Fall 2015

A Framework for a Formal Sovereign Debt Restructuring Mechanism: The KISS Principle (Keep It Simple, Stupid) and Other Guiding Principles

Charles W. Mooney Jr.
University of Pennsylvania Carey Law School

A FRAMEWORK FOR A FORMAL SOVEREIGN DEBT RESTRUCTURING MECHANISM: THE KISS PRINCIPLE (KEEP IT SIMPLE, STUPID) AND OTHER GUIDING PRINCIPLES

*Charles W. Mooney, Jr.**

TABLE OF CONTENTS

* Charles A. Heimbold, Jr. Professor of Law, University of Pennsylvania Law School. I wish to thank Steven Burbank and the participants at the conference on Sovereign Debt Restructuring sponsored by Centre for International Governance Innovation and Columbia University's Initiative for Policy Dialogue at Columbia University, September 22, 2015, for helpful comments on an earlier draft.

Introduction

This paper explores the feasibility of a formal legal regime for the restructuring of sovereign state debt and outlines a framework for such a mechanism.[1] More than a decade ago, senior officials at the International Monetary Fund (IMF) proposed the creation of a formal sovereign debt restructuring mechanism (SDRM).[2] The proposal received support, but was eventually abandoned.[3] One factor that contributed to its demise was the unwillingness of IMF members to submit to a tribunal that would encroach on a state's sovereignty.[4] Another determinative factor was the ultimate opposition of the United States.[5] Likely related to that opposition,

1. As used here, "restructuring" refers to the legally binding modification of the terms of a debtor state's sovereign debt, such as by a reduction of principal or by an extension of maturities (such an extension being a "reprofiling" in the vernacular of the International Monetary Fund (IMF). *See generally* IMF, The Fund's Lending Framework and Sovereign Debt—Preliminary Considerations PG (2014), http://www.imf.org/external/np/pp/eng/2014/052214.pdf [hereinafter IMF, Lending Framework].

2. *See* Anne O. Krueger, A New Approach to Sovereign Debt Restructuring (2002), http://www.imf.org/external/pubs/ft/exrp/sdrm/eng/sdrm.pdf (following up on recent speeches and articles and explaining current thinking within the IMF); Francois Gianviti, et al., A European Mechanism for Sovereign Debt Crises Resolution: A Proposal, 15-20, (Bruegel Blueprint Series, 2010) [hereinafter Gianviti, European Mechanism] (discussing the IMF's SDRM proposal, various objections, and its eventual demise). The proposal may have been inspired, at least in part, by Steven Schwarcz's article calling for such a framework based on corporate reorganization law. *See* Steven L. Schwarcz, *Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach*, 85 Cornell L. Rev. 956 (2000) [hereinafter Schwarcz, *Reorganization*].

3. *See* Gianviti, *European Mechanism*, *supra* note 2, at 19.

4. *See* IMF, Sovereign Debt Restructuring—Recent Developments and Implications for the Fund's Legal and Policy Framework 13 (2013), https://www.imf.org/external/np/pp/eng/2013/042613.pdf [hereinafter IMF, *Recent Developments*] (stating that the SDRM proposal "received considerable support within the Board, but failed to command the majority needed to amend the Fund's Articles of Agreement due to the members' reluctance to surrender the degree of sovereignty required to establish such a framework.").

5. Gianviti, European Mechanism, *supra* note 2, at 19 ("[T]he fact that the US effectively held veto power doomed the SDRM proposal once the US administration formally opposed it.") (footnote omitted).

and perhaps its primary source, was the strong opposition of the private sector to the IMF's SDRM proposal.[6]

In the wake of the SDRM proposal's rejection, the IMF, International Capital Market Association (ICMA), United States, European Union (EU) and EU member states, and other organizations and states have advocated and supported a contractual, market-based approach to sovereign debt restructuring. Such an approach would involve the incorporation of collective action clauses (CACs) into documentation for sovereign debt securities.[7] Under a CAC, a supermajority (typically 75%) of debt security holders could amend the payment terms (and other designated significant terms) of the issue and impose these amendments on a dissenting minority. While for many years CACs had been common features of debt securities governed by English law, securities governed by New York law generally required unanimity in order to modify terms of payment and other important provisions, making consensual restructuring difficult.[8]

---

6. For a thoughtful analysis, by the General Counsel of the IMF, of the SDRM proposal's demise, including the strong opposition of the private sector, *see* Sean Hagan, *Designing a Legal Framework to Restructure Sovereign Debt*, 36 Geo. J. Int'l L. 299, 390-94 (2005) [hereinafter Hagan, *Designing*].

> [I]ndustry associations made up of investors that actually purchased and held sovereign debt (the "buy-side") were more willing to engage in discussions regarding the design of the SDRM proposal than those responsible for actually placing new bond issuances for emerging-market sovereigns (the "sell-side"). Nevertheless, all voiced concern with the fact that the SDRM proposal would limit the rights of individual investors, something which they found particularly disturbing given the general view that creditor rights against a sovereign were already very fragile. In their view, collective action problems in the sovereign context were not of a sufficient magnitude to merit the degree of official intervention that the SDRM entailed. More generally—and not surprisingly—they expressed a strong preference for resolving such problems through self-regulation rather than official intervention. Hence, their belated embrace of collective action clauses.

Id. at 392 (footnotes omitted).

7. *See, e.g.*, IMF, Recent Developments, *supra* note 4, at 2, 7, 27; Int'l Capital Market Ass'n [ICMA], ICMA Sovereign Bond Consultation Paper, 1-2 (2013), http://www.icmagroup.org/assets/documents/Maket-Practice/Regulatory-Policy/Sovereign-Debt-Information/ICMA-Sovereign-Bond-Consultation-Paper-79801-5-863-v1-8-161213.pdf; ICMA, ICMA Sovereign Bond Consultation Paper Supplement (2014), http://www.icmagroup.org/resources/Sovereign-Debt-Information/; Press Release, General Assembly, Resolution on Sovereign Debt Restructuring Adopted by General Assembly Establishes Multilateral Framework for Countries to Emerge from Financial Commitments (summary of statement of Terri Robi of United States), U.N. Press Release GA/11542 (Sept. 9, 2014); European Union @ United Nations, *EU Explanation of Vote—United Nations General Assembly: Draft Resolution: Sovereign Debt Restructuring* (Dec. 5, 2014), http://eu-un.europa.eu/articles/en/article_15833_en.htm [hereinafter EU@UN, *Explanation*].

8. *See, e.g.*, Patrick Bolton & David A. Skeel, Jr., *Inside The Black Box: How Should A Sovereign Bankruptcy Framework Be Structured?*, 53 Emory L.J. 763, 765 (2004) [hereinafter Bolton & Skeel, *Black Box*]. The limitations of CACs as a means of restructuring sovereign debt are discussed later. *See infra* Part II.A.

More recently, the ICMA has published forms of standard aggregated CACs for sovereign debt securities (Model CACs).[9] The Executive Board of the IMF has expressed support for the inclusion of the Model CACs in the issuance of sovereign debt.[10] One alternative provided in the Model CACs would create a "single limb" voting system under which all of a debtor state's bondholders would be permitted to vote in the aggregate on a proposed modification of all of the state's bonds, in lieu of issue-by-issue voting. Approval by a supermajority of bondholders, 75% of the outstanding principal of all of the state's bonds, would be required for an effective modification.[11] Of course, to be fully implemented with respect to all of a state's bonds, it would be necessary for Model CACs to be incorporated in all of those bonds, which would take years. Accordingly, the Model CACs by their terms apply as among the holders of bonds that contain essentially identical CACs.[12]

Notwithstanding the rejection of the IMF's SDRM proposal and the widespread use and acceptance of CACs,[13] calls for a formal restructuring mechanism have not ceased. Motivated in part by the recent financial crisis in the Eurozone, in recent years there has been a resurgence of such proposals.[14] In a recent development, the General Assembly of the United Nations (UN), passed a resolution (September 2014 UN Resolution) by an overwhelming majority, calling for the establishment of procedures for international negotiations on "a multilateral framework for sovereign debt restructuring processes."[15] The General Assembly then passed a follow-up resolution (December 2014 UN Resolution) establishing an ad hoc committee on sovereign debt restructuring processes (Ad Hoc Committee).[16] The Committee held its first meeting in February 2015 and its second

9. ICMA, Standard Aggregated Collective Action Clauses ("CACs") for the Terms and Conditions of Sovereign Notes, (2014), http://www.icmagroup.org/resources/icma-documentation/ [hereinafter Model CACs].

10. Press Release, IMF, IMF Exec. Bd. Discusses Strengthening the Contractual Framework in Sovereign Debt Restructuring, No. 14/459 (Oct. 6, 2014) (noting the practicability of CACs with "robust aggregation features" that are "consistent with Fund policy").

11. Model CACs, *supra* note 9, ¶ (c) at 4-5. Other, more flexible, alternatives that could be utilized for modification under the Model CACs are discussed in Part III.A.2.

12. *Id.* ¶ (a)(x) at 3 (defining "Debt Securities Capable of Aggregation").

13. IMF, Strengthening the Contractual Framework to Address Collective Action Problems in Sovereign Debit Restructuring, 16, ¶ 24 (2014) [hereinafter IMF, Strengthening] ("Inclusion of CACs in international sovereign bonds has become the standard market practice and CACs have played a useful role in achieving high creditor participation in a number of past sovereign debt restructurings . . .").

14. *See, e.g.*, C.H. Beck et al., A Debt Restructuring Mechanism for Sovereigns: Do we Need a Legal Procedure? (Christoph G. Paulus ed., 2014) [hereinafter Paulus, Mechanism]. For the case that a collective proceeding is *not* appropriate for restructuring sovereign debt, *see, e.g.,* Yanying Li, *Question the Unquestionable Beauty of a Collective Proceeding for All Sovereign Debt Claims,* 22 J. Bankr. L. & Prac. 5 (2013).

15. G.A. Res. 68/304, *Towards the Establishment of a Multilateral Legal Framework for Sovereign Debt Restructuring Processes,* at 4 (Sept. 9, 2014) [hereinafter G. A. Res. 304].

16. G.A. Res. 69/247, U.N. GAOR, at 2 (Nov. 28, 2014) [hereinafter December 2014 UN Resolution].

meeting in April 2015.[17] The Committee held a third meeting in July 2015.[18]

As a general matter during the past fifteen-plus years, informal, voluntarily negotiated restructurings have been quite successful.[19] That said, an SDRM could improve the framework for sovereign debt restructuring. Moreover, past successes in informal restructurings do not ensure future successes. The issue, then, is whether there exists a problem that is substantial enough to warrant the costs and effort to create and implement an SDRM and to warrant imposing the risk that the new regime might not get

17. *See* United Nations, *Ad Hoc Committee on Sovereign Debt Restructuring Processes - General Assembly, 1st meeting, 69th Session*, U.N. Web TV: The United Nations Live and On Demand (Feb. 3, 2015), http://webtv.un.org/watch/ad-hoc-committee-on-sovereign-debt-restructuring-processes-general-assembly-1st-meeting-69th-session/4030566416001; United Nations Conference on Trade and Development, *UNCTAD serves as Secretariat to the Ad Hoc Committee of the General Assembly on Sovereign Debt Restructuring Processes*, United Nations Conference on Trade and Development: UNCTAD (Apr. 28-30, 2015), http://unctad.org/en/Pages/MeetingDetails.aspx?meetingid=817; United Nations Conference on Trade and Development, *Third Ad Hoc Committee Session on Sovereign Debt Restructuring Processes 27-28.07.2015*, United Nations Conference on Trade and Development: UNCTAD (Aug. 3, 2015), http://www.unctad.info/en/Debt-Portal/News-Archive/Our-News/Second-ad-hoc-committee-session-on-Sovereign-Debt-Restructuring-Processes—28-30042015/. At the second meeting UNCTAD made available the work product of its Working Group on a Debt Workout Mechanism, which it established in 2013. *See* United Nations Conference on Trade and Development, *Sovereign Debt Workouts - Roadmap and Guide Published by UNCTAD*, United Nations Conference on Trade and Development: UNCTAD (Apr. 28, 2015), http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=987&Sitemap_x0020_Taxonomy=UNCTAD%20Home;#4;%23Globalization%20and%20Development;%231705;%23Debt%20and%20Development%20Finance.

18. *See* Committee Report, Second Part: Chairperson Summary, Ad hoc Committee on Sovereign Debt Restructuring Processes, Third Working Session, (July 24, 2015), http://www.unctad.info/upload/Gong/Final%20Chairs%20Summary%20July%2024,%205%2030pm.pdf [hereinafter Ad hoc Committee, Chairperson Summary].

19. *See* Elena Duggar, *Sovereign Defaults Series: The Role of Holdout Creditors and CACs in Sovereign Debt Restructurings*, Moody's Inv. Serv. (April 10, 2013) (on file with author). The Moody's report concluded:

> Our findings indicate that creditor coordination and holdouts have been less of a problem in sovereign bond restructurings than commonly believed. Sovereign bond restructurings have generally been resolved quickly, without severe creditor coordination problems and with little litigation, except for Argentina. Holdouts have not presented significant problems and very high levels of participation have been the norm outcome in sovereign bond restructuring offers.

Id. at 13. A later study, however, demonstrates that the volume and costs of litigation in connection with sovereign debt have been greater than what has generally been believed. *See* Julian Schumacher et al., Sovereign Defaults in Court (May 6, 2014), https://ae624e09-a-62cb3a1a-s-sites.googlegroups.com/site/christophtrebesch/research/SovereignDefaultsinCourt.pdf?attachauth=anoY7cqFDzpPbPHw9BxZ9iLzYwcSjsfMMvRFzTuiO9DJC-Ad0Cb2j-husYdy8ORtLQYAyEmym-shULXSR8KZpnPlDIN-C_AWJ5Lb3DmqTo3O6pa6UL5_uSXiHmc6t2DH4OFDrg7MnQ4dhRHgb8t9TKrE4F3d4LijEGgleRsSDWiw8nSG-qrM52ElstJBoSr30zXeIy7X01fMuBILtlCdJURCuVS-G6JLh_EpFiE7WhwQMG0zLsFMmoVDrDTLlt_STxCiU1IV1iqI&attredirects=0.

it right. I reserve judgment on this question. Ultimately, a successful SDRM regime will emerge only if market participants with skin in the game—debtor states and their investors and other creditors—become convinced of the need and wisdom of implementing an SDRM.

Having completed its work, the Ad Hoc Committee appears content that its efforts "will enable further discussions on debt issues."[20] Its principal contribution was its "Principles on Sovereign Debt Restructuring Processes."[21] Nonetheless, by announcing these principles and increasing the visibility of the expressed need for more formal processes, the work of the Ad Hoc Committee may make it more likely that an SDRM proposal once again will be on the table for consideration by governments. Given that, one hopes that constructive proposals concerning the content and approach of an SDRM would be welcomed in the process. Notwithstanding my agnosticism about the need for an SDRM, I offer the proposals outlined in this paper in order to move the process forward. While I generally refer to the framework outlined here as a proposal, it is perhaps better understood as a proposed agenda for negotiations over the need for an SDRM and the appropriate content of an SDRM. An SDRM (whether in principle or in the form of a concrete proposal) could gain widespread support only after serious and sustained intergovernmental negotiations. It is unlikely that any single individual or organization could devise and propose ex ante a regime whose specifics would receive broad and deep support. Consequently, the proposal presented here is based on some general principles that should move the proposal in the direction of broader agreement. It also includes some details for the purpose of illustrating and testing these principles.[22]

The formal mechanism proposed here is guided by four overarching principles. First, it embraces the KISS principle—keep it simple, stupid. The KISS principle "is a design rule that states that systems perform best when they have simple designs rather than complex ones."[23] Second, the proposed approach seeks, to the extent possible, to mimic the methods of the Model CACs for modifying the important terms of bonds.[24] Third, any

20. Ad hoc Committee, Chairperson Summary, *supra* note 18.

21. *See id.*

22. *See, e.g.*, *infra* Part II.A. 1. (discussing CAC-like creditor approval), Part II.A. 2. (discussing classification of creditor claims and voting by creditors).

23. Techopedia, Keep It Simple Stupid Principle (KISS Principle), http://www.techopedia.com/definition/20262/keep-it-simple-stupid-principle-kiss-principle. The Kiss Principle has been attributed to Kelly Johnson, who was an engineer with Lockheed Martin's advanced aircraft development program. *Id.* The KISS approach cannot ensure widespread acceptance, of course, as the IMF's unsuccessful SDRM proposal also adopted a minimalist approach. *See* Hagan, *Designing*, *supra* note 6, at 346-47 (explaining that the proposal adopted a "simple and streamlined framework . . . for early and expedited negotiations . . . not a fully elaborated blueprint for a restructuring.").

24. For this purpose, the model would be the version of the Model CACs that at the time an SDRM was established actually were being included in actual issues of sovereign bonds.

tribunal or administrator involved in an SDRM must be given minimal discretion.

The fourth principle emanates from the first three. The goal of the proposal is not to offer an optimal SDRM. Instead, the goal is to explore a system that could be a substantial improvement over the status quo and that could, over time, actually gain widespread acceptance in the international community. The system should address the major deficiencies that currently exist. To be successful, a system must meet and respond to the normative and practical objections of important stakeholders who currently oppose the development of a formal restructuring mechanism. A strategy of proposing a potentially optimal and comprehensive regime—while hoping against hope that important stakeholders that oppose the formal mechanism approach will conclude that they have been misguided and admit their errors—is unlikely to be successful. So far, the facts on the ground bear this out.

Experience with international, multilateral negotiations teaches the importance of adhering to the KISS principle as a key to successful results. Patterning a sovereign debt restructuring mechanism on analogous provisions of the (famously complex) United States Bankruptcy Code,[25] for example, would hardly be promising. By drawing from the Model CACs in its provisions for voting on and approving a restructuring plan, the proposed system would conform to demonstrably acceptable market norms and practices.[26] This approach could mitigate at least some of the criticisms of stakeholders like the United States, the European Union, and the IMF who have favored a contractual, market-based approach, and whose consent would be crucial to the success of an SDRM proposal. Moreover, both sovereign debtors and creditors could take some comfort from knowing that the system provides almost no discretion to tribunals. In sum, a sovereign debt restructuring mechanism that is simple, consistent with market norms and practices, and that is largely non-discretionary has the best prospect for widespread acceptance.

My proposal contemplates a multilateral, international convention or a model law with reciprocal obligations among adopting states. The principal obligation of an adopting state would be to recognize a sovereign debt restructuring proceeding and plan in another adopting state. The recognition obligation would apply only to proceedings and plans that comply with a debtor state's national sovereign debt restructuring law (SDRL),

25. 11 U.S.C. §§ 101-1532 (2012).

26. The statement in the text assumes that by the time a formal mechanism would be on the table once again the Model CACs would have become the norm. I acknowledge that the Model CACs when implemented would be grounded on a different basis for pre-SDRM creditors than an SDRM incorporating identical classification and voting structures. The Model CACs would apply only with respect to creditors that had embraced them as a part of a debt contract.

but only if that SDRL meets the standards and incorporates the rules specified in the convention or model law—a qualifying SDRL or QSDRL.[27]

The framework proposed here contemplates that a state's restructuring plan would become effective only when approved by a supermajority of all classes of creditors, voting under a Model CACs-like classification and voting structure. An administrator would preside over the process, but would not be charged with determining that the restructuring plan is in all respects compliant with the QSDRL. Mimicking a contractual approach as utilized in CACs, it would be the supermajority acceptances that give effect to the plan. The administrator would be responsible primarily for determining that the supermajority acceptances have been obtained. Of course, the acceptability of any particular administrator would depend in part on the functions that would be assigned to that administrator. Again, strictly limiting the administrator's discretion would be a key consideration.

One potential restructuring administrator considered here is a court of the debtor state itself. This suggestion is quite plausible, despite seeming counterintuitive at first blush. But upon examination it is a quite plausible choice for the regime proposed here. It also is a thought experiment, inasmuch as strong objections may provide an indication that the characteristics of a given framework confer on the administrator excessive discretion (or an indication of a lack of imagination in some quarters). Under the framework proposed here, the restructuring proceeding should not be conceptualized as one in which a debtor state and its creditors submit to the jurisdiction, power, and judgment of the administrator. Instead, the administrator is best understood as convening and supervising a meeting of creditors, largely in a ministerial manner, for the purpose of allowing classes of creditors to accept or reject a restructuring plan. A local court may not be a perfect administrator, but other potential administrators or tribunals might not be acceptable to the very debtor states that would be most likely to need, and employ, a restructuring mechanism for their sovereign debt.[28]

The restructuring mechanism advanced here is at once both conventional and novel. It is conventional inasmuch as it contemplates that a sovereign debtor state would enact an insolvency law that incorporates several of the traditional elements normally included in laws dealing with restructuring of private firms, including approval of a restructuring plan by supermajorities of classes of creditors. It is novel because it suggests that the insolvency law would apply to the sovereign state itself as a debtor and because it suggests consideration of established courts of a sovereign debtor state as plausible administrators of the restructuring process. While

---

27. For simplicity, it is assumed here that it would be the debtor state that would enact a QSDRL under which its debts could be restructured. But there is no principled reason why a debtor state could not initiate a restructuring proceeding under the QSDRL of another state.

28. Other possible administrator candidates are discussed later in the article. *See infra* Part II.B.

remaining receptive to other potential administrators, it generally eschews for this purpose special or international courts or arbitral administrators.[29]

One obstacle to earlier proposals has been the resistance of sovereign states to the jurisdiction of an external tribunal or proceeding. This resistance would likely be eliminated were the administrator a member of the debtor state's own judiciary. The formidable challenge of attracting support from various creditor and official constituencies, of course, would remain.

I first explored the idea of a sovereign debt restructuring in a formal insolvency proceeding under the domestic laws of the sovereign debtor itself in connection with an earlier project. That project addressed the feasibility of restructuring the sovereign debt of the United States.[30] In that exercise, it became apparent that there might be insurmountable constitutional impediments to enacting such a law in the United States.[31] But that may not be the case under the law of other states. Consider as well that an era of unprecedented cross-border judicial and administrative cooperation in the insolvencies of multinational debtors is emerging.[32] This suggests that future sovereign debt restructurings might be undertaken under the rule of law—that is, new regimes of insolvency law designed for restructuring sovereign debt. In order to inspire confidence, any SDRM must be seen as fair to all parties. Such a law should be a real and recognizable insolvency regime. The proposed QSDRL would be such a law. Ideally, moreover, it would be enacted in better times and not on the eve (or in the midst) of a state's default or financial crisis.

No one would disagree that an SDRM administrator that inspires the confidence of all stakeholders is preferable to one that does not. But the approach I advocate here is to fashion a sensible SDRM under which the nature and identity of the administrator would be, to the greatest extent possible, insignificant. Such an SDRM would offer the greatest prospect for generating a consensus on an appropriate administrator.

---

29. Mechele Dickerson has suggested that a sovereign state debtor might adopt such an insolvency law, but her suggestion contemplated that a special restructuring panel would administer the process. A. Mechele Dickerson, *A Politically Viable Approach to Sovereign Debt Restructuring*, 53 EMORY L.J. 997, 1032 (2004) [hereinafter Dickerson, *Viable*]. Bolton and Skeel, however, proposed that the tribunals should be bankruptcy courts in jurisdictions whose laws govern the debtor state's sovereign debt. *See* Bolton & Skeel, *Black Box*, *supra* note 8, at 813.

30. Charles W. Mooney, Jr., *United States Sovereign Debt: A Thought Experiment on Default and Restructuring*, IS U. S. GOVERNMENT DEBT DIFFERENT? (Wharton Financial Institutions Center Press, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2520062 [hereinafter Mooney, *Thought Experiment*].

31. *Id.* at 19 (discussing, *inter alia*, Section Four of the Fourteenth Amendment and the scope of the Bankruptcy Clause); U.S. Const. amend. XIV, § 4 ("validity of the public debt of the United States . . . shall not be questioned."); U.S. Const. art. 1, § 8, cl. 4 (power of Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States . . . .").

32. For an outstanding survey, analysis, and critique of these developments, *see* BOB WESSELS, ET AL., INTERNATIONAL COOPERATION IN BANKRUPTCY AND INSOLVENCY MATTERS 71–250 (2009).

Is the time now ripe for the creation and implementation of an SDRM? The Group of 77 (G-77)[33] and China[34] certainly believe so if the statements and votes at the UN General Assembly are any indication.[35] But it is discouraging for any SDRM proposals that the IMF, the United States, the European Union, and EU members oppose a binding multilateral restructuring framework. Indeed, both the United States and the European Union have taken the position that they will not even participate in discussions of such a framework.[36] If a strong consensus in favor of an SDRM is ever to emerge, however, it may be necessary to build confidence and trust across borders and philosophies through more modest initial efforts.

Richard Gitlin and Brett House have proposed such incremental efforts under the auspices of a Sovereign Debt Forum (SDF).[37] They describe the mission of the SDF: "To provide an independent standing body that will bring creditors and debtors together in a centre of evolutionary best practice in order to address sovereign financial stress at an early stage and maximize residual value for both sovereign debtors and creditors."[38] They also explain the important benefits of incremental reforms and provide examples of past incremental advances that ultimately have led to

---

33. Founded by seventy-seven developing countries in 1964 the Group of 77 (G-77) currently has 134 member states. G-77, About the Group of 77, The Group of 77 at the United Nations, http://www.g77.org/doc/ (last visited on Sept. 22, 2015).

34. The G-77 and China sponsored the September 2014 UN Resolution. Bhumika Muchhala, *Historic UN General Assembly Vote on a Multilateral Sovereign Debt Mechanism*, Third World Network, at 1/9 (Sept. 19, 2014), file:///Volumes/cmooney/My%20Documents/Wp/Sovbankr/Historic%20UN%20General%20Assembly%20vote%20on%20a%20multilateral%20sovereign%20debt%20mechanism.webarchive [hereinafter Historic, Third World Network].

35. *See infra* notes 200-01 and accompanying text.

36. Historic, Third World Network, *supra* note 34, at 5 ("[T]he fact that only the US explicitly rejected an intergovernmental negotiation on the draft resolution bears repeating, as even the other 10 countries that voted against the [September 2014] resolution seem willing to engage in some type of intergovernmental process going forward."); EU@UN, Explanation, *supra* note 7 ("Neither the EU nor Member States will participate in discussions aiming at the establishment of a binding multilateral legal framework for sovereign debt restructuring processes."). At the first two meetings of the Ad Hoc Committee at the UN there were no delegations participating from the United States, the European Union, EU member states, Japan, Switzerland, the IMF, or the World Bank Group. E-mail from Hironori Matsuo, Attorney, Civil Affairs Bureau, Ministry of Justice, Japan, to author (Oct. 30, 2015, 08:05 EDT) (on file with author); E-mail from Sean Hagan, General Counsel, IMF, to author (October 18, 2015, 09:32 EDT).

37. Richard Gitlin & Brett House, A Blueprint for a Sovereign Debt Forum Centre for International Governance Innovation Paper No. 27 (March 2014), https://www.cigionline.org/publications/blueprint-sovereign-debt-forum [hereinafter Gitlin & House, Blueprint]. For an update on the authors' thinking about the proposed Sovereign Debt Forum, see generally Richard Gitlin & Brett House, Further Reform of Sovereign Debt Restructuring: An Agenda for 2015, Centre for International Governance Innovation Policy Brief No. 54 (Jan. 2014), https://www.cigionline.org/publications/further-reform-of-sovereign-debt-restructuring-agenda-2015.

38. *Id.* at 14.

important reforms in other contexts.[39] But the potentially useful activities that the SDF contemplates should not be an occasion for those who favor the implementation of an SDRM in the future to abandon their efforts.

Continued exploration of structures and approaches that could appeal to current naysayers is necessary. As Gitlin and House have explained: "[i]t is important to underscore that the SDF is not proposed as an initial step toward a statutory or treaty-based approach, but it is consistent with such proposals."[40] Variations on the theme of the IMF's SDRM proposals abound and this paper joins the fray. When and if a consensus in favor of a formal restructuring mechanism were to emerge, the ultimate structure is likely to be an amalgam of components of earlier proposals together with new approaches that would emerge during the process. Perhaps the framework advanced here will be useful in this respect.

The Gitlin-House SDF could be a step in an incremental process leading to an SDRM, but it also may serve another purpose on a stand-alone basis. It may provide a useful platform for negotiation and agreement that would serve the needs of market participants so that a consensus emerges that an SDRM is not necessary. Of course, it appears that such a consensus among market participants, excluding the G-77 members and China, already exists today. But looking at the literature on sovereign debt restructuring, one could get the impression that an overarching goal is to eliminate the "holdout problem" and further that the central debate is about whether the elimination should take place through an accretion of bond issues with CACs or through the SDRM approach. But that would be a myopic take on the situation.

The Emerging Markets Trade Association (EMTA) recently held a special seminar in New York City, "Sovereign Debt Restructuring: A Better Way Forward?"[41] EMTA's goals in this respect included "ascertaining market sentiment" and "strengthening private sector input into the poli-

---

39. *Id.*

40. *Id.* at 20. Gitlin and House continued: "[w]ithout endorsing any formalized statutory or treaty-based reform proposals, it is useful to recognize that the potential joint or several bundling of incremental reforms proposed above could constitute a useful foundation on which statutory frameworks could be built, should political support arise for such measures. *Id.* (citation omitted).

41. For a report summarizing the discussions held at the seminar, see *Trade Association for Emerging Markets, EMTA Hosts Special Seminars on Sovereign Debt Restructuring in NYC: Argentina Situation Identified as an "Outlier"*, EMTA (Dec. 18, 2014), http://www.emta.org/WorkArea/DownloadAsset.aspx?id=8514 [hereinafter EMTA, Special Seminar]. There also exists a report on two earlier, related seminars. *See* EMTA, *EMTA Hosts Special Seminars on Sovereign Debt Restructuring*, EMTA BULLETIN, 2013:4 (2013), at 1, 9-12, http://www.emta.org/WorkArea/DownloadAsset.aspx?id=8410. The latter report notes:

> For well over a decade (and, in fact, going back further than that to the first efforts to distribute sovereign debt more widely throughout the investing community by exchanging bank loans for bonds), members of the official sector, some academics and lawyers representing debtor countries have expressed concerns about perceived difficulties in restructuring sovereign debt. These concerns have been, in Mr. Chamberlin's [Michael Chamberlin is the Executive Director of EMTA] personal view, "overblown", but they have been exacerbated in recent years by Eu-

cymaking process." Official sector proposals discussed at the seminar were (i) a requirement for creditor "bail-in" as a condition for IMF lending when a state has lost market access,[42] (ii) adopting stronger aggregated CACs to address holdout problems, (iii) creating a European SDRM through the European Stability Mechanism treaty, and (iv) setting up a World Trade Organization (WTO) dispute-settlement mechanism for sovereign debt negotiations. As a reality check, the following are some of the principal points made by members of a panel that featured private sector reactions to these proposals:

- The bail-in requirement would allow the IMF to force states to default and restructure whenever the slightest doubt about solvency existed before providing to member states assistance to which they are entitled.
- The bail-in requirement would result in more instability and uncertainty and would cause unnecessary defaults and provide more power to the IMF.
- The bail-in requirement illustrates the IMF's complete failure to understand the financial markets, reflects the lack of actual restructuring experience of the IMF, and offers a solution to a problem that does not exist.
- The bail-in requirement would give a blank check to the IMF.
- The bail-in requirement is poorly conceived and communicates that states are not villains but that creditors are if they try to enforce their rights.
- Some dispute that there is a holdout problem. The 76% participation rate in Argentina's restructuring demonstrates that it was not a successful restructuring, as 90-95% should be the norm.
- Aggregation of CACs and modifying documentation do not provide the proper incentives for states and bondholders to work together.
- Aggregated CACs are not that relevant, and creditor committees can negotiate with debtor states.
- Although aggregated CACs can be useful, the private sector should be more involved with the documentation instead of

---

> rope's credit problems and by the inability of Argentina to move beyond its 2001 default.

Id. at 9.

42. E.H. & P.C., *What is a bail-in?*, THE ECONOMIST: THE ECONOMIST EXPLAINS (Apr. 7, 2013), http://www.economist.com/blogs/economist-explains/2013/04/economist-explains-2 ("[A] bail-in, a term first popularized in the pages of *The Economist*, forces the borrower's creditors to bear some of the burden by having part of the debt they are owed written off.").

leaving it to academics and lawyers who are not themselves market participants.

- The real problem with the IMF's SDRM proposal was that there was not a forum that could be counted on by creditors for enforcement. Also, the IMF is hostile toward the private sector.
- The problem with the WTO dispute resolution panel proposal is that it could work to extinguish debt without a corresponding enforcement mechanism against debtor states.[43]
- The creditor committee in Argentina was not so successful because Argentina would not engage with it; Argentina is a bad example to argue that creditor committees cannot be successful.
- The IMF's fixation on holdouts is questionable inasmuch as most investors do not care to spend time and money in litigation.
- The real fight is among the official sector creditors to get preferential treatment.

The debates among market participants are even deeper and broader than much of the literature might suggest.

Following this Introduction, Part II explains various approaches to restructuring mechanisms, including methods of binding creditors who do not assent to the restructuring plan. Part III proposes and describes a framework for sovereign debt restructuring. It first outlines the structure of a multilateral or reciprocal approach. The structure would provide two components: first, an obligation of an adopting state to recognize restructuring proceedings and plans under another state's QSDRL and, second, the description of the substantive provisions required to be embodied by a QSDRL. It then discusses the nature of an appropriate administrator for a restructuring proceeding under a QSDRL, explaining why the courts of the sovereign debtor would be a plausible and appropriate administrator and also considers other alternatives.

I. Approaches to Sovereign Debt Restructuring

This Part explains various approaches to a sovereign debt restructuring. Subpart A compares the "contractual" or "private law" approach with the "statutory" or "public law" approach. Subpart B explores methods of implementation and making effective an SDRL in a multi-state environment. It addresses how an approved restructuring plan could be made binding against a debtor state's creditors, including those that have not assented to it, and effective with respect to assets located outside the debtor state's territory.

43. I am quite sympathetic in principle to the idea of mutuality of enforcement, but I would need details of a concrete proposal before making any assessments.

A. *"Contractual" (or "Private-Law") and "Statutory" (or "Public-Law") Approaches to Restructuring Mechanisms.*

The proposal outlined here embraces the statutory approach, at least at one level of conceptualization. It contemplates a restructuring process that would be governed by an insolvency law—a statute—of the debtor state, the SDRL. The SDRL would apply to the sovereign as debtor. However, the SDRL could be implemented under either a contractual or a statutory approach.[44]

The principal manifestation of the contractual approach has been the incorporation of CACs as terms in sovereign bond issues. To be truly effective as a comprehensive restructuring mechanism, CACs would need to be incorporated into each of a sovereign's bond issues, which could take years. Maturities of outstanding international sovereign bonds as of 2014 are presented in Figure 1.[45]

Figure 1. Maturities of Outstanding International Sovereign Bonds

	NY Law	**English Law**	**Total**
3 years	17.1%	28.5%	24%
5 years	27.7%	45.0%	39.3%
7 years	39.7%	61.0%	53.0%
10 years	61.0%	78.8%	71.3%
>10 years	39.0%	21.2%	28.7%

Even then, under most existing CACs a restructuring plan could only be fully effective if each of the bond issues were to accept the plan by the requisite super majorities. The prospect of dissenting creditors acquiring blocking positions in bond issues would remain a threat to any restructuring plan. As Gelpern and Gulati have observed,

> CACs are both effective (as a political tool) and ineffective (as a legal constraint), important (as a symbol) and unimportant (as a stand-alone restructuring device). . . . Legal and policy experts have a key role in this picture, but not necessarily for their capacity to produce a viable tool for future restructurings—rather for

44. The SDRL could be implemented contractually by incorporating it into the terms of a debt contract, along the lines proposed by Christoph Paulus and Ignacio Tirado for a "resolvency" court. *See* Christoph G. Paulus, *A Resolvency Proceeding for Defaulting Sovereigns*, in 12 Institute for Law and Finance Series: Collective Action Clauses and the Restructuring of Sovereign Debts 181, 194 (Patrick S. Kendajian et al. eds., 2013) [hereinafter Paulus, *Resolvency*]; Christoph G. Paulus & Ignacio Tirado, *Sweet and Lowdown: A Resolvency Process and the Eurozone's Crisis Management Framework*, in 2 L. and Econ. Yearly Rev. 504, 516 (2013) [hereinafter Paulus & Tirado, *Sweet*]. Statutory implementation is discussed in Part II.B.

45. IMF, Strengthening, *supra* note 13 at 34.

their part in creating a viable appearance of present crisis response.[46]

The Model CACs are more promising as restructuring tools because the aggregation approach makes it possible to modify bonds across issues instead of the issue-by-issue modifications that would be necessary under traditional CACs.[47] Although the Model CACs appear to be gaining acceptance,[48] as indicated above it could be a very long-term process for a state to incorporate them into every debt security.[49]

Another weakness of the contractual approach as currently contemplated for implementation through the Model CACs is that the new provisions would be limited to incorporation into debt securities and would not be applicable to a debtor state's other debt, such as bank loans, debt owed to official creditors, and trade debt. However, Paulus has taken a broader view. He envisions a contractually binding term providing for a sovereign debt "resolvency" proceeding beyond bonds, incorporating the term into "all loan and bond agreements of a sovereign."[50] He proposes as a classification, for purposes of voting on a restructuring plan, the debtor state's

---

46. Anna Gelpern & G. Mitu Gulati, *Foreword: Of Lawyers, Leaders, and Returning Riddles in Sovereign Debt*, 73 L. & CONTEMP. PROBS. i, xii (2010). The authors also note that "[w]e offer this somewhat cynical unifying 'theory' tongue-in-cheek . . ." *Id.*

47. *See infra* Part II.A.3. (discussing the Model CACs as a template for classification and voting under a QSDRL).

48. For example, in October 2014, Kazakhstan incorporated the Model CACs into a debt issue and Vietnam and Mexico followed suit in November 2014. Ashley Lee, *New ICMA Clauses Debut in Kazakhstan Sovereign*, INT'L FIN. L. REV. (Oct. 15, 2014), http://www.iflr.com/Article/3390692/New-ICMA-clauses-debut-in-Kazakhstan-sovereign.html; Ashley Lee, *Viet Nam's ICMA CAC First Explained*, Int'l Fin. L. Rev. (Nov. 26, 2014), http://www.iflr.com/Article/3404031/Search/Results/Vietnams-ICMA-CAC-first-explained.html?PageId=201737&Keywords=Viet+Nam+ICMA+CAC&OrderType=1&PartialFields=(CATEGORYIDS%3a14718); Zoe Thomas, *Sovereign Bond Clauses Grow in Popularity*, Int'l Fin. L. Rev. (Jan. 21, 2015), http://www.iflr.com/Article/3419256/Search/Results/Sovereign-bond-clauses-grow-in-popularity.html?PageId=201737&Keywords=Mexico+ICMA+CAC&OrderType=1&PartialFields=(CATEGORYIDS%3a14718).

49. As the IMF has observed:

> In light of the significant amount of time during which much of the current stock [of sovereign bonds] will be outstanding, one approach would be to encourage issuers to accelerate the turn-over through liability management operations, including bond buybacks and bond swaps (exchanges) whereby sovereign issuers would exchange their existing stock of international sovereign bonds for newly issued bonds with the proposed contractual provisions. However, the consultation with issuers and the market indicates that such an approach is likely not feasible, at least in the near term.

IMF, STRENGTHENING, *supra* note 13, at 34. It should be noted that under a statutorily imposed SDRM only states that had adopted a multilateral regime (convention or model law) would be bound by an SDRM applicable to another state. *See infra* Part II.B.2. It also could take many years before such a regime would become widely adopted. And, of course, it might never become widely adopted.

50. Paulus & Tirado, *Sweet*, *supra* note 44, at 29. The scope of sovereign debt subject to a restructuring framework as proposed here is discussed below. *See infra* Part II.A.5.

"creditors—and this means, generally speaking, all creditors."[51] (He does not refer specifically to trade creditors, however.) Under this contractual "hybrid" (my term) approach, the creditors would agree to be bound by the resolvency proceeding in a designated tribunal. But, this hybrid approach, like any contractual approach, would require incorporation into all or substantially all of a sovereign's debt contracts for the proceeding to bind all dissenting creditors. Of course, if a statutory approach is not attainable, then the contractual approach may be necessary and appropriate. Certainly I do not mean to suggest that a statutory approach could not coexist with the contractual approach—it could—or that efforts to incorporate Model CACs in bond issues should not continue—they should.

So long as key nations like the United States, EU member states, and Japan; official sector institutions such as the IMF; and many private sector market participants remain opposed to an SDRM, it is unlikely that incorporating an SDRM into debt contracts would be successful. While these quarters may favor a contractual approach in principle, this does not mean that they would find an SDRM any more palatable merely because it is incorporated into debt contracts. The issue is the acceptability of an SDRM, an inherently "statutory" proceeding, not whether it would be imposed through contractual as opposed to statutory means.[52]

No one can be certain about which approach—contractual or statutory—would be most likely to achieve a widespread binding effect. The remainder of the paper generally assumes that a state's SDRL would be implemented through a statutory approach. If a consensus on a structure and substance of an SDRM were to emerge down the line, a statutory or a contractual approach or both could implement the consensus approach in tandem.

B. *Implementation and Effectiveness of Statutory Approach.*

1. Stand-alone SDRL.

The most straightforward and easiest means of implementing the statutory approach would be for a debtor state to enact an SDRL, even in the absence of any assurances that the law would be binding on its creditors in foreign jurisdictions where the state's commercial assets might be found.[53] It is a safe assumption that assets located in the debtor state would be immune from the reach of creditors either under the generally applicable

51. Paulus & Tirado, *Sweet*, *supra* note 44, at 19.

52. The point made here admittedly assumes that prospective investors would read and understand debt contracts; undoubtedly some would not. Moreover, it may be that institutions that underwrite and market sovereign debt would convince potential issuing states not to take the risk that a debt offering containing an SDRM provision would not find favor in the market.

53. The reference to "commercial assets" recognizes that the laws of many states provide for restricted forms of sovereign immunity from execution that would allow a judgment creditor to reach a state's commercial assets (as opposed to its diplomatic or other governmental assets), although some other states apply an absolute version of sovereign immunity. *See* Mooney, *Thought Experiment*, *supra* note 30, at 36-42.

law or by virtue of a discharge under the state's SDRL.[54] Whether a state would find such an approach satisfactory could depend in part on its assessment of the likelihood that creditors would discover the existence of such foreign commercial assets. Moreover, some foreign states might recognize the effectiveness of the debtor state's restructuring plan under its SDRL, thereby providing a basis for a foreign state's judiciary to deny creditors the ability to reach assets subject to the foreign state's jurisdiction.[55]

Even if a state were to conclude that actual enforcement by creditors against the state's foreign commercial assets was a remote possibility, adopting and employing a proceeding as to which there would be no reliable means of binding creditors to a restructuring plan would not appear promising. Moreover, one goal of an SDRL would be to induce a debtor state to commence restructuring efforts at an early stage even before an actual default. Such inducements would be unlikely in the case of such a stand-alone SDRL. Perhaps if a state's default were inevitable such a proceeding could provide a forum for a consensual restructuring, but there would be no means of ensuring creditor participation.[56] Essentially this approach would amount to a unilaterally-imposed default.

2. Multilateral or Reciprocal Approaches.

Next consider two approaches: namely, a multi-state international convention and a reciprocal Model Law. Each approach would involve two central components. The first would be an obligation of each adopting state to recognize restructuring proceedings and restructuring plans under the QSDRL of any other adopting state. The second would specify the characteristics that an adopting state's SDRL must have in order to qualify as a QSDRL (as described below in subpart IV.B). This second compo-

54. *See id.* at 43-54.

55. *See, e.g.*, U.N. Comm. on Int'l Trade Law, UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, U.N. Sales No. E.14.V.2 (1997), arts. 19 (relief that may be granted upon application for recognition of a foreign proceeding), 21 (relief that may be granted upon recognition of a foreign proceeding) [hereinafter UNCITRAL Model Law]. However, the Model Law would not apply to the SDRL unless it was a proceeding in which "the assets and affairs of the debtor are subject to the control or supervision by a foreign court for the purpose of reorganization or liquidation[.]". *Id.* art. (2)(a) (defining "foreign proceeding"). If it were a foreign proceeding and the foreign state had adopted the Model Law, the debtor state's proceeding could be recognized as a "foreign main proceeding," as the debtor state certainly would be its own "centre of its main interests." *Id.* art. 2(b) (defining "foreign main proceeding as "a foreign proceeding taking place in the State where the debtor has the centre of its main interests . . . ."). The United States has adopted a version of the Model Law. 11 U.S.C. §§ 1501-32 (2012). On recognition of foreign stays and foreign representatives generally, *see generally* Philip R. Wood, Principles of International Insolvency ¶¶ 28-017–28-089 (2d ed. 2007) (providing background on recognition of foreign stays and foreign representatives generally).

56. Were a debtor state to adopt the contractual approach of incorporating the binding applicability of the state's SDRL into the terms of its bond issues, however, this stand-alone approach would be feasible once the SDRL had been incorporated in all of the state's bond issues.

nent would be analogous to a European directive.[57] It would specify the qualifying criteria, but each adopting state could then adopt its own QSDRL incorporating these criteria. It must be emphasized that no adopting state would be obligated to enact a QSDRL applicable to its sovereign debt.[58]

a. Multi-State International Convention.

Consider first a multi-state international convention—e.g., Convention on Recognition of Judgments and Restructuring Plans in Qualifying Sovereign Debt Restructuring Proceedings. Under the convention, each state party would be obligated to recognize the restructuring proceedings, judgments, and restructuring plans (including the discharge of sovereign debt) rendered in restructuring proceedings pursuant to a QSDRL of another state party to the convention. A state party would be excused from its recognition obligation on grounds similar to those provided in the New York Convention on recognition of arbitral awards (such as the failure to give proper notice to creditors, the ineffectiveness of the restructuring plan because it is not yet binding or has been set aside in the debtor state, or if recognition would be contrary to public policy of the state party in which recognition is sought).[59] A state party also could be permitted to specify, in a declaration, that it has no recognition obligation with respect to restructuring plans under the QSDRL(s) of specific state(s) named in the declaration if the state party also declares that the rule of law is not generally observed in the named states.[60] Under the posited convention,

57. "A 'directive' is a legislative act that sets out a goal that all EU countries must achieve. However, it is up to the individual countries to decide how." *Regulations*, *Directives and Other Acts*, EUROPA, http://europa.eu/eu-law/decision-making/legal-acts/index_en.htm (last visited Sept. 22, 2015).

58. For example, the United States could join such a convention or adopt such a model law. But its adoption of a QSDRL for the restructuring of United States sovereign debt probably would be unconstitutional. *See* Mooney, *Thought Experiment*, *supra* note 30, at 185-215.

59. *See* United Nations Conference on International Arbitration, Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V (exceptions to duty to recognize and enforce arbitral awards), http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf [hereinafter New York Convention]. Note that UNCITRAL Working Group V currently is working on a Draft Model Law on Recognition and Enforcement of Insolvency-Related Judgments. U.N. Comm. On Int'l Trade Law, *Insolvency Law, Cross-Border Recognition and Enforcement of Insolvency-Related Judgments*: *Note by the Secretariat*, A/CN.9/WG.V/WP.130 (March 12, 2015), http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V15/017/25/PDF/V1501725.pdf?OpenElement [hereinafter DMLR]. The grounds for refusal of recognition of an insolvency-related judgment in the DMLR also would provide useful guidance for exceptions under the proposed convention. *Id.* art. 10 (grounds to refuse recognition of an insolvency-related judgment). The DMLR is discussed below. *See infra* notes 84-88.

60. Alternatively, an existing instrumentality of the United Nations or another international intergovernmental organization could be assigned the duty of making such a determination or a court sitting in a State party in which recognition is sought could be empowered to make such a determination on an ad hoc basis as an additional exception to its duty to recognize.

as under the New York Convention, it should not be necessary or appropriate in a state in which recognition is sought to challenge generally the effectiveness of a completed restructuring proceeding. However, in the context of a sovereign debt restructuring proceeding, it might be necessary to afford additional flexibility to the states from which recognition is sought.[61] For example, a state could be allowed to refuse recognition if its courts determined that the restructuring plan's scheme of classification of creditor claims for purposes of voting on the plan did not comply with the debtor state's QSDRL.[62] Similarly, a state might be permitted to deny recognition upon a determination that another state's putative QDRSL failed to comply with the convention's mandatory requirements.

As noted above, the convention would not mandate that a state party enact a QSDRL applicable to its own sovereign debt. Moreover, even if a state party were to enact a QSDRL it would not be obligated to seek the opening of a sovereign debt restructuring proceeding. The state party would be free to pursue other means of restructuring, such as consensual arrangements by way of exchange offers, the operation of CACs, or otherwise.

b. Reciprocal Model Law.

Another approach to statutory implementation would be a Model Law on Recognition of Judgments and Restructuring Plans in Qualifying Sovereign Debt Restructuring Proceedings. A state adopting the model law would be required to recognize judgments and restructuring plans pursuant to the QSDRL of another model law adopting state (i.e., a reciprocity condition). Essentially the same conditions and provisions described above in connection with an international convention approach would apply under the model law approach.[63]

c. Binding Creditors.

For an SDRL to achieve its ends, it must make provision for a restructuring plan to become effective and binding on the debtor state's creditors, including those that did not accept the plan or did not participate in the restructuring process. Consider a simple scenario. Debtor State X is a state party to a multi-state convention along the lines discussed above in this

61. This would especially be so if the administrator presiding over the proceeding in question were the courts of the sovereign debtor's state as considered here. *See infra* Part II.B. (discussing the selection of an administrator for the QSDRL).

62. *See infra* Part II.A.2. (discussing classification of creditor claims and voting).

63. The model law that I envision would, as explained above in the context of a convention, address the substantive content of a QSDRL by specifying the mandatory characteristics in the fashion of a European directive. *See* Mooney, *Thought Experiment*, *supra* note 30, at 43-54. It would not actually provide a model statutory text as would be the case with a typical model law. Without affecting the understanding that a convention and a model law are alternative approaches to the same end, in the remainder of the paper I will, for convenience, generally refer only to a convention. But the discussion and analysis would be essentially the same for a reciprocal model law. Note as well that the two approaches could coexist, with some states adopting the convention and other adopting the model law.

Subpart B. It obtains approval of its restructuring plan based on acceptance by creditors of all classes in the requisite supermajorities.[64] Under the plan, the relevant creditors are entitled to receive new debt securities in exchange for the old debt, which has been discharged. Creditor is a relevant creditor, but did not participate in the restructuring process or otherwise consent to be bound by the plan. Before Debtor State's restructuring proceeding was commenced, Creditor obtained a judgment on pre-plan, old debt, obtained in a court sitting in State B. The law of State B governs both the old and the new debt.

Creditor now seeks to enforce its judgment through judicial process against an asset located in State A, a state party to the convention. Debtor State objects, asserting that, under the restructuring plan, Creditor's old debt has been discharged and replaced by the new debt (as to which Debtor State is not in default).[65] Pursuant to its convention obligations, State A would not permit such a recovery on the discharged pre-plan debt. It follows that if the convention were adopted by virtually all states, then it is clear that the convention could bind creditors generally in the context of reaching assets.

But such a discharge might not, of itself, solve the "*pari passsu* problem." This is the issue that gave rise to an injunction under New York law that has prevented Argentina from paying its restructured debt unless it also paid the unrestructured debt held by so-called "holdout" creditors.[66] The result has been that Argentina now is in default on its restructured debt, even though it is willing and able to pay that debt.[67] The convention should address the *pari passu* problem directly. For example, ICMA has proposed a standard *pari passu* provision for inclusion in sovereign debt security documentation.[68] Language such as the following could adapt relevant language in the ICMA standard provision for inclusion as a term of the convention: A debtor state with respect to any of its indebtedness shall

---

64. Creditor acceptance and claims classification are discussed in Part III.A.2. and 3.

65. Alternatively, Creditor Y might have commenced an action to enforce the defaulted old debt after completion of the restructuring process and Debtor State X might have defended based on the discharge under the plan.

66. NML Capital, Ltd. v. Republic of Argentina, 727 F.3d 230, 237-41 (2d Cir. 2013), *cert. denied* 134 S.Ct. 2819 (2013), *cert. denied sub nom.* Exch. Bondholder Group v. NML Capital, Ltd., 134 S.Ct. 2819 (2013). *See generally* Laura Alfaro, *Sovereign Debt Restructuring: Evaluating the Impact of the Argentina Ruling* 5 HARV. BUS. L. REV. 47 (2014).

67. Daniel Bases, *UPDATE 1-U.S. Judge Gives Argentina Debt Mediator More Authority in Negotiation*, REUTERS (Nov. 3, 2014), http://www.reuters.com/article/2014/11/04/argentina-debt-mediator-idUSL1N0ST2TD20141104 (explaining Argentina's default on its restructured debt).

68. *ICMA Standard Pari Passu Provision for the Terms and Conditions of Sovereign Notes* NEW RULES FOR GLOBAL FINANCE (August 2014), http://www.new-rules.org/what-we-do/sovereign-debt-consultation/583-icma-new-standards-for-cacs-and-pari-passu. However, some are of the view that the Argentina litigation represents a special situation unlikely to recur in connection with other restructurings in the future. *See* EMTA, Special Seminar, *supra* note 41, at 1 ("In particular, the second panel expressed the view that the Argentina holdout situation was an outlier, in large part because Argentina's actions toward its creditors had been extreme.").

have no obligation to effect equal or ratable payment(s) at any time with respect to any other indebtedness and, in particular, shall have no obligation to pay any such other indebtedness at the same time or as a condition of paying sums due on the first mentioned indebtedness and vice versa. Alternatively, *pari passu* could be addressed by a similar amendment to the IMF Articles of Agreement.[69]

It is not implausible that at some point in the future, the widespread adoption of a restructuring mechanism could occur. If the United States came to view a future proposed SDRM as consistent with its support of a market-based, voluntary, and contractual approach to sovereign debt restructurings, then the regime might be adopted by appropriate amendments to the IMF's Articles of Agreement.[70] Another scenario would be the widespread adoption of a convention by most of the 134 members of the G-77 and by China,[71] which would result in a significant "safe zone" for assets throughout the world. Such a development might put substantial pressure on the United States, the European Union, EU members, and other states to accept the new regime, inasmuch as the overwhelming majority of the debtor states most likely to need debt restructuring at some future time would have adopted the SDRM approach.

Returning to the earlier example, consider the situation of states that are not parties to the convention and in which assets of Debtor State may be found. Clearly there is a risk that Debtor State's approved restructuring plan would not be given effect in non-adopting states. For example, now assume that State A is not a state party to the convention. The State A court first must consider whether the issue presented—the Debtor State's discharge under its approved plan—implicates the application of its choice-of-law rules or the recognition of a foreign judicial decision (i.e., a foreign judgment). The resolution may turn on whether the administrator or tribunal that approved the restructuring plan under a QSDRL would be considered a "court" or whether the approval of a plan arose from a judicial decision or judgment.[72] For example, if the administrator is not a court

69. *See* Committee on International Economic Policy and Reform (CIEPR), Revisiting Sovereign Bankruptcy, 34 (Brookings, Oct. 2013), http://www.brookings.edu/research/reports/2013/10/sovereign-debt (suggesting amendment of the IMF Articles of Agreement to address the *pari passu* problem).

70. *See id.* at V (suggesting amendment of the IMF articles to create a Sovereign Debt Adjustment Facility).

71. Recall the strong support that these states gave to the UN General Assembly's resolutions calling for the development of a sovereign debt restructuring process. *See supra* notes 34-35.

72. *See, e.g.,* Restatement (Third) of Foreign Relations Law § 481 (describing the conditions for recognition of "final judgment of a court"). Comment *d.* discusses what constitutes a final judgment; comment *e.* explains that a judgment of a court may extend to "decisions of administrative tribunals." *Id.* cmts. *d.*, *e.* Note that a state party to the convention would have no need to consider the question whether the administrator's approval of a restructuring plan under a state's QSDRL was a judicial decision by a court inasmuch as the adopting state would be obliged to recognize the restructuring plan as its convention obligation.

for this purpose or the administrator's approval is not a judicial decision, the question may be whether, as a matter of contract and private law, Creditor (the "holdout") is bound by the supermajority vote in the Debtor State X's QSDRL proceeding.[73] Arguably, in this situation the State A court could determine that the law of Debtor State (Debtor State's COMI), including the convention as a part of Debtor State's law, applies to this question. On the other hand, it is more likely than not that State A would look to the law that governs the debt contract, the law of State B, which would enforce the terms of the debt contract requiring unanimous consent of the debt security holders for the modification of payment terms. In that case, only a change in State A's choice-of-law rule, such as by adopting the proposed convention and its recognition requirement, would be sufficient to bind Creditor under the approved plan. However, now assume that State B is a state party to the convention. Because the convention is a part of the law of State B, the State A court may conclude that Creditor is bound by the restructuring plan because the governing law provision of the old debt security effectively incorporated the convention.[74]

Were the administrator determined to be a court, the next question would be whether the administrator's approval of the restructuring plan under Debtor State's QSDRL was a judicial decision or judgment. While the administrator would not have approved, for example, the reasonableness or feasibility of the restructuring plan,[75] it would have counted the votes of creditors and determined that the supermajorities had been achieved so as to make effective the restructuring plan.

Assuming that under State A law the administrator's approval of the plan was a judicial decision of a court, the final question would be whether the State A court would give effect to the approved plan. In this situation the State A court would be called upon to recognize, but not to enforce, the plan approval. The UNCITRAL Secretariat explains this as follows:

> In the case of some judgements, recognition might be sufficient and enforcement will not be needed, for example, declarations of rights or non-monetary judgements, such as the discharge of a

73. *See* Tomas Arons, *Recognition of Debt Restructuring and Resolution Measures under the European Union Regulatory Framework*, 23 INT. INSOLV. REV. 57, 62-63 (2014) (distinguishing between a debtor's proposal to restructure debt claims, which is "a contractual offer to alter the contractual relationship" subject to conflict of law rules, and the court approval of a restructuring plan, which is "a question of recognition and enforcement of a judicial decision."). Arons concludes that when a court determines that a plan is reasonable and should be imposed on a dissenting minority of creditors, it is the court's decision and not the approval of the majority that creates legal obligations. *Id.*

74. It does not necessarily follow, however, that because State B law governs the debt contract it also would incorporate the convention. Moreover, if the relevant debt was incurred before State B became a party to the convention, one would have to consider whether State B could (or would) apply the convention retroactively to pre-convention debt. Retroactive application of the convention is discussed below. *See infra* note 90.

75. *See infra* Part II.A.10.

> debtor or a judgement that the defendant did not owe any money to the plaintiff. The receiving court may simply recognize that finding, and if the plaintiff were to sue the defendant again on the same claim before that court, the recognition already accorded would be enough to dispose of the case.[76]

The judicial decision approving the plan would operate essentially as a discharge of Creditor's claim, but would not require any affirmative action by the State A court once the decision is recognized.

There are a number of treaty regimes in force that address the recognition and enforcement of judgments,[77] although insolvency-related decisions generally are excluded.[78] The European Union Insolvency Regulation, however, does provide for the recognition by EU member states of judgments opening insolvency proceedings in other member states.[79] Other judgments in insolvency courts and closely linked judgments in other courts of member states also are recognized in other member states.[80] In addition, the UNCITRAL Model Law on Cross-Border Insolvency[81] "provides a procedure for the recognition and enforcement of orders and decrees entered in foreign proceedings that would include an order confirming a foreign plan of reorganization; applications under Chapter 15[82] routinely seek such relief."[83]

---

76. U.N. Comm. On Int'l Trade Law, *Insolvency Law: Recognition and Enforcement of Foreign Insolvency-Derived Judgements, Note by the Secretariat*, A/CN.9/WG.V/WP.126, 4, ¶ 10 (Oct. 6, 2014), http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V14/065/38/PDF/V1406538.pdf?OpenElement [hereinafter UNCITRAL, Note on Recognition].

77. For a brief overview of existing regimes, *see id.* at 2-3, ¶¶ 4–8.

78. *See, e.g.*, Council Regulation 1215/2012, of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), 2012 O.J. (L351) 1, art. 1(2)(b) [hereinafter, Brussels I Regulation Recast] ("This Regulation shall not apply to: . . . bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings . . . ."); *see also Hague* Convention on Choice of Court Agreements, art. 2(2) June 30, 2005, 44 I.L.M. 1291 ("This Convention shall not apply to . . . insolvency, composition and analogous matters . . . .").

79. Council Regulation 2015/848, On Insolvency Proceedings (Recast), art. 19(1), 2015 O.J. (L 41) 1, 26 (EU).

80. *Id.* art. 32(1). Such judgments are to be enforced under Articles 39 to 44 and 47 to 57 of the Brussels I Regulation Recast. *Id.*

81. *See* U.N. Comm. on Int'l Trade Law, UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, U.N. Sales No. E.14.V.2 (1997) [hereinafter UNCITRAL Model Law].

82. Chapter 15 of the United States Bankruptcy Code is the United States version of the UNCITRAL Model Law. *See* 11 U.S.C. §§ 1501-32.

83. UNCITRAL, Note on Recognition, *supra* note 76, at 6, para. 16. UNCITRAL Model Law, *supra* note 81, art. 19 (stating relief may be granted upon application for recognition of a foreign proceeding), 21 (stating relief may be granted upon recognition of a foreign proceeding). The Model Law would apply to a SDRL only if it were a proceeding in which "the assets and affairs of the debtor are subject to the control or supervision by a foreign court for the purpose of reorganization or liquidation." *Id.* art. 2(a) (defining "foreign proceeding"). In the *sui generis* case of a sovereign or other governmental debtor, it is not

UNCITRAL Working Group V is currently developing a Draft Model Law on the Recognition and Enforcement of Insolvency-Related Judgements (DMLR).[84] The scope of the DMLR is based on the scope of the UNCITRAL Model Law.[85] While proponents of an SDRM might see the DMLR project as a promising development, any hope is likely to be illusory. First, the subject of restructuring sovereign debt has not even been discussed in the Working Group's consideration of the DMLR.[86] Were the issue to be raised, it is entirely possible that the Working Group would consider the subject beyond the project's scope (even though it is literally covered and not excluded under the Commission's mandate).[87] Second, attempts to harmonize the recognition and enforcement of judgments at a general level have not met with substantial success in the past.[88] Some states that support the recognition of a sovereign restructuring might, for example, balk at a statute of general application. Third, some states might find a statute or convention that addresses sovereign debt restructurings to be acceptable only if narrowly fashioned for that particular context—for example, including content such as the QSDRL proposed here.

---

clear whether an administrator or other tribunal under a QSDRL would have the requisite "control or supervision" of the debtor's "assets and affairs." As to the somewhat analogous situation of a municipality debtor under Chapter 9 of the United States Bankruptcy Code, *see* 6 Collier on Bankruptcy ¶ 900.01[2] (Alan N. Resnick & Henry J. Sommer eds. 16th ed. 2013) [hereinafter 6 Collier] (discussing limitation on powers of court in Chapter 9 case). If the Model Law were applicable and the QSDRL were a foreign proceeding and the foreign state had adopted the Model Law, the debtor state's proceeding could be recognized as a "foreign main proceeding," as the debtor state certainly would be its own "centre of its main interests." UNCITRAL Model Law, *supra* note 81, art. 2(b) (defining "foreign main proceeding" as "a foreign proceeding taking place in the State where the debtor has the centre of its main interests").

84. DMLR, *supra* note 59.

85. *See id.* art. 2(a), (b) & nn.2-3 (defining "foreign proceeding" and "foreign representative" based on corresponding definitions of UNCITRAL Model Law).

86. Interview with Hon. Allan L. Gropper & Christopher J. Redmond, members of the United States delegation to UNCITRAL Working Group V (June 15-16, 2015).

87. *See* U.N. Comm. On Int'l Trade Law, Report of Working Group V (Insolvency Law) on the Work of its Forty-Fifth Session (New York, 21-25 Apr. 2014), at 12, ¶ 39(b) (recommending a mandate from the Commission "to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-derived judgments); U.N. Comm. On Int'l Trade Law, Report of United Nations Commission on International Trade Law, Forty-Seventy Session (7-18 July 2014) at 28, ¶ 154 (noting Working Group V's request for "mandate for work on the recognition and enforcement of insolvency-derived judgments [sic]"); U.N. Comm. On Int'l Trade Law, Report of Working Group V (Insolvency Law) on the Work of its Forty-Sixth Session (Vienna, 15-19 Dec. 2014) at 3-4, ¶ 3 (noting the Commission's approval of mandate "to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-derived judgments [sic]").

88. *See* U.N. Comm. On Int'l Trade Law, Recognition and Enforcement of Foreign Insolvency-Derived Judgements (October 6, 2014) [hereinafter UNCITRAL, Note on Recognition] at 2 ¶ 4 ("Efforts to develop an international regime for recognition and enforcement of judgements (sic) more generally have not necessarily met with success") [hereinafter UNCITRAL, Note on Recognition] at 3 ¶ 7.

In the absence of widely-adopted harmonized rules on recognition, it is difficult to predict how a court in the position of the State A court would approach and decide the question of whether to recognize a judicial decision approving a restructuring plan under a QSDRL. It might treat the matter as it would any other question of recognizing a foreign insolvency decision. Alternatively, it might have controlling precedent or be bound by a related treaty framework. Even in the presence of controlling law in the commercial context, it might conclude that, because the QSDRL restructuring plan approval relates to a sovereign debtor, the question is *sui generis*. In the absence of harmonized and widely adopted rules on the recognition of insolvency judgments as applied to sovereign debtors, only the largely universal adoption of an SDRM regime, such as the convention proposed here, would provide comfort that an approved restructuring plan would be recognized in foreign jurisdictions.

Now assume that State B is not a party to the convention (but continue to assume that the law of State B governs the old and new debt), that State C is a state party to the convention, and that Creditor Y is a national of State C. Even though State C is a party to the convention and Creditor Y is a State C national, the risk would remain that Creditor Y would seek to enforce its judgment against assets found in non-convention states, such as State A. To reduce that risk, the Convention might seek to prevent creditors that are nationals of convention states from enforcing debt that has been discharged under another convention state's QSDRL.

Several convention provisions could reduce the risk of Creditor Y's enforcement of its discharged debt. One approach would be for the convention to impose prohibitions on enforcement of a State's debt obligations if a QSDRL restructuring proceeding is commenced by any contracting state (i.e., an automatic stay).

Another, perhaps more realistic approach would be to impose such prohibitions as a function of the approval and implementation of a restructuring plan (i.e., imposing restrictions on enforcement of discharged debt). Under either approach, nationals of each state party would be prohibited from pursuing any action to enforce the restructuring state party's debt by a seizure of assets, injunction, or the like.

The convention also should prohibit nationals of a contracting state from transferring claims against the restructuring state party to a national of a state that is not a party to the convention.[89] It should provide further that each state party will recognize a convention restructuring proceeding, will issue orders binding on the state party's nationals giving effect to the automatic stay (if any is provided by the convention) and prohibiting transfers of claims, and will recognize and enforce any approved QSDRL restructuring plan. It also should provide that an approved restructuring plan is binding on the nationals of each state party. The convention should require these provisions to be enacted as a part of each state party's na-

89. In order to facilitate continued trading in claims against a debtor state, an exception could be made for transferees that agree to be bound by limitations on enforcement and other restrictions applicable to nationals of contracting states.

tional laws (except when the convention has such effect under a state's law without further action).[90]

Finally, in this connection, the convention should extend these provisions to cover the conduct of non-nationals that are controlled by a national of a contracting state. To illustrate, consider a State X corporation that controls its wholly owned State Y subsidiary corporation. Assume further that State X has adopted the convention. The convention should provide that actions of the controlled State Y subsidiary corporation are actions of the controlling State X parent corporation.[91]

Returning to the example, because Creditor Y is a national of State C, a state party to the convention, it is plausible that the State A court would conclude that the law of State C applies to the right of Creditor Y to enforce its judgment on the discharged debt. In that case, Creditor Y would be bound by the provisions of the convention and Debtor State X's restructuring plan.

Assuring that the governing law provided by debt instruments is that of a convention state would materially enhance the prospects for non-convention states to respect and recognize restructuring plans effected under the convention. Moreover, because sovereign debt instruments often select New York law or English law as the governing law, adoption of the convention by the United States or the United Kingdom could greatly contribute to the effectiveness of a convention in courts sitting in states other than states party to a convention.[92] Similarly, the adoption of the

---

90. None of the provisions just described would be problematic under United States law. As a general matter the United States (as with most states) can regulate its nationals anywhere, including imposing sanctions on citizens for noncompliance with United States law. Malcolm D. Evans, International Law 323 (3d ed. 2010) ("States have an undisputed right to extend the application of their laws to their citizens (that is, those who have the nationality of the State), wherever they may be."). Moreover, a convention-based QSDRL could be made retroactive so as to be binding on existing creditors, at least under United States federal law and the law of the United Kingdom. *See* Steven L. Schwarcz, *"Idiot's Guide" to Sovereign Debt Restructuring*, 53 Emory L.J. 1189, 1207-08 [hereinafter Schwarcz, *Idiot's Guide*] (explaining effectiveness of retroactively applicable SDRM under an international convention and under United States federal and English law). However, if a debtor state were constitutionally prohibited from enacting and enforcing an insolvency law that applied retroactively to preexisting debt, then the benefits of that state's enactment of a QSDRL would be substantially undermined. Schwarcz also expresses the view that a state such as New York could enact legislation providing that supermajority voting could retroactively bind creditors to a restructuring plan. *Id.* However, the constitutionality of such legislation would be tested under the Contracts Clause of the United States Constitution. U.S. Const. art. I, sec. 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts.") While an analysis of the constitutionality of such legislation is beyond the scope of this paper, in my view it is questionable whether such legislation would be constitutional.

91. *See, e.g.*, 42 U.S.C. § 2000e-1(c) (2012) (describing prohibited practices of a corporation controlled by an employer "presumed to be engaged in by such employer."); Taylor v. Sturgell, 553 U.S. 880, 895 (2008) ("[A] nonparty is bound by a judgment if she 'assume[d] control' over the litigation in which that judgment was rendered."). Without such a provision and an effective prohibition on transfer the imposition of the convention terms on nationals of state parties might easily be subject to manipulation and evasion.

92. *See* Schwarcz, *Idiot's Guide*, *supra* note 90, at 1207-08. Note that if the model law approach were taken instead of the convention mechanism, then adoptions at the subnational

convention by states whose nationals are significant holders of sovereign debt (or control entities that are significant holders) could provide a basis for non-convention states to recognize approved restructuring plans. But, to reiterate, the extent to which courts sitting in non-convention states would recognize a restructuring plan effected under a convention QSDRL would remain uncertain absent widely adopted, harmonized rules on recognition.[93] The only other effective mitigation of this concern would be the universal (or nearly so) adoption of an SDRM such as the convention proposed here.

II. Sovereign Debt Restructuring as a Virtual Aggregated Collective Action Clause

This Part proposes and describes a framework for sovereign debt restructuring. Subpart A first outlines the substantive provisions that would be included in a QSDRL. Subpart B then explores the nature of the administrator of a restructuring proceeding under a QSDRL.

A. *Substance of a QSDRL.*

A state's SDRL would qualify as a QSDRL only if it met the criteria specified in a convention or model law on recognition.[94] One important aspect of a QSDRL would be the identity and nature of the administrator that would oversee a restructuring proceeding. One possible administrator (suggested in Subpart B) is a court of the debtor state. Presumably, that feature would be satisfactory to the debtor state. On the other hand, that approach might give rise to more than minor concerns for investors in sovereign debt securities, other creditors, and other states, all of whom might be reluctant to accept the debtor state's own courts as the administrator. But how such stakeholders would view the prospect of a QSDRL regime may turn in large part not only on the identity of the administrator but also on the substantive provisions of the QSDRL. Moreover, views on an administrator also would be greatly influenced by the tasks assigned to the administrator under the QSDRL. This Subpart addresses those substantive provisions in the context of the requisite criteria for—and content of—a QSDRL. Subpart B then considers whether the courts of a debtor state might be an appropriate administrator for a QSDRL and the feasibility of that approach. It also addresses other alternative administrators that could attract widespread acceptance.

---

level, such as under New York and English law, would be feasible. However, if enacted by New York (or any other state of the United States) it would face a constitutional challenge under the Contracts Clause. *See supra* note 90.

93. Such widespread adoption would not be unheard of. For example, as of 2015, 156 states were parties to the New York Convention. *See* Status, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

94. If a state implemented its QSDRL through the contractual approach, the terms of debt contracts could specify the criteria or refer to an existing QSDRL.

1. Commencement of Proceeding and Proposal of Restructuring Plan.

The framework posited here contemplates that only a debtor state could commence a restructuring proceeding under a QSDRL[95] and that there would be no test to be met as a condition to commencement,[96] except, perhaps, a requirement that the commencement be made in good faith.[97] It also contemplates that only the debtor state would be empowered to propose a restructuring plan. I make no claim that either approach is optimal but agree with others that these features are dictated by political realities.[98]

2. CAC-Like Creditor Approval.

The QSDRL proposed here is best viewed as a system of classification and voting that mimics as closely as possible the modification structures provided in the Model CACs. But under the QSDRL these voting structures could apply not only across different issues of debt securities, as in the Model CACs, but also across other types of debt. As a practical matter, the protection of creditor interests would rest almost exclusively on a requirement that a restructuring plan be accepted by a specified supermajority of 75% in amount of creditors of each class.[99] A QSDRL structure that would require substantial creditor reliance on the proper

95. *See, e.g.*, Paulus, *Resolvency*, *supra* note 44, at 198-99.

96. See Schwarcz, *Idiot's Guide*, *supra* note 90, at 1207-08. Note that if the model law approach were taken instead of the convention mechanism, then adoptions at the subnational level, such as under New York and English law, would be feasible. However, were New York (or another state of the United States) to enact a model law on recognition of restructuring plans modifying sovereign debt contracts, its constitutionality would be tested under the Contracts Clause of the United States Constitution. U.S. Const. art. I, sec. 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts."). An analysis of the merits of this issue is beyond the scope of this paper.

97. *See infra* Part II.A.10.

98. *See, e.g.*, Paulus, *Resolvency*, *supra* note 44, at 196, 198-99.

99. Others have suggested that approval should require only a supermajority of creditors that actually vote or that have registered their claims in a restructuring proceeding. *See, e.g.*, Schwarcz, *Idiot's Guide*, *supra* note 90, at 1216-17 & n.125 (including in a draft convention alternative provisions on voting that would require supermajority approval of members of each class (i) voting on the Plan or (ii) entitled to vote on the Plan, noting that the former approach would make it easier to attract the requisite supermajority); Republic of Argentina, Towards a Multilateral Legal Framework for Sovereign Debt Restructuring Processes 5 (2015), http://www.unctad.info/upload/Debt%20Portal/GA%20Ad%20hoc%20committee%20statements/Permanent%20Mission%20of%20Argentina.pdf [hereinafter Argentina Proposal] (stating that voting framework for proposed SDRM would permit voting *only* by creditors that register their claims in the proceeding, but approval by requisite supermajorities of voting creditors would be binding on *all* creditors.). However, the proposal in the text is patterned on the approval process provided in the Model CACs, which I have assumed are or will be generally accepted in the sovereign debt markets. *See, e.g.*, Model CACs, *supra* note 9, ¶¶ (c)(ii), (c)(iii) at 4. Paulus appears to favor a similar approach. Paulus, *Resolvency*, *supra* note 44, at 196 ("all creditors of that sovereign - are grouped together into classes") (footnote omitted). However, Paulus suggests that if a plan fails to achieve the requisite majority vote because of "hold out" creditors, the court could withdraw that creditor's voting rights or deem its vote to be one of approval of the plan. *Id.* at 198. I would not support such power

and judicious exercise of discretion and factual determinations by the administrator for the proceeding would almost certainly not attract support.[100] Even if this assessment is correct, it remains necessary to consider important aspects of a QSDRL that would be ancillary to the super-majority acceptance requirement.

3. Classification of Creditor Claims and Voting by Creditors.

Appropriate classification of creditor claims is key for the application of the super-majority acceptance requirement. All substantially similar claims should be required to be classified together. The simplest approach (and the most effective approach to avoiding blocking positions in classes of claims and avoiding administrator discretion) would be to mandate that all claims that are *pari passu* be placed in a single class (a "unitary classification" approach).[101] A unitary classification approach should be conclusively presumed to be an appropriate classification. Although that approach would prevent the taking account the various characteristics of claims (such as different types of debt), the overarching goal should be to inhibit a debtor state's ability to gerrymander the classification process in order to foster class acceptances that might not emerge from more coherent classifications.

Absent a unitary classification approach, the classification of claims necessarily and inevitably would involve at least some exercise of discretion in any determination by the administrator that a proposed scheme of classification complies with the QSDRL. For this reason (again, unless the QSDRL were to provide for a mandatory unitary classification approach), a QSDRL must clearly and broadly provide, for example, that unsecured *pari passu* claims must be included in the same class unless the claims are materially different. For example, one plausible approach would be to separately classify debt securities, bank loans, debts owed to official credi-

---

and discretion for an SDRM administrator. Moreover, it is not clear how one would distinguish a "hold out" creditor from a creditor that merely does not vote for the proposed plan.

100. This would be so in part, but only in part, if it were a court of the debtor state that would be the tribunal administering the proceeding. But even with a more "neutral" international or arbitral tribunal both the debtor state as well as creditors would likewise harbor considerable skepticism about the exercise of substantial discretion by the administrator. *See* Schwarcz, *Idiot's Guide*, *supra* note 90, at 1198 (advocating an international convention that should "require only minimal adjudicatory discretion in its administration.").

101. Schwarcz explained that voting under a convention regime should "include all of the State's creditors holding *pari passu* claims, *voting as a single group*." Schwarcz, *Idiot's Guide*, *supra* note 90 at 1205 & n75. However, in the same article he includes a draft convention that provides, in part: "Each class of claims shall consist of claims against the debtor State that are *pari passu* in priority, provided that (a) *pari passu* claims need not all be included in the same class, and (b) claims of governmental or multigovernmental entities each shall be classed separately." *Id.* at 1217. The unitary classification approach differs radically from the first-in-time classification approach suggested by Bolton and Skeel, discussed below. *See infra* notes 136-145 and accompanying text. Paulus and Tirado suggest that creditors are to be grouped into "classes that are to be formed in compliance with rational and verifiable criteria." Paulus & Tirado, *Sweet*, *supra* note 44, at 535.

tors,[102] debts owed to other states, short-term trade debt, and debt governed by the debtor state's domestic law.[103] Official commentary approved by the organization sponsoring the convention[104] should provide examples—extensive examples—of both appropriate, complying classification schemes and classification schemes that are inappropriate and noncomplying.

Discretion in the approval of a proposed classification scheme could be reduced (or eliminated) by requiring approval of the scheme by a majority or supermajority of all creditors. Although such approval arguably would be imbedded in any ultimate supermajority approval of the restructuring plan, the credibility of the supermajority approval would be undermined if the classification scheme were seriously flawed. For this reason, approval (or not) of the classification scheme by creditors earlier in the proceeding could be useful. On the other hand, depending on how early in a proceeding a classification proposal emerges, such a vote could be problematic.[105] One potential means of ameliorating difficulties with a creditor vote could lie with the implementation of a worldwide registry of sovereign debt.[106] Having a public record of a state's outstanding debt would be useful for ensuring that creditors and groups of creditors are not overlooked. Moreover, the identification of creditors at the stage of voting on a classification proposal need not be definitive; it could precede the final

102. *See* Kunibert Raffer, *Considerations for Designing Sovereign Insolvency Procedures*, L., Soc. Just. & Global Dev. J. (Oct. 2005), http://www.go.warwick.ac.uk/elj/lgd/2005_1/raffer (proposing that official creditors, including International Financial Institutions such as the IMF, should receive the same treatment as private creditors in the restructuring of sovereign debt).

103. I do not suggest that all of these types of sovereign debt necessarily would be dealt with in a restructuring proceeding under a QSDRL. I consider below the scope of the debts that could be subject to restructuring. *See infra* Part II.A.5.

104. *See, e.g.*, Roy Goode, Official Commentary, Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment (3d ed. 2013); Hideki Kanda, et al., Official Commentary on the Unidroit Convention on Substantive Rules for Intermediated Securities (2012). Given the weight borne by claims classification and the supermajority acceptance requirement, arguably this approach would be insufficient. One might consider permitting a state's court in which recognition of a restructuring plan is sought to examine *de novo* the classification of claims under the restructuring plan (assuming that in the restructuring proceeding plausible objections to the classification had been raised) for compliance with the QSDRL. However, that approach could lead to inconsistent results among states.

105. Bolton and Skeel have explained, in the context of discussing creditor approval of DIP financing, that organizing a vote of creditors in a timely fashion would present difficulties and delay in the case of a state with a complex debt structure. Bolton & Skeel, *Black Box*, *supra* note 8, at 775, 779.

106. *See* Assistant Secretary-General of the UN Department of Economic Affairs, Special Event of the Second Committee on Sovereign Debt Restructurings: Lessons Learnt and Proposals for Debt Resolution Mechanisms (Oct. 12, 2012), http://www.un.org/en/development/desa/usg/statements/asg/2012/10/sovereign-debt-restructuring.html. ("An important and cross-cutting issue is that of transparency and availability of data. Parallel to private sector efforts to address this issue, the creation of an international registry of debt, reported by creditors and reconciled with debtors, has been proposed."). *Id.*

determination of creditor claims for purposes of the ultimate voting on a proposed restructuring plan and subsequent distributions to creditors.[107]

Consider next how the voting structures offered by the Model CACs could be applied to classes of creditors voting on a debtor state's proposed restructuring plan. Once the classes of creditors are identified, one of the options in the menu of voting structures provided in the Model CACs would be applied to voting by creditors in each class. For example, a debtor state might propose in the restructuring plan a single limb voting procedure that would apply to voting by creditors in Class I. Under that approach, acceptance of the plan would require a supermajority 75% in amount vote of all of the members of the class.[108] The single limb voting procedure would mean, for example, that if Class I included all bank loan creditors there would be no voting on a syndicate-by-syndicate basis.[109] Under the single limb voting procedures for debt securities, the Model CACs require that all affected holders receive in the restructuring identical instruments or menus of instruments.[110] Applying those procedures to a restructuring under a QSDRL, all members of Class I would be provided with identical treatment or an identical menu of treatment alternatives.

Through consultations with stakeholders during 2013 and 2014, the IMF concluded that there are circumstances under which flexibility to offer debt holders differing treatment is appropriate and the Model CACs incorporate such flexibility.[111] To illustrate, suppose that the debtor state wishes to propose different terms for three different groups of issues of debt securities: Class II (issues A, B, and C), Class III (issues D, E, and F), and Class IV (issues G, H, and I). Under this sub-aggregation approach, the single limb voting procedure would be applied separately within each group.[112] Acceptance by holders of 75% of the outstanding principal in each of the three classes would be required for acceptance by each class, and the identical treatment or menu requirement would be applied within each class.[113] Alternatively, the debtor state may wish to propose different treatment for different issues of debt securities. Model CACs offer the debtor state two alternatives in this situation. One approach, of course, would be to propose the traditional, non-aggregated, issue-by-issue voting procedure, with the 75% supermajority required for acceptance by holders of that issue.[114] The Model CACs include another approach as well—a two-limb aggregation voting procedure. Under the two-limb procedure, acceptance would require a 66 & 2/3% (aggregate) supermajority vote

107. *Cf.* 11 U.S.C. § 502(c)(2012) (governing the allowance and estimation of claims).

108. *See* IMF, STRENGTHENING, *supra* note 13, 20-22; *see also* Model CACs, *supra* note 9, ¶ (c) at 4-5.

109. *See* Model CACs, *supra* note 9, ¶ (c) at 4-5.

110. IMF, STRENGTHENING, *supra* note 13 at 21-22; Model CACs, *supra* note 9, ¶ (c)(v) at 5.

111. IMF, STRENGTHENING, *supra* note 13, at 22.

112. *Id.*; Model CACs, *supra* note 9, ¶ (c) at 4-5.

113. Model CACs, *supra* note 9, ¶ (c) at 4-5.

114. *Id.*

across all issues of debt securities (i.e., voting as under a single limb procedure) and a 50% majority for each issue.[115] Figure 2 presents the alternative voting procedures provided in the Model CACs.[116]

FIGURE 2. CAC WITH MENU OF VOTING PROCEDURES

KEY FEATURES	*MENU OF VOTING PROCEDURES*		
	SINGLE-SERIES	AGGREGATED	
		TWO-LIMB	SINGLE-LIMB
Uniform applicability requirement	No	No	Yes
Voting threshold	75% (per series)	$66\frac{2}{3}$% (aggregate), 50% (per series)	75% (aggregate)
Sub-aggregation	No	Yes	Yes

Also with respect to voting procedures, a QSDRL should provide for the disenfranchisement of debt held by certain creditors. Consistent with the Model CACs, debt owned or controlled directly or indirectly by the debtor state, including debt that has been cancelled or redeemed, should not be entitled to vote.[117] Such disenfranchisement serves to inhibit manipulation of the voting process by the debtor state.[118]

As a final matter, consideration should be given to the possibility that a debtor state would have incurred unsecured subordinated debt, although that is not usual in the case of sovereign debtors.[119] The Model CACs and most SDRM proposals operate on the assumption that the unsecured debt being modified or restructured is *pari passu*. But if junior debt were to exist, it would have to be placed in a class of its own. Even so, given the generally applicable requirement that a supermajority of all classes must

115. IMF, STRENGTHENING, *supra* note 13, at 22-23.

116. *Id.*

117. *See* Model CACs, *supra* note 9, ¶ (i) at 9-10; IMF, STRENGTHENING, *supra* note 13, at 26-27 (describing disenfranchisement provisions recommended by the G-10, the standardized CACs mandated in Europe, and the adaptation in the Model CACs of aspects of each).

118. IMF, Strengthening, *supra* note 13.

119. *See* MARCOS CHAMON, ET AL., SOVEREIGN DEBT STRUCTURE FOR CRISIS PREVENTION 13 (2004) ("[S]overeign liabilities generally fall into just two classes—secured debt and unsecured debt. Within the unsecured debt class there is no distinction between ordinary debt and subordinated debt.").

approve the plan, the QDSRL must provide a means for preventing the junior debt from effectively having a veto power over the plan approval process.[120] Perhaps the best approach would be for the QSDRL to provide that if senior debt approves a plan under which the senior debt receives a haircut in principal amount, then any junior debt would be discharged and eliminated. If the plan provided for re-profiling (maturity extensions) of senior debt only, then the QSDRM might require substantially equivalent treatment for the junior debt.[121]

4. No Cramdown: Just Count the Votes.

The QSDRL should not permit the cramdown of a dissenting, non-accepting class of creditors. Acceptance by the requisite supermajorities of all classes of claims should be required for plan approval.[122] Of course, a non-accepting class may force the debtor state to renegotiate the plan and "sweeten" the deal for that class in a revised plan, but only if there were full disclosure and all classes once again were entitled to vote on the revised plan. Broad classifications of claims which do not draw small distinctions between classes should enhance the likelihood that all classes would accept a plan.[123]

A plausible response might be that it could be relatively easy to follow the approach to cramdown of a non-accepting class under a Chapter 9 municipal bankruptcy in the United States.[124] For a class of unsecured creditors that do not receive the full value of their claims, cramdown requires that the plan be "fair and equitable and, for such a class, a plan is fair and equitable if holders of claims or interests junior to such class re-

---

120. *See* Bolton & Skeel, *Black Box*, *supra* note 8, at 779 (criticizing the IMF's SDRM proposal on this basis).

121. As another alternative, the debtor state could opt to exclude the junior debt from the restructuring process altogether. Because (presumably) the restructured *pari passu* senior debt would retain its seniority, if properly structured the subordinated debt could be left without remedies so long as the senior remains outstanding. In a worst case the state debtor would need to undertake separate negotiations with holders of subordinated debt.

122. Some would support the conclusion in the text that cramdown should not be included in an SDRM. *See, e.g.*, Schwarcz, *Reorganization*, *supra* note 2, at 1006-09. Some others have been more receptive to a cramdown feature for an SDRM, but without substantial detail as to how it would work. *See, e.g.*, Christoph G. Paulus, *Should Politics be Replaced by a Legal Proceeding?*, in PAULUS, MECHANISM, *supra* note 14, at 191, 206 [hereinafter PAULUS, *Politics*] (suggesting the possibility of a cramdown of a class of creditors that does not approve a plan by the requisite majority). I note that in its SDRM proposal Argentina does not mention a cramdown power and it appears, at least, that it does not contemplate such a power. Argentina Proposal, *supra* note 99, at 3 ("The decisions adopted by a majority of the creditors of a State must be binding upon the minority of creditors, even if they oppose such decision or have not participated in its adoption.").

123. Narrowly drawn, smaller classes would enhance the probability that a blocking position could be acquired in order to prevent acceptance by a class.

124. 11 U.S.C. §§ 1129(b)(1)(2012) (plan may be confirmed if it "does not discriminate unfairly, and is fair and equitable" to impaired classes of claims that have not accepted the plan); 901(a) (section 1129(b)(1) applies to classes of secured and unsecured claims in a Chapter 9 case).

ceive nothing under the plan.[125] While a state debtor would not have holders of interests (i.e., equity security holders), it is at least possible for it to have subordinated debt. As long as the holders of the subordinate debt (if any) receive nothing, then a plan would be fair and equitable for senior, *pari passu* claims. However, this approach would be problematic in at least three respects. First, because sovereign debtors normally do not have junior, subordinated debt, the United States' approach would not provide a meaningful test.

Second, if the United States' approach were followed, cramdown of a class of claims also would require that the plan not unfairly discriminate with respect to the non-accepting class of claims. That determination would appear to require a level of discretion on the part of the administrator that could be inconsistent with the nondiscretionary principle advanced here. Moreover, it also could run afoul of the KISS Principle.

Third, whether the United States' approach or some other method were adopted, provision for a cramdown of non-accepting classes might be politically unacceptable and incompatible with market expectations. It would represent a substantial step away from the Model CACs as a template. It could undermine the goal of inspiring trust and confidence in an SDRM that could be provided by a flat requirement that supermajorities of all classes would be necessary for a plan's effectiveness.

One possible middle ground would be a requirement in a QSDRL that a restructuring plan be fair and equitable and not unfairly discriminate (or analogous standards addressing the same goals). However, under this approach the QSDRL also would provide that supermajority acceptance by all classes would be final and conclusive as to compliance with these requirements.[126] The convention or model law also might make it clear that such conclusiveness would not be subject to collateral attack in courts of adopting states.

5. Scope of Sovereign Debt Subject to Restructuring Under a QSDRL: Debt Eligible for Restructuring.

The ICMA proposed that the Model CAC's be included in documentation for "syndicated issues of sovereign debt securities lead managed by one or more ICMA members with cross-border distribution (that are not

125. 11 U.S.C.§ 1129(b)(2)(B)(ii). In this way, "the absolute priority rule contained in § 1129(b)(2)(B)(ii) can easily be met in a municipal case even if unsecured creditors are not paid in full." Zack A. Clement & R. Andrew Black, *How City Finances Can be Restructured: Bankruptcy and Contract Impairment Cases*, 88 Am. Bankr. L.J. 41, 53 (2014) [hereinafter Clement & Black, *Bankruptcy*]. A principal concern of Schwarcz in the sovereign debt context was that a cramdown along the lines of Bankruptcy Code Chapter 11 would require a valuation of the debtor state as if it had holders of interests. *See* Schwarcz, *Reorganization*, *supra* note 2, at 1007-08. But sovereign states, like municipalities in the United States, do not have equity interest holders. *See* In re Corcoran Hosp. Dist., 233 B.R. 449, 458 (Bankr. E.D. Cal. 1999) (no holders of equity interests of a municipality in Chapter 9). So the cramdown procedure described above by Clement and Black and in the text could be applied without a valuation was an SDRM to embrace such a cramdown regime.

126. For a similar approach, *see infra* Part II.A.10.

otherwise subject to the mandatory euro area model collective action clause introduced in January 2013)."[127] These debt securities consist primarily of those governed by foreign law.[128] The IMF supported this approach, but recognized that the Model CACs in debt contracts governed by domestic law may have merit.[129]

A QSDRL must address at least two fundamental issues in connection with the scope of debt subject to a restructuring: what debt is eligible to be the subject of a restructuring plan[130] and what debt, if any, should the QDSRL require to be the subject of a restructuring plan? The KISS principle and the goal of mimicking the voting structures provided in Model CACs would support the answer to the first question as "all indebtedness on debt securities, for borrowed funds, and trade debt"[131] and "none" to the second. The QDSRL should permit flexibility for a debtor state to be as inclusive or exclusive as it chooses in putting together a restructuring plan.[132] In particular, the debt that would be eligible for restructuring under a QSDRL would not be limited to debt covered by debt contracts governed by the law of any particular state. Moreover, the debtor state should be afforded sufficient flexibility so as to allow certain creditors (e.g., government creditors, including members of the Paris Club) to remain outside of the QDSRL restructuring process. Circumstances vary too greatly across state debtors to accommodate a one-size-fits-all approach to

127. Press Release, ICMA, ICMA Publishes Revised Collective Action Clauses (CACs) and a New Standard *Pari Passu* Clause to Facilitate Future Sovereign Debt Restructuring (Aug. 29, 2014), http://www.icmagroup.org/assets/documents/Media/Pressreleases-2014/ICMA1406—-ICMA-publishes-revised-collective-action-clauses.pdf.

128. IMF, Strengthening, *supra* note 13, at 24 ("[T]he approach taken by the ICMA Model Clauses is to include such clauses in 'syndicated issues of sovereign debt securities lead managed by one or more ICMA members with cross-border distribution,' which consists primarily of bonds governed by foreign law.").

129. See *id.*

130. Otherwise expressed, which debt (if any) is *not eligible* to be the subject of a restructuring plan?

131. The earlier discussion of classification suggested that plausible classes could include debt securities, bank loans, debts owed to official creditors, debts owed to other states, short-term trade debt, and debt governed by the debtor state's domestic law. *See supra* notes 102-104 and accompanying text. One also might consider including liabilities on final arbitral awards arising out of investor-state arbitration.

132. Argentina's proposed SDRM would leave to each state to determine which of its sovereign debt would be subject to the restructuring process. Argentina Proposal, *supra* note 99, at 4. However, the proposal notes:

> [F]ollowing the practice of States, the concept of "Sovereign Debt" shall not include (i) debts of the State Party to other States and their agencies, (ii) debts of the State Party to international organizations, (iii) debts governed by domestic law and subject to the exclusive jurisdiction of domestic courts, (iv) debts incurred after the initiation of the Multilateral Sovereign Debt Restructuring Mechanism, notwithstanding the fact that they may be included in a subsequent Multilateral Sovereign Debt Restructuring Mechanism.

Id.

the scope of a sovereign debt restructuring. Creditors that are left unaffected outside a plan's scope cannot complain. Creditors that are subject to a proposed plan and that object to the exclusion of other creditors can vote it down.

Notwithstanding the foregoing, the goal here remains to suggest a structure for an SDRM that would garner support from important constituencies that currently oppose such an approach. It is plausible that over the course of discussions it would prove necessary for a QSDRL to provide that certain types of debt (e.g., debt owed to official sector creditors, such as the IMF) would not be eligible for restructuring under a QSDRL.

6. Disputed Claims.

Classification aside, the administrator's principal dispute resolution duties would be to adjudicate disputed claims. Consider, however, the typical situation of a debtor state that has contractually submitted itself to the jurisdiction of another state's courts (typically the courts of a state the law of which governs the state's obligations). In those circumstances the QSDRL might permit the putative creditor, and require the debtor state, to resolve the disputed claims in the courts of that other state. Another option would be arbitration. As explained in Subpart B, experience with investor-state arbitration under investment agreements and conventions teaches that many state debtors consider an arbitral administrator to be an unwelcome participant in the context of an SDRM. In the narrow context of resolving disputed claims (i.e., the validity and amount of debt), however, such resistance might be tempered.[133]

7. Creditor Priorities.

The QSDRL should provide that priorities as among creditors under the applicable law generally should be observed, as is implicit from the foregoing discussion of classification.[134] By not promoting the claims of junior creditors over those of senior creditors, and by not prioritizing some *pari passu* creditors' claims over other *pari passu* creditor's claims, absolute priority would be respected.[135] A QSDRL's respect for the priorities of claims under applicable law outside the QSDRL would not reflect the

133. As to debt securities and loans the process should be quite straightforward. Although disputes concerning trade debt could involve the assessment and determination of damage claims, arbitration is routine in that realm and also might not be objectionable.

134. If the QSDRL did not require a unitary classification approach, then some discrimination among classes could be tolerated. But the constraints of the classification requirements would remain and the no cramdown/supermajority voting scheme would discipline the process.

135. I use the term "absolute priority" generally to mean respect for priorities outside of a restructuring proceeding and not necessarily as the precise term of art that has been achieved under the Bankruptcy Code. *See* Collier on Bankruptcy, *supra* note 83, ¶ 1129.03[4][a] (explaining "absolute priority": A senior class of creditors "is to be paid or allocated all value from the debtor before any of that value is paid or allocated to a junior class.").

priority scheme advocated by Bolton and Skeel.[136] Their version of an SDRM priority structure would rank a debtor state's unsecured debt in the order in which it was incurred with earlier-in-time debt being senior to later-in-time debt, to the end that "all unsecured debts would be classified by date of issue and earlier issues would have higher priority over later issues."[137] Their motivation for this priority scheme is to protect "against dilution [of earlier-in-time debt] through overborrowing."[138]

It seems extremely unlikely that this first-in-time priority scheme would find widespread support,[139] let alone if it were to be applied retroactively to *pari passu* issues of debt that existed before the SDRM were put in place—an issue that Bolton and Skeel do not discuss.[140] If such pre-existing debt were exempted from the first-in-time rule, then it could take many years for that debt to be replaced by post-SDRM effective date debt. That would eliminate one of the potential advantages of a statutory regime over the gradual shifts as new debt is issued over time.[141] There are other drawbacks as well. For example, more and smaller classes of claims would provide attractive bait for potential holdout investors.[142] The priority rule also could eliminate or materially reduce liquidity at a time when it

136. Bolton & Skeel, *Black Box*, *supra* note 8, at 799.

137. *Id.* The authors recognize that, where there are many issues of a state's debt outstanding, a classification based strictly on the date of issue may be impractical. *Id.* To overcome that problem they suggest that all debt incurred in a given year could be placed in a single class or that there might be a minimum amount for each class. Curiously, later in the article they suggest that multilateral debt and trade debt might be placed in "a separate class"—presumably not together in the same class—and that bank loans and bonds might be separately classified. *Id.* at 801. They also suggest that bonds might be classified "by the financial center where they were issued." *Id.* How these classifications could be reconciled with the first-in-time priority that they advocate is never explained.

138. *Id.* at 799.

139. *See* Anna Gelpern, *Building a Better Seating Chart for Sovereign Restructurings*, 53 Emory L.J. 1119, 1150 (2006) [hereinafter Gelpern, *Building*] ("[I]t is inconceivable that any of the G-7 would agree to constrain their own debt management with a first-in-time rule, raising further obstacles to implementation.")

140. Throughout the article the authors advocate the observance of "absolute priority." Bolton & Skeel, *Black Box*, *supra* note 8, *passim*. One could infer from that, and the absence of a discussion of pre- versus post-SDRM effective date debt, that the authors assumed that the pre-existing debt *would* be subject to the first-in-time rule. Their view of "absolute priority" apparently presumes its application within the priority framework that they propose.

141. *See supra* Part II.A.

142. Bolton and Skeel presumably would respond that the holdouts could be addressed through a cramdown process. See Bolton & Skeel, *Black Box*, *supra* note 8, at 798 (suggesting that holdouts could be addressed through a cramdown process).

is most needed[143] and discourage refinancing.[144] Clearly the complexity of the priority rule and the resulting issues surrounding classification are incompatible with the KISS principle or a QSDRL as advanced here.[145]

8. DIP Financing.

Several SDRM proposals have included a provision for granting priority to creditors who provide financing to the debtor state after the commencement of a restructuring proceeding[146] (often referred to as "interim" or "DIP" financing[147]). DIP financing normally is designed to provide needed liquidity. Several proposals also recognize the important and ongoing role of the IMF in providing DIP financing.[148]

I have no principled objection to such priority and indeed support it if subject to appropriate checks. But there are several problems with providing for such a priority in the QSDRL proposed here. An absolute and unconditional priority for any DIP financing could invite, or at least accommodate, improvident borrowing and bailouts. But providing restrictions and standards for borrowing would likely introduce too much complexity and could jeopardize the prospects for reaching an interna-

143. Gelpern, *Building*, *supra* note 139, at 1149 ("[T]he rule would tend to raise borrowing costs and shrink maturities as sovereign finances deteriorate [and] may also make liquidity crises harder to manage.") Schwarcz has made a similar point in explaining that awarding priority to later-in-time financers, instead of subordinating them, creates value for earlier-in-time creditors by increasing a debtor's liquidity. Schwarcz, *Idiot's Guide*, *supra* note 90, at 1202. Bolton and Skeel appear to recognize this principle, inasmuch as they favor awarding priority to new credit extended after a formal proceeding has been commenced. *See* Part II.A.8., *infra* (discussing Bolton and Skeel's proposal on interim financing). Apparently what they view as over borrowing outside such a proceeding can provide beneficial liquidity inside the proceeding, although they recognize that over borrowing also is possible inside the proceeding. *Id.*

144. Gelpern, *Building*, *supra* note 139, at 1149.

145. For this reason I do not offer a critique or analysis of Bolton and Skeel's claims as to the beneficial *ex ante* effects of the proposed first-in-time priority rule or as to any net costs or benefits of such a rule. That priority rule also would be inconsistent with the other principles underlying the structure of a QSDRL proposed here—the KISS Principle, mimicking the voting procedures of the Model CACs, providing very little discretion for the administrator, and offering real potential for widespread acceptance.

146. *See, e.g.*, Bolton & Skeel, *Black Box*, *supra* note 8, at 801-09; Alice de Jong, *Returning to Fundamentals: Principles of International Law Applicable to the Resolution of Sovereign Debt Crises*, 36 SUFFOLK TRANSNAT'L L. REV. 1, 32-34 (2013); Gianviti, *European Mechanism*, *supra* note 2, at 24-25; Hagan, *Designing*, *supra* note 6, at 374-76; Schwarcz, *Idiot's Guide*, *supra* note 90, at 1199-1202.

147. The term has been borrowed from the United States vernacular to refer to post-bankruptcy petition financing obtained by a "debtor in possession" (hence, DIP) in a case under Bankruptcy Code Chapter 11. *See* 11 U.S.C. § 1101(1) (2012) (defining "debtor in possession" as the "debtor" except when a trustee has been appointed). A debtor in possession generally has the rights, powers, and duties of a trustee. 11 U.S.C. § 1107(a)(2012).

148. *See, e.g.*, Dickerson, *Viable*, *supra* note 29, at 1027-30; Hagan, *Designing*, *supra* note 6, at 374-76; Paulus & Tirado, *Sweet*, *supra* note 44, at 548-49.

tional consensus.[149] And what if the standards incorporated in a convention turned out to be too lenient or too strict? Adjustments to multilateral agreements are problematic and uncertain and may involve considerable delay.[150] Of even more concern, perhaps, the administration of any conditions to DIP financing could be beyond the competency of the administrator and could require a level of administrator discretion that would be incompatible with the core principles of the QSDRL approach envisioned here.

A priority DIP financing feature could add unwanted complexity to an SDRM in other respects as well. A DIP financer's claim in a United States Chapter 11 case is awarded priority as an administrative expense claim.[151] That claim must be paid in full upon confirmation of a plan of reorganization unless the DIP financer otherwise agrees.[152] If confirmation does not occur and the case is converted to Chapter 7 liquidation,[153] the priority will be claimed in the liquidation proceeding.[154] In a restructuring under a QSDRL, however, presumably the DIP financer's claim would emerge from a restructuring proceeding side-by-side with the debtor state's restructured debt. What would be the attributes of the DIP financer's "priority"?

One need only consider some of the most basic issues that must be addressed when drafting and negotiating contractual subordination agreements to appreciate that, in the sovereign debt restructuring context, it would not do to simply provide in a QSDRL that the DIP indebtedness would be granted "priority" over other indebtedness.[155] For example, how deeply would the restructured debt be subordinated? Could the restructured debt be serviced before the DIP indebtedness had been paid in full? Could it be serviced only if the DIP financing were not in default? Would holders of the subordinated restructured debt have any obligations to

149. For example, Bolton & Skeel would adapt the United States Bankruptcy Code scheme for DIP financing (found in 11 U.S.C. § 364 (2012)) to the sovereign debt context, affording the DIP lender priority over other creditors. *See* Bolton & Skeel, *Black Box*, *supra* note 8, at 807-09. They would permit DIP financing for trade credit but require a majority vote of creditors for other credit, but do not specify how that dichotomy would be determined. *Id.* They acknowledge that this approach could be expensive, involve delays, and discourage debtors, while also acknowledging that the "chilling effect" could be beneficial and "would minimize the risk of overborrowing." *Id.* at 808-09. It is interesting that they note that "[t]he framework we propose is quite simple." *Id.* at 807.

150. Even if the model law approach were adopted, as opposed to a convention, a state that unilaterally modified its SDRL would run the risk that another adopting state would not recognize a restructuring under such a non-uniform SDRL.

151. *See* 11 U.S.C. §§ 503(b), 507(a)(2) (2012).

152. *See* 11 U.S.C. § 1129(a)(9)(A) (2012).

153. *See* 11 U.S.C. § 1112(a), (b) (2012).

154. However, the Chapter 11 administrative expense priority claims would be subordinate to post-conversion administrative expense priority claims incurred in the Chapter 7 liquidation case. 11 U.S.C. § 726(b) (2012).

155. *See, e.g.*, American Bar Association, Subordination Agreement, http://apps.americanbar.org/buslaw/committees/CL190016pub/meetings/2005/annual/20050816000002.pdf.

share or pay over to the DIP financer collections on the restructured debt? If so, under what circumstances? Of course, negotiation of these matters could be left to the restructuring plan, but that approach would undercut the need for liquidity early in the restructuring process.

This is not to say that priority DIP financing would or should be unavailable under a QSDRL regime. Given the importance of priority DIP financing, it seems virtually certain that were a QSDRL regime ever put in place, international financial institutions such as the IMF would develop a parallel regime for priority DIP financing.[156] By developing a priority DIP financing regime under the auspices of the IMF, for example, the regime could be made binding on the IMF members. It could extend to private as well as official DIP financers. The convention itself could, for example, explicitly recognize a priority DIP financing regime adopted by the IMF and binding on its members. Alternatively, the IMF could provide DIP financing itself, relying on its traditional implicit priority. It could fund such financing by selling participation interests in the DIP loans to private investors.

9. Treatment of Claims Supported by Credit Default Swaps or Similar Credit Enhancements.

In advance of the first meeting of the Ad Hoc Committee, the Republic of Argentina submitted a proposal for a Multilateral SDRM (Argentina Proposal).[157] The proposal insinuated, without categorically stating or explaining, that creditors with the benefit of a hedging transaction, such as a credit default swap (CDS), may be engaged in fraudulent conduct by participating in a sovereign debt restructuring process:

> As a corollary of the principle of good faith, the prohibition against fraud is especially significant and must be particularly taken into consideration in cases where a creditor simultaneously holds both sovereign debt securities and hedge instruments, which

156. Of course, were the IMF to be the DIP financer, the question would be whether it would, and should, enjoy the implicit priority that traditionally has been conferred. Paulus & Tirado, *Sweet*, *supra* note 44, at 514 (noting "the 'virtual' priority traditionally awarded to the IMF by nations—and accepted by creditors—of rescued countries, despite there being no explicit and binding legal instrument to support it (concerning creditors)."). Moreover, Airapetian has argued that while a statutory approach to DIP financing is preferable, allowing the market to deal with such financing is likely to produce a similar result:

> Despite the apparent benefits of the statutory approach, the free-market approach might not be much worse than the statutory approach due to political and economic motivation to fund debtor nations during a debt-restructuring process . . . regional alliances would probably come to the rescue of countries in need of loans during the restructuring process. In short, the statutory and free-market approaches would likely lead to similar results.

Stephan Airapetian, *Managing Sovereign Debt: A More Long-Term Debt-Restructuring Solution*, 22 S. CAL. INTERDISC. L.J. 385, 404 (2013).

157. *See* Argentina Proposal, *supra* note 99, at 4.

> may generate proceeds in the event of non-payment by the debtor State.[158]

The proposal also provides that, in connection with the claims process,

> creditors should be required to state whether they, their subsidiaries or related companies have any hedge instrument or mechanism which may generate proceeds in the event of non-payment by the debtor State . . . relating to the [relevant] Sovereign Debt.[159]

The perceived problem is one of so-called "empty" voting that arises when the holder of debt has not retained the risk associated with nonpayment, which has been assumed by a third party protection seller, and may receive a right to payment from the protection seller upon the debtor's default.[160] Presumably, Argentina's proposed disclosure requirement contemplates a process in which such protected creditors would be screened with a view toward disenfranchisement. Both the KISS Principle and the principle of limited administrator discretion would discourage any such process or remedy, including disenfranchisement, that would address empty voting under a QSDRL. Moreover, it is not clear that empty voting actually presents a serious problem for sovereign debt restructuring.

In 2013 the IMF addressed in considerable detail various issues relating to CDS protection for holders of sovereign debt.[161] But that discussion made no mention of empty voting or CDS acting as an impediment to restructuring. Moreover, the Model CACs and relevant discussions by the ICMA and the IMF similarly do not address the issue or pose it as a problem for restructuring.[162] On the flip side of an empty creditor there is a protection seller that does bear the credit risk. That seller has the power to protect, contractually or through the development of a market in creditor control, its ability to control its creditor counterparty's participation in a restructuring process.[163] Even if it would be optimal for an SDRM to in-

---

158. *Id.* at 3.

159. *Id.* at 5.

160. *See, e.g.*, Jay L. Westbrook, *Sovereign Debt and Exclusions from Insolvency Proceedings*, in PAULUS, MECHANISM, *supra* note 14, at 251, 258 ("There also is the problem of the 'empty' creditor whose use of derivatives may have made its actual financial interest antagonistic to resolution of the crisis even as it sits at the negotiating table by virtue of its apparent creditor status.").

161. IMF, GLOBAL FINANCIAL STABILITY REPORT 57-64 (April 2013), http://www.imf.org/external/pubs/ft/gfsr/2013/01/pdf/text.pdf.

162. *See* ICMA, ICMA SOVEREIGN BOND CONSULTATION PAPER (Dec. 2013), http://www.icmagroup.org/resources/Sovereign-Debt-Information/; ICMA, ICMA SOVEREIGN BOND CONSULTATION PAPER SUPPLEMENT (June 2014), http://www.icmagroup.org/resources/Sovereign-Debt-Information/; IMF, Strengthening, *supra* note 13.

163. Yesha Yadav, *Empty Creditors and Sovereign Debt: What Now?*, 9 CAP. MARKETS L.J. 103, 117 (2014) (advocating a formal market in creditor control for transfer by creditors of aspects of control to protection sellers and discussion bilateral contracting between those parties on an ad hoc basis). Yadav explains:

clude bells and whistles for empty voting, a QSDRL should steer clear of the issue.

10. Other Potential Conditions for Plan Effectiveness.

Eliminating the possibility of a cramdown of dissenting classes from the debtor state's arsenal is consistent with the conceptualization of the QSDRL as a virtual comprehensive, aggregated CAC. But, the question remains whether the administrator should be assigned the task of approving a restructuring plan or certain of its elements. Three additional requirements for a restructuring plan, typical of proceedings to restructure debt of private firms, might be considered for inclusion in a QSDRL. First, the administrator might be empowered to dismiss a restructuring proceeding if it had not been commenced in good faith. Such a provision would afford some protection for creditors in egregious cases of substantial abuse.[164]

Second, approval of a restructuring plan might be conditioned on the administrator's finding that the plan is in the best interests of creditors. Municipal bankruptcy under Chapter 9 of the United States Bankruptcy Code is roughly analogous to a sovereign debt restructuring inasmuch as each involves the restructuring of the debt of a government.[165] The best interest of creditors test is "a flexible standard" that should be applied "to require a reasonable effort by the municipal debtor that is a better alternative to its creditors than dismissal of the case."[166] In the sovereign debt context, this would mean that a debtor state's proposed mix of austerity and taxation must be balanced against the benefits offered to the creditors.

Third, the QSDRL might include as a condition for approval of a restructuring plan that the administrator find that the plan is feasible. In order to establish feasibility in the context of a municipality debtor under

---

> A market in creditor control substitutes the voice of an empty creditor with that of a protection seller with respect to select control rights. In this way, it also helps foster interdependence between protection sellers and lenders to leverage the cooperative potential inhering within the relationship.

Id.

164. Such a permissive basis for dismissal is provided in Chapter 9 of the Bankruptcy Code. 11 U.S.C. § 921(c) (2012) (permitting dismissal of a petition upon objection, after notice and a hearing if the petition was not filed in good faith or does not comply with Bankruptcy Code). However, in order to protect interests of municipality and its residents, "a finding that a municipality did not file in good faith should be reserved for those situations in which the evidence is compelling." 6 COLLIER, *supra* note 83, ¶ 921.04[2].

165. 11 U.S.C. §§ 901–946 (2012). Kunibert Raffer sees this as a sufficiently strong analogy to have proposed a "Fair Transparent Arbitration Process" for sovereign debt that would be an international version of Chapter 9. Kunibert Raffer, *Internationalizing US Municipal Insolvency: A Fair, Equitable, and Efficient Way to Overcome a Debt Overhang*, 6 CHI. J. INT'L L. 361, 362, 367-69, 379 (2005) [hereinafter Raffer, *Internationalizing*].

166. 6 COLLIER, *supra* note 83, ¶ 943.03[7][a].

Chapter 9,[167] "[t]he debtor must establish that, after all proposed spending cuts, revenue increases and payments to creditors proposed in the plan, the municipality will still be able to serve its citizens at a level it determines to be appropriate in the exercise of its judgment."[168]

In the abstract, a feasibility requirement is not so troubling. But it might be unwise to include that requirement under a QSDRL, especially if the debtor state's courts were the administrator for the restructuring proceeding. One can imagine the debtor state proposing and all classes of creditors accepting a restructuring plan only to have the court determine that the plan is not feasible. The debtor state would then presumably have to propose a revised restructuring plan, one less favorable to creditors. A feasibility requirement could invite the administrator and debtor to behave strategically (or even to collude) and in this way to lessen the creditors' bargaining power. The goal of the QSDRL should be to replicate as closely as possible a contractual solution under a comprehensive aggregated CAC. The administrator should not be permitted to override the agreement of the supermajorities of creditors and the debtor state.

Given the supermajority acceptance requirement and the absence of cramdown for non-accepting classes, as proposed here, one might question the need for providing for the administrator's dismissal of a proceeding that was not commenced in good faith or for its determination that a plan is in the best interests of creditors. On the other hand, these provisions could provide a framework for the goals of a restructuring proceeding and the general standards under which a plan should be negotiated. They could provide a constructive roadmap for negotiations that could result in a plan that is fairer to all concerned.

On balance, however, all three of these potential conditions—filing in good faith, feasibility, and best interests of creditors—should be included in the QSDRL as conditions to the effectiveness of a restructuring plan. But the convention should ensure that the satisfaction of these conditions, once approved by the supermajorities, is not subject to collateral attack. Moreover, the QSDRL should not provide for the administrator to determine compliance, or not, with these or other requirements. The supermajority creditor approvals should provide adequate assurance that the proceeding and plan comply with the QSDRL. The administrator's role would be to count the votes and issue its order as to whether or not the supermajorities had been achieved and, if achieved, render its judgment that the restructuring plan has been duly approved and is effective on that basis.

167. 11 U.S.C. § 943(b)(7) (2012) (requiring that a plan for the adjustment of debts be "in the best interests of creditors and is feasible" as a precondition to confirmation by the court).

168. Clement & Black, *Bankruptcy*, *supra* note 125, at 49.

11. Other matters.

There are several other matters that should be addressed by a QSDRL. The possibility of providing for an automatic stay has been mentioned already.[169] As to some others, I need only refer to earlier commentary. The QSDRL must provide for the notification of creditors,[170] the filing and processing of claims,[171] and a timetable for the completion—successful or not—of the proceeding.[172]

B. *The Administrator.*

1. A Skeptical View: Unfriendly Fora.

I am skeptical that debtor states, and in particular emerging market states, would be willing to submit to the various types of tribunals that have thus far been proposed and discussed in the literature. Does my skepticism conflict with the spirit of the General Assembly's December 2014 UN Resolution establishing the Ad Hoc Committee for intergovernmental negotiations on a multilateral framework for sovereign debt restructuring processes? I believe not. That resolution (as well as the General Assembly's September 2014 UN Resolution) appears to avoid quite carefully any mention of a "tribunal" or "court" or "statutory" approaches to restructuring.[173]

Some proponents of an SDRM for Europe have advocated the use of an existing international tribunal or a tribunal connected with such an existing tribunal.[174] Some proposals involve the establishment of a relatively large panel of potential judges with a small panel to be selected for each case that arises[175] or the selection of an ad hoc panel for each debtor state

169. *See* Part I.B.2.c., *supra*.

170. *See, e.g.*, Schwarcz, *Reorganization*, *supra* note 2, at 1032 (showing the provision in draft convention providing for notification to creditors within thirty days of filing a petition).

171. *Cf.*, Paulus, *Politics*, *supra* note 122, at 208 (identifying the significance of claims verification process with respect to resolvency).

172. *See, e.g.*, Paulus, *Resolvency*, *supra* note 44, at 201 (calling for "rather strict time frames" for the restructuring process and noting that "the focus of timing rules should be on disciplining the creditors").

173. Note, however, that Argentina's proposal recommends the appointment of an Oversight Commission consisting of three states party to an international convention. *See* Argentina Proposal, *supra* note 99, at 2, 5-6; *see also infra* Part II.B.3. (discussing the Argentina Proposal).

174. Some proposals address an SDRL for Europe. Paulus & Tirado, *Sweet*, *supra* note 44, at 512-13 (suggesting one possibility would be a separate and independent chamber of the European Court of Justice); Paulus, *Politics*, *supra* note 122, at 201-04 (similar to Paulus & Tirado, *Sweet*); Gianviti, *European Mechanism*, *supra* note 2, at 28-29, (suggesting as a tribunal The European Court of Justice, a specialized chamber of that court, or an entirely new court).

175. Paulus, *Resolvency*, *supra* note 44, at 195. Paulus suggests a tribunal with a permanent president and a pool of potential judges. The president would then appoint of a smaller panel of judges for particular cases. Although he refers to "judges," Paulus contemplates that each panel actually would be constituted as an arbitral tribunal, possibly under the auspices

each year.[176] Others would create a tribunal on a case-by-case, ad hoc basis.[177] Some contemplate that the tribunal would actually be a special arbitral tribunal within the scope of the New York Convention.[178] Other proposals urge the use of an accepted regime for commercial or investor-state arbitration, such as ICSID.[179] One proposal calls for utilizing the national courts of jurisdictions the laws of which apply to a debtor state's debt.[180] The relevant national courts would be those that preside over domestic corporate bankruptcy cases.[181] Another proposes a non-binding international certification board that would approve sovereign debt restructuring proposals as inconformity with appropriate standards of process and creditor protection.[182]

I do not claim here that any of these approaches, or combinations of them, would be unsatisfactory. It is theoretically possible that any of the proposed tribunals could function adequately in connection with an SDRM. But if these tribunals would not find favor with the states that are most supportive of an SDRM and that would be the most likely future candidates for a restructuring proceeding, then insistence on these types of tribunals could undermine the entire project. I next explain, and reiterate, my skepticism about the willingness of debtor states to submit to the jurisdiction of such tribunals.

---

of the Permanent Court of Arbitration in The Hague. *Id.* For a similar, more recent, proposal for a European tribunal *see* Paulus, *Politics*, *supra* note 122, at 201-04.

176. Dickerson, *Viable*, *supra* note 29, at 1032 (proposing an administrative or adjudicative body as a standing panel of global insolvency experts, selected annually, with the debtor state selecting two members, creditors selecting two, and the four members selecting a fifth, as chair).

177. Ross P. Buckley, *The Bankruptcy of Nations: Let the Law Reflect Reality*, 29 BANKING & FIN. SERV. POL'Y REP. 1, 20 (stating that near term alternative would be to establish ad hoc arbitral tribunals for each case).

178. *See* Christoph G. Paulus, *A Standing Arbitral Tribunal as a Procedural Solution for Sovereign Debt Restructuring*, in SOVEREIGN DEBT AND THE FINANCIAL CRISIS: WILL THIS TIME BE DIFFERENT? 317, 320-22 (Carlos A. Primo Braga & Gallina A. Vincelette eds. 2010) (suggesting appointment of 20-30 arbitrators by a public figure with international stature (such as the Secretary-General of the U.N. and a smaller number of arbitrators assigned on a case-by-case basis); Raffer, *Internationalizing*, *supra* note 165, at 363-64 (suggesting conventional international arbitral panel); Paulus & Tirado, *Sweet*, *supra* note 44, at 513 (suggesting in near term for Europe an arbitral tribunal connected to the Permanent Court of Arbitration in the Hague).

179. Steven L. Schwarcz, *Sovereign Debt Restructuring Options: An Analytical Comparison*, 2 HARV. BUS. L. REV. 95, 119 (2012) (describing the resolution of disputes under the rules of the International Centre for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (2006)); Schwarcz, *Idiot's Guide*, *supra* note 90, at 1210-12; Schwarcz, *Reorganization*, *supra* note 2, at 1028 (describing a new tribunal based on ICSID model).

180. Bolton & Skeel, *Black Box*, *supra* note 8, at 813.

181. *Id.* at 813-16.

182. John. A.E. Pottow, *Mitigating the Problem of Vulture Holdout: International Certification Boards for Sovereign-Debt Restructurings*, 49 TEX. INT'L L.J. 221 (2014). Pottow's proposal is *sui generis* indeed. Such a board, perhaps organized by the IMF or World Bank, would serve a screening function but would have no adjudicatory powers.

As I wrote recently in connection with investor-state dispute settlement (ISDS) regimes:

> In some quarters "BIT" [bilateral investment treaty] is a "four-letter word." UNCTAD noted in 2012 that the negotiation of IIAs [international investment agreements], including BITs, "continues to lose momentum." . . . [P]ertinent for this discussion, it pointed to "the fact that IIAs are becoming increasingly controversial and politically sensitive, primarily owing to the spread of IIA-based investor-State arbitrations." For example, in 2011 Australia announced that it would no longer include ISDS provisions in its IIAs. Also in 2011, Bolivia denounced its BIT with the United States. In 2012 Venezuela gave notice of its intention to withdraw from the ICSID Convention (an action already taken by both Bolivia and Ecuador). Argentina has refused to pay large and long-outstanding arbitral awards to United States firms. Moreover, in the past several years there has been a substantial and rapid increase in the numbers of ISDS cases. This may be attributable to increased investor awareness (and that of their counsels), significant increases in foreign direct investment, States' "*reassertion of their role in regulating and steering the economy*, as implemented through a number of national regulatory changes," and "increased nationalizations, especially in Latin America" (Venezuela and Argentina being examples).[183]

An earlier commentator observed:

> Although a number of Latin American countries have expressed their dissatisfaction with the current international investment law system, Argentina and Bolivia have led the way in voicing their frustration.
>
> . . . .
>
> Countries in Latin American are not the only ones that are seemingly frustrated with the current international investment law sys-

183. Charles W. Mooney, Jr., *The Cape Town Convention's Improbable-but-Possible Progeny Part Two: Bilateral Investment Treaty-Like Enforcement Mechanism*, 55 VA. J. INT'L L. 451, 476 (2015) (emphasis in original) (footnotes omitted). For a particularly scathing attack on the international investment dispute systems, *see* PIA EBERHARDT & CECILIA OLIVET, PROFITING FROM INJUSTICE: HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELLING AN INVESTMENT ARBITRATION BOOM (2012), http://corporateeurope.org/trade/2012/11/profiting-injustice. This critique serves as a useful framework for identifying some of the putative evils that people have associated with investment arbitration. Its thesis is that investment arbitration does not provide an independent and fair dispute resolution process because it has become a lucrative industry that is dominated by lawyers and law firms (as well as arbitrators) primarily motivated by a profit incentive. *Id.* at 11, 18-55. This theory is used to explain the enormous growth in the numbers of cases brought using the ISDS framework, the huge damage awards, and the staggering attorney and arbitrator fees. *Id.* at 13-15. It also argues that real and potential conflicts of interests among arbitrators and attorneys, as well as the familiarity of the specialized arbitration attorneys with the repeat-player arbitrators, have encouraged the increase in numbers of cases and the size of awards. *Id.* at 18-55.

> tem. Outside of Latin America, one of the more notable examples of the emerging reluctance to participate in the international arbitral system is the Japan-Philippines Economic Partnership Agreement. . . . Despite the breadth of protections, however, the Agreement does not provide investors a right to international arbitration.[184]

Friction between investment treaties and states' "right to regulate" continues to emerge.[185]

Concerns about the intrusiveness of ISDS regimes are not limited to those emanating from emerging market states. Whether an ISDS should be included in the proposed Europe-United States Transatlantic Trade and Investment Partnership, currently under consideration, has proved to be enormously controversial. After the European Commission suspended negotiations on an ISDS component of the agreement in January 2014,[186] it commenced an online consultation on the subject.[187] In January 2015 the Commission published its analysis of the nearly 150,000 replies received in the consultation.[188] Most of the replies (88%) were opposed to the inclusion of an ISDS.[189] Moreover, a committee of the European Parliament has taken the position that an ISDS should involve the use of national courts, not arbitration.[190] Resumption of negotiations and "a decision on

184. Christopher M. Ryan, *Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law*, 29 U. PA. J. INT'L L. 725, 746, 754 (2008). Note that Argentina and Bolivia were two of the strongest proponents of the UN's sovereign debt restructuring project. *See* Press Release, United Nations, Proposal for Sovereign Debt Restructuring Framework among 6 Draft Texts Approved by Second Committee, U.N. Press release GA/EF/3417 (Dec. 5, 2014), http://www.un.org/press/en/2014/gaef3417.doc.htm [hereinafter UN, Restructuring Framework].

185. For a detailed analysis, *see* AIKATERINI TITI, THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW (2014).

186. *See* EurActiv, *ISDS Decision Delayed to End of TTIP Talks* (Jan. 13, 2015), http://www.euractiv.com/sections/trade-society/isds-decision-delayed-end-ttip-talks-311234 [hereinafter EurActiv, *ISDS Decision*]. Note as well that claims based on defaults on sovereign debt obligations may constitute a breach of some BITs, providing creditors with enhanced rights when compared to employing judicial enforcement proceedings. *See* Ellie Norton, *International Investment Arbitration and the European Debt Crisis*, 13 CHI. J. INT'L L. 291, 299-303 (2012); Karen Halverson Cross, *Arbitration as a Means of Resolving Sovereign Debt Disputes*, 17 AM. REV. INT'L ARB. 335, 354-65 (2006). The flip side of this observation is that international investment treaties (such as BITs) may not provide sufficient protections for sovereign debtors and may impair debt-restructuring efforts. *See* Kevin P. Gallagher, *The New Vulture Culture: Sovereign Debt Restructuring and Trade and Investment Treaties*, (The Ideas Working Paper Series), Paper No. 02/2011, http://www.ase.tufts.edu/gdae/publications/Gallagher SovereignDebt.pdf.

187. Press Release, European Commission, Report Presented Today: Consultation on Investment Protection in EU-US Trade Talks (Jan. 13, 2015), http://europa.eu/rapid/press-release_IP-15-3201_en.htm [hereinafter European Commission, Consultation].

188. *Id.*

189. EurActiv, *ISDS Decision*, *supra* note 186.

190. *EurActiv,* European Parliament Committee Signals Opposition to ISDS (Jan. 13, 2015), http://www.euractiv.com/sections/trade-society/european-parliament-committee-signals-opposition-isds-311189.

whether or not to include ISDS is to be taken during the final phase of the negotiations."[191]

With one exception, the global tribunals suggested above are somewhat reminiscent of the investor-state arbitral tribunals that have become so disfavored in emerging market states and so controversial within the European Union.[192] The idea that these states would submit to such tribunals in the context of sovereign debt restructuring seems, at least for the moment, quite unlikely.

The one exception is the Bolton and Skeel proposal to employ tribunals (corporate insolvency courts) located in jurisdictions (other than the debtor state) whose laws govern the debtor state's debt obligations.[193] The authors acknowledge that the most likely eligible courts under their proposal would be courts located in New York and London.[194] The New York and English courts are probably perceived by emerging market debtor states as creditor-oriented.[195] Plausible as this proposal might have been when made more than a decade ago (as to which I take no position), today those courts may be much less palatable to emerging market debtor states than the other proposed tribunals. This seems especially true considering the litigation in the Southern District of New York and the Second Circuit Court of Appeals[196] involving Argentina's unrestructured debt held by its so-called "holdout" creditors.[197] The September 2014 UN Resolution's references to the litigation in New York were thinly (if at all) veiled.[198] Reports on the UN debates on that resolution and on the December 2014

191. European Commission, Consultation, *supra* note 187.

192. Arguably a European tribunal, as suggested by Paulus and Tirado, with jurisdiction only over European debtor state restructurings would not be unpalatable to member states. *See* Paulus & Tirado, *Sweet*, *supra* note 44, at 520-21. However, the controversy over including an ISDS in the proposed Europe-United States Transatlantic Trade and Investment Partnership, discussed above, might suggest otherwise. *See supra* notes 187-190 and accompanying text.

193. Bolton & Skeel, *Black Box*, *supra* note 8, at 813.

194. *Id.*

195. *See, e.g.*, Lourdes Garcia-Navarro, *The Man Argentines Love To Hate Is An American Judge*, NPR, Dec. 4, 2014, http://www.npr.org/blogs/parallels/2014/12/04/368281989/the-man-argentines-love-to-hate-is-an-american-judge (quoting Argentina's President Cristina Fernandez: "No financial vulture nor judicial raptor is going to extort money from this president.").

196. NML Capital, Ltd. v. Republic of Argentina 2012 WL 5895786 (S.D.N.Y. Nov. 21, 2012), *aff'd* 727 F.3d 230 (2d Cir. 2013), *cert. denied* 134 S.Ct. 2819 (2013), *and cert. denied sub nom.* Exch. Bondholder Group v. NML Capital, Ltd., 134 S.Ct. 2819 (2013).

197. *See, e.g.*, Max Abelson & Katia Porzecanski, *Paul Singer Will Make Argentina Pay*, Bloomberg, Aug. 7, 2014, http://www.businessweek.com/articles/2014-08-07/argentinas-vulture-paul-singer-is-wall-street-freedom-fighter#p1.

198. Two of the resolution's recitals follow:

> *Recognizing* the sovereign right of any State to restructure its sovereign debt, which should not be frustrated or impeded by any measure emanating from another State, *Recognizing also* that the efforts of a State to restructure its sovereign debt should not be frustrated or impeded by commercial creditors, including specialized investor funds such as hedge funds, which seek to undertake speculative

UN Resolution reflect the enormous hostility borne by emerging market state representatives for the so-called "vulture funds."[199]

2. The Debtor State's Courts.

Having raised some doubts about the potential acceptability to many debtor states of certain proposed tribunals, it is necessary to again address the merits of a debtor state's own courts as an appropriate administrator for a QSDRL. The rationale for considering a debtor state's courts as the appropriate administrator for an SDRM is straightforward. To be effective, any SDRM would require a debtor state's willingness to invoke the proceedings. When (and if) the time is ripe for renewed serious discussions on an SDRM, under whatever auspices those discussions might emerge, debtor states, creditors, and other states either will or will not reach an agreement on the proper tribunal for administering an SDRM.[200] In my view the possibility that a debtor state's courts could be the administrator under a QSDRL should be on the table and fully explored.[201] Moreover,

---

> purchases of its distressed debt at deeply discounted rates on secondary markets in order to pursue full payment via litigation[.]

G.A. Res. 304, *supra* note 15.

199. In its report on the debate on this resolution in the General Assembly the Third World Network was highly critical of "'vulture fund' holdout creditors." THIRD WORLD NETWORK, *supra* note 34. It took particular aim at the Argentina litigation in the United States and the "legal precedents that explicitly favour the predatory and destructive behavior of vulture funds." *Id.* The UN press release on the September 2014 UN Resolution reported that during the debate Argentina's Minister for Foreign Affairs observed that "[t]he profits currently made by vulture funds were scandalous" and he made reference to "the 'sinister masters of opulence' who ran vulture funds." Press Release, United Nations, Resolution on Sovereign Debt Restructuring Adopted by General Assembly Establishes Multilateral Framework for Countries to Emerge from Financial Commitments, file:///Volumes/cmooney/My%20Documents/Wp/Sovbankr/Resolution%20on%20Sovereign%20Debt%20Restructuring%20Adopted%20by%20General%20Assembly%20Establishes%20Multilateral%20Fram.webarchive. That press release also noted that the representative of Cuba "pointed out that vulture funds did not deserve the name 'vulture' . . . Vultures contributed positively to ecosystems; vulture funds were parasitic." *Id.* During the debate on the Second Committee's draft resolution (on which the December UN Resolution subsequently was based) the representative of Argentina again made disparaging remarks about the actions of "vulture funds." UN, Restructuring Framework, *supra* note 184.

200. Of course, formal discussions are currently underway at the UN and I do not intend to suggest that the participants are not serious. *See supra* notes 16-18, 30-33 and accompanying text. But it seems doubtful that a broad consensus will emerge in the near future—except perhaps as among the G-77 states and China. Again, I am in substantial agreement with Gitlin and House that an intermediate step, such as their proposed Sovereign Debt Forum, would be advantageous. *See supra* notes 37-40 and accompanying text.

201. The QSDRL proposed here contemplates some form of tribunal or administrator, as have almost all earlier proposals for an SDRM, albeit one with very limited discretion. However, negotiations over an SDRM also should consider the possibility that a restructuring plan could be proposed and approved by creditors in a procedure conducted without any form of tribunal. For example, an SDRM could provide for procedures that mimic exactly a single-limb voting procedure under the Model CACs, which would become effective and binding on creditors as if all of the debt being restructured contained the terms of the Model CACs.

even as a thought experiment, considering this possibility provides a good means to test whether any proposed substantive framework for an SDRM has eliminated or reduced sufficiently the discretion afforded to an administrator or other tribunal.

The issue of the potential unacceptability to many debtor states of certain tribunals, as just discussed, presumably would be fully resolved by a debtor state's adoption of a QSDRL to be administered by its own courts. States routinely submit themselves to the jurisdiction of their own courts for matters ranging from taxation disputes to criminal cases to various forms of civil litigation. Similarly, private parties also routinely call on the courts of a state to resolve disputes with the state itself.

Consider also the administrative and geographic convenience. There would be no need to identify, organize, and finance a new or special forum or to fashion ad hoc panels of potential judges.[202] Moreover, the courts in many states have observable historical records that facilitate evaluation based on past performance.[203] With a state's own court serving as the administrator for a QSDRL restructuring proceeding, it is plausible to expect that the state would be much less likely to engage in the oft-lamented unreasonable delays in confronting unsustainable debt and commencing steps to restructure its debt.[204]

What of concerns about home-state favoritism on the part of a debtor state's own courts?[205] After all, the restructuring of a state's debt and the attendant implications for future taxation and austerity are quite a bit more significant—even existential—when compared to typical litigation of disputes with a state in its courts. But a state whose courts would run roughshod (presumably at the state's urging) over a QSDRL could face huge reputational costs in the international community generally, not to mention in the capital markets. That many exchange offers, for example, have been widely accepted (even if not unanimously) in the past suggests that states are capable of offering restructuring terms that are satisfactory to the market.[206] Moreover, by wringing out the administrator's discretion under the substantive terms of a QSDRL, the power (absent outright cor-

---

202. This is not to say that a state would not be permitted to create a special sovereign debt tribunal under its own laws.

203. Recall that the posited convention or model law would permit an adopting state to opt out of any recognition obligations with respect to any state that it would designate as one in which the rule of law is not generally observed. Part II.B.2.a., *supra*. A corrupt judiciary, for example, would provide an appropriate basis for such an opt out.

204. *See, e.g.*, Ugo Panizza, *Do We Need a Mechanism for Solving Sovereign Debt Crises? A Rule-Based System*, in PAULUS, MECHANISM, *supra* note 14, 223, 228 ("The . . . most important problem with the status quo relates to delayed defaults . . . . Delayed defaults can lead to a destruction of value because a prolonged pre-default crisis may reduce both ability and willingness to pay.").

205. *See* Bolton & Skeel, *Black Box*, *supra* note 8, at 813 ("To avoid the problem of 'home court' favoritism, sovereign debtors or creditors should not be allowed to file in the sovereign's own courts.").

206. *See generally* IMF, *A Survey of Experiences with Emerging Market Sovereign Debt Restructurings*, 15 (June 5, 2012), http://www.imf.org/external/np/pp/eng/2012/060512.pdf.

ruption and disobedience of clear statutory provisions) to discriminate unfairly in favor of the state would be diminished. If the voting procedures under the QSDRL were to operate functionally as would those provided by the Model CACs, as envisioned here, the administrator's discretion would be minimized. The New York Convention-like (and even enhanced)[207] bases for a state to be excused from its obligation of recognition also offer a buffer against abuse.[208]A final issue is whether investors and other creditors, and governments of states that would be substantially influenced by the interests of those market participants, would find favor with a debtor state's courts being the administrator for a QSRDL. A preliminary question, however, is whether those market participants and states would support *any* SDRM under *any* circumstances. There is a great deal of support in the literature for the proposition that an SDRM would offer substantial benefits to the holders of sovereign debt.[209]But in the recent debates at the UN over sovereign debt restructuring, the United States and a few other states voted against the resolutions in support of a sovereign debt restructuring mechanism. Moreover, the United States and the European Union declared their unwillingness *even to participate in negotiations on the subject*.[210] One suspects that this attitude does not reflect the results of a thoughtful analysis of the potential for an SDRM approach but instead a reaction to views of private sector market participants, which support a contractual, market-based approach.[211]

3. Other Approaches: The Argentina Proposal and Variations.

Other approaches for a tribunal also might escape the criticisms leveled at investor-state arbitration[212] and might avoid the likely opposition of many debtor states to the courts of jurisdictions the law of which are the governing law in many sovereign debt contracts. For example, under the Argentina Proposal's framework, a debtor state's restructuring process would be overseen and administered by an Oversight Commission.[213] The Oversight Commission would be composed of three states selected from the parties to the agreement creating the SDRM, presumably represented by a judge from each of the states.[214] The debtor state would choose one state member and all states parties would choose (presumably by majority

207. *See supra* notes 59-62 and accompanying text.

208. Part II.B.2.a., *supra*.

209. *See, e.g.*, Bettina Nunner-Krautgasser, *The Importance of Being Prepared—A Call for a European Sovereign Debt Restructuring Mechanism*, in PAULUS, MECHANISM, *supra* note 14, at 244-47.

210. *See supra* notes 33-35 and accompanying text.

211. IMF, Strengthening, *supra* note 13, at 20-22; Model CACs, *supra* note 9, ¶ (c) at 4-5.

212. Of course, some potential approaches to a tribunal might be tarred with the same brush.

213. Argentina Proposal, *supra* note 99, at 5-6.

214. *Id.* at 5.

vote) the other two state members of the Oversight Commission.[215] Given the makeup of the G-77 and the overwhelming support for a multilateral SDRM as reflected by the September 2014 UN Resolution and the December 2014 UN Resolution,[216] one might expect that the three states that would make up such an Oversight Commission would be quite similar to the debtor state and generally like-minded. And one also might expect that states whose (or whose subdivisions') laws frequently are chosen to govern external debt, such as the United States (New York law) and the United Kingdom (English law) would not be chosen by a debtor state or a majority of the states parties. Nonetheless, the Argentina Proposal's Oversight Commission does avoid the baggage that would be carried by investor-state arbitration stigma or submission, for example, to a New York or English court.

The Argentina Proposal is an encouraging development inasmuch as it reflects, at least on its face, the willingness of a debtor state (one that has had its share of troubles with foreign courts) to permit foreign actors to administer a restructuring process. Building on that proposal, perhaps a more balanced alternative would be, as a first step, for the states parties to the convention to select two state members of the Oversight Commission (as proposed by Argentina). As a second step, an international intergovernmental organization (such as the IMF or the International Court of Justice), not the debtor state (as proposed by Argentina), would select the third state. The international organization could be given the mandate to take account of the first two elected states and to select the third, giving due consideration to ensuring that the Commission's member states reflect the interests of both the debtor state and its creditors.

4. Convention Menu of Administrators.

A convention need not limit itself to one candidate when selecting administrators for a QSDRL. The convention could provide a menu of several potential approved administrators with each adopting state selecting by declaration one or more administrators. When commencing a restructuring proceeding, a debtor state could then select one of its chosen administrators to oversee the actual process. Alternatively, the convention might provide that a debtor state need not make any selection until the time it commences a proceeding under its QSDRL. So long as investors and other sovereign debt creditors and states that support their interests are satisfied with the available choices, there would be no need for a one-size-fits-all approach.

No doubt through the process of international negotiations, other alternatives for an appropriate administrator or administrators would emerge. In any case the administrator for a QSDRL would need to be one that a debtor state would actually use. And it also must be one that could win the confidence of the holders of sovereign debt and the states that pay

215. *Id.*

216. *See supra* notes 33-35 and accompanying text.

attention to the interests of those creditors. But, any assessment of a prospective administrator must take account of the elimination (or near elimination) of the administrator's discretion under the substantive terms of a QSDRL. With an ideal QSDRL, given the substantial elimination of discretion, the identity and nature of the administrator would be largely symbolic.

III. Breaking the Logjam: Viewing a QSDRL as a Market-Based, Voluntary, and Contractual Approach

The key question remains: can this approach win over traditional detractors such as the United States, EU, and IMF? Taking into account its supermajority voting, its rejection of any cramdown of dissenting classes, and its functional equivalence to classification and voting procedures under the Model CACs, the QSDRL advocated here should be viewed as a market-based approach. By virtue of the supermajority acceptance requirement, it also is fundamentally contractual and voluntary in nature. It is true that under the Model CACs a supermajority vote could bind dissenting members of a class to a modification of debt securities.[217] It is also true that an issuer (debtor) or representative of bondholders can call a meeting of holders of securities to propose, *inter alia*, a modification of debt securities[218] (a move quite analogous to commencing a restructuring proceeding under a QSDRL).[219] But, to the extent that these features might be viewed as inconsistent with a "voluntary" restructuring, hopefully the United States, EU, the IMF (and others that currently do not support the idea of an SDRM), as supporters of CACs, would not object to these aspects of an SDRM (such as the proposed QSDRL). Moreover, once any SDRM is put in place and widely adopted, it would of course be contractual and market-based thereafter. Every time a creditor would enter into a debt contract with a debtor state that has implemented the SDRM, it would be adopting the SDRM contractually as a potential method of restructuring that state's debts and that creditor's claim.

Consider also the metaphor of a securities exchange. Exchanges are "statutory" in the sense that they normally are subject to substantial government regulation and operate pursuant to detailed rules. But they certainly are voluntary and contractual in the sense that participants willingly enter into legally binding trades. Clearly they are market-based. It would be impossible for investors—or even all of their brokers—to trade with one another in the absence of a high level of organization.

But the creation of exchanges that enhance the efficiency and transparency of trading, reporting, and settling transactions does not make the

217. IMF, Strengthening, *supra* note 13, at 20-22; Model CACs, *supra* note 9, ¶ (c) at 4-5.

218. Model CACs, *supra* note 9, ¶ (a) at 1-2.

219. Note also that the Issuer may appoint an Aggregation Agent and Calculation Agent in connection with the conduct and calculation of supermajority voting. *See* Model CACs, *supra* note 9, ¶¶ (a)(iv)(I), (g) at 2, 9, Aggregation Agent, Aggregation Procedures ¶ (a) at 10.

system any less market-based, any less voluntary, or any less contractual. Similarly, classification and voting pursuant to a QSDRL that mimics the Model CACs would enhance the efficiency and transparency of negotiations for the restructuring of sovereign debt.[220] Moreover, nothing in the proposed convention or model law would require an adopting state to enact a QSDRL for itself[221] or require an adopting state to use its QSDRL to restructure its debts once enacted. States would be free to restructure debts through other methods such as exchange offers and by operating CACs.

The eventual and successful implementation of a QSDRL as proposed here or any other version of an SDRM would require the support of the United States, EU member states, and Japan. It also would require the support of the investor and creditor communities. It would be necessary to overcome fears that a formal mechanism would increase the likelihood of default and discourage bailouts. But an approach such as the Sovereign Debt Forum proposed by Gitlin and House would be an excellent start down the path of negotiation, communication, and confidence building. Moreover, that an implementation of an SDRM may not be just around the corner is no reason to abandon serious consideration and debate over how such a regime could, should, and would function.

Conclusion and Summary

This paper has taken no position on whether developing and implementing an SDRM is necessary or appropriate. The paper has taken note, however, of the benefits that an SDRM might provide to the process of restructuring sovereign debt, such as addressing collective action problems and binding minorities of dissenting creditors. Given the recent activity of the Ad Hoc Committee in the UN, consideration of the appropriate substance of an SDRM and its implementation is timely and clearly in order.

The paper also has outlined the framework and content of an SDRM. The approach suggested here would mimic the structure and operation of the Model CACs with respect to classification and supermajority voting of claims in the process of approving a restructuring plan. Sovereign debt restructuring under a QSDRL as proposed here would be guided by four overarching principles: (i) observe the KISS (keep it simple, stupid) principle, (ii) follow the Model CACs, (iii) limit the discretion of a tribunal or administrator of a proceeding, and (iv) address only major current problems. Moreover, a convention must respond to concerns of stakeholders that currently oppose an SDRM as well as to the concerns of those that support the SDRM approach.

---

220. Opponents of an SDRM demonstrate an insouciant disregard for these sorts of structural benefits that such a regime could provide.

221. Indeed, it is probable that a QSDRL for United States sovereign debt would be unconstitutional under United States law. *See supra* note 30. Yet the United Sates would be free to adopt the convention or model law, in which case it would be obliged to recognize approved QSDRL restructuring plans adopted by other states.

An implementing convention (or model law) would oblige an adopting state to recognize a restructuring plan approved under a QSDRL of another adopting state. This obligation would be subject to exceptions along the lines of—and even somewhat broader than—those provided by the New York Convention on the recognition and enforcement of arbitral awards. Moreover, the approach suggested here would go beyond earlier proposals in its methods of binding a debtor state's creditors under an approved restructuring plan. For example, following approval of a debtor state's restructuring plan, nationals of all adopting states would be prohibited from enforcing their claims against the debtor state (even through procedures in non-adopting states) or from transferring their claims to nationals of non-adopting states.

The convention would spell out the requirements for a state's SDRL to qualify as a QSDRL. For example, in addition to the substantive provisions already mentioned, (i) only a debtor state could commence a proceeding, (ii) an administrator to oversee the process would have very little discretion, (ii) all indebtedness of a state would be eligible for restructuring, but the indebtedness actually to be restructured would be specified by the debtor state in its proposed plan, (iii) disputed claims would be resolved by the administrator, by arbitration, or by a court whose law applies to the disputed debt, (iv) priorities among creditors would remain as under the applicable law outside the QSDRL, (v) no provision would be made for priority interim DIP financing (instead, a framework would be developed outside of the QSDRL), (vi) no provision for cramdown of dissenting classes of creditors would be imposed, and (vii) other requirements for approval of a plan, such as being proposed in good faith, not unfairly discriminating, being in the best interests of creditors, and being feasible would be determined by the requisite supermajority votes of creditors, not by the administrator or any other tribunal.

Finally, the proposal outlined here addressed directly the objections lodged by SDRM opponents that have eschewed participation in the work of the Ad Hoc Committee, such as the United States, the EU, and the IMF. The paper has explained that an SDRM, such as the QSDRL, is capable of capturing the standards of being market-based, voluntary, and contractual—standards advocated by those who oppose implementation of an SDRM. Like a securities exchange, when properly implemented a QSDRL would provide a structure under which creditors could vote according to their interests. The principal involuntary component would be the binding of minority dissenting creditors, which is a substantive result currently embraced under CACs even by SDRM opponents.