International Law and the Rule of Law under Extreme Conditions

Rules for an Orderly Insolvency of States?

August Reinisch*

I. Introduction

The financial crises of the beginning of this century have reminded lawyers and policy-makers of the lack of suitable rules addressing insolvencies of sovereign states on the international level. While most domestic legal systems have developed relatively mature rules on tackling the insolvency of private actors, comparable rules do not exist on the level of international law. This may be the result of a widely held, but factually incorrect assumption that states cannot become bankrupt.

When states do indeed become unable to meet their debt obligations, various reaction patterns have emerged:

a) Private and sovereign creditors have extended further credit to the insolvent debtor to overcome.
b) Where the level of indebtedness of sovereign debtors becomes unsustainable, mostly private creditors have engaged in a race to the courthouse' in order to recover as much as possible; sometimes they were successful; sometimes inroads of public international law have served as impediments, e.g. state immunity or preclusion of wrongfulness concepts like state of necessity have led to a delay of their enforcement attempts.
c) Private and sovereign creditors have tried to seek a dialogical negotiation solution with the debtor state in an environment, largely free of law, guided by economic, political and other considerations.
d) Most recently, proper mechanisms for an orderly insolvency of states have been deliberated.

* August Reinisch is Professor of International and European Law at the University of Vienna. He may be contacted at august.reinisch@univie.ac.at.

Whether and to what extent these reactions may have led to the development of rules for an orderly insolvency for states is questionable. Nevertheless, there is an increasing debate that attempts to distil some elements for this end. *De lege lata* rules on the impact of emergency situations (extreme conditions) on existing contractual debt obligation are equally important as certainly coherent behavioural patterns of state practice (that may arguably have risen even to the level of soft law) and could form *de lege ferenda* inspiration.

II. Ignoring the Problem

Often state insolvencies are not addressed at all. Instead, creditors, openly supported by debtor states, keep up the belief that a state cannot become bankrupt.[1]

In fact, this approach is a kind of voodoo politics, with the consequence that the implicit delay in actually dealing with insolvency situations often exacerbates the problem. It has also been described as 'muddling through' politics,[2] with creditor banks and often creditor nations as well, doing business as usual, merely rescheduling sovereign debt, i.e. agreeing an delayed repayment terms. As long as the theoretical option of repayment was alive this actually meant good business for the banking industry that largely led the sovereign lending market in the 1970s and 1980s.

III. Triggering Enforcement Action

When the debt level becomes unsustainable, a collective action problem arises: the entire outstanding debt will have become unrepayable. However, individual creditors may see a chance to call the debt outstanding to them and to seek effective enforcement against assets of the debtor state in a particular situation.

These enforcement steps are usually taken by private creditors only and in domestic courts. In an *ex ante* assessment they will be conscious of the procedural risk of immunity from suit and enforcement action that may be raised by sovereign defendants. Since loan agreements between private banks and sovereign states or bonds issued by the latter usually provide for a

[1] C. O. Roche, 'Understanding the Modern Monetary System' (2011) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1905625, 18. See also Paul Krugman, 'MMT, Again', 15 August 2011, available at http://krugman.blogs.nytimes.com/2011/08/15/mmt-again/?_php=true&_type=blogs&_r=0.

[2] See Dornbusch, 'On the Consequences of Muddling Through the Debt Crisis', 7 *The World Economy* 145 (1984); Belaunde-Moreyra, 'Dramatic Action or Muddling Through Strategy in the Debt Problem', in Dicke (ed.), *Foreign Debts in the Present and in a New International Economic Order* (1986) 10-25.

waiver of immunity from jurisdiction and sometimes even from enforcement measures, individual creditors may be willing to take the legal risk to seek judicial assistance to enforce their outstanding debts.

These actions have proven risky indeed. Some courts have upheld the immunity defense even though underlying debt contracts may have contained a waiver of immunity or may be normally regarded as *iure gestionis*/commercial activity in the forum state.[3] Exemplary is the Italian Supreme Court judgment of 2005 in which the Corte di Cassazione qualified the Argentine emergency legislation, calling for a repayment moratorium, as a sovereign act.[4]

Other courts may have considered that a general waiver of enforcement immunity was not broad enough to cover the specific provisions under diplomatic law concerning the inviolability of embassy accounts[5] or other state owned property like ships as evident in the *ARA Libertad* case.[6] Also attempts to seize Argentine deposits with the Bank for International Settlements in Switzerland ultimately failed because they were protected by the Bank's privileges and immunities, more specifically the inviolability of its assets which also covered member state deposits.[7]

Even where immunity obstacles may have been successfully overcome, debtor states have raised state of necessity or similar excuses in order to defy a court order to make payment.

In particular, there is legal uncertainty, (as to) whether this defense contained in the ILC Articles on State Responsibility[8], is available also in the relation between states and private parties.

---

[3] Loan agreements of States are usually considered to be commercial, *iure gestionis* activities which do not entitle a state to claim sovereign immunity. See *Sociéte Bauer-Marchal et Cie* v. *Gouvernement Turc*, France, Court of Appeal of Rouen, 1965, 47 *ILR* 155 (1974); *Consorzio Agrario della Tripolitania* v. *Federazione Italiana Consorzi Agari and Cassa di Risparmio della Libia*, Italy, Court of Cassation, 1966, 65 *ILR* 265 (1984); *Republic of Argentina et al.* v. *Weltover, Inc. et al.*, 504 U.S. 607 (1992); see also H. Fox, *The Law of State Immunity*, 529-530 (2nd ed., 2008); C. Schreuer, *State Immunity: Some Recent Developments*, 25 (1988).

[4] *Borri v Republic of Argentina*, Corte di Cassazione, order of 27 May 2005, n 11225, 88 *Rivista di Diritto Internazionale* 856 (2005); see also B. Bonafè, 'State Immunity and the Protection of Private Investors: The *Argentine Bonds* Case Before Italian Courts', 16 *Italian Ybk. Int'l. L.* 165 (2006); G. Cataldi/M. Iovane, 'Corte di Cassazione (Sezioni Unite civili)', 15 *Italian Ybk. Int'l. L.* 315f. (2005).

[5] See BVerfG, 2 BvM 9/03, 6 December 2006, available at http://www.bverfg.de/entscheidungen/ms20061206_2bvm000903.html, holding that a general waiver of enforcement immunity did not cover assets necessary for the functioning of a diplomatic mission.

[6] See the *ARA Libertad Case*, Supreme Court of Ghana, Accra, 20 June 2013, available at http://www.pca-cpa.org/showfile.asp?fil_id=2336.

[7] See *NML Capital Ltd. And EM Ltd. c. Banque des règlements internationaux*, Tribunal Fédéral (IIème Chambre civile), 5A_360/2010, Arrêt du 12 juillet 2010. See also T Neumann/A Peters, 'Switzerland', in A Reinisch (ed.), *The Privileges and Immunities of International Organizations in Domestic Courts* (2013) 241-274.

[8] Article 25 ILC Articles ('1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for

This was a major issue in German court proceedings and led to a decision of the Federal Constitutional Court in which a majority rejected that possibility.[9] The ruling was widely criticized, not only by a robust dissent on the Court itself,[10] but also by many commentators.[11] However, it should not be overlooked that the availability of the necessity defense also in proceedings brought by private parties was generally affirmed by investment tribunals.[12] Though individual arbitral panels disagreed on whether the situation prevailing on Argentina during the financial crisis was severe enough to amount to such a state of necessity, they were unanimous in holding that, as a matter of principle, economic emergencies may amount to a state of necessity.[13]

---

precluding wrongfulness if: (a) The international obligation in question excludes the possibility of invoking necessity; or (b) The State has contributed to the situation of necessity.').

[9] BVerfG, 2 BvM 1/03, 8 May 2007, para. 64, available at http://www.bverfg.de/entscheidungen/ms20070508_2bvm000103.html („Die Frage nach der gewohnheitsrechtlichen Anerkennung gerade eines wirtschaftlichen oder finanziellen Staatsnotstands wie auch nach dessen Voraussetzungen im Hinblick auf den Gefährdungsgrad wesentlicher Staatsinteressen kann hier offen bleiben. Denn jedenfalls kann auch ein wirtschaftlich oder finanziell definierter Notstand seitens eines Staates nicht gegenüber Privaten eingewendet werden, solange es an einer gewohnheitsrechtlichen Regel des Völkerrechts fehlt, die die Übertragbarkeit der Einrede des Notstands von Völkerrechtsverhältnissen auf Privatrechtsverhältnisse anerkennt.") While the Court accepted that necessity was recognized as circumstance precluding the wrongfulness of a breach of international law, it held that 'currently no rule of general international law can be ascertained entitling a State, vis-à-vis private individuals, to suspend the performance of due obligations for payment arising under private law by invoking necessity based on an inability to pay.' (*Ibid*, the author's translation).

[10] Judge Lübbe-Wolff, *ibid*, paras 75-95.

[11] See *eg* SW Schill, 'Der völkerrechtliche Staatsnotstand in der Entscheidung des BVerfG zu Argentinischen Staatsanleihen – Anachronismus oder Avantgarde?', (2008) 68 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 45, 45; M Paparinskis, 'Investment Arbitration and the Law of Countermeasures', (2009) 79 *British Yearbook of International Law*, 264, 342. See already ILA Committee on International Monetary Law, 'The International Law of External Debt Management. Some Current Aspects', *ILA-Report*, 1988, 418, at 432 ('[…] it would be surprising if an individual or institution were to receive a higher degree of protection than a state. In general, aliens will enjoy only a minim standard of protection, whereas the rules on the relationship between States reflect the principle of sovereign equality.').

[12] See *eg CMS v Argentine Republic*, ICSID Case No ARB/01/8, Award, 12 May 2005, para 214; *LG&E v Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability, 2 October 2006, paras 226 *et seq*; *Sempra v Argentine Republic*, ICSID Case No ARB/02/16, Award, 28 September 2007, para 374; *Enron v Argentine Republic* ICSID Case No ARB/01/3, Award, 22 May 2007, para. 339; *Suez v Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, paras 236 *et seq*; *Continental Casualty Company v Argentine Republic*, ICSID Case No ARB/03/9, Award, 5 September 2008, para 173; *Impregilo S.p.A. v Argentine Republic*, ICSID Case No ARB/07/17, Award, 21 June 2011, 75 *et seq*; *El Paso Energy International Company v Argentina*, ICSID Case No ARB/03/15, Award, 31 October 2011, 203 *et seq*. The *Enron* and *Sempra* were subsequently annulled. *Enron Creditors Recovery Corp. v Argentina*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010; *Sempra Energy International v Argentina*, ICSID Case No ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010. Only the *BG* tribunal avoided to take a clear position on the availability of the defence. See *BG Group Plc v Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, paras 408 *et seq*.

[13] For further literature on the initial ICSID 'necessity' cases also see *inter alia* A Reinisch, 'Necessity in International Investment Arbitration – An Unnecessary Split of Opinion in Recent ICSID Cases? Comments on CMS and LG&E', (2007) 8 *Journal of World Investment and Trade* 191; M Waibel, 'Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E', (2007) 20 *Leiden Journal of International Law* 637; C Binder, 'Changed Circumstances in Investment Law: Interfaces between the Law of Treaties and the Law of State Responsibility with a Special Focus on the Argentine Crisis', in C Binder, U Kriebaum, A Reinisch and St Wittich (eds.), *International Investment Law for the 21st Century. Essays in Honour of Christoph Schreuer* (2009), 608.

There is a growing consensus that a state of necessity is not limited to natural disasters, but may also include extreme financial crises.[14] The preparatory work of the ILC demonstrates that a state of necessity may be invoked to justify the non-performance of financial obligations when the execution of core governmental functions is at risk[15] – a consideration that will be relevant when considering the design of an appropriate sovereign insolvency procedure.[16] The major difficulty lies in determining the level of intensity of the crisis situation that amounts to a state of necessity.[17] Further problematic elements are the question whether the invocation of a state of necessity is precluded in case of a contribution of the indebted state to its own insolvency. Since this will almost always be the case, the question arises to what degree this contribution should be relevant for purposes of excluding the defense. Investment tribunals have given different answers and a number of them demonstrated a certain sensitivity by demanding a 'significant contribution'.[18]

The existence of economic necessity and its potential implications for a sovereign's repayment obligations was also affirmed by the *UNCTAD Principles on Promoting Sovereign Lending and Borrowing.*[19] However, they remain rather non-committal as to the issue and effect of contribution.[20]

Because of the many uncertainties surrounding litigating sovereign debt cases in domestic courts, some private creditors, in particular Argentinian bondholders, have turned to

[14] See already *Affaire de l'Indemnité Russe* (*Russian Indemnity Case*), (1912) XI *UNRIAA* 431, at 443 ('[...] l'obligation pour un Etat d'exécuter les traités peut fléchir « si l'existence même de l'Etat vient à être en danger, si l'observation du devoir international est [...] *self destructive*. »'); but see *Serbian Loans,* 1929, PCIJ, Series A, No 20, 39/40 ('*Force majeure*. – It cannot be maintained that the war itself, despite its grave economic consequences, affected the legal obligations of the contracts between the Serbian Government and the French bondholders. The economic dislocations caused by the war did not release the debtor State, […].');

[15] Addendum to Eighth Report on State Responsibility by Mr. Roberto Ago, UN Doc A/CN.4/318/ADD.5-7, in [1980] YBILC Vol. II, Part One, 25, para 28 ('No state is required to execute, or to execute in full, its pecuniary obligation if this jeopardizes the functioning of its public services and has the effect of disorganizing the administration of the country.').

[16] See *infra* text at note 43.

[17] See Ago, *supra* note 15, paras 74 and 76.

[18] See *CMS v Argentine Republic*, ICSID Case No ARB/01/8, Award, 12 May 2005, para 329 ('government policies and their shortcomings significantly contributed to the crisis and the emergency and while exogenous factors did fuel additional difficulties they do not exempt the Respondent from its responsibility in the matter.'). Similarly, *Enron v Argentine Republic* ICSID Case No ARB/01/3, Award, 22 May 2007, paras 311-312; *Sempra v Argentine Republic*, ICSID Case No ARB/02/16, Award, 28 September 2007, paras 353-354.

[19] *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. Principle 9 ('A sovereign debt contract is a binding obligation and should be honored. Exceptional cases nonetheless can arise. A state of economic necessity can prevent the borrower's full and/or timely repayment. Also, a competent judicial authority may rule that circumstances giving rise to legal defense have occurred. […].').

[20] Ibid., Implications ('A sovereign's inability to continue normal debt servicing is typically caused by acute financial distress. Sometimes the sovereign will have been the author of its own difficulties (for example, by pursuing imprudent macroeconomic policies); occasionally a sovereign predicament will have been abetted by reckless creditor behavior. In other cases the crisis may have been precipitated by events beyond the sovereign's control (natural disasters or a general deterioration in international markets).').

investment arbitration as an alternative forum to enforce their debt claims. While it is obvious that before such international tribunals no immunity defence is available, it was more questionable whether bonds or other debt instruments could be classified as ‘investments’. At least where modern investment treaties, covering both ‘portfolio’ and direct investment, are applicable, bonds and other loans are often expressly included in the definition of ‘investment’. In two bondholder cases, in *Abaclat*[21] and in *Ambiente Ufficio*,[22] ICSID tribunals have also held that bonds are not excluded from the investment definition under Article 25 ICSID Convention[23] and dismissed arguments that the investors state dispute settlement mechanism would be inherently inapt to address sovereign insolvency issues.[24] Nevertheless, it is clear that such proceedings can merely seek to force payment of outstanding debt and are not able to fulfil the functions of a debt restructuring mechanism.

IV. Seeking Negotiated Solutions

For decades, states and private creditors have attempted to find practical negotiated solutions for state insolvencies in informal fora such as the so-called Paris and London Clubs.[25]

In these informal and often confidential negotiations, creditor states have developed a certain routine in dealing with insolvent states since the first multilateral debt rescheduling in 1956 when the external debts of Argentina were renegotiated. These meetings are regularly hosted by the French treasury in Paris (hence ‘Paris Club’) and allow the debtor state to negotiate new terms with creditor states often with the participation of international organizations, such as the IMF, the EU, UNCTAD, or OECD, as observers.

The Paris Club is not an international organization, but a mere negotiating forum convened on an *ad hoc* basis. That has not prevented the evolution of a number of recurrent features:

---

[21] *Abaclat and ors v. Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011.

[22] *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9 (formerly *Giordano Alpi and others v. Argentina*), Decision on Jurisdiction and Admissibility, 4 August 2011.

[23] Article 25(1) ICSID Convention, Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159 (‘The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.’).

[24] See M Waibel, ‘Opening Pandora’s Box: Sovereign Bonds in International Arbitration’, (2007) 101 *American Journal of International Law* 711. See also UNCTAD, SOVEREIGN DEBT RESTRUCTURING AND INTERNATIONAL INVESTMENT AGREEMENTS, *IIA Issue Note*, No. 2 July 2011.

[25] See Rieffel, Restructuring sovereign debt – The case for ad hoc machinery (2003) 56 et seq.; Reinisch, ‘Debt Restructuring and State Responsibility Issues’, in Carreau/Shaw (eds.), *La dette extérieure/The External Debt* (1995) 537.

The process is triggered by a request of the debtor state; the talks aim at rescheduling or partly restructuring debt, usually not at reducing the overall debt level; the Paris Club does not have any obligatory powers, the exercise is fully voluntary which means that, at the end, all parties have to agree to the negotiated solution.[26] This outcome is laid down in so-called agreed minutes which are non-binding recommendations. However, the individual creditor states implement them through bilateral restructuring agreements with the debtor nation which are binding treaties.

A precondition for debt restructuring is that the debtor state is ready to agree with the IMF on structural adjustment loans and thus to accept the latter's conditions (so-called 'IMF Conditionality').[27] These often controversial recipes for economic recovery are regarded as a crucial expression of the debtor state's willingness to adopt reform measures and to enable thus its long-term repayment capability.[28]

A major substantive principle followed in Paris Club restructurings is that of 'equal treatment' for all creditors which is often stressed by the inclusion of 'comparable treatment clauses' obliging the debtor country to seek comparable restructuring terms from its commercial creditors. The only exception is that the IMF and other IFIs are preferred creditors whose claims are not subject to restructuring but have to be satisfied according to their original terms.

The non-state creditors are meeting with the sovereign debtor in a parallel forum which has become known as London Club. In an *ad hoc* fashion largely resembling that of the Paris Club, the London Club enables private creditor banks often represented by a 'steering committee' to re-negotiate the outstanding debt with the debtor state.

The lessons learned from the Paris and London Clubs may be considerable. In substance, much of the present procedure resembles what happens in insolvency procedures on a domestic law level. This has been recently affirmed by the *UNCTAD Principles on Promoting*

---

[26] See also *Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System*, September 21, 2009, p. 122, para. 64 ('The system for sovereign debtors has operated under the informal and imperfect coordination of the debtor and its creditors by the IMF, under the guidance of the G-7 major industrialized countries, which set the overall policy directions for the IMF and the other involved institutions, such as the Paris Club, where debts owed to governments are restructured. […] Often there is very little real debt relief, only a rescheduling of obligations, […].').

[27] IMF Factsheet, IMF Conditionality, available at http://www.imf.org/external/np/exr/facts/conditio.htm; Buira, 'An Analysis of IMF Conditionality', in Buira (ed.), Challenges to the World Bank and IMF – Developing Countries Perspectives (2003) 55 et seq.

[28] *Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System*, September 21, 2009, p. 122, para. 64 ('[…]. The system assumes a developing country government in debt distress will adopt an IMF-approved macroeconomic adjustment program, that the program will be effective, and that all the relevant classes of creditors (banks, bondholders and suppliers, government creditors, and multilateral institutions) will cooperate in providing the overall amount of relief and financial support deemed necessary on the basis of IMF documents. […]').

Sovereign Lending and Borrowing[29] (UNCTAD Principles) which have captured the lessons of restructuring exercises and demanded a prompt, efficient and fair debt restructuring[30] procedure where necessary with the following implications:

> 'Although debt servicing should be a high priority for governments, there may be occasions in which, by state of economic necessity, the sovereign borrower will be left with insufficient funds to normally service its debt.
>
> The sovereign borrower's first responsibility in this situation of substantive financial troubles is to move in a timely fashion to communicate with its creditors and commence the process of finding and implementing a transparent and consensual debt rearrangement. Protracted debt restructurings are generally injurious to all concerned parties, both the debtor and its creditors. The sovereign debtor should therefore seek to conclude the operation as efficiently as possible.
>
> The sovereign borrower should provide the necessary information which would demonstrate that the sovereign is unable to normally service its debt.
>
> If the sovereign has proved that a debt restructuring is in fact necessary, the debtor should seek and propose an agreement with the supermajority of creditors to modify the original contractual terms. Collective action clauses can facilitate sovereign debt restructuring; therefore it is recommended that debtors and creditors should include them in multi-party debt instruments.
>
> The borrower should avoid opportunistic behaviour and arbitrary discrimination among creditors; and it should respect the voluntary basis of the process and the seniority of debts. The restructuring should be proportional to the sovereign's need and all stakeholders (including citizens) should share an equitable burden of adjustment and/or losses.'[31]

V. New Rules for an Orderly Insolvency of Sovereign States

[29] *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. The Principles are the outcome of a joint initiative including experts from academia, civil society and international financial institutions, also received input form governments and other stakeholders. They aim at building consensus on the rules to be applied to debt crises. See also M Goldmann, 'Responsible Sovereign Lending and Borrowing: The View from Domestic Jurisdictions' (UNCTAD, MPI for Comparative Public Law and International Law, February 2012) 7.

[30] Ibid., Principle 15 ('If a restructuring of sovereign debt obligations becomes unavoidable, it should be under-taken promptly, efficiently and fairly.').

[31] Ibid., p. 13.

The financial crisis of the first decade of the 21st century has renewed calls for an orderly insolvency mechanism for states. No one believes any more that states cannot go bankrupt. States and private creditors are increasingly becoming aware that unilateral enforcement of sovereign debt obligations will not be in their common interest but merely in the interest of individual creditors.

In a wave of new pragmatism, private and state creditors accept even ‘haircuts’ in genuine debt restructurings, including partial debt forgiveness.[32] However, this new willingness to accept some of the burden of debt restructuring also implies concern that the burden should be equitably distributed. Holdout creditors trying to enforce loan or bond agreements according to their original terms are the bad guys spoiling the party of a voluntary debt restructuring. Often they are commercialising the risks of debt rescheduling by acquiring outstanding claims against sovereign debtors from holdout creditors at a discount but still at higher prices than the envisaged haircut would leave them in the form of ‘vulture funds’. Taking the risk, they then seek to enforce the total nominal outstanding.

In the absence of successful defences as outlined above they may be able to operate quite profitably and in spite of the moral opprobrium they often encounter, from a purely legal perspective, they merely enforce what they are entitled to as assignees of the original creditors’ claims.

The problem of holdout creditors and vulture funds is also one of the main challenges that have to be addressed in an orderly insolvency mechanism because otherwise the incentive to ‘voluntarily’ comply with debt restructurings would be low.

Since the 1990s, proposals have been made to devise a sovereign insolvency procedure.[33] Often domestic insolvency laws, already invoked by Adam Smith,[34] have served as templates to be transferred to the international level.[35] The financial crisis has reinforced this debate.[36]

---

[32] M. Bickel, *Default and Debt Swap in Argentina: Kirchner’s fair Haircut*, Policy Paper 12 (03-2005).

[33] See already A Reinisch, ‘The Need for an International Insolvency Tribunal’, (1994)42 *Österreichisches Bank Archiv* 115. See also the overview in K Rogoff/J Zettelmeyer, ‘Bankruptcy Procedures for Sovereigns: A History of Ideas, 1976–2001’, *IMF Staff Papers No. 3* (2002).

[34] A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), vol. II (1979) 930 (‘When it becomes necessary for a state to declare itself bankrupt, in the same manner as when it becomes necessary for an individual to do so, a fair, open and avowed bankruptcy is always the measure which is both least dishonorable to the debtor, and least hurtful to the creditor.’).

[35] See e.g. Miller, ‘Sovereign Bankruptcy: Examining the United States Bankruptcy System as a Forum for Sovereign Debtors’, 22 Law and Policy in International Business 107 (1991); Oechsli, ‘Procedural Guidelines for Renegotiating LDC Debt: An Analogy to Chapter 11 of the U.S. Bankruptcy Reform Act’, 21 Virginia Journal of International Law 305 (1981); Cohen, ‘A Global Chapter 11’, 75 Foreign Policy 109 (1989). Since Chapter 11 of the US Bankruptcy Law (U.S.C. §§ 1101 et seq.) deals with the reorganization of private parties, it has been rightly pointed out that the more appropriate analogy would be Chapter 9 which addresses insolvent municipalities; see already K Raffer, ‘Applying Chapter 9 Insolvency to International Debts: An Economically Efficient Solution with a Human Face’, 18 *World Development* 301 (1990); G Kodek, ‘Nationale Regelungen der Insolvenz von Gebietskörperschaften – ein Modell für die Regelung der Staateninsolvenz? ’, in G Kodek/A

The deputy director of the IMF launched a high-level proposal in the form of a 'Sovereign Debt Restructuring Mechanism' (SDRM)[37] in 2002 that would have been administered by the IMF. Its core element was the attempt to ensure that all creditors are bound by the outcome of a restructuring agreement struck between the debtors and a 'super-majority' of creditors. This was intended to be achieved either through the introduction of 'collective action clauses' (CACs)[38] or through an amendment of the IMF agreement.[39] In addition, an independent dispute settlement mechanism would assist in interpreting these principles by adjudicating disputes concerning the existence of claims or the voting procedure.

However, ultimately these suggestions received mixed political support and were not adopted. In practice, CACs have become more and more widespread in new lending agreements. In collective action clauses creditors accept that in future insolvency situations only a certain majority of creditors can decide on restructuring terms and they also accept to be bound in case they are outvoted.[40] But this increased use of CACs in new debt instruments does not

---

Reinisch (eds.), *Staateninsolvenz* (2011) 145-162; Pettifor, Chapter 9/11? Resolving International Debtcrises – the Jubilee Framework for International Insolvency (2002).

[36] See K Berensmann/A Herzberg, 'Sovereign Insolvency Procedures – A Comparative Look at Selected Proposals', (2009) 23 *Journal of Economic Surveys* 856; A von Bogdandy/M Goldmann, 'Sovereign Debt Restructurings as Exercise of International Public Authority: Towards a Decentralized Sovereign Insolvency Law', February 2013, available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2089480; FX Buckley, 'The Bankruptcy of Nations: An Idea Whose Time Has Come', (2009) 43 *International Lawyer* 1189; B Eichengreen, 'Restructuring Sovereign Debt', (2003) 17(4) *The Journal of Economic Perspectives* 75; S Hagan, 'Designing a Legal Framework to Rescue Sovereign Debt', (2005) 36 *Georgetown Journal of International Law* 299; A Krueger, 'Sovereign Debt Restructuring: Messy or Messier?', (2003) 93(2) *The American Economic Review* 70; Paulus, 'Ein rechtlich geordnetes Insolvenzverfahren für Staaten', Österreichische Juristen-Zeitung 701 (2002/5); RK Rasmussen, 'Sovereign Debt Restructuring, Odious Debt, and the Politics of Debt Relief', (2007) 70(4) *Law and Contemporary Problems* 249. See also Sovereign Insolvency Study Group, Interim Report The Hague 2010, available at http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1026.

[37] Anne Krueger, First Deputy Managing Director, International Monetary Fund, to the Bretton Woods Committee Annual Meeting, 6 June 2002, Washington, DC, available at http://www.imf.org/external/np/speeches/2002/060602.htm; see also IMF, *The Design of the Sovereign Debt Restructuring Mechanism – Further Considerations*, November 2002, paras. 183-208, available at http://www.imf.org/external/np/pdr/sdrm/2002/112702.pdf; see also A. Krueger, 'Sovereign Debt Restructuring: Messy or Messier?', 93 *American Economic Review* 70 (2003); S. Hagan, 'Designing a Legal Framework to Restructure Sovereign Debt', 36 *Georgetown Journal of International Law* 299 (2005); J. Sedlak, 'Sovereign Debt Restructuring: Statutory Reform or Contractual Solution?', 152 *University of Pennsylvania Law Review* 1483 (2004).

[38] See Gugiatti/Richards, 'The Use of Collective Action Clauses in New York Law Bonds of Sovereign Borrowers', (2004) 35 *Georgetown Journal of International Law* 815; E. Helleiner, 'The Long and Winding Road Towards a Sovereign Debt Restructuring Mechanism', 19 (2006), available at http://www.annualconference.garnet-eu.org/fileadmin/documents/workshop_reports/JERP%205.2.4%3A%20Global%20Economic%20Governance%20and%20Market%20Regulation/Helleiner_Garnet_2006.pdf; IMF, *Collective Action Clauses: Recent Developments and Issues* (2003), available at http://www.imf.org/external/np/psi/2003/032503.htm.

[39] Cf. Article XXVIII IMF Articles of Agreement on Amendments requiring 85 %. See B. Eichengreen, 'Restructuring Sovereign Debt', 17 *The Journal of Economic Perspectives* 75, 89 (2003).

[40] W Mark C Weidemaier and Mitu Gulati, 'A People's History of Collective Action Clauses' (2013) 54 *Virginia Journal of International Law* 51;Michael Bradley and Mitu Gulati, 'Collective Action Clauses for the Eurozone' (2013) *Review of Finance* 1; Sönke Häseler, 'Collective Action Clauses in International Sovereign Bond Contracts – Whence the Opposition?' (2009) 23 *Journal of Economic Surveys* 882.

solve the problem of older debt instruments and the question of how to deal with them in a restructuring scenario where different classes of creditors may meet. Thus, the problem-solving potential of CACs may be more limited than suggested by its supporters.[41]

1) The Preferred Treaty Solution

It appears that the preferred method to achieve an orderly sovereign insolvency mechanism would be the adoption of a treaty. In spite of the difficulty to convince states of the need for such an instrument and the expected length of time and negotiation skills necessary to arrive at an acceptable text as well as the uncertainty of future ratifications, it appears that only a treaty solution would guarantee one crucially important effect: an effective debt restructuring that is binding on all sovereign and non-sovereign creditors, even on those who have resisted the outcome.[42]

The interesting point of departure for a sovereign debt restructuring mechanism is that most elements for a procedure necessary to ensure a fair and feasible sovereign insolvency are rather clear.

A Protection of the fulfilment of core governmental tasks of the sovereign debtor

It is common ground that any potential sovereign insolvency mechanism would have to ensure, not only the continued existence of the debtor (ruling out any bankruptcy analogy that aims at distributing remaining debtor assets to creditors), but also the continued provision of core governmental services.[43] This notion may have inspired the term ‘sovereign debt restructuring mechanism’ as opposed to ‘sovereign insolvency proceedings’ or the like.

---

[41] See also *Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System*, September 21, 2009, p. 123, para. 70 (‘Some have argued that new debt restructuring procedures are not needed; all that is required are small reforms in debt contracts, such as collective action clauses. But no country relies solely on collective action clauses for debt resolution, and there is no reason to believe that doing so for international debt would be sufficient. For instance, collective action clauses do not provide effective means for resolving conflicts among different classes of claimants.’).

[42] *Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System*, September 21, 2009, p. 124, para. 73 (‘Achieving these objectives requires a more structured framework for international cooperation in this area. For the same reason that governments adopt bankruptcy legislation and do not rely solely on voluntary processes for resolving corporate bankruptcies, an efficient sovereign system requires something more than a moral appeal to cooperation. This means the creation of a sovereign debt workout mechanism.’).

[43] See the similar considerations with the regard to state of necessity *supra* text at note 16.

Ensuring basic services is certainly an aspect that can be integrated into insolvency proceedings. The analogy to insolvencies of natural persons or, even more pertinent, of municipalities under domestic bankruptcy laws shows that this is perfectly possible.[44]

The real difficulty will be striking the right balance between the necessary carve-out for the fulfilment of such governmental tasks and the use of debtor assets for the satisfaction of creditor claims.

B Reduction of the total outstanding debt burden

One of the main purposes of an orderly sovereign insolvency proceeding is to enable the debtor state to return to a viable debt servicing level. This means that contrary to the current Paris and London Club practices of merely rescheduling and rarely reducing sovereign debt,[45] a genuine restructuring including a reduction of the outstanding debt level should take place.

Also in this context, past practice in the context of municipal insolvencies are instructive. They have often led to considerable reductions of the outstanding debt (‘haircuts’).[46] Similarly, the recent sovereign debt restructurings of Argentina and other countries have led to substantial haircuts.[47]

Such reductions of an unsustainable total debt burden is one of the key elements to be achieved in a sovereign debt restructuring in order to permit debtor states to return to normalcy.

C Equal treatment of creditors

A core issue for any insolvency proceedings is the question how to ensure that individual creditors do not receive an unfair advantage by either winning the ‘race to the courthouse’ or receiving unilateral favourable treatment from the debtor, but are rather treated equally. A

---

[44] For instance, under Austrian law, which permits insolvency procedures for municipalities, Section 15 of the Law on Enforcement Measures (Exekutionsordnung) allows enforcement measures only to the extent that they do not affect the ability of a municipality to carry out their public interest tasks. See Kodek, *supra* note 35. Similarly, under Chapter 9 of the US Bankruptcy Act assets serving ‘public use’ are exempt from enforcement measures. See McConnell, ‘When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy’, (1993) 60 *University of Chicago Law Review* 425, at 430.

[45] See also *Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System,* September 21, 2009, p. 121, para. 60 (‘Not only are current “work-out” processes protracted and costly, but often, the debt write-downs have also been insufficient to ensure debt sustainability. […]’).

[46] See Raffer, ‘Applying Chapter 9 Insolvency to International Debts’, *supra* note 36.

[47] See F Sturzenegger/J Zettelmeyer, ‘Haircuts: Estimating Investor Losses in Sovereign Debts Restructurings’, 1998-2005, IMF Working Paper No. 05/137 (2005).

related question may be whether all creditors should indeed be treated equally or whether some classes of preferred creditors should be accepted.[48] Domestic insolvency laws often contain provisions according to which different classes of creditors exist, with the effect that their claims may be satisfied in different stages, often leaving the general creditors' claim to the true 'haircut', while classes of preferred creditors may be able to collect the entire outstanding debt. In a similar way, different classes of external debt have evolved in the practice of the Paris Club. Debts vis-à-vis international financial organizations like the IMF, the World Bank, or other development banks are not 'eligible' for restructuring which means that they will be satisfied according to their original terms. For practical reasons, also short-term export credits are usually not affected by London Club reschedulings in order to avoid trade disruptions.[49]

Of course, it is open debate whether a new sovereign insolvency procedure should adopt a system of different classes of creditors. What is crucial, however, is the implementation of the principle of equal treatment within one class of creditors that will ensure that the economic burden of debt reduction will be shared equally.

2) The Binding Effect of the Treaty Solution

As already mentioned, the central issue of a sovereign insolvency mechanism is to make sure that any agreement on new debt repayment terms becomes binding on all creditors. The pragmatic response of contractual solutions in the form of CACs and the like is limited. Also the need for a third-party dispute settlement institution may be achieved only with a treaty solution.

The most efficient way to achieve the major substantive goals outlined above is through the establishment of an independent insolvency court or tribunal with the power to collect and scrutinize debt claims, to decide on an overall best reduction and to ensure that creditors receive equal treatment.[50] Many proposals for an international institution managing such

[48] See ILA Sovereign Insolvency Study Group, 'State insolvency: options for the way forward', *ILA Conference 2010* (The Hague, 2010) 28 ff.

[49] See A Reinisch, 'The Need for an International Insolvency Tribunal', (1994) 42 *Österreichisches Bank Archiv* 115, at 124.

[50] See, for instance, the proposal by the *Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System*, September 21, 2009, p. 124, para. 74 ('This entails the creation of an "International Debt Restructuring Court," similar to national bankruptcy courts. This court would ensure that agreed international principles regarding the priority of claims, necessary overall write-downs, and sharing of "haircuts" are followed. It could differentiate between distinct debt categories, which might include government, government guaranteed, and government-acquired private debt, so as to make transparent the actual effective liabilities of the sovereign. It could also determine what debts could be considered "odious," and it would be able to grant potential private or public creditors authority to

issues have been made. They range from giving an enhanced role to the IMF, as suggested by the Krueger proposal concerning a SDRM,[51] to creating a debt arbitration mechanism[52] and to the establishment of a new international insolvency court.[53]

For sovereign creditors, a sovereign debt restructuring treaty may be conceived as a subsequent treaty modifying the original repayment terms. Under the law of treaties, contracting states are free to change their existing treaty obligations. According to the *lex posterior*-rule codified in Article 30(3) of the 1969 Vienna Convention on the Law of Treaties (VCLT),[54] states enjoy the contractual freedom to 'change their minds'.[55] Where a state-to-state loan is governed by a bilateral treaty, a subsequent multilateral treaty, in which the original two treaty parties also participate, can modify the original terms. The same applies if the subsequent sovereign debt restructuring treaty provides a framework within which a restructuring institution adopts binding decisions modifying the original repayment terms of a sovereign debtor.

For private creditors, a treaty giving an international institution the power to reduce the total outstanding debt means that international law intervenes and ultimately 'takes' some property rights of creditors. The original debt agreement is usually governed by a private law agreement rooted in a domestic legal system. While the sovereign debtor and the private creditor may come to an agreement to change the original debt instrument, such individualized re-negotiations are impractical and likely to be unattainable on a broad scale

---

extend "debtor in possession" financing, as in corporate restructurings. National courts would have to recognize the legitimacy of the international court, and both creditors and debtors will therefore follow its rulings.').

[51] See *supra* text at note 37.

[52] See already United Nations, *'We the Peoples': The Role of the United Nations in the 21st Century*, Report of the Secretary-General of the United Nations, Kofi Annan (2000) 38 ('I would go a step further and propose that, in the future, we consider an entirely new approach to handling the debt problem. The main components of such an approach could include immediate cancellation of the debts owed by countries that have suffered major conflicts or natural disasters; expanding the number of countries in the HIPC scheme by allowing them to qualify on grounds of poverty alone; pegging debt repayments at a maximum percentage of foreign exchange earnings; and establishing a *debt arbitration process* to balance the interests of creditors and sovereign debtors and introduce greater discipline into their relations.').
See also A Acosta/O Ugarteche, 'Global Economy Issues and the International Board of Arbitration for Sovereign Debt (IBASD)', (2007) *Finnish Journal of Latin American Studies*, available at http://www.elnorte.fi/archive/2007-1/2007_2_elnorte_ugarteche.pdf.; Ch Paulus/S Kargman, 'Reforming the Process of Sovereign Debt Restructuring: A proposal for a Sovereign Debt Tribunal', Workshop on Debt, Finance and Emerging Issues in Financial Integration. Financing for Development Office (FFD), DESA, 8-9th April 2008, available at http://www.un.org/esa/ffd/events/2008debtworkshop/papers/Kargman-Paulus-Paper.pdf; Ch Paulus, 'A Standing Arbitral Tribunal as a Procedural Solution for Sovereign Debt Restructurings', in C Primo Braga/G Vincelette (eds.), *Sovereign Debt and the Financial Crisis – Will This Time be Different?* (2010) 317-329.

[53] See *supra* text at note 50.

[54] Article 30(3) Vienna Convention on the Law of Treaties, 1155 UNTS 331 ('When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.').

[55] See also J Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?', (2001) 95 *AJIL* 535, at 545.

without a considerable number of ‘holdout’ creditors who do not wish to participate. This is the precise reason for creating a sovereign insolvency mechanism which is empowered to change the original debt terms with binding effect for all creditors. However, such a power to intervene in private rights raises fundamental rights and general international law issues regarding ‘expropriation’.[56] This does not necessarily mean that this approach could not be taken in conformity with international legal principles.

Past models where property rights of individuals have been affected by treaties concluded between their home states and third countries are lump sum agreements where claims by private parties against states were reduced by treaties between the formers’ home states and the debtor states.[57] In public international law it is an accepted notion that states may also modify the claims of their nations against foreign states. In addition to lump sum agreements, trying to solve large scale expropriations and nationalizations, also post-conflict agreements like peace treaties have partly contained similar provisions whereby states have dealt with reparation claims which included claims of their nationals by either reducing or even waving them.[58] Thus, it appears that public international law offers a viable template that could be used in the state insolvency debate.

States could devise a multilateral state insolvency treaty which sets up a minimum of institutions in charge of overseeing an orderly insolvency procedure and ultimately approving a quota of the total outstanding debt to be satisfied for the discharge of the remainder.

Institutional inspiration could be drawn from various mass claims procedures, such as the Iran-US Claims Tribunal,[59] the Bosnia Herzegovina Real Property Commission,[60] the Housing and Property Claims Commission in Kosovo,[61] the Swiss Banks Claims

[56] See Austrian OGH, 1Ob149/02x; S v Austria, Appeal judgment, 1Ob149/02x, ILDC 1618 (AT 2002), 30 September 2002; and already OGH 22 November 1961, 3 Ob 500/60, 40 ILR 184. See also German BVerfG, 2 BvR 955/00 26 October 2004, paras. 116-119, *East German Expropriation Case*, Joint constitutional complaint, BverfG, 2 BvR 955/00, 1038/01; ILDC 66 (DE 2004) 112 Entscheidungen des Bundesverfassungsgerichts 1-49; (2005) Neue Zeitschrift für Verwaltungsrecht (NVwZ) 560–567, 26 October 2004.

[57] Bank / Folz, ‘Lump Sum Agreements’, Max Planck Encyclopedia of Public International Law (OUP Online), Rz 27.

[58] See B Weston/R Lillich/D Bederman, *International Claims: Their Settlement by Lump Sum Agreements* (1999) 101 et seq.

[59] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration, 19 January 1981, 81 Dep't St. Bull. 3, 20 ILM 230.
230.

[60] Bosnia Herzegovina Commission on Real Property Claims Annex 7 of the General Framework Agreement for Peace in Bosnia Herzegovina (‘Dayton Accord’ of 14 December 1995, 75 ILM 138, welcomed by the UN Security Council (SC Res 1031 of 15 December 1995). See also van Houtte, Mass Property Claim Resolution in a Post-War Society: The Commission for Real Property Claims in Bosnia and Herzegovina, 48 *Int’l & Comparative Law Quarterly* 623-638 (1999).

[61] Housing and Property Directorate with a Claims Commission (HPD/CC) to adjudicate property claims UNMIK/REG/1999/23 and UNMIK/REG/1999/60. See also Dodson / Heiskanen, ‘Housing and Property Restitution in Kosovo’, in Leckie (ed.), *Returning Home: Housing and Property Rights of Refugees and*

procedures,[62] or the institutions set up by the Austrian General Settlement Fund Legislation in 2001.[63] The latter is based on a bilateral treaty between the US and Austria[64] providing for two separate adjudicatory bodies, an Arbitration Panel for *In Rem* Restitution[65] and, most interesting for present purposes, a Claims Committee[66] that adjudicated more than 20,000 claims for monetary compensation.[67] Where found valid, the applications were not settled in full; rather, since the so-called General Settlement Fund contains only a total lump sum, they were ultimately be satisfied *pro rata*.

This and other models could be multi-lateralized by a treaty in which all contracting state parties consent to subject all claims in case of a state insolvency to one central procedure. An international debt restructuring tribunal would then scrutinize and adjudicate the validity of individual claims both by sovereign and private creditors. The treaty would have to provide for the exclusive jurisdiction of this tribunal and that national courts, even if competent according to the loan agreements, would be barred from entertaining proceedings in this regard. The treaty would further have to provide that the outcome of such an international insolvency procedure is recognized in the domestic legal order of the contracting parties, thus pre-empting free-rider attempts by individual claimants.

VI. Conclusions

Displaced Persons (2003) 225-242; Hassine, *Housing and Property Directorate/ Claims Commission in Kosovo* (HPD/CC) (2009).

[62] See B Neuborne, 'Preliminary Reflections On Aspects Of Holocaust-Era Litigation In American Courts', 80 *Washington University Law Quarterly* 795 (2002); Less, 'International Administration of Holocaust Compensation: The International Commission on Holocaust Era Insurance Claims (ICHEIC)', 9 *German Law Journal* 1651 (November 2008); Gribeth / Reig, 'The Swiss Banks Holocaust Settlement', in Ferstman / Goetz / Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making* (2009) 115-144.

[63] Bundesgesetz über die Einrichtung eines Allgemeinen Entschädigungsfonds für Opfer des Nationalsozialismus und über Restitutionsmaßnahmen (Entschädigungsfondsgesetz), BGBl. I Nr. 12/2001. See also H Lessing/R Rebernik/N Spitzy, 'The Austrian General Settlement Fund: An Overview', in: The International Bureau of the Permanent Court of Arbitration (ed.), *Redressing Injustices Through Mass Claims Processes. Innovative Responses to Unique Challenges* 95 (2006).

[64] Agreement between the Austrian Federal Government and the Government of the United States Regulating Questions of Compensation and Restitution for Victims of National Socialism (=Washington Agreement), BGBl. III Nr. 121/2001.

[65] Washington Agreement, Annex A 3. b. Arbitration Panel for *In Rem* Restitution of Publicly-Owned Property. ('In connection with the establishment of the GSF, the Austrian Federal Government will propose the necessary legislation to the Austrian Parliament by April 30, 2001 to establish, fund, and authorize a three-member Arbitration Panel ('Panel') to address the *in rem* return of publicly-owned property, including property formerly owned by Jewish communal organizations.').

[66] Washington Agreement, Annex A 2. a. ('The GSF legislation will establish an independent three-member Claims Committee ("Committee") for all property/aryanization claims, [...].').

[67] Cf. Statistics on Application Processing of the Claims Committee of the General Settlement Fund as of 16 February 2009. Available at http://www.en.nationalfonds.org/cgi-bin/dynamic?id=20061215235128007&temp=.

It is evident that the adoption of a multilateral sovereign insolvency mechanism through a multilateral treaty still appears far from being a politically feasible option. Nevertheless, it seems necessary to devote sufficient attention to the required features of such a legally binding institution. To date, all *ad hoc* and voluntary sovereign debt restructuring exercises have suffered from a crucial deficiency inherent in their voluntary nature; they were unable to bind non-consenting sovereign as well a private creditors. The suggested treaty solution is intended to remedy this weakness and would guarantee a binding outcome for all classes of creditors. Its practical impact will, of course, depends upon the adherence of a large number of states, in particular those which may request a debt restructuring and those which are either creditors themselves or whose nationals hold a large portion of the outstanding debt.