimacy involve religion/moral codes, science/technical expertise, monarchy/traditional government, and law (originally natural law but now other forms of law that might be considered authoritative). Deeper questions of the underlying basis for such authority or expertise are left aside here; the proper authority of religious figures, for example, is well beyond the scope of this paper. However, to the extent that such authority/expertise is understood to exist—for example in economics, international relations, insolvency mechanisms, and applicable international law—it may be relevant for maximizing the source legitimacy of a DWM.

- In general, source legitimacy drawn from this basis will only appeal to specific sub-groups that validate the relevant authority. However, certain forms of authority—such as that grounded in scientific/technical expertise—can be more broadly accepted, and therefore the participation and support of these experts may enhance DWM input legitimacy. In addition, it may be worth appealing to other more specialized authority figures in discussion of a DWM with certain groups.

<u>Process (or Implementation) Legitimacy:</u>

A second level of legitimacy can be understood as process or implementation legitimacy. Once a DWM (or associated rule) is actually established, the nature of its implementation and ongoing functioning may also impact its legitimacy. In particular, processes that adhere to certain procedural standards, including those that guard the impartiality of the DWM and its decision-makers, may grant the DWM greater legitimacy in the eyes of key constituents. These standards are central to the traditions and emerging legal principles of international public authority and global administrative law, discussed above.

One key caveat to keep in mind in terms of process, however, is that certain generally desirable elements—for example, broad participation and transparency—may be less feasible in certain emergency or crisis management situations. As such, the establishment of any DWM should likely include a discussion of whether modified procedures are appropriate for such situations, and a mechanism for delineating when the application of a modified process may be warranted.

Ongoing Participation: Even after an institution or rule has been established, the participatory ideal that undergirds one form of source legitimation (mentioned above) can continue to play a role. In line with ideas of procedural fairness, the ongoing involvement and input of affected individuals and groups, particularly before key decisions are made, can enhance DWM legitimacy. Such participation could work through either direct access or representative structures. In order to ensure the presence of a broad array of voices, participatory processes may also allow for input from third parties (such as NGOs) acting as amici curiae.

More specifically, this could involve the opportunity to be heard or provide comments on, among other issues, possible restructuring plans and the allowance/disallowance of debt claims. The notice and comment procedures present in administrative law and specified in the GAL framework, along with the claim allowance procedure in some domestic insolvency proceedings, may provide guidance on this front. The mechanisms for ongoing participation should ideally strive to be impartial, not inappropriately privileging one or another viewpoint.

Ownership: One exception to this general preference for impartial procedures would be a special attentiveness to the concerns of the sovereign debtor undergoing a restructuring, including an allowance of debtors controlling the process when fair to other parties. Country "ownership" of adjustment programs, particularly those mandated by IFIs, have been considered an important element of process legitimacy in global governance frameworks and is relevant to a DWM.

- This comports with ongoing commitments to self-determination and sovereign control, which remain an overarching principle in international law, particularly attended to by less powerful countries in the global arena.
- Like process legitimacy itself, country ownership also has instrumental value: "[P]rogram ownership, by reflecting a firm commitment from the government, implies that the difficult policy measures… are more likely to be implemented."[27]

Comprehensiveness/Full Involvement: A general problem in any governance system, especially at the global level, is likely to be the lack of collective action among disparate parties. This certainly is the case in sovereign debt issues, and creditor uncoordination and forum fragmentation has been identified as a key problem to be addressed by a DWM in the UNCTAD Framing Document.[28] The formulation and successful implementation of procedures that address collective action and coordination problems will likely enhance the process legitimacy of any DWM. Thus the goal here is not just to ensure that there is an opportunity to participate (through transparency and comment opportunities, for example) but also that all relevant parties in fact do participate to the extent possible.

- This would also serve to promote impartiality or the limitation of bias/preference (discussed more fully below). To the extent that all claims are dealt with at once, the identification and correction of any bias or preference across creditors can be dealt with.
- This element is likely to have an impact on outcome legitimacy as well, as comprehensive involvement by relevant parties is more likely to result in a final resolution of debt claims, a return to economic growth, and an enhanced capacity to access capital markets at better rates.

Transparency: Transparency has already been established as a general principle that should govern any DWM, and has been well covered in a previous background paper.[29] It supports the general goal of process legitimacy as well. To begin with, it is a precondition for ongoing participation, as it allows for the dissemination of information and possible courses of action about which parties may have an opinion. Furthermore, it allows stakeholders to determine whether the functioning of the institution or mechanism is in line with its goals and is likely to result in positive outcomes. Agencies involved in global governance, including the IMF and the World Bank, have made efforts to improve their transparency (including through greater provision of internal documents).

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[27] Mohsin S. Khan and Sunil Sharma, "Reconciling Conditionality and Country Ownership," *Finance & Development*, vol. 39, no. 2 (June 2002); see also J.H. Johnson, "Borrower Ownership of Adjustment Programs and the Political Economy of Reform," World Bank Discussion Paper No. 199 (1992).

[28] UNCTAD Framing Document, n. 2, 3.

[29] Matthias Goldmann, "Good Faith and Transparency in Sovereign Debt Workouts," Paper Prepared for the Second Session of the UNCTAD Working Group on a Debt Workout Mechanism, 23 January 2014. See especially 17-23. In addition, it has been highlighted as a general principle of Global Administrative Law and an important emerging feature of international law and global governance. See Kingsbury, Krisch and Stewart, n. 15, 37-39; Andrea Bianchi and Anne Peters, *Transparency in International Law* (Cambridge University Press, 2013); Alexandru Grigorescu, "Transparency of Intergovernmental Organizations," *International Studies Quarterly*, vol. 51 (2007).

Reasoned Decision: Closely related to the ideal of transparency is the process of reason-giving, i.e. clarifying the reasons for particular decisions, including providing the analytical and informational/evidentiary foundations underpinning final outcomes. This helps to ensure that the views of various stakeholders have in fact been taken into account, and that improper bases for decision-making have not impacted the outcome.

Efficiency: One element of process or implementation legitimacy may be the efficiency of the procedures themselves. Parties will be more likely to accept an institution, rule, or mechanism if the procedures with which it is associated do not divert undue time and attention away from the pursuit of other important goals. This also implicates outcome legitimacy, as even generally positive results (e.g. a return to debt sustainability or achieving satisfactory levels of socio-economic rights) will be undermined if they are not achieved in a reasonably timely fashion.
The phrasing of Principle 15 of the UNCTAD Principles on Promoting Responsible Sovereign Lending and Borrowing, which requires that any restructuring "should be undertaken promptly, efficiently, and fairly," very explicitly incorporates this element.[30]

Review: The possibility of review by an external entity of the procedures and decisions of a DWM may help to support fair and impartial processes as well as outcome legitimacy. Improper biases or procedural irregularities could be corrected for or possibly compensated and, perhaps more importantly, the possibility of review can encourage internal monitoring by parties and others involved in DWM processes.[31] In addition, external review may help to ensure that restructuring outcomes comply with substantive principles and goals.

Outcome or Substantive Legitimacy:

A final set of standards for legitimacy of a DWM may involve the ability to generate successful outcomes, understood in terms of substantive goals. The capacity of a rule, institution, or mechanism to produce results that satisfy the needs or desires of relevant constituencies will almost always confer an important degree of legitimacy.[32] Of course, it is unlikely that any institution or rule produces absolutely optimal outcomes; however, the mechanism in question must meet a minimum threshold of results to be acceptable.[33] The type of outcome that characterizes 'success' necessarily varies across issue area, but several possibilities are especially relevant for a DWM.

Economic/Financial Outcomes: Positive economic/financial results feature importantly in the outcome legitimacy of any institution or mechanism that deals with economic issues. From the sovereign debtor perspective, a successful DWM outcome would involve a return to debt sustainability and economic growth, and perhaps also an eventual improvement in creditworthiness and return to capital market access. From a creditor perspective, it would involve reasonable

[30] UNCTAD, Principles on Promoting Responsible Sovereign Lending and Borrowing, 10 January 2012. Available at: http://www.unctad.info/upload/Debt%20Portal/Principles%20drafts/SLB_Principles_English_Doha_22-04-2012.pdf.
[31] See, e.g., Kingsbury, Krisch, and Stewart, n. 15; Theodor Meron, "Judicial Independence and Impartiality in International Criminal Tribunals," *American Journal of International Law*, vol. 99, no. 2 (April 2005), 361.
[32] In the EU context, this is called "output legitimacy" by Fritz Scharpf, Vivien Schmidt, and others. Fritz Scharpf, *Governing in Europe* (Oxford University Press, 1999); Vivien Schmidt, n. 24.
[33] Buchanan and Keohane refer to this more instrumental perspective as a concern with "comparative benefit" as compared to other possible institutions (or presumably as compared to the absence of an institution, if that is the alternative). Buchanan and Keohane, n. 10, 46-47.

recovery on an investment. Outcome considerations calibrated according to more specific standards (for instance, approaches associated with 'global justice' advocated by certain groups) may consider other economic results to be desirable, such as global redistribution of wealth. Asset recovery may also feature as a desirable financial outcome, and could partially relieve the need for creditor losses.

- As part of positive economic/financial outcomes, a key facet of outcome legitimacy, a DWM should deal as best as possible with the problem of debtor procrastination, identified as a key issue by the DWM Framing Document.[34] Procedures that encourage states to make use of the DWM process at a sufficiently early point—while not pushing states to restructure when it is not necessary—are likely to result in better economic outcomes. This includes limitation of any stigma attached to a debt workout, to the extent possible, which may aggravate procrastination.
- Debtors may want to regain access to capital markets relatively swiftly after a restructuring. Thus, it may be desirable for any DWM to include a mechanism by which restructured sovereign debtor can demonstrate to the market its economic soundness and willingness to make debt payments (two key components of creditworthiness).

Human Impact: Any global governance institution will likely be judged in part according to basic human impact in the restructuring country.

- Within this, alternative approaches might focus on a simple concern for human impact, versus the active promotion/improvement of on-the-ground outcomes for individuals .
- In addition, there may be questions as to which standards (i.e. for political, civil, or socio-economic well-being) are sufficiently established and internationally appropriate to ground outcome judgments of a DWM.[35]

Adherence to other Substantive Principles: Aside from human impact outcomes, consistency with other substantive principles or doctrines may be relevant to judging outcomes. These might include unclean hands, unconscionability, fraudulent transfer, and concerns about governmental responsiveness to and responsibility for underlying populations.

Consistency across Cases: One final feature of DWM outcome legitimacy might involve an assessment of the degree to which there is consistency across cases of sovereign debt restructuring. Such consistency would enhance the predictability and stability of markets, a benefit for both sovereign borrowers and investors alike.

- This consistency is currently undermined by forum fragmentation and by variations in (and possibly inconsistent interpretations of) the laws, principles, and procedures that apply to debt restructurings.
- As a cautionary note, however, it is important to keep in mind that consistent application of a substandard mechanism, perhaps leading to uniformly problematic results, is not necessarily favorable in and of itself. As such, consistency may perhaps be understood as a subsidiary standard.
- In addition, given the political, social, and economic variability that can exist among sovereign debt situations, any DWM should likely not focus on consistency at the expense of an attentiveness to the situation at hand.

[34] UNCTAD Framing Document, n. 2, at 3.

[35] Along these lines, Buchanan and Keohane refer to "minimal moral acceptability" and a "non-violation of human rights." Buchanan and Keohane, n. 10, 46.

Note on Distributional Ramifications of a Process or Outcome Focus

The assertion of legitimacy on behalf of a rule or rule-making body can have power in its own right, suggesting important distributional ramifications in the global arena. As such, it is important to highlight how emphasizing one understanding of legitimacy over another can itself have impact, and to incorporate legitimating features drawn from multiple approaches.

Risks of Source or Process Focus: A DWM oriented toward source or process legitimacy may have the effect of inadvertently privileging powerful players more fully in control of such procedures.

- More specifically, certain actors will inevitably have a greater capacity to engage in the initial formulation of a DWM and to participate in any given debt restructuring. This is due to variation in terms of actor knowledge/expertise and also in terms of resources—including financial resources and the availability of trained individuals who could participate on behalf of interested parties. This is the case across international actors and states, which may differ significantly in their capacity to provide initial feedback in the formulation of a DWM and also to engage with ongoing restructuring processes. It is also the case across different socio-economic actors within any given country (i.e. financial groups, government agencies, individuals impacted by welfare programs) and across various transnational groups (including different types/sizes of creditors).
- Emphasizing source and process as the basis for legitimacy could thus potentially magnify the impact of this capacity variation as, in the absence of appropriate safeguards, more capable actors may have disproportionately greater voice in sovereign debt.[36]

Risks of Outcome Focus: A focus on substantive outcomes as the basis for legitimacy may also have distributional impact, in particular by granting control to those claiming an ability to deliver the desirable outcome.

- It is obviously difficult to fully control or ensure the outcome of any restructuring through a DWM. Furthermore, it may not be easy to secure the agreement of various parties on the particular substantive goals of any transnational institution, including a DWM.[37] However, to the extent that a desirable outcome is identified, powerful actors may shape the initial DWM establishment or particular debt restructurings by promising a favorable substantive outcome. In the meantime, they may ask other stakeholders to minimize their process

[36] Or, in other words, the public goods of transparency, information, and openness, while generally desirable and applicable, are arguably most beneficial to those who can best take advantage of them, and so can inadvertently skew outcomes in their favor. This is part of the basis for criticisms of Global Administrative Law and related approaches by proponents of 'Third World Approaches to International Law' and other writers explicitly concerned with global justice. For example, B.S. Chimni argues that "without a concurrent concern with substantive law, GAL may only legitimize unjust laws and institutions. By focusing exclusively on GAL, a false impression may arise that existing international institutions are becoming more participatory and responsive to the concerns of developing countries and their peoples." B.S. Chimni, "Co-option and Resistance: Two Faces of Global Administrative Law," *NYU Journal of International Law and Politics*, vol. 37 (2006), 800. Writing in the context of the WTO, Greg Shaffer similarly notes that "process-based review also raises serious concerns, in particular, because processes can be manipulated to give the appearance of consideration of affected foreigners without in any way modifying a predetermined outcome…. Powerful actors can thus go through the steps of due process without meaningfully considering the views of the affected parties." Greg Shaffer, "Power, Governance and the WTO: A Comparative Institutional Approach," in *Power in Global Governance*, Michael Barnett & Raymond Duvall, eds. (Cambridge, 2005), 130-161.

[37] This difficulty in identifying clear substantive outcomes to which all can agree is part of the reason for caution in the legal approaches mentioned above. See, for example, von Bogdandy and Goldmann, n. 12, 55.

legitimacy requests. In this way, a DWM or a particular debt restructuring can be constructed in favor of these actors, regardless of whether the desirable outcome is ever actually delivered.

- The pressures that favor a focus on substantive outcome can be especially acute in emergency or crisis management debt workout situations. In these cases, certain elements of process legitimacy (i.e. broad participation, transparency) are impracticable or may even be considered undesirable. Where a more strict focus on outcome is appropriate or inevitable, some degree of accountability for those actors given control of the situation could be considered suitable. This would have to balanced against the uncertainty and lack of guarantee inherent in any debt restructuring.

Importance of Balance: In light of these considerations about distributional impact and power imbalances, which are difficult to avoid in the global arena, it is especially important to remain open to multiple bases of legitimacy. More specific discussions might cover:

- *Broad stakeholder involvement, with a special attention to seeking out marginalized voices*: In the formulation of a DWM and in its ongoing procedures, discussion with a broad group of stakeholders may help. Special effort could be made to seek out those voices that might be under-represented due to power or capacity issues.
- *Amici & Ombudsman*: A DWM could be especially attentive to amici who may be able to speak on behalf of under-represented groups. In addition, the appointment of an ombudsman or special representative for certain groups might be appropriate in some restructurings.

B.2. Impartiality

A central cognate to legitimacy in the international arena is the ideal or principle of impartiality. Impartiality has already been mentioned as an element of several of the legitimating features mentioned above, but deserves further explication.

Basic Definition

Impartiality can be understood as a *way of thinking, decision-making or acting that is free of bias or preference and which is grounded in independence and objectivity.*[38] It is an essential component of colloquial understandings of justice and fairness. Impartiality may be compromised by biases or preferences grounded in national, regional, political/ideological, or personal affiliation. Although these biases are perhaps most easily cognizable in how individuals think and act, they can also impact how institutions are established and can therefore affect institutional goals and operating processes.

As a central underpinning of legitimacy, impartiality plays a role not only through actual objectivity and independence, but also through *perceptions/acknowledgment* of objectivity and independence by relevant constituencies. In other words, the interactive/audience element of

[38] Steven Ratner, for example, describes impartiality as "a way that individuals and institutions decide and act, one based on disinterestedness, consistency, and fairness and not merely personal motives." Steven R. Ratner, "Do international organizations play favorites? An impartialist account," in Meyer, ed., n. 9, 128.

legitimacy discussed above translates to impartiality as well.[39] Although complete impartiality (like universal legitimacy) is exceedingly difficult and perhaps impossible to achieve, impartiality remains an important guiding principle for any DWM.

Elements of Impartiality

This section thus lays out key considerations for enhancing the impartiality of an institution or governance mechanism more generally. These are organized according to the potential impact of particular features on *institutional* impartiality, *actor* impartiality, and what I call *informational* impartiality. Each of these elements may be relevant for developing an appropriately independent and objective DWM, as will be discussed more fully below.

Institutional impartiality

To maximize impartiality, any institutional framework should be constructed to avoid systematic bias in favor of one or another interested group. Several sub-features support this larger goal, some of which overlap with process legitimacy characteristics discussed above.

- *Institutional Independence:* To increase impartiality and also the public perception of impartiality, governance institutions and mechanisms ideally minimize their affiliation with parties/groups that might be affected by the institution's processes or decisions.
    - This might include attentiveness to *financial* independence, *personnel* independence, and perhaps *physical* independence (i.e. geographic location in a neutral setting). This would be especially important to the extent that any DWM takes the shape of a more permanent organization, rather than working through ad hoc settings.
- *Transparency and Review*: As with process legitimacy above, transparency and review procedures can enhance impartiality by making an institution's inner workings more visible to interested parties, and by serving as a check on those procedures. Bias that exists can be more easily identified and corrected.

Actor Impartiality

To the extent that any DWM envisions a central role for third party decision-makers, be they mediators/facilitators or adjudicators, it is important to ensure the impartiality of these actors.

- *Actor Independence:* Perhaps the central feature of actor impartiality involves ensuring that decision-makers/mediators are independent of the negotiating parties, both individually and certainly taken as a group (in multi-party decision-making situations).[40] As part of this, decision-maker *disclosure requirements* may be appropriate.
- *Reasoned Decision*: Clarifying the rationale for any decision can help to support actor impartiality. This practice ensures that the decision-maker clarifies for herself or himself that the underlying reasons are impartial, and also allows other actors to provide a check on any bias that may exist.
- *Multi-Person Decision-Making*: The involvement of multiple individuals in any decision can help to mitigate actor bias, as decisions will have to be discussed and justified. This

[39] The desirability of drawing from a plurality of traditions and standards, discussed in the context of legitimacy above, is applicable to the principle of impartiality as well, given that it will be judged by the same multiple audiences.

[40] This gives rise to the expectation or requirement, in many domestic and international judicial settings, of judicial decision-makers recusing themselves from cases in which they may be biased or be perceived to be biased.

depends, of course, on a balanced initial selection of individuals, as well as on a commitment on the part of these individuals to think and act impartially.

Informational impartiality

A third dimension of impartiality includes what I call 'informational impartiality,' or the impartiality of informational inputs. Although information may be presented as objective, recent scholarship has highlighted the ways in which such inputs may embed biases or preferences in unnoticed ways. This can affect both a restructuring outcome and also the final assessment/opinion of its success. Such informational inputs might include the following:

- *Indicators*: Indicators constitute one central informational input into any sovereign debt restructuring, and the UNCTAD Working Group has already paid special attention to the economic and legal aspects of the use of indicators in a DWM.[41] The principle of impartiality further strengthens the need for ensuring the validity of such indicators and of the situations in which they are used.
- *Economic Models*: Social science models, and especially economic models, that predict the likely outcomes of restructurings and related domestic measures (i.e. in terms of GDP growth, social costs, and other metrics) feature importantly in any sovereign debt decision. They may be used by debtors, creditors, and other decision-makers to determine the *ex ante* feasibility of a particular restructuring plan, and in particular to determine the extent of relief necessary to return a debtor to sustainability.
    - Although such models are no doubt presented in good faith, they may fail to accurately characterize the situation. This could result in a systematic bias that favors one or another group in a debt crisis, even when relevant actors and institutions aim for independence and objectivity in their assessments.[42] The question of which models and methodologies are appropriate, and of who should make this selection, can thus be quite controversial.
    - The consideration of particular models is beyond the scope of this background paper. However, care should be taken to ensure, to the extent possible, that the selection and use of social science models reflects an understanding of their distributional ramifications and potential political character.[43] Soliciting broad feedback on these informational inputs might be appropriate to enhance DWM impartiality.[44]

[41] Michael Riegner, "Legal frameworks and general principles for indicators in sovereign debt restructuring," UNCTAD Working Group Paper (2014); Jasper Lukkezen and Hugo Romagossa, "Early warning indicators in a debt restructuring mechanism," UNCTAD Working Group Paper (2014).

[42] In the first days of 2013, IMF chief economist Olivier Blanchard co-published a working paper (interpreted as a *mea culpa*) suggesting the organization had misjudged and underestimated the negative effect of austerity measures on growth in European countries during the crisis. See Olivier Blanchard and Daniel Leigh, "Growth Forecast Errors and Fiscal Multipliers," IMF Working Paper No. 13/1, 3 January 2013; Howard Schneider, "An Amazing *Mea Culpa* from the IMF's Chief Economist on Austerity," *Washington Post online*, 3 January 2013.

[43] This insight is central to the discipline of international political economy. For volumes emphasizing the contingent and politically conditioned nature of economic models, see Jonathan Kirshner, ed., *Monetary Orders: Ambiguous Economics, Ubiquitous Politics* (Cornell University Press, 2003); Rawi Abdelal, Mark Blyth, and Craig Parsons, eds., *Constructing the International Economy* (Cornell University Press, 2010).

[44] This of course implicates the impartiality and appropriateness of the *sources* of any such inputs, including the institutions and individuals whose expert opinions are relied upon by restructuring participants. The raises questions about the use of experts (and possibly expert testimony) in a DWM, linking to concerns about 'battles of the experts' in domestic dispute resolution procedures. While such questions may be worthy of future consideration, they are beyond the scope of this paper.

Note on possible tension between impartiality and accountability

As suggested above, a key mechanism for promoting impartiality in any decision-making setting is to ensure the independence of both the individual actors making the decisions as well as the institutional settings in which the decisions are made. It is important to point out, however, that this might be seen as in tension with the general goal of accountability of decision-makers, which at least in some approaches requires that they answer to and perhaps be controlled by broad constituencies. It also may run into pragmatic problems, in particular the power of key actors and creditors and their possible resistance to impartial institutions.

C. OVERVIEW OF PAST DEBT RESTRUCTURINGS

Although some parties will be convinced by conceptual arguments about legitimacy and impartiality, the views of many stakeholders will likely be framed through their own concrete experiences of sovereign debt restructuring, or their interpretations of how previous restructurings have unfolded. As such, this section will briefly consider the institutional and historical background of debt restructuring in light of the principles of legitimacy and impartiality. While a comprehensive overview is beyond the scope of this paper, some attention to the perceived problems and successes of previous moments can deepen an understanding of the political and economic context of current discussions of a potential DWM.[45]

Although the predicament of unsustainable sovereign debt has existed as long as sovereigns have borrowed, perhaps the modern era of debt restructuring dates from the debt crises of the 1980s. These restructurings saw the concretization of institutional features developed in the preceding decades (including the interactions of the Paris Club and especially the London Club) and also witnessed the rise to prominence of the IFIs, particularly the IMF. The processes that have emerged since then, when aggregated, provide the foundations for the informal and fragmented debt workout mechanism that exists today. This section looks at several key institutions in light of concerns about legitimacy and impartiality, and then briefly turns to several episodes and events in debt restructuring for further illustration.

C.1. Key Players

While there are a large number of institutional players involved in sovereign debt issues, several deserve special attention in discussing questions of legitimacy and impartiality. This section pays particular attention to the roles of the Paris and London Clubs and the IMF.

[45] Elements of the discussion here are drawn from Odette Lienau, *Rethinking Sovereign Debt: Politics, Reputation, and Legitimacy in Modern Finance* (Harvard University Press, 2014), especially chapter 6. For additional overviews focused on sovereign debt restructuring, see Udaibir S. Das, Michael G. Papaioannou, and Christoph Trebesch, "Sovereign Debt Restructurings 1950-2010: Literature Survey, Data, and Stylized Facts," IMF Working Paper WP/12/203 (2012); Eugenio Bruno, "Lessons from history: Structuring, defaulting and restructuring and the emerging markets" and "Lessons from the most recent restructurings," in Federico Sturzenegger and Jeromin Zettelmeyer, *Debt Defaults and Lessons from a Decade of Crises* (Cambridge, MA: MIT Press, 2006); Lex Rieffel, *Restructuring Sovereign Debt: The Case for Ad Hoc Machinery* (Brookings Institution Press, 2003); William R. Cline, *International Debt Reexamined* (Washington, DC: Institute for International Economics, 1995).

The Paris Club of Bilateral Official Creditors

One core institutional player in the informal debt workout mechanism has been the Paris Club. Founded by creditor governments in 1956, it addresses the debt owed by sovereign borrowers' to official bilateral creditors at regularly scheduled meetings at the French Treasury.[46] Although its centrality has waned somewhat in the last decade, in part due to more comprehensive efforts at bilateral debt relief, it has featured prominently in the contemporary history of debt restructurings and remains an important player today. The rise of emerging market official creditors also suggests that bilateral credit issues will remain a feature in sovereign debt going forward, and indeed the Paris Club has recently reached out to emerging market lenders in an effort to harmonize approaches to sovereign lending.[47]

The Paris Club has no legal/institutional personality and no written charter and, perhaps in line with this relative informality, it has not sought source legitimacy by soliciting the opinions of other stakeholders in establishing its basic negotiating mechanisms. Although it aims to work in the public interest, and likely falls under the IPA and GAL understandings of public authority and global administration, it is to an important degree driven by the particular political goals of its members. On the process legitimacy front, consensus among Paris Club participants is required for agreement, thus ensuring that its members have their voices fully heard.[48] Setting aside the power dynamics that might exist between Paris Club members, this high level of representation goes beyond the majority or supermajority standard that might reasonably be required for state consent. However, there has been concern expressed that not all those impacted by Paris Club decisions have an equal voice in the negotiations. In addition to the Paris Club creditors, non-Paris Club official creditors implicated in a particular country case may be invited to join as well. The IMF, World Bank, UNCTAD, and other official international and regional institutions have observer status, and debtors must already have agreed to an IMF-approved program before entering into negotiations with the Paris Club.[49] Civil society actors and private creditors have generally been excluded from negotiations. Nonetheless, Paris Club agreements have contained comparability of treatment clauses that effectively prevent debtors from offering better terms to other creditors (including both private and non-Paris Club public lenders) than those obtained by Paris Club members. Particularly beginning in the 1990s, this has generated dissatisfaction among private sector creditors, some of whom have resented that Club decisions may affect their investments without incorporating their input. Perhaps in part as a result of this exclusion, debtors have sometimes had difficulty securing the agreement of private creditors to the Paris Club-established

[46] For more on the Paris Club, see, among others, Martin A. Weiss, "The Paris Club and International Debt Relief," Congressional Research Service (U.S. GPO October 2013). For a consideration of the uniquely political character of much of this official debt, see Anna Gelpern, "Odious, Not Debt," *Law & Contemporary Problems*, Vol. 70 (2007).

[47] Hugh Carnegy, "'Rich Country' creditors seek emerging markets lender accord," *Financial Times*, 23 October 2013. For an overview of the Paris Club's evolution, along with recommendations for improving its mechanisms and a suggestion that it may be the only feasible intergovernmental debt restructuring mechanism (at least in the absence of a more comprehensive effort), see Enrique Cosio-Pascal, "The Emerging of a Multilateral Forum for Debt Restructuring: The Paris Club," UNCTAD Discussion Papers No. 192 (Nov. 2008).

[48] This is one of the five key principles of Paris Club negotiations. Available at http://www.clubdeparis.org/sections/composition/principles/cinq-grands-principes. Of course, the general power dynamics that apply among the members outside of the Paris Club context likely translate into this setting as well.

[49] UNCTAD is unique among the international economic organizations, in part because it is not a creditor to sovereign borrowers. It has participated in over 260 debt rescheduling for over 60 countries since 1978, often providing technical support to debtor countries preparing for and participating in Paris Club negotiations. This assistance is offered in accordance with resolutions 165 (S-IX) and 222 (XXI) of UNCTAD's Trade and Development Board.

terms.[50] Also relevant to process legitimacy, the Paris Club has historically resisted calls for increased transparency, only beginning to publicly post the basic contours of negotiated agreements in 2003.[51] It does not have written rules, though it aims to work according to stated principles and makes reference to precedent, and may be fairly flexible across different country cases.[52] The virtue of the Paris Club is its ability to act relatively quickly, at least once an IMF package is in place. It also is able to achieve significant debt relief when motivated, through both the official bilateral agreements and the leverage offered by the principle of comparable treatment.

The London Club of Commercial Bank Creditors

Although international capital flows in the initial post-World War II era moved largely through public creditors, private lenders returned to the global arena en masse in the 1970s. Initially this private capital moved through commercial banks, whose enthusiastic lending practices through the 1970s resulted in their being deeply implicated in the 1980s debt crisis.[53] To coordinate a response to debtor payment problems that emerged, these private banks established ad hoc processes to negotiate jointly this debt, and as a group came to be called the London Club. The importance of these negotiations has diminished with the move away from commercial bank lending. However, the London Club may still be relevant for certain restructurings, and the memory of London Club restructurings (particularly those of the 1980s, discussed below) may impact current views.

The London Club's meetings and associated processes are even more ad hoc than those of the Paris Club. There is no institutional base or regular meeting location, and any particular instantiation of the London Club is dissolved at the conclusion of a restructuring. There are no written rules and there may be significant flexibility across different country cases, though bank participants have historically been keenly aware of (and concerned about) setting precedents for future restructuring terms. A London Club meeting is generally convened when a sovereign debtor contacts its major commercial bank creditors seeking to negotiate. These key banks then establish a Bank Advisory Committee (BAC, or creditors' committee), which undertakes negotiations toward a broadly acceptable agreement. These agreements might include the extension of debt maturities, provision of new lending, and/or reduction of the face value of the debt. Once an agreement is reached between the BAC and a sovereign debtor, the lead banks present the agreement to other implicated banks, who must then agree to the outcome to finalize a debt restructuring. Relative to the current system of bond restructuring, the London Club process appears relatively coherent. This is not to say that unanimity existed among member banks; indeed, disagreements and holdouts remained common.[54] However, the London Club process in its heyday generally did not include banks who became creditors with the intention of holding out for preferential treatment, as we see with vulture/distressed debt funds today. In addition, internal disciplining mechanisms within the commercial bank group, including carrots and sticks, were available. Eventually, these helped to

[50] Jürgen Kaiser, "Resolving Sovereign Debt Crises: Towards a Fair and Transparent International Insolvency Framework," Global Policy and Development Study, October 2013, 13.
[51] These basics are provided at the Paris Club website, www.clubdeparis.org. The agreed minutes, which constitute the basis for binding bilateral agreements between the debtor and particular official creditors, remain unavailable.
[52] Given that political considerations may play a part in the determination of appropriate solutions, the goal of consistency is sometimes set aside. The restructuring of Iraq's debt after the fall of Saddam Hussein offers a case in point. For more on this, see Lienau, *Rethinking Sovereign Debt*, n. 45, 210-215.
[53] For an overview of trends in lending , and in particular the increased integration of lending (and then debt restructuring) frameworks, see Lienau, *Rethinking Sovereign Debt*, n. 45, 154-171.
[54] Das, Papaioannou, and Trebesch, n. 45, 17; Bruno, n. 45, 185.

ensure fairly broad creditor participation, even if certain creditors objected to these processes as unfair and unrepresentative of their interests. BAC efforts were supported by major public actors, including the finance ministries of the largest creditor countries, who were concerned with the systemic implications of a failed restructuring (again in contrast to the less systemically relevant funds that constitute current holdout creditors).

The International Monetary Fund (IMF)

Multilateral creditors, such as the IMF and the World Bank, have also been essential to debt restructuring over the last several decades. The IMF in particular has been central in addressing the external payment and debt problems of its members. Initially established to support the gold-dollar standard of the Bretton Woods monetary regime, which was abandoned in the early 1970s, it has multiple overlapping mandates, including the broad maintenance of global financial stability.[55]

As part of this, the IMF has emerged to play multiple roles relevant to debt workouts. In particular, it engages in interrelated programs of surveillance, technical assistance, and conditional financial assistance, all of which may be brought to bear in sovereign debt. To begin with, the IMF has developed considerable expertise on a range of financial and economic matters, enabling it to provide policy advice and technical assistance to countries. Accepting this policy advice (after negotiations) may be effectively mandatory for certain debt restructurings, such as through the general requirement that an IMF-approved program is agreed upon before states receive Paris Club debt relief. This has been a central feature of the HIPC and MDRI programs, which provide public creditor debt relief to low-income countries. Once a restructuring has been agreed upon, the IMF may also monitor the debtor to ensure that the conditions of the agreement are met. This program-specific monitoring complements the more general surveillance function that the IMF plays within global finance. Finally, the IMF can become a lender in its own right as part of conditional crisis financing. This lending may be organized conjunction with a broader restructuring agreement and coordinated with private creditors.

Although IMF governance structures mean that the largest global economies have the strongest voice on its executive board, the IMF is legally accountable to its 188 member countries. While the IMF Board of Governors (through which state members are represented) votes on major issues, in practice IMF policy is directed largely by the Executive Board. Historically, the Board has been relatively resistant to process legitimacy concerns and to receiving input on specific issues from its member states and especially from civil society actors. However, since the turn of the millennium and particularly within the last decade the IMF has become more politically aware and more concerned about perceptions of its own representativeness, impartiality, and legitimacy. For example, it has progressively committed itself to the ideal of transparency, introducing in 2009 a 'Transparency Principle' indicating that the Fund will "strive to disclose documents and information on a timely basis unless strong and specific reasons argue against such disclosure," and following up with regular reviews of its transparency policy.[56]

[55] For an excellent overview of the international financial institutions, see Ngaire Woods, *The Globalizers: The IMF, the World Bank, and their Borrowers* (Cornell University Press, 2006). For a general overview of the IMF, see among others Rosa Lastra, "The Role of the International Monetary Fund," in *Sovereign Debt Management*, eds. Lee C. Buchheit & Rosa M. Lastra (Oxford, 2014).

[56] The most recent review was conducted in 2013. See IMF, "2013 Review of the Fund's Transparency Policy," 14 May 2013). Available at: https://www.imf.org/external/np/pp/eng/2013/051413.pdf

This new openness, the multiple roles played by the IMF, and its concern for global financial stability means that the Fund is uniquely well situated to take a global view on the international financial architecture and the role of sovereign debt restructuring within it. It is hardly surprising that the much-discussed SDRM proposal of 2003 originated within the IMF. Nonetheless, there may be some concern that the Fund's multiple roles mean that it could be subject to internal conflicts of interest. Such conflicts could compromise the degree to which it is able to act in an impartial and independent manner in a debt restructuring context, and also may compromise (and indeed has compromised) perceptions of its impartiality in sovereign debt situations. These criticisms are made more pressing by the practice of IMF conditionality, i.e. the requirement that sovereign debtors undertake a series of (sometimes controversial) policy reforms as part of the condition for lending.[57]

In addition, the IMF's broad mandate of supporting global financial stability has sometimes required it to be especially attentive to the systemic importance (and fragility) of major international banks. Their collapse under the pressure of sovereign debt crises could well undermine global financial and economic well-being as a whole—perhaps more so than the continued underperformance of a given debtor state. As such, IMF attentiveness to bank concerns may be sensical in light of this general mandate. However, this orientation is arguably in tension with the features of impartiality and fair burden-sharing that would characterize a maximally legitimate DWM.

C.2. Periods in Sovereign Debt Restructuring

The institutional underpinnings of sovereign restructuring have remained relatively constant for several decades, involving the presence of the three key players just discussed. Still, distinct periods can be identified, each of which has likely shaped the perspectives of stakeholders.

1980s Debt Crisis and Bank Negotiations

Sovereign debt restructuring through the 1980s debt crisis centered on the London Club mechanism discussed above, as commercial banks constituted the major creditors of the period. Falling export commodity prices and the US Federal Reserve decision to sextuple interest rates (from 3% to 20%) precipitated Mexico's 1982 announcement of its inability to continue debt servicing, followed soon after by similar announcements from other states in Latin America and elsewhere. BACs responded by agreeing to reschedule loan payments and to provide bridge loans to sovereign debtors, effectively treating the crisis as a temporary (if lingering) liquidity problem. This allowed countries to continue interest payments and also allowed banks to avoid declaring the loans to be non-performing. This approach helped to forestall banking crises in major Northern countries, given that the exposure of major banks to Latin American debt in some cases exceeded these banks' entire capital.[58]

[57] For a recent critical take on IMF conditionality practices, see Jesse Griffiths and Konstantinos Todoulos, "Conditionally yours: An analysis of the policy conditions attached to IMF loans," Eurodad, April 2014.

[58] For more on this dynamic, see among others Lienau, n. 45, 166-171; Bruno, n. 45, 184-186; Vinod K. Aggarwal, *International Debt Threat: Bargaining Among Creditors and Debtors in the 1980s* (Berkeley: Institute of International Studies, 1987), 21-23.

However, this proved to be insufficient relief for debtor countries themselves, many of whom had to return to the London Club for serial rescheduling. The relatively harmonized creditor approach of the 1980s thus did not correlate with positive debtor outcomes, and perhaps offers a cautionary note against too heavy an emphasis on creditor coordination problems. In the 1980s such coordination allowed for an oligopoly of sorts, in which banks were collectively able to demand terms that sovereign debtors may have considered objectionable.[59] Furthermore, the treatment of all bank debts through a single process made it effectively impossible to challenge those debt contracts that arguably violated substantive principles of equity or incipient principles of responsible sovereign lending.[60] But in the absence of alternative capital sources, there was little option but to accede to these demands.

The IMF interaction with private banks and sovereign debtors through much of the 1980s only aggravated perceptions in the global South of a partial system biased toward creditors. BACs required debtors to agree to IMF adjustment programs as part of rescheduling agreements, and throughout the 1980s the IMF did not lend into arrears—that is, the Fund refused to extend loans to sovereign debtors with outstanding payments due to private creditors. Although banks too had to agree to the negotiated terms for IMF participation, this Fund policy placed considerable pressure on debtors and arguably granted additional leverage to banks, leading to charges that the IMF was serving as a "debt collector" for private banks.[61] As the decade drew to a close, public actors including the IMF and the U.S. Treasury eventually assumed a greater role in bringing the debt crisis to an end, in part due to frustration with the recalcitrance of some banks.[62] Most importantly, US Treasury Secretary Nicholas Brady announced a plan to securitize the sovereign debt, converting bank loans into freely tradable bonds (commonly called Brady bonds). This allowed commercial banks to exit the debt market, after accepting a write-off on the original face value of the debt, and launched a new period of disintermediated sovereign lending, i.e. sovereign loan obligations connecting the investor directly to the sovereign state without the intermediary of commercial banks.

1990s Bail-Outs and the Return of Bonds

The Brady bond plan was widely hailed as a success, and private investors enthusiastically returned to sovereign debt markets, with many assuming that the bonds themselves—unlike previous bank loans—were "inviolable."[63] Payment on these bonds was in fact ensured through much of the 1990s, though not necessarily by the debt sustainability of the sovereign borrowers themselves.

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[59] For example, the Philippine deal to which Corazon Aquino's administration reluctantly agreed in 1987 bowed to the banks' insistence that the new (post-Marcos) regime acknowledge not only government debt but also Marcos-era private debt as a condition for future lending. Lienau, n. 45, 188. For a discussion of the Philippine case generally, see Lienau, n. 45, 184-190.

[60] Again the Philippine case offers a telling example. During its negotiations, government officials objected to a loan made by Credit Suisse First Boston (CSFB) on the basis of the bank's "unclean hands" in the loan's origin. However, the bank advisory committee's insistence that all debt simply be negotiated in bulk dissolved these principled distinctions. Lienau, n. 45, 188.

[61] This charge still occasionally emerges in popular contemporary discourse. The IMF was helpful in exerting pressure on resistant commercial banks by agreeing to lend only if all implicated commercial banks agreed to reschedulings and to committing new funds for bridge loans. Bruno, n. 45, 185.

[62] Some major banks did eventually announce losses on sovereign debt, with Citibank leading the way in 1987. Bruno, n. 45, 186.

[63] As described in Lee C. Buchheit, "A Quarter Century of Sovereign Debt Management: An Overview," *Georgetown Journal of International Law* (2004).

When Mexico's financial turmoil in 1994 raised the specter of default, which some feared could have systemic affects paralleling the 1980s debt crisis, the U.S. Treasury and the IMF stepped in with up to $50 billion of financing. This swift and significant attention by major public actors, including the direct lending of public funds, allowed Mexico to continue payment on its bond debt, constituting a significant shift from 1980s practices.

This public sector involvement in Mexico created a template for similar actions in Thailand, Indonesia, and South Korea following the Asian financial crisis and financial problems in Brazil and Russia. In each of these cases, with the exception of Russia, official sector bail-outs of sovereign debtors allowed them to remain current on their debt to private creditors and so maintain their engagement with international capital markets. As such, the 1990s bail-outs benefited the bondholders just as they did sovereign borrowers. Furthermore, as a condition of IMF involvement, sovereign debtors accepting these rescue packages undertook a series of policy reforms, generally involving significant deregulation and privatization of key economic sectors and the curtailing of public expenditures (including on subsidies and social welfare programs)—the so-called Washington Consensus. Such programs tended to be unpopular within these countries, where some felt that the IMF in particular (the target of much ire) had placed the entire burden of financial crisis adjustment on debtor state populations while expecting that private creditors would be paid in full. Such feelings were aggravated by the expectation, in some cases, that sovereign states also take responsibility for the debt of private domestic banks that owed significant amounts to international investors.

2000s Bond Restructurings and the Rise of the Holdout Problem

Though official sector bailouts have of course continued to play a central role in debt crises, the era of near-continuous bailouts to ensure uninterrupted service of privately held debt ended in 2000 with the restructuring of Ecuador's Brady bonds.[64] Restructurings covering sovereign bonds issued by Pakistan, Ukraine, Uruguay and others followed shortly thereafter, with each adding to the available techniques for sovereign bond restructurings. When the proposal for a sovereign debt restructuring mechanism put forth by Ann Krueger in 2001-2002 failed to make headway,[65] practitioners and policy makers dealing with sovereign debt intensified their efforts to promote the use of Collective Action Clauses (CACs), which allowed a sovereign debt restructuring to bind all creditors so long as it received a threshold level of support. These became more common in bonds issued by major emerging market economies in the U.S., and have also been required in bonds issued by Eurozone countries since January 2013. Official sector support has remained central in certain cases, with IMF bail-outs organized in Argentina, Brazil, Seychelles, Iceland, Hungary, and Ukraine since 2000. Such official sector involvement has played a major role in the European sovereign debt crisis, featuring in the Greek restructuring and in the IMF-EU loan agreements with Ireland, Portugal, and Cyprus.[66] Again, however, this reliance on official sector liquidity support

[64] Lee C. Buchheit, "How Ecuador Beat the Brady Bond Trap," *International Financial Law Review* (December 2000). Although this restructuring was considered to be a significant success, these bonds were implicated in (and the subsequent 2008 default. For more on the 2008 Ecuador default, see the discussion in Lienau, n. 45, 215-222.

[65] Anne Krueger, "Sovereign Debt Restructuring and Dispute Resolution", Speech given at the Bretton Woods Committee Annual Meeting, Washington, DC, June 6, 2002.

[66] The Irish rescue package, like those of the 1990s, involved the use of official sector funds to cover what had originally been private bank debt (especially that of Anglo-Irish). This has generated internal criticism from some parliamentarians and civil society groups akin to that seen in the 1990s restructurings. See discussion in Lienau, n. 45, 223-224.

has been subject to criticism, for (among other things) incentivizing short-term lending, risking public funds, and delaying needed reforms.[67]

Parallel to these developments, and suggesting the insufficiency of purely contractual debt resolution mechanisms, has been the full emergence of the holdout creditor problem in bond restructurings. In the 1999 case of *Elliott Associates v. Banco de la Nacion (Peru)*, Elliot obtained a judgment that entitled it to full principal payment plus interest, along with an attachment order against Peru's US-based property used for commercial activities.[68] Peru ultimately chose to settle rather than risk any interference with its Brady bond payments. The more recent case involving Argentina and NML Capital (also owned by Elliot Management), denied certiorari by the US Supreme Court, may prove more intractable. The Second Circuit decision entitles Elliott to full payment plus interest and actually prevents Argentina's trustee (BNY Mellon) from making payment to restructured bondholders unless payment is also made to Elliot.[69] As of writing, no payment has been made and the final resolution of the situation remains unclear.[70]

To deal with the holdout problem, individual states may choose to circumscribe these investors' access to courts in their jurisdiction, as did the UK in 2010. However, as it stands the NML decision threatens to undermine the system of debt restructuring, such as it is, by rewarding holdouts and disincentivizing investors from agreeing to restructurings. Although CAC's can be helpful in promoting orderly restructuring to some degree, they do not apply retroactively to previously issued bonds. In addition, even those bonds with CACs rely on supermajorities within individual bond series, so that holdout problems may remain in certain circumstances.[71]

C.3. A Suboptimal and Fragmented Restructuring Mechanism

The constellation of actors, institutions, and processes that has developed since the 1980s debt crisis has constructed a patchwork sovereign debt restructuring mechanism to some degree.[72]

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[67] See, for example, Martin Brooke, Rhys Mendes, Alex Pienkowski, and Eric Santor, "Sovereign Default and State-Contingent Debt," *Bank of Canada Discussion Paper* 2013-3 (November 2013). The desire to reduce reliance on official sector bailouts features importantly in the IMF's June 2014 paper, "The Fund's Lending Framework and Sovereign Debt—Preliminary Considerations." The paper falls fall short of calling for a comprehensive debt restructuring mechanism, recommending instead debt reprofiling, or an extension of maturities, under certain circumstances. Available at: http://www.imf.org/external/np/pp/eng/2014/052214.pdf.

[68] *Elliott Associates Lp. V. Banco de la Nacion*, 194 F.3d 363 (2nd Circuit, 1999).

[69] *NML Capital Ltd. et al. v. the Republic of Argentina*, various (2nd Circuit).

[70] At the expiration of the 30 day payment grace period on July 30, BNY Mellon remained unable to disburse the funds sent by Argentina due to the court ruling, and Argentina was declared in default by the major credit rating agencies. For UNCTAD's comment following the US Supreme Court's denial of certiorari, see "Argentina's 'vulture fund' crisis threatens profound consequences for international financial system," 25 June 2014. Available at: http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=783&Sitemap_x0020_Taxonomy=UNCTAD.

[71] This remains a problem in the mandated Euro-CACs as well, although CACs generally have proven helpful in low See Michael Bradley and G. Mitu Gulati, "Collective Action Clauses for the Eurozone: An Empirical Analysis," Working Paper (March 2013).

[72] von Bogdandy and Goldmann suggest as much, n. 12, 52-53. They also highlight that the ICSID tribunal in *Abaclat v. Argentina* recognized the existence of an informal restructuring mechanism made up of the institutions and processes discussed here. *Abaclat v. Argentine Republic*, ICSID Case ARB/07/5, Decision on Jurisdiction and Admissibility, 14 November 2011, §40. See also Anna Gelpern, "Hard, Soft, and Embedded: Implementing the UNCTAD Principles," in Espósito, Li, and Bohoslavsky, eds., n. 12, 358 (noting the existence of a "sovereign debt restructuring process [that] is routinized and well known to countries and institutions that participate"). Gelpern provides a pictorial representation of this system (or, rather, "non-system") on 357.

However, to the extent that such a system exists, it is largely incomplete, somewhat incoherent, and suboptimal. Each sub-element of the mechanism has problems, from a legitimacy and impartiality perspective, and the system as a whole shares these defects.

The fragmented nature of the sovereign debt arena means that each group of creditors is heavily focused on obtaining a restructuring agreement that meets its own institutional goals and constraints; there is no need to compromise or think more comprehensively across creditors. Once the pieces of a debtor's debt puzzle are put back together, the final outcome may be insufficient to return the debtor to sustainability and to make fair payment to creditors. In addition, the principles and procedures governing a particular sovereign state's debt can vary, and they may also vary across different debtor states. This undermines the predictability and stability of the sovereign debt market, in addition to being problematic in the eyes of many debtors. The IFIs, particularly the IMF, offer a more global view, given their explicit concern with the long-run economic sustainability of debtor countries and the financial system as a whole. However, the multiple roles played by the IMF, including that of a lender in its own right, arguably undermines perceptions of its impartiality in debt workouts.

D. EXAMPLES FROM CONTEMPORARY PRACTICE

If the current, informal sovereign debt restructuring system is problematic from the point of view of legitimacy and impartiality, how might other correlate institutions or practices fare through this lens? While it is impossible to undertake a comprehensive review, this section looks at several features of two relevant mechanisms to help fill in the ways in which a DWM might attempt to meet these goals. The first part will focus on key agreed upon features of domestic insolvency/debt restructuring institutions, primarily as interpreted through the UNCITRAL Legislative Guide on Insolvency. The second part will consider rules covering two adjudicative bodies that focus particularly on investor-state arbitration.

D.1. Legitimacy and Impartiality for Domestic Insolvency Systems

Given certain parallels with the sovereign debt situation, it is useful to consider the degree to which features of legitimacy and impartiality play a central role in domestic insolvency proceedings. Although laws governing the relations between debtors and creditors, and in particular rules addressing the collection of judgment debt, are among the most ancient, the development and study of insolvency law as a standalone field is relatively recent.[73] That said, the last decades have seen an explosion of interest in insolvency (in particular for business organizations), with significant attention paid at the international level to encouraging and harmonizing the rules and mechanisms governing insolvency. Perhaps the most comprehensive and successful effort to formulate both shared principles for insolvency and possible models for their implementation has been that undertaken by UNCITRAL in its development of the UNCITRAL Legislative Guide on Insolvency,

[73] However, particularly since the 1970s, there has been greater attention paid to this field at the national level, with authoritative study groups and committees formulating principles and recommendations for modernizing bankruptcy/insolvency policy and legislation. See, for example, the Commission on the Bankruptcy Laws of the United States (1970, partially leading to the major 1978 reforms of federal bankruptcy legislation); Report of the Review Committee on Insolvency ('Cork Report,' 1982); Report of the Canadian Advisory Committee on Bankruptcy and Insolvency ('Colter Report', 1986); Australian Law Reform Commission's Report No. 45: General Insolvency Inquiry ('Harmer Report,' 1988).

published in 2005 (with additional sections added in 2011 and 2013).[74]

Legitimacy Concerns

The source legitimacy of national insolvency laws are beyond the ambit of this paper, depending on the legitimating mechanisms within each jurisdiction. However, it is worth highlighting that the UNCITRAL guide itself was developed on the basis of representation, through the auspices of a working group attuned to source legitimacy concerns.[75] This representation involved official state delegations, observer state delegations, international financial institutions (especially the IMF, World Bank, and ADB), international governance organizations (such as the OECD and COMESA), and professional associations. Expert-based source legitimacy also derived from the involvement of these professional associations, along with the use of experts from practice, academia, IFIs, and other arenas in more ad hoc drafting sessions. General state consent to the process and to the product was offered through the General Assembly Resolution 59/40,[76] though of course the actual enactment and implementation of insolvency laws exist at the national level.

Process legitimacy and procedural fairness, including a commitment to impartiality, are central to domestic insolvency proceedings and may be understood as general principles of law applicable to insolvency. As such, they should translate to the global/transnational level as well. This falls in line with the emphasis on process in legal traditions of International Public Authority and Global Administrative Law. One of the key objectives of insolvency procedures, as laid out in the UNCITRAL Guide is to provide for a "timely, efficient and impartial resolution of insolvency."[77] The Guide further emphasizes the centrality of transparency, noting that enacted laws should "[e]nsure a transparent and predictable insolvency law that contains incentives for gathering and dispensing information."[78] In every jurisdiction, debtors can voluntarily commence insolvency proceedings, encouraging ownership of the proceedings, although some jurisdictions require an eligibility determination before the insolvency proceeding technically begins and applicable standstill mechanisms are put in place.[79] Domestic insolvency proceedings involve fair process and a right to be heard for creditors whose claims will be determined and possibly curtailed. Given the large number of creditors involved in some insolvency proceedings, many national jurisdictions contemplate the use of creditor committees as a mode of participation. However, the UNCITRAL Guide notes that steps should be taken to ensure that such committees are truly representative and impartial as to the interests of its members, for example by disallowing the appointment of unduly partial creditors to a committee.[80]

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[74] The foundational text of the UNCITRAL Legislative Guide is available at http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf. For a fascinating overview of its developments, as well as the ways that global-local tensions can result in implementation gaps, see Terence C. Halliday and Bruce G. Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (Stanford, 2009).

[75] This attentiveness to legitimacy was deepened because of UNCITRAL's recognition that it had been brought into the process in part due to the legitimacy problems of other institutions, in particular the IMF and the World Bank (due to suspicion of their activities among some developing countries and their association with Washington, D.C.), INSOL and the IBA (primarily insolvency and legal practitioners, respectively, with professional biases and associated pecuniary interests); and the regional development banks. Halliday & Carruthers, id., 128-129.

[76] United Nations General Assembly, A/Res/59/40 (2 December 2004).

[77] Recommendation 1(e), at 14.

[78] Recommendation 1(g), at 14.

[79] There is also variation in the availability and strength of involuntary proceedings. In any case, given the special sovereignty and autonomy concerns at the sovereign debt level, these would not be relevant.

[80] See, for example, UNCITRAL Guide Recommendation 131, at 204.

Perhaps the most distinctive feature of insolvency law is its recognition of a debtor's inability to pay creditors as a group—as opposed to an unwillingness or inability to pay a particular creditor—and therefore its commitment to dealing with this unsustainable debt on a collective basis. This collective element means that to an important degree creditors may be in tension with one another in insolvency proceedings, rather than only with the debtor.[81] But it also draws impetus from the determination that, as a whole, creditors will gain from cooperation, as compared to the situation in which each seeks payment for itself but risks the prospect of complete non-payment in the event of coming late to the game. As such, comprehensiveness is central to insolvency proceedings at the domestic level. The participation of creditors is not voluntary, at least to the extent they intend to make any claim against the debtor after the commencement of an insolvency proceeding. This fact ensures full participation, and also is accompanied by procedures that allow for the full participation of creditors or creditor groups, such as the creditor committees mentioned above. In the words of Rosalind Mason, "insolvency law features the notion of collective impartiality… there is a moratorium on creditor action and proceedings and a consolidation of the conduct of litigation. Individual claims are addressed through the collective administration, which balances the disparate interests of the various parties."[82]

In terms of outcome, the UNCITRAL Guide, as well as most national insolvency procedures, set a baseline of acceptable creditor recovery. The first key objective of the Guide, namely achieving a balance between liquidation and reorganization, includes the provision that in any restructuring "creditors would not involuntarily receive less than in liquidation."[83] Given the non-applicability of financially liquidating a sovereign state, this is difficult to translate. However, it relates to the general requirement that creditors be treated in good faith, and that they not be required to take a greater discount than is necessary for the debtor's recovery. On the debtor side, as a general matter, restructuring plans in insolvency proceedings should not be agreed to or confirmed (to the extent that court confirmation is required) unless they are likely to actually rehabilitate the debtor in question.[84] Thus a restructuring plan considered to be "too little" for the debtor problems at issue would not be considered outcome-legitimate, and therefore likely should not be confirmed or agreed to under general insolvency principles.

Many states have ratified the major human rights conventions, and thus they are likely applicable to domestic insolvency laws in those cases, and might be considered an element of outcome legitimacy (as well as binding international law). The UNCITRAL Guide notes that in determining which assets might be excluded from eventual distribution to creditors in the case of a natural person debtor, "consideration might need to be given to applicable human rights obligations, including international treaty obligations, which are intended to protect the debtor and relevant family members and may affect the exclusions that should be made," in order to "allow for the minimum necessary to preserve the personal rights of the debtor and allow the debtor to lead a

[81] For one early overview, see Elizabeth Warren, "Bankruptcy Policy," *University of Chicago Law Review*, vol. 54, 775 (1987), esp. 780-789.
[82] Rosalind Mason, Cross-Border Insolvency Law: Where Private International Law and Insolvency Law Meet," in Paul Omar, ed., *International Insolvency Law: Themes and Perspectives* (Ashgate, 2008), 32.
[83] UNCITRAL Guide (2004), 14-15. Quoted in Halliday & Carruthers, n. 74, 141.
[84] In the U.S. Chapter 11 context, for example, a court may not confirm a reorganization plan unless it meets the requirement of feasibility, in that it is not likely to result in an eventual liquidation. See 11. U.S. §1129.

productive life."[85] The more general implication could be that such human rights should be protected regardless of how natural persons are situated in an insolvency (i.e. whether as debtors themselves or as those impacted by another debtor's—including a sovereign state debtor's—restructuring).[86]

Impartiality

As noted above, process legitimacy, with its implication of impartiality, is a core feature of domestic insolvency proceedings. Impartiality may also be considered central to insolvency proceedings at the domestic level in its own right.

In terms of institutional impartiality, there is considerable variation among states in the institutional settings for insolvency proceedings. For example, certain civil law countries (such as France) mandate significant court involvement for any major decision. At the other end of the spectrum, Australia advocates that debtors dealing with insolvency avoid court oversight to the extent possible. The UNCITRAL Guide remains neutral, not requiring court involvement in every instance. However, it does specify that "competent and independent" courts are available, at least as a background measure.

More focus is placed on actor impartiality. Given that the UNCTRAL Guide focuses on individual or organizational insolvency, it contemplates (but does not mandate) the appointment of an "insolvency representative" (such as a trustee, administrator, judicial manager, etc.) to administer the bankruptcy proceedings. Any such individual must not only be knowledgeable but also have the attributes of "integrity, impartiality, and independence."[87] The Guide recommends that any insolvency law "require the disclosure of a conflict of interest, a lack of independence or circumstances that may lead to a conflict of interest or lack of independence" and also that this obligation "continue throughout the insolvency proceedings."[88]

D.2. Efforts Toward Impartiality and Legitimacy in Investor Treaty Arbitration

Additional support can be found for attending to characteristics that aim to support legitimacy and impartiality in the area of investor treaty arbitration. Such arbitration, which may be incorporated into hard law instruments (such as Bilateral Investment Treaties or concession contracts), directly involves sovereign states and investors. By its nature such arbitration is ad hoc and oriented toward the agreement of the specific parties to a dispute (rather than toward general fairness,

[85] UNCITRAL Guide, Part II, A, para. 19, at 80. Additional references to human rights along these lines may be found in Part III, A., paras. 19 & 29. Para. 19 notes that the rights of "a natural person debtor in insolvency proceedings may be affected by obligations under international and regional treaties such as the International Covenant on Civil and Political Rights and the European Convention on Human Rights."

[86] Human impact more generally can be considered relevant in insolvency proceedings. For example, the U.S. Bankruptcy Code provides certain exceptions to the general rule that unsecured debts will be discharged in a liquidation proceeding. However, even these exceptions may be excused if the continued payment of the debt would constitute an "undue hardship" for the debtor and his/her dependents. See 11 U.S. Code §523(a)(8).

[87] UNCITRAL Guide, Recommendation 115, at 188.

[88] UNCITRAL Guide, Recommendations 116 & 117, at 188. Less explicit attention is paid to informational impartiality in domestic insolvency proceedings. However, as part of general process requirements, parties to insolvency proceedings are often allowed to offer expert opinions and testimony to support their projections of the likelihood of success (or of the value of particular assets, etc.) and also challenge the claims made by opposing stakeholders (for example, of the likely effect of a plan or plan provisions).

coherent law, or particular outcomes). Indeed, considerable concern has been expressed about inconsistency across arbitral tribunals and decisions, given the lack of precedent: "Parallel tribunals can give rise to awards with inconsistent conclusions, and which may even be scandalously contradictory."[89] Even more troubling charges have been made that such arbitration may be systematically biased in favor of investor claimants.[90] Nonetheless, certain procedural rules in these arbitrations still offer some insight into how process legitimacy and impartiality are broadly acknowledged to be essential goals—even in this controversial arena and even when not fully achieved. Two sets of rules commonly used, and referred to in this section, are the ICSID Rules and the UNCITRAL Rules.

Impartiality

In terms of institutional impartiality, one of the central purported benefits of arbitration is precisely that parties have a greater degree of control over the proceedings than in a conventional judicial dispute resolution setting. As such, by design, there is a lower degree of institutional independence in both the ICSID and UNCITRAL Rules than in standard domestic court settings. The parties pay the arbitrators directly and have significant control over the arbitral location.[91]

The primary safeguard of impartiality in this setting, then, is supposed to be through attentiveness to actor impartiality, and in particular through the selection of arbitrators themselves. ICSID Rule 6(2) requires that all arbitrators sign a declaration of independence in advance of the first session that lists any factors that might compromise their impartiality.[92] In addition, ICSID Convention Article 39 specifies that the majority of arbitrators be citizens of states other than the claimant-investor's home state and the respondent state. Similarly, in the event that the parties are unable to arrange a panel independently, arbitrators appointed by the Chairman of ICSID's Administrative

[89] Bernardo M. Cremades, "Arbitration under the ECT and Other Investment Protection Treaties: Parallel Arbitration Tribunals and Awards," *Transnational Dispute Management* vol. 2 (June 2005), 1; in Stephen Jagusch & Jeffrey Sullivan, "A Comparison of ICSID and UNCITRAL Arbitration," in Michael Waibel et al., eds., *The Backlash Against Investment Arbitration* (Kluwer, 2010), 80.

[90] Gus Van Harten, for example, suggests that "the system is flawed, above all because it submits the sovereign authority and budgets of states to formal control by adjudicators who may be suspected—because they are untenured and because only one class of parties can bring claims—of interpreting investment treaties broadly in order to expand the system's appeal to potential claimants and, in turn, their own prospects for future appointment." Van Harten acknowledges that certain arbitrators may develop reputations for fairness and balance, but suggests that there is nonetheless "an unreliable bias." Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007), vii. See also Pia Eberhardt & Cecilia Olivet, "Profiting from Injustice: How Law Firms, Arbitrators, and Financiers are Fuelling an Investment Arbitration Boom," (Corporate Europe Observatory and the Transnational Institute, Nov. 2012). UNCTAD has also highlighted concerns with the current investor-state dispute settlement regime and laid out advantages and disadvantages to five potential paths to reform. See UNCTAD, "Reform of Investor-State Dispute Settlement: In Search of a Roadmap," IIA Issues Note, June 2013; available at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf. For a response to critics and a defense of the basic contours of the current system, see Charles N. Brower & Sadie Blanchard, "From 'Dealing in Virtue' to 'Profiting from Injustice': The Case Against 'Re-Stratification' of Investment Dispute Resolution," *Harvard International Law Journal Online*, vol. 55 (January 2014).

[91] However, given the absence of a standing institution with full-time professional decision-makers, there is arguably less of a risk that a longstanding and deep-seated institutional bias would develop.

[92] ICSID Rule 6(2). Note that ICSID maintains a pre-screened Panel of Arbitrators considered to have sufficient expertise and professionalism to be appropriate. However, parties may select arbitrators that are not on this list and so additional safeguards of impartiality have been put in place.

Council must not be nationals of either the state party or the home state of the claimant-investor.[93] Finally, the default procedures for ICSID involve a three-person tribunal, with each party appointing one arbitrator and then agreeing on a third, who serves as the panel's president.[94]

The basic orientation is very similar under the UNCITRAL Rules. Both prospective and appointed arbitrators for UNCITRAL must disclose circumstances that may raise justifiable doubts as to impartiality or independence, with the 2010 changes to the rules clarifying that this duty is ongoing and continues until issuance of the final award.[95] UNCITRAL does not specify nationality requirements for arbitrators, but does mandate that that appointing authority consider "the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties."[96] The UNCITRAL Rules also presume (but do not mandate) that three individuals will be appointed to the arbitration panel. Each party appoints one arbitrator, and then the two initial appointees consult and jointly select a third.[97]

Charges have been made that even these procedures fall short and that problems are more endemic.[98] Concern has also been expressed that, in any case, such processes have not been sufficiently followed to rid investor state dispute settlement of bias and the perception of bias.[99] However, the desirability of impartiality as a goal or guiding principle is hardly in question.

Legitimacy

The ownership element of legitimacy is well respected in arbitration, as suggested in the discussion of impartiality above. Given the limited number of parties generally involved, equal participation of these parties is less of a problem than it might be in other, larger settings. A series of amendments to the ICSID Rules in 2006 aimed to improve the transparency and participatory element of proceedings for non-parties. In particular, Rule 37 makes possible submissions by "non-disputing parties" through amici curiae, Rule 32 covers the possibility of making hearings open to the public, and Rule 48 governs the publication of awards.[100]

In regards to efficiency, ICSID Rules specify that a tribunal should be constituted "as soon as possible" and "with all possible dispatch" after an arbitration is requested, with a series of time

[93] ICSID Convention Art. 38.
[94] ICSID Convention Art. 37(2)(b); ICSID Rule 3.
[95] UNCITRAL Rev. Art. 11. An annex to the UNCITRAL Rules even provides model "Statements of Independence" that can be used by arbitrators.
[96] UNCITRAL Art. 6(4).
[97] Parties may also agree on a sole arbitrator, or on the appointing authority for a sole arbitrator, with the Secretary General of the Permanent Court of Arbitration serving as the default in the event that the parties fail to reach agreement. UNCITRAL Art. 6.
[98] Van Harten, n. 90; Eberhardt & Olivet, n. 90.
[99] One much remarked upon ICSID arbitration is that of Vivendi II, in which an ad hoc committee reviewing a tribunal's decision criticized one of the arbitrators for failing to disclose her board position at a bank holding shares in the claimant investor, but ultimately upheld the award. *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) (Annulment Proceeding) (10 August 2010). See especially para. 231-232.
[100] Jason Yackee and Jarrod Wong review these amendments in detail, and generally consider them to be "modest, incremental, and conservative." Jason W. Yackee and Jarrod Wong, "The 2006 Procedural and Transparency-Related Amendments to the ICSID Arbitration Rules," in *Yearbook on International Investment Law & Policy*, Karl. P. Sauvant, ed., ch. 6 (Oxford University Press, 2010).

frames for arbitrator appointments.[101] The UNCITRAL Rules similarly specify a series of time frames for constituting the tribunal and appointing arbitrators, specifying that the appointing authority is required to make the appointment "as promptly as possible."[102] However, under both processes there is the possibility or opportunity of manipulation and delay by the parties, particularly through the process of appointing (and objecting to) arbitrators. As such, the process ownership and consent elements of investment treaty arbitration may undermine, to some degree, efficiency.[103]

D.3. Guiding Principles of Law

One final question is the degree to which the principles and practices embedded in, or at least sought after, in these other mechanisms may be understood as embodying emerging customary international law or as demonstrating general principles of law.

As noted in the conceptual discussion above, legitimacy can be understood as a composite principle, made up of a number of procedural and substantive norms. Similarly, impartiality is an ideal that itself sub-divides, and supplements multiple other key principles. The content of both of these ideals is perhaps too multi-faceted and variable to provide the specificity of a principle of customary international law or a general principle of law in their own right.[104] However, legitimacy and impartiality can be understood as guiding principles in international law, which help to orient the formulation of more specific rules and decision-making procedures. Their near-universal desirability is demonstrated in both domestic insolvency procedures and in the arbitration procedures briefly discussed here.

E. APPLICABILITY OF LEGITIMACY AND IMPARTIALITY TO A DWM

This final section will consider how a future DWM might instantiate the principles of legitimacy and impartiality. It offers preliminary recommendations for discussion based in part on current practices in other areas and in part on concerns about previous episodes in debt restructuring. It will briefly assess several debt restructuring proposals in light of these themes. It will also note several obstacles to meeting the goals of legitimacy and impartiality in a DWM, asking whether the negative effects of such impediments might be mitigated.

E.1. Preliminary Recommendations

In light of the preceding discussion, some preliminary recommendations can be made relevant to enhancing the legitimacy and impartiality of any DWM. Note that these recommendations are relevant regardless of the particular form a DWM takes. Furthermore, they are presented as ideals/goals, with the understanding that in some situations compromises would have to be made

[101] See ICSID Convention Article 37(1); ICSID Rule 1
[102] UNCITRAL Art. 6(3).
[103] For a brief description of delay tactics from a practitioner perspective, see Jagusch & Sullivan, n. 89, 84-85. Note that this refers to a previous version of the UNCITRAL Rules, but the themes remain pertinent.
[104] Customary international law, accepted in key international documents as one potential source of law (along with treaties and general legal principles), is identified through "evidence of a general practice accepted as law." The emergence of customary international law on a topic can be demonstrated by the existence of relevant state practice in conjunction with a sense of legal obligation (*opinio juris*) – the belief on the part of the acting state that the practice is required by law. ICJ Article 38(1).

in light of more pragmatic considerations of political feasibility, timeliness, and cost effectiveness.

Recommendations Relevant to the Establishment of a DWM (Source Legitimacy)

State Consent: Given the continuing viability of state consent as a source of legitimacy in international affairs, due regard should be given to maximizing the support for a DWM across as broad a range of states as possible.

- This is the case whether a DWM emerges as a treaty-based international organization, through ad hoc tribunals, or as soft law principles governing private mechanisms.
- One question here may be the degree to which other facets of legitimacy – such as particular procedural safeguards including transparency or a commitment to particular substantive outcomes – may have to be balanced against the goal of broad state consent.

Participation: In establishing a DWM and determining its rules, a good faith effort should be made to identify and involve an appropriately broad array of stakeholders through meaningful participatory mechanisms.

- These may involve state groups, creditor groups, IFIs, NGOs, special rapporteurs and other appointed representatives, and other interested parties.
- Democratic legitimation is likely not sufficiently broadly accepted to feature in the establishment of a DWM. However, general attentiveness to the voices of individuals and sub-state groups (rather than exclusively those of states), may offer a subsidiary element of democratic legitimacy to a DWM.

Expertise: In establishing a DWM, it may be helpful to consult with those considered particularly expert in relevant fields.

- A relatively unified opinion from expert groups could be valuable in establishing DWM legitimacy on this front.

Recommendations for Ongoing DWM Processes (Process Legitimacy)

Ongoing Participation: The working processes of any DWM should ensure that affected parties have a chance to be heard before decisions are made. They should also ideally involve those parties in the decision-making process, for example through appropriate majority or super-majority voting procedures.

- Depending on the size and complexity of the restructuring, this participation might work through representative structures such as committees or class/stakeholder groups. To the extent that committees are utilized, care should be taken to ensure that there is fair representation within the committee structure. As part of this, there should be substantial similarity within committees or stakeholder groups, and DWM decision-makers should consider placing significantly different parties in separate groups/committees.
- An opportunity should be heard on, among other issues, possible restructuring plans and the allowance/disallowance of debt claims.
- Participation should be supported by notice and comment procedures, claim processes akin to those used in domestic insolvency law, or similar procedures.
- A DWM should be open to participation from civil society actors including NGOs acting as

observers and amici curiae.

- Due care should be taken to balance the goal of broad participation with the exigencies of crisis management, should this be relevant for a particular restructuring.[105]

Ownership: DWM processes should be especially attentive to the concerns of the sovereign state involved in restructuring to promote country ownership of the final outcome.

- In order to begin a restructuring process through the DWM, the debtor state must submit a formal request. Only voluntary proceedings should be permitted.
- Special attention should be paid to involving institutions and groups within the restructuring state in the DWM process. These might include different governmental branches and agencies, as well as major civil society groups and perhaps important opposition parties.

Comprehensiveness/Full Participation: To the extent possible, a DWM should aim to engage the full array of creditors and stakeholders in any restructuring.

- Procedures designed to enhance creditor participation, including the use of representative committees, should be promoted.
- All participants should be bound by the final outcome so long as they meet threshold voting requirements (for example, a super-majority of creditors in a particular group).
- To the extent that any stakeholders are excluded from DWM decision-making or voting procedures, due regard should be given to their claims in formulating any restructuring plan or sustainability analysis, and procedures should be available to ensure their voices are heard.
- Stakeholders/creditors who are eligible for the DWM process but who elect not to participate should nonetheless have their claims bound by the process to the extent possible/enforceable under the DWM framework, so long as other key elements of legitimacy and impartiality are present.

Transparency: DWM processes should be as transparent as possible. Any deviations should be exceptional and necessary for the public good, and should be permitted only to the extent required to meet important policy goals, such as successful crisis management.

- Transparency and publicity should apply to procedural/logistical information on the restructuring (key dates, deadlines, etc.) and to substantive outcomes/decisions.
- Information should be easily accessible at a global level, with due care paid to variations in the technological capacity of different audiences.
- Sovereign borrowers should seek to be transparent to external and internal audiences on issues related to sovereign debt, in line with UNCTAD Principles 10 and 11.

Reasoned Decisions: Any DWM should require all parties, and particularly any third-party decision makers, to provide reasons for their decisions.

- Reasons should include the analytical and informational/evidentiary foundations underpinning final outcomes.
- Parties/stakeholders (including the debtor and creditors) should provide the reasons underpinning their own positions as well.

Efficiency: Restructuring under the DWM should be conducted in as efficient a manner as possible.

[105] See the brief comments on emergency/crisis management situations on pages 9 and 14 above.

This is in line with UNCTAD Principle 15, which requires prompt, efficient, and fair rearrangements, and with UNCTAD Principle 7, which notes that creditors "should seek a speedy and orderly resolution to the problem."

- Time frames should be specified for the making of an eligibility determination, for the appointment of arbitrators or core key players, for the formulation of a restructuring plan, and other key procedural steps.
- Deadlines should be provided for any notice and comment procedures and the submission of debt claims.
- Time frames/deadlines may need to be calibrated to the size/complexity of a particular restructuring. Appropriate reasons should be given for diverging from pre-set/recommended time frames.
- Attention should be paid to the possibility that efficiency may be somewhat in tension with the goal of broad and deep participation. Due regard should be given to balancing these goals, and the development of participatory mechanisms should be attentive to efficiency concerns.

Review: The possibility of review by an external body of procedures of or decisions arising from a DWM could be considered.

- This may be limited to particular subject matters over which the reviewing institution has jurisdiction or expertise.

Recommendations on DWM Outcomes
(Outcome Legitimacy)

Sustainable Economic Outcomes: Restructurings under the DWM should comprehensively address the underlying debt problem in order to avoid the need for disruptive serial restructurings.

- This depends in part upon the careful determination, ex ante, of long-term debt sustainability. Parties and other DWM decision-makers should clarify the evidentiary basis for these determinations, and use caution and balance in employing indicators and economic models.
- To the extent that debt restructuring plans contemplate or depend upon significant domestic adjustment, this fact should be made clear in advance to all stakeholders.
- To the extent that domestic legislation (or other contingent action) is required for the success of the restructuring plan, sovereign debtors should be encouraged to undertake such measures in advance of the final DWM agreement (even if the entry into force of relevant domestic legislation is conditioned upon the restructuring agreement itself).
- Agreements under a DWM might consider the use of techniques that allow for some flexibility in payment amounts *ex post* (such as GDP-indexed bonds and contingent-convertible (CoCo) bonds).[106] The use of CACs, including aggregated CACs, may also be helpful in limiting the need for a return to the DWM.

Acceptable Creditor Outcomes: To ensure that the outcome of a debt restructuring is acceptable and fair to creditors, modifications to the debt burden must be proportional to the need of the debtor.

[106] See Brooke et al., n. 67, 1. GDP-indexed bonds link principal and interest payments to the level of a country's nominal GDP. Sovereign 'cocos' would automatically extend repayment maturities if a country receives official sector emergency assistance. Ibid.

- The burden of adjustment should be shared across stakeholders, including by the citizens of the restructuring state as well as creditors.
- To the extent relevant, seniority/priority and security interests that are enforceable outside of the DWM process should be respected within the DWM.
- Asset recovery could relieve the need for and size of creditor losses, and can be understood as a substantive goal in its own right.

Capital Access: To enable the sovereign debtor to return to reasonably-priced capital market access in a timely fashion, agreements under a DWM should consider incorporating measures that would allow the sovereign debtor to demonstrate its creditworthiness (understood as both the capacity and the willingness to pay) following the restructuring.

- The capacity to pay should be improved by the sovereign state's improved debt profile and stronger economic foundations, and this should be emphasized in the agreement.
- Agreements under the DWM should contemplate some ongoing payment of restructured debt (rather than full buyback, to the extent this is a possibility), in order to demonstrate the state's commitment to debt payment.

Human Impact: The human impact of debt restructurings should be taken into account in determining legitimate restructuring outcomes.

- This human impact assessment could be undertaken in light of relevant treaties and other sources of applicable international law (including customary international law and general principles of law).

Substantive Principles: To the extent that other substantive principles, including generally accepted legal principles and doctrines, are implicated by particular debts, these may also be considered in determining the permissibility of particular claims.

- These doctrines and principles may include, among others, unclean hands, unconscionability, fraudulent transfer, and the violation of a government's fiduciary duty to its population.
- More generally, DWM outcomes should accord with principles of responsible lending and borrowing, such as those laid out in the UNCTAD Principles.

Consistency: Decision-makers within a DWM should attend to the goal of promoting consistency and coherence across restructurings, while keeping in mind the unique political and economic situation of each sovereign debtor.

- To the extent possible, the DWM should work according to a unified set of principles and procedures. These could initially be developed or adopted along with the establishment of a DWM, and then extended through practice.
- Departure from standard practice should be explained and justified in line with the broader/deeper goals of restructuring as they apply to the case at hand.

Recommendations on Impartiality

Institutional impartiality: Any institutional framework associated with a DWM should be constructed/selected to avoid systematic bias in favor of one or another interested group.

- A DWM should ideally minimize its affiliation with parties/groups and institutions whose interests are impacted by the DWM's processes or decisions.

- To the extent possible, a DWM should be impartial and independent in terms of its finances, personnel, and physical/institutional location.
- If full independence is not feasible, measures should be taken to limit improper influence and also to minimize the broader perception of bias/partiality.
- The DWM's working processes should be transparent to enhance monitoring of impartiality.

Actor Impartiality: To the extent that any DWM envisions a central role for third party decision-makers, be they mediators/facilitators or adjudicators, the impartiality and independence of these actors should be protected.

- Decision-makers/mediators should be independent of the negotiating parties. This is relevant at the level of individuals and also in composing multi-person panels.
- Key actors in a DWM should be required to disclose any relationships that could lead to bias or to the perception of bias.
- To the extent that third-party decision makers are included in a DWM, the possibility of multi-person panels might be considered.

Informational impartiality: Care should be taken to ensure the impartiality of informational inputs into debt restructuring to the extent possible.

- The use of indicators and debt assessments should be governed by principles and procedures that promote the independence and objectivity of such indicators.[107]
- Economic and other social science models predicting the expected outcomes of restructurings and associated measures should be selected with care. To the extent that significant disagreement exists as to the accuracy or applicability of particular models, feedback should be solicited to construct a comprehensive assessment.

E.2. Relevance to DWM/Restructuring Proposals

UNCTAD, among others, has long called for the development of a more coherent debt restructuring mechanism. In 1986, the UNCTAD Secretariat's *Trade and Development Report* noted that "the lack of a well-articulated, impartial framework for resolving international debt problems creates a considerable danger… that international debtors will suffer the worst of both possible worlds:… being judged de facto bankrupt… largely without the benefits of receiving the financial relief and financial reorganization that would accompany a de jure bankruptcy."[108] In light of the financial crises of the late 1990s, the 1998 *Trade and Development Report* suggested that "adoption of the principle of automatic stay for international creditors and investors is certainly one of the most helpful steps which might be taken."[109] UNCTAD published a further review of the issues and proposals involved in reforming the global financial architecture in 2002. This review recommended a combination of internationally sanctioned standstills and voluntary mechanisms, accompanied by a provision of liquidity to maintain imports and economic activity, and a requirement of private participation when official financing went above threshold levels.[110]

Since then, a number of more formal proposals for dealing with sovereign debt problems, which

[107] This follows the recommendations in Riegner, n. 41.
[108] UNCTAD, Trade and Development Report, 1986, annex to chapter VI.
[109] UNCTAD, Trade and Development Report, 1998, 93.
[110] Yilmaz Akyüz, "Crisis Management and Burden Sharing," in *Reforming the Global Financial Architecture: Issues and Proposals*, ed. Yilmaz Akyüz (UNCTAD, Third World Network, Zed Books, 2002), 117-156, esp. 150.

provide a greater degree of specificity about the institutional grounding for a workout mechanism, have been developed by other multilateral and non-governmental organizations. It is not feasible to discuss all of them, or even any one of them in detail, given the scope of this paper. However, a preliminary assessment of these proposals against principles of legitimacy and impartiality remains worthwhile. As part of this consideration, it is important to keep in mind that legitimacy and impartiality are hardly the only relevant standards for evaluation. Feasibility has a virtue all itself, and indeed several proposals admit that they are non-ideal or second best.[111] UNCTAD of course is currently engaged in a project to clarify how debt workout principles might be applied in the complex contemporary global context.[112]

A Statutory SDRM Based at the IMF

The core statutory SDRM proposal remains that presented by Anne Krueger in 2001-2002 and ultimately rejected by the IMF board in 2003.[113] Indeed, recent developments in the *NML v. Argentina* case have encouraged key institutional players and prominent economists to suggest that it might be resuscitated.[114] This proposal was organized primarily around the creation of a Sovereign Debt Dispute Resolution Forum (SDDRF), which would serve as the primary actor and decision-maker on any debt restructuring plan, presenting plans for approval by creditor groups. The SDDRF as proposed was heavily embedded in the IMF itself, with the key decision-makers selected out of a pool pre-screened by the IMF Board or an IMF-appointed selection panel. Furthermore, the IMF's own loans (like those of other multilateral organizations) would not be subject to restructuring through the process.

- The primary benefit of the SDDRF idea was its capacity to aggregate the treatment of all private debt into a single forum. Furthermore, it would ensure that any agreement reached would be enforceable by virtue of the role of the IMF, requiring an amendment of the IMF Articles of Agreement which would effectively bind all countries.
- However, this proposal was criticized as being especially partial. Although it is intended to be independent, institutional and actor links to the IMF might bias the SDDRF and, just importantly, might aggravate the general perception that is may be biased. Furthermore, the exclusion of debt owed to multilateral organizations (including to the IMF) would only deepen concerns of unfairness, including among creditors.
- These concerns do not immediately doom such a proposal. Were this or another similar

[111] For example, while advocating a more modest proposal based at the IMF, a paper published by the Brookings Institution acknowledges that "the first and best approach to addressing these problems would presumably be a fully fledged international sovereign insolvency-cum-crisis management regime… But such a regime is practically and politically unfeasible." Lee C. Buchheit et al., "Revisiting Sovereign Bankruptcy," Brookings Institution, October 2013, 29.

[112] UNCTAD's Debt Workout Mechanism Framing Paper, n. 2, provides an initial reference document and starting point for ongoing work on the project.

[113] Although the SDRM proposal was originally presented in 2001, the latest version is "Report of the Managing Director to the International Monetary and Financial Committee on a Statutory Sovereign Debt Restructuring Mechanism," August 8, 2003. Available at http://www.imf/org/external/np/omd/2003/040803.htm

[114] IMF Managing Director Christine Lagarde suggested that, depending on the outcome of legal decisions in New York, "the debt restructuring principles and the efficiency of collective action clauses will have to be reviewed," but did not specifically mention the earlier proposal. "IMF's Lagarde says Argentina default not market-shaking," *Reuters*, July 29, 2014. Economist Nouriel Roubini did suggest that resuscitating the earlier proposal might be appropriate. Nouriel Roubini, "Gouging the Gauchos," *Project Syndicate*, July 1 2014. UNCTAD also reiterated its longstanding call for a coherent debt workout mechanism in light of the US Supreme Court decisions to deny certiorari in the Argentina cases, though not specifically with reference to the IMF proposal. UNCTAD, n. 70.

mechanism able to achieve desirable economic outcomes for debtors and creditors, at least in dealing with private debt, while remaining attentive to substantive principles and human impact concerns, this might balance against concerns about impartiality. However, this might be a fairly high threshold, particularly in light of the historical experience of some debtors with IMF involvement in 1980s and 1990s debt restructurings.

Updated IMF-Based Sovereign Debt Adjustment Facility (SDAF)

This proposal, published by the Brookings Institution in October 2013, is designed to further two goals: (1) to commit the Fund *not* to bail out countries with unsustainable debts in the absence of a restructuring; and (2) to protect countries restructuring under the SDAF from holdouts.[115]

- It shares some features of the earlier SDRM, most notably being housed in the IMF itself, using a modification of the IMF Articles of Agreement as an institutional hook and as leverage against holdouts, and reliance upon IMF technical expertise (including for sustainability determinations, etc.).
- However, the SDAF does not envision an associated tribunal for claims determinations, an automatic stay on litigation, or a mechanism to bind all creditors. (Holdouts would be prevented from collecting on judgments, though their legal claims would technically remain intact.) In addition, the proposed restructuring process itself seems to leave more in the hands of sovereign debtors.
- The authors explicitly acknowledge the preferability of a comprehensive (and presumably more impartial) insolvency court but consider that development to be a remote possibility. They propose that locating an updated DWM in the IMF is most likely to be feasible and effective.

Ad Hoc Debt Arbitration

A range of DWM proposals have been grounded in the more informal process of ad hoc arbitration. Jürgen Kaiser highlights that these extra-legal processes generally share the key features of relatively low cost, party autonomy, confidentiality, and attentiveness to balancing parties' interests (rather than according with legal principles and precedent).[116] However, significant variation is possible within this general framework, given that parties may adopt different sets of rules or principles for the arbitration.

- Because of its informal nature, ad hoc arbitration has the potential to ensure party ownership. Arbitrator selection procedures could be monitored to ensure impartiality.
- Although it is not required, parties may nonetheless agree to apply a body of law—such as international law, including general principles of law applicable to sovereign debtor relations—in their arbitration.
- One version of this ad hoc approach, proposed initially by Kunibert Raffer in 1990, would involve the adoption of procedures akin to US municipal bankruptcy (Title 11, Chapter 9 of the US Code), which include core elements of procedural fairness and transparency while

[115] Buchheit et al., n. 111, 32-35. Available at: http://www.brookings.edu/research/reports/2013/10/sovereign-debt. Other authors include Anna Gelpern, Mitu Gulati, Ugo Panizza, Beatrice Weder di Mauro, and Jeromin Zettelmeyer.
[116] Jürgen Kaiser, "Resolving Sovereign Debt Crises: Towards a Fair and Transparent International Insolvency Framework," Global Policy and Development Study, October 2013, 19.

making allowance for the sovereign character of the debtor.[117]

- Because of their voluntary nature, ad hoc arbitration processes may not be able to compel unwilling/hold-out creditors to participate in negotiations.
    - This might be the case even if they are established with a view to enabling comprehensive participation (as in the Chapter 9 proposal) and even if the awards themselves are ultimately enforceable (through the New York Convention on Recognition of Foreign Arbitral Awards).
- As a correlate to ad hoc arbitration, a forum could be set up to promote early debtor-creditor dialogue and impartially develop a store of knowledge on best practices in sovereign debt restructuring. This is the core of the 2014 proposal from Richard Gitlin and Brett House to establish a Sovereign Debt Forum.[118]

International Insolvency Tribunal

In these proposals, arbitration would be housed at an impartial international institution (i.e. one not itself implicated in sovereign lending), such as the Permanent Court of Arbitration (PCA) or through the auspices of the UN Secretary General or another impartial UN agency.[119]

- Establishment of such a tribunal would be through treaty, which would also ensure the compliance of countries and private creditors within countries.
- Proceedings and substantive outcomes, including the assessment of restructuring plans, would be governed by agreed-upon law, likely international law including general principles of law applicable to sovereign debt.
- The tribunal would be able to hear particular debt claims and would be required to comply with international standards for participation and transparency.
- This proposal may be considered the most legitimate and perhaps the most impartial. However, it is (maybe as a result) the most ambitious of the proposals, and likely to be the most difficult to implement.

E.3. Obstacles and Final Considerations

Unfortunately, several features of the sovereign debt system that make the establishment of a DWM imperative are precisely the same features that constitute major obstacles to its establishment. This section will highlight several of these special challenges and suggest possibilities for mitigating their effects.

The Selective Efficacy of Fragmentation

Forum fragmentation is broadly acknowledged as a key problem in sovereign debt restructuring, preventing a comprehensive treatment of a sovereign's debt. However, it is possible that any

[117] Kunibert Raffer, "Applying Chapter 9 Insolvency to International Debts: An Economically Efficient Solution with a Human Face," *World Development*, vol. 18, no. 2 (February 1990), 301-313.

[118] Richard Gitlin and Brett House, "A Blueprint for a Sovereign Debt Forum," CIGI Papers, No. 27 (March 2014). They note the lack of support for statutory measures and aim for "a non-statutory, incorporated, non-profit, membership-based SDF that would provide an independent standing body to research and preserve institutional memory on best practice in sovereign debt restructuring and to facilitate early engagement among creditors, debtors, and other stakeholders." Id. at 6.

[119] See, for example, Christoph Paulus, "A Resolvency Proceeding for Defaulting Sovereigns," *International Insolvency Law Review* (1/2012), 1-20.

particular forum (i.e. Paris Club, bond restructuring committees) does serve a function for the particular creditors at issue.

- In particular, within a narrower/smaller forum, creditors may have greater control and may be able to work more efficiently, and there is no requirement that they attend to the concerns of other creditors. This can ease negotiations from the creditor perspective, as negotiations will be less complex and more dyadic (i.e. between just the debtor and the relevant forum group) than they would be in a consolidated multi-party framework. As such, a fragmented system may be effective/functional for a sub-set of key actors.
- To the extent that this is the case, and particularly if those actors are not committed to long-run sovereign debtor concerns or the public good, there may be minimal incentive for such creditors/actors to agree to an alternative, more comprehensive, and more coherent DWM. While it is clear that a DWM would be in the best interest of sovereign debtors, attention could be paid to highlighting the benefits to particular creditor groups of a DWM.

Opposition of Private Creditors

Private creditor groups have historically been resistant to the establishment of a DWM or indeed to any greater institutionalization of debt restructuring. The Institute for International Finance (IIF), representing the interests of private creditors, prefers an ongoing commitment to voluntary, good faith negotiations.

- The IIF expresses particular concern that any unilateral debtor invocation of a stand-still mechanism, including one condoned by the IMF, would "severely undermine creditor property rights and market confidence and thus raise secondary bond market premiums for the debtor involved and other debtors in similar circumstances" and highlights the unilateral, non-negotiated deal offered by Argentina as being problematic.[120]
- The IIF advocates strengthening market-based approaches, including clarifying the meaning of pari passu language and including aggregation clauses. However, it calls for a balance between facilitating timely debt restructurings and protecting creditor property rights, noting that "excessive emphasis on eliminating the possibility of holdout creditors might be counterproductive."[121]
- Working with creditor groups in DWM development and highlighting how a DWM is in the long-run interests of creditors could help to soften the opposition of such groups, although it is unlikely to eliminate such resistance altogether. Acknowledging the ways in which such actors may be (and historically have been) structurally suspicious of insolvency ideas—including of successful domestic insolvency regimes prior to their establishment—may help to keep remaining opposition in perspective.

Concerns of Major Public Actors, including Bilateral and Multilateral Creditors

It is also possible that certain public actors may resist any movement toward a DWM that limits their role, even while accepting the general need for more comprehensive approaches to sovereign debt restructuring.

- Essential actors such as the IMF might accept the general importance of impartiality and

[120] Institute for International Finance, "Special Committee on Financial Crisis Prevention and Resolution: Views on the Way Forward for Strengthening the Framework for Debt Restructuring" (January 2014), 4. Available through: http://www.iif.com/emp/
[121] Id., 5.

legitimacy, but highlight their own centrality/expertise in sovereign debt issues. They may also simply resist any effort to include their debt as part of a comprehensive restructuring, following the template of the earlier SDRM proposal.

- Given the central role played by these actors, they (and their buy-in) are important for any successful DWM. In addition, their technical expertise and global standing are essential in particular debt restructurings. Continued engagement with these actors on the instrumental value of perceptions of legitimacy and impartiality for any DWM may be helpful.

Debtor Resistance

It is possible that some sovereign debtors will resist the establishment of a DWM as well, due to concerns that the existence of a DWM will raise capital costs. Indeed, comments by the IIF and other international finance groups tend to exacerbate these fears, regardless of the degree to which they are well-founded.

- As much as possible, it is important to minimize the stigma associated with debt restructuring. In part, this may depend on attentiveness to the legitimating features discussed above, and on the use of objective indicators/triggers for restructuring.

F. CONCLUSION

This discussion paper has asserted that attentiveness to the principles of legitimacy and impartiality will be important for the *ex ante* establishment and *ex post* success of any Debt Workout Mechanism. It has highlighted the existence of a broad audience for the determination of legitimacy, and noted its source, process, and outcome components. It has also identified institutional, actor, and informational understandings of impartiality, which connect to and support legitimacy. In light of this analysis, it has reviewed the key institutional and recent historical features of sovereign debt restructuring, which shape the current political and economic context for DWM discussions. It has considered the degree to which these principles can be translated from relevant domestic and international issue areas, and suggests that legitimacy and impartiality can be understood as guiding principles of international law. Finally, the paper has presented preliminary recommendations for instantiating these principles in a DWM and also briefly raised questions about existing DWM proposals and obstacles to maximizing the legitimacy and impartiality of a DWM.

The establishment of a sovereign debt restructuring mechanism can be understood as a global public good, and attentiveness to legitimacy and impartiality can maximize the benefits of any DWM. In considering how to apply these principles, however, it is important to keep in mind that neither are likely to be achieved perfectly in any institutional setting. Furthermore, neither principle works on a binary basis—few institutions or practices are likely to be perfectly legitimate/impartial or illegitimate/partial. Given that compliance with either is a matter of degree, the goal in thinking through a DWM (or several possible DWMs) should be to include as many features as possible that promote legitimacy and impartiality, as understood by a relatively broad audience, while paying due regard to the balancing goals of political feasibility, timeliness, and cost effectiveness. This admittedly high standard can serve as a guide or ideal in negotiations to establish a more rational and coherent global debt workout mechanism for the future.