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International sovereign insolvency procedure – A comparative look at selected proposals

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Abbreviations

CAFOD	Catholic Agency for Overseas Development
DIP	Debtor in Possession
DRF	Dispute Resolution Forum
FTAP	Fair and Transparent Arbitration Process for Indebted Southern Countries
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IDF	International Debt Framework
IDFC	International Debt Framework Commission
IDFS	International Debt Framework Secretariat
IIF	Institute of International Finance
IMF	International Monetary Fund
SDRM	Sovereign Debt Restructuring Mechanism
U.S.C.	United States Code
UNCITRAL	United Nations Commission in International Trade Law
UNICEF	United Nations International Children's Emergency Fund
WTO	World Trade Organization

1 The need for an international sovereign insolvency procedure

The financial crises that have occurred since the mid-1990s have pointed unmistakably to the need for a reform of the international financial architecture, for debt crises are bound to continue to occur under altered constellations in the world economy. Even though at present only a limited number of countries are faced with a situation of high external debt, it is essential to be able to prevent and come to terms with debt and financial crises with a view to stabilizing the international financial markets; financial crises lead to major welfare losses in the affected countries and tend to endanger the stability of the international financial system. Instruments designed to facilitate an orderly and low-cost restructuring of sovereign external debt for this reason constitute an important element of the international financial architecture. In view of the fact that most actors in the international financial markets reject any international insolvency procedure,[1] the most practicable short-term approaches would include a voluntary code of conduct[2] and collective action clauses.[3] However, since an international insolvency procedure would be a comprehensive instrument designed to coordinate different debtor groups prior to and during a debt crisis, it may have an important role to play in the medium term.

The problem with the current system designed to restructure debt on a case by case basis is that the processes involved are disorderly, delayed, and inefficient. Therefore the existing ad hoc machinery generate undue costs for both debtors and creditors. Uncertainties about the restructuring process itself are one reason for a delayed debt restructuring procedure. In addition, the delay itself triggers enormous costs for both creditors and debtors. For these reasons an orderly debt-restructuring mechanism that is both predictable and based on a general set of principles accepted by creditors and debtors alike could lead to an initiation of a restructuring process at an earlier stage.

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1 As insolvency procedures for sovereign states are rejected by many actors in the international financial markets, no such procedure has been adopted thus far. Most representatives of developing countries and emerging markets fear that opening an insolvency procedure would bar them from access to the international financial markets. Private creditors, in particular banks and banking associations, are against an international insolvency procedure because they fear that it could reinforce moral hazard on the part of debtors. Since an insolvency procedure of this kind would make it easier for a debtor to initiate insolvency proceedings, it is thought that it might tempt debtors to take advantage of a procedure. In addition, even the first signs that insolvency proceedings might be announced could trigger a financial crisis in a debtor country. None of the proposals published thus far have been able to completely allay these fears.

2 A code of conduct is an instrument that covers the conduct of all market participants both prior to and during a debt and/or financial crisis – including debtors, creditors, and institutions. For various proposals of a code of conduct see Banque de France (2003), Cardona / Farnoux (2002), IIF (2004) and (2006) and Couillault / Weber (2003).

3 The aim of collective action clauses is to simplify restructuring procedures for sovereign bonds. When they are issued, contracts on government bonds could e. g. contain majority clauses that would authorize a qualified majority of bondholders to include minorities in any amendments to a contract. The aim of such clauses is to offer both creditors and debtors an incentive to participate in debt restructuring. The type of collective action clause most often included in bond contracts is the collective majority clause. For an overview of collection action clauses see Bedford / Penalver / Salmon (2005); Dixon / Wall (2000); Eichengreen / Mody (2000); IMF (2002a) and (2002b).

Due to the fact that creditor groups holding sovereign bonds are large and heterogeneous, serious coordination problems arise when it comes to restructuring.[4] Collective action problems have, to date, made the cost of restructuring excessively high for debtors and creditors alike, and they are an important obstacle to the rapid recovery of a sovereign debtor.

Box 1: Collective action problems

If a country declares itself insolvent, the heterogeneous structure of its creditors gives rise to severe coordination and collective action problems. The restructuring of sovereign bonds in particular may entail substantial coordination problems in that the holders of sovereign bonds are a highly heterogeneous group extending from smaller private creditors to institutional creditors like pension funds. Three collective action problems play a significant role in this connection: rush to the exit, rush to the courthouse, and the holdout problem. There is no one instrument that could be used to fully resolve these coordination problems.

- **The holdout problem**: In this case a restructuring procedure that works to the advantage of a majority of creditors can be blocked by a creditor minority (holdouts). As a result creditors have an incentive not to participate in a restructuring process that is likely to entail losses for them, and they may instead prefer to wait until the restructuring process has been completed in order then to seek to enforce their claims in full.
- **The rush to the exit problem**: If creditors fear that a sovereign debtor may not be able to meet his liabilities and may be faced with an immanent debt crisis, they are likely to seek to sell off their claims as soon as they can. In this case it is rational for the individual creditor to sell his claims before other creditors, because when a debtor is faced with a liquidity bottleneck, the bondholders who sell first will be able to achieve a higher price for their bonds than those who wait.
- **The rush to the courthouse problem**: When a debt crisis emerges, there is a risk that some creditors will take legal action to enforce their claims (Berensmann 2003a).

The aim of an international insolvency procedure is to boost the incentives for both creditors and debtors to opt for an orderly and predictable restructuring mechanism, in this way contributing to the prevention and resolution of debt crises. One aim here is to safeguard the value of the economic assets in question and to minimize as far as possible the costs of a restructuring process. Moreover, a predictable and cooperative process involving both creditors and debtors would also contribute to improving the effectiveness and integrity of the international capital markets (IMF 2003a, 2).

A large number of proposals for sovereign insolvency procedures have been tabled in recent years. This paper deals only with those proposals that develop a comprehensive and in-depth framework for an insolvency procedure.[5] The paper presents a comparison of selected proposals with the objective of providing the reader with an overview of the – in part highly complex – issue of insolvency procedures, pointing to possible approaches to improving individual elements outlined in these proposals, and presenting a number of

4 These coordination problems involved in sovereign bond restructurings are greater than those associated with restructuring other debt instruments, because creditor groups holding other debt instruments are not that heterogeneous. International bank loans, for example, are often held by banking syndicates consisting of a small number of large international banks.

5 See Rogoff / Zettelmeyer (2002) for a detailed survey of the conceptual basis for sovereign bankruptcy procedures proposed until 2001.

ideas for elements of new insolvency procedures that could prove conducive to reaching consensus and would be immediately practicable.

One thing that most of the proposals considered here have in common is that they take bankruptcy under private law as their point of departure and then go on to apply it – to the extent that this appears possible and reasonable – to sovereign insolvency procedures. Since the primary aim of the US bankruptcy code is to grant the debtor a fresh start, it serves as a model in this context.[6] The following proposals were selected for the present paper:[7]

(i) The proposal of Kunnibert Raffer, first published in 1990, applies the most important principles of Chapter 9 Title 11 of the United States Code (Adjustment of Debts for a Municipality) to sovereign insolvency procedures (Raffer 1990, 302; Raffer 2005b, 364). There are two particular reasons why Raffer chooses Chapter 9, which is conceived for sovereign public municipalities: It protects the sovereignty of a public debtor, and it establishes the right to a hearing as a means of involving the affected population in proceedings leading to a restructuring agreement.[8]

(ii) Based mainly on Chapter 11 Title 11 U.S.C. (Reorganization), the proposal of Steven L. Schwarcz (2000; 2004) derives a normative framework for an international sovereign insolvency procedure, developing a concrete draft for an international convention on sovereign insolvency procedures. According to prevailing opinion, Chapter 11 focuses, in essence, on two aims: debtor rehabilitation and distributional equity among creditors (Schwarcz 2000, 975).

(iii) Proposals for the Fair and Transparent Arbitration Process for Indebted Southern Countries (FTAP), formulated or advocated mainly by international non-governmental organizations such as the Jubilee campaigns, build on various elements of Chapter 9 and thus have many points in common with Raffer's proposal (Kaiser / Schröder 2002, 8; Raffer 2005b, 362).[9]

(iv) The Sovereign Debt Restructuring Mechanism (SDRM) was initiated by Deputy IMF Managing Director Anne O. Krueger in November 2001, and in April 2003 a finalized version of the proposal (February 2003) was submitted to the IMF's Executive Board for a vote. However, the Board judged the proposal to be impracticable and it was therefore rejected at the IMF's spring meeting that year (IMF 2003b, 4). The SDRM's aim would be to create incentives for a rapid and efficient restructuring as well as to contribute preventing and to resolving crises. The SDRM adopts some important elements of Chapter 11.[10]

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6 For an overview of civil bankruptcy procedures, see Bolton (2002); see also Paulus (2002, 5–3).

7 The proposals are listed in the order in which they appeared. This (ascending) order is also retained in the citing of sources.

8 According to Raffer, there is one technical problem with adopting Chapter 11 bankruptcy procedures because the latter is only applied for enterprises and not to public entities (Raffer 1990, 302).

9 While there are several proposals for the FTAP, they are largely consistent with one another. When we speak below of the FTAP, we mean the denominator common to all of the proposals known to us. We quote mainly from Erlassjahr.de (2002), Fritz / Hersel (2002), and Kaiser / Schröder (2002).

10 For a detailed discussion of the SDRM see Hagan (2005).

(v) The proposal advanced by Bolton / Skeel Jr. (2004) is devoted to a detailed elaboration of the individual substantive aspects of a sovereign insolvency procedure. Bolton / Skeel focus in particular on protecting priority creditor rights when it comes to classifying claims. The authors base their proposal primarily on the Chapter 11 procedure as well as on the IMF proposal referred to above.

(vi) The International Debt Framework (IDF) proposed by Berensmann / Schröder (2006) is designed to contribute to preventing and resolving financial and debt crises; in institutional terms it would be linked to G20. One of the aims of the IDF is to improve the transparency of and the ways in which information is made available on debtor countries by instituting a regular debtor-creditor dialogue with the aid of an IDF Secretariat. Based on an orderly debt-restructuring mechanism, an IDF Commission would contribute to resolving crises.

A proposal for an international insolvency procedure advanced by Paulus (2002) is also viewed in the context of the ongoing discourse. Since Paulus refrains from making *"a detailed proposal elaborated in substantive terms"* (Paulus 2002, 4), and furthermore often discusses several alternative approaches, his proposal is not compared systematically with the other proposals dealt with here. Paulus does model his proposal in Chapter 9 as well, while at the same time seeking to include in it elements of the German insolvency code.

The proposals selected for the present paper are compared on the basis of the key design features that need to be settled by an international sovereign insolvency procedure. Section 2 of the present paper analyzes how and to what extent the proposals under discussion may create the framework conditions required for an efficient restructuring of sovereign debt. One important question in this connection is concerned with the institutions that would be responsible for conducting a sovereign insolvency procedure. Section 3 deals with the actual core of any insolvency procedure – the restructuring of debt. The main objective here must be to define what claims would be restructured, to what extent they would be restructured, what priorities claims would have, and whether fresh credits would be made available to debtors and how these in turn would be treated. The fourth and last section sums up the results to which the paper has come.

2 Framework conditions for restructuring

2.1 The right to open and to terminate an insolvency procedure

The first question is who – debtor or creditors – would be authorized to open and to terminate an international sovereign insolvency procedure. While most of the proposals under consideration discuss only the activation of a procedure, the SDRM also addresses the issue of termination.

Out of respect for state sovereignty, nearly all of the proposals discussed here would accord the right to initiate an insolvency procedure to the debtor country.[11] However, opening an insolvency procedure would not automatically mean that creditors would be forced to relinquish their rights as creditors. This goes in particular for existing contracts, and these would, to whatever extent possible, remain in force (Fritz / Hersel 2002, 13; Paulus 2002, 6-1-2; IMF 2003a, 4; Bolton / Skeel 2004, 786–87; Schwarcz 2004, 1215; Berensmann / Schröder 2006, 13).

Aside from protection of state sovereignty, the debtor is expected to know best when debt restructuring is needed, since on the one hand he has an information edge as far as his indebtedness and liquidity needs are concerned. Further, he has incentives to apply for a procedure at the earliest possible point of time with a view to preventing his liabilities from continuing to grow due to delays in declaring a default that he can no longer avert. A debtor's incentive to initiate an insolvency procedure will be the more compelling, the more urgent his need for liquidity is and the greater his confidence is in the anticipated efficiency of restructuring negotiations (Schwarcz 2000, 981–83). On the other hand, the debtor may, for fear of impairing his reputation, do his best to delay the opening of an insolvency procedure. Bolton / Skeel therefore propose that the creditors should be accorded the right to initiate a procedure without the debtor's consent. It is, though, questionable whether the option of opening a procedure on an involuntary basis would meet with the approval of (potential) debtor countries, i. e. whether the idea is politically practicable (Bolton / Skeel 2004, 786).

Regardless of whether it is the debtor or the creditors who seek to initiate an insolvency procedure, it is essential that mechanisms be found to limit the risk that a procedure could be opened for improper reasons. If creditors are to be authorized to activate a procedure, it would be essential to define a minimum percentage of creditors that would be required to vote in favor of an application to open a procedure. Otherwise there would be a risk that a minority of creditors might abuse this right (Bolton / Skeel 2004, 787).

Paulus proposes that an application submitted by a debtor should also be reviewed by a neutral third party who would at the same time have access to the databases of the IMF and the World Bank (Paulus 2002, 6-1-3).[12]

On balance, it can be argued that there are more advantages to permitting the debtor to open a procedure, because if creditors were permitted to open it without the consent of the debtor, there would be little reason to expect the procedure to be conducted swiftly and efficiently, i. e. its prospects of success would not be positive. However, it would at the same time be essential to ensure, through appropriate mechanisms, that the debtor does not

11 Raffer does not consider the issue of the right to open an insolvency procedure. In the Chapter 9 procedure – Raffer adopts its most important elements – the debtor has the right to apply to open an insolvency procedure (Raffer 1990, 304).

12 In addition, further applications would have to be placed within a given time span (of e. g. two, five, or more years); this would serve as a means of preventing any "inflationary use" of the instrument (Paulus 2002, 12).

misuse his right to open a procedure. Of the proposals dealt with here, only the SDRM explicitly provides for a mechanism of this kind.[13]

The SDRM proposal, however, does not provide for an ex ante review, but it contains an option that would permit a procedure to be terminated prior to completion if – once the process of registration and verification had been completed, i. e. a few months after the procedure had been activated – at least 40 % of all verified creditors should see no justification[14] for a formal opening of the procedure. In this case the debtor country would be obliged to cover all of the costs that have accrued in connection with the procedure. All litigation and claims to enforcement against debtor assets would continue in effect once a procedure had been opened, unless the creditors reached an agreement on a different approach. Otherwise, the SDRM could be terminated at any time on request of the debtor country, or it would end automatically once the arbitration body had certified a restructuring agreement (IMF 2002c, 76; IMF 2003a, 27).

2.2 Decision-making and arbitration bodies

Decision-making and arbitration bodies would have a central role to play in the implementation of an insolvency procedure. All of the proposals for sovereign insolvency procedures treated here concur that it would not be consistent with the rule-of-law principle to leave a debt-restructuring procedure solely to the parties affected. At least when it comes to issues in need of arbitration, there would be a need to bring in a neutral third party (Paulus 2002, 6-1-1). But there are differences of opinion regarding the institution that would be called in and the concrete shape of the powers that would be given to it.

While the procedure proposed by Raffer as well as the SDRM, the FTAP, and the IDF provide for the creation of a new, neutral body, Bolton and Skeel propose that existing institutions – namely national bankruptcy courts – should be called in for the purpose. Schwarcz discusses both the creation of a new decision-making body and the possibility of assigning insolvency procedures to the International Court of Justice.

2.2.1 Creation of new institutions

The **SDRM** provides for the creation of a Dispute Resolution Forum (DRF) that would guarantee a certain measure of *"independence, competence, diversity and impartiality"* (IMF 2003a, 27). The DRF would be assigned the following tasks:

(i) administration of the procedure, including, among other things, notification of creditors, registration of claims, administration of the verification and voting process;

(ii) arbitration of disputes emerging in the course of a restructuring process, e. g. concerning registration, verification, or classification of claims;

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13 Implicitly, the arrangement providing for a stay on enforcement and cessation of payments to creditors would constitute a means of protection against any misuse of the procedure by a debtor. (See section 3.4 of the present paper.)

14 The proposal does not explain precisely what "justification" must be understood to mean.

(iii) coming to decisions on suspension of litigation and stays on enforcement requested by the debtor and consented to by the creditors, should the DRF see enforcement of claims as constituting a serious threat to the restructuring process.

Under the SDRM the IMF's Executive Board would have extensive control powers bearing on both nominations of DRF members (see Box 2) and decisions of the DRF, for which the IMF would have unilateral powers of revocation. While the IMF Executive Board would be empowered to revoke any rules and regulations adopted by the DRF, the DRF would not be able to challenge the pertinent decisions taken by the Executive Board.[15]

Box 2: The SDRM's Dispute Resolution Forum (DRF)

The DRF would be set up in a four-stage procedure. In the first stage the managing director of the IMF would – in consultation with the relevant international organizations (e. g. UNCITRAL[a]) and the trade associations – appoint seven to eleven highly qualified arbitrators and/or private experts, who would start out by forming a selection panel.

In stage two the selection panel would, in the framework of an open nomination procedure,[b] nominate a pool of 12 to 16 arbitrators and then select, from this pool, a president and one or more deputy presidents for the DRF. The voting procedure would be based on a rule requiring a unanimous vote of the members of the selection panel (IMF 2002c, 59–61).

However, the pool nominated would require confirmation by the IMF's Executive Board (stage 3); this would be an up or down vote only (the aim being to prevent the Executive Board from selecting individual candidates itself). In the fourth and last stage the IMF's managing director would formally appoint the members of the DRF.

Apart from the DRF's permanent and full-time president, all other DRF members would continue to work in their regular professions.[c] The selection panel would be reshuffled every three years, with new candidates being nominated or old members being confirmed in office (IMF 2002c, 61).

Alongside its president, the DRF's actual executive organ would be made up of four arbitrators appointed by the DRF president from the pool once an insolvency procedure had been opened. One arbitrator would be responsible for making provisional decisions; the other three would be responsible for ruling on appeals and challenges (IMF 2002c, 55–66; IMF 2003a, 15–16 and 27–28).

The DRF would be funded by the IMF; the selection panel would advise the IMF's managing director on budget issues and in particular when it comes to appointing new members to the DRF (IMF 2002c, 66).

a United Nations Commission on International Trade Law (UNCITRAL) has tentatively agreed to participate in the nomination process for selection panel (IMF 2003a, 16).

b The selection criteria to be used in the process of nominating the pool of arbitrators are as follows: (i) court experience in issues involving insolvency and debt restructuring; (ii) competence and impartiality; (iii) diversity of candidate legal training, with nominations being restricted to two candidates from any one nation (IMF 2002c, 60).

c Furthermore, a limit of max. six years would be set for the terms to be served by DRF members, with one half of the members being rotated every three years.

15 For purposes of comparison: The rulings of the International Court of Justice cannot be revoked by an organ of the United Nations, whereas rulings of the European Court of Justice require confirmation by the Council of Europe (IMF 2003a, 16).

On the one hand, there is a good reason to take a critical view of a powerful role of this kind for the IMF in a neutral arbitration panel, for an arrangement of this kind would place the IMF in the dual role of creditor and arbitrator (Paulus 2002, 10; Berensmann 2003b, 23).[16] On the other hand, the IMF would "buy" its influence by having the DRF fund the arbitration panel.

Under the **IDF** two institutions – both of them linked to the G20 – would be responsible for the oversight and arbitration process: the permanent IDF Secretariat (IDFS), which would mainly serve the purpose of crisis prevention, and the ad hoc IDF Commission (IDFC), which would plan and implement the restructuring process.

The IDF Secretariat would, in essence, implement two principles of the code of conduct proposed by the Institute of International Finance (IIF): "transparency and timely flow of information" and "close creditor-debtor dialogue and cooperation".[17] The tasks of the IDFS would therefore include both the preparation and analysis of information and exchange of information between debtor, creditors, and financial market experts. Furthermore, the IDFS could serve as a forum for discussions on debt issues between G20 governments, other middle-income countries, and multilateral organizations. The IDFS would be required to ensure that confidential information is protected. The secretariat would also define criteria for debt sustainability, possible involving consultations with experts from the multilateral institutions, the private sector, and academia.

A small group of prominent experts would be nominated to fulfill the tasks named above; the group would be made up of persons representing the most important actors in the international financial markets (international financial institutions, the G20, and private creditor groups like the Institute of International Finance). Creditors and debtors would themselves reach agreement on the exact selection modalities and the number members the IDFS would have. Based on improvements in transparency and dialogue, the IDFS would be able to contribute in key ways to preventing crises (Berensmann / Schröder 2006, 12–13).

The IDF Commission would conduct the restructuring process, ensuring that the principles of "good faith action" and "fair treatment" set out in the IIF code of conduct were complied with. It would also decide on the measure of financial support a debtor required, including in given cases debt cancellation, evaluate creditor claims at the point of time when a procedure is opened, and be empowered to extend stays on enforcement. The IDFC would be made up of representatives of the debtor country and representatives of the private and public multi- and bilateral creditors. The IDF Secretariat would define the framework for the nomination process and provide assistance in selecting external advisors for negotiations (Berensmann / Schröder 2006, 12–14). The size of the IDFC, and in particular the number of representatives to be appointed by the creditor and debtor sides, would, however, not be specified.

The **Raffer** proposal and the **FTAP** proposal provide for creation of an arbitration panel that would be appointed on an ad hoc basis and be made up of an uneven number of arbi-

16 What is more, big shareholders on the IMF's Executive Board would in this way be able to seek to realize their own particularist interests.

17 For a detailed presentation of the code of conduct, see IIF (2004).

trators (three or at most five). The debtor and the registered creditors would each have the right to nominate the same number of arbitrators (i. e. one or two each), and these in turn would elect, by simple (or qualified) majority, one further person to serve as their chair. The arbitrators would mediate between debtor and creditors, hold the chair in restructuring negotiations, and provide the parties with advisory support. They would also ensure that there was a right to be heard and – if necessary – take decisions. Furthermore, the arbitration panel would – in analogy to § 943 U.S.C. – certify all agreements reached by debtor and creditors, in this way giving them force of law. However, the most important decisions taken by the arbitration panel would concern the legality of claims and cancellation of unpaid debts or provision of debt relief (Raffer 2001, 26–28; Fritz / Hersel 2002, 14–15). As a means of ensuring that the arbitration panel is in fact impartial, Raffer proposes that it should operate in a neutral country, i. e. in a country from which neither debtor nor creditors stem from (Raffer 2000, 229).

Schwarcz suggests that a sovereign insolvency procedure be crafted in such a way that the restructuring negotiations between debtor and creditors would – mirroring the model of the US bankruptcy code – be self-executing.[18] A neutral institution would be involved only for the purpose of settling disputes that might arise between the parties. To this end it would be possible to set up an ad hoc arbitration panel patterned on the model of the International Centre for Settlement of Investment Disputes (ICSID). This would call for the formation of a pool of neutral arbitrators with acknowledged competence in insolvency law; the parties would select one or three arbitrators from the pool. Decisions made by the arbitration panel would be incontestable. It would also be possible for the parties to agree that the arbitrators would have to come from different countries and thus represent different systems of insolvency law (Schwarcz 2004, 1209–12). However, Schwarcz is not sufficiently clear about whether arbitration would require – as the ICSID does – that a secretariat be set up to guide the arbitration panel (in the ICSID the secretariat is made up of a secretary-general, one or more deputies, and administrative staff). Under the Schwarcz proposal (as under the DRF) the process of appointing arbitrators would be facilitated by the existence of a pool of arbitrators from which debtor and creditors would select representatives. This is a procedure traditionally used in forming courts of arbitration.

2.2.2 Use of existing institutions

The existing institutions that could function as arbitration/decision-making bodies would include either national courts (Bolton 2002; Bolton / Skeel 2004) or international courts like the International Court of Justice (Schwarcz 2000 and 2004; Paulus 2002, 6-1-1). The idea is on the one hand to make use of these institutions' expertise in the field of civil bankruptcy proceedings or arbitration and on the other hand not to incur the costs involved in creating a new institution.

Under the Bolton / Skeel proposal the debtor, as applicant, would have the right to select a (from his perspective) foreign court in one of the creditor countries – provided that his

18 Under US law a bankruptcy court's function is restricted to arbitration and oversight; a receiver is placed in charge of administrative tasks. The reason for this is a comprehensive bankruptcy framework that lays the groundwork for debt restructuring negotiations that are very largely self-executing (Schwarcz 2004, 1019–20).

bonds had been issued in that country at least 18 months before the insolvency procedure was opened (Bolton 2002, 17; Bolton / Skeel 2004, 813).

Under this proposal the first step would be to examine whether all of the national courts that might come in for consideration would be able to cope with the complexity and significance of sovereign insolvency procedures. While this condition is given at the world's main financial centers such as New York, London, Tokyo, Frankfurt, where debt-restructuring procedures are sometimes conducted that exceed the restructuring volumes involved in the cases of many emerging markets (Bolton / Skeel 2004, 816), it would not necessarily be given when it comes to other locations with smaller courts. Hence, it would be useful to publish (and regularly update) a list of "qualified" insolvency courts with a view to providing debtors information on the "suitability" of various jurisdictions.

There are also some doubts as to whether national courts may be regarded as impartial – an important criterion that must be met by an arbitration body. One risk involved in the Bolton / Skeel proposal is that a national court might accord treatment to "national" creditors that it denied to "non-nationals" (Frankel 2003, 76). At the same time, this approach would also make it possible for debtors to "shop for jurisdictions", that is to allow debtors to pick out jurisdictions – should there be any such jurisdictions – that they regarded as "debtor-friendly," in this way triggering a race to the bottom in search of "debtor-friendly" jurisdictions (Bolton / Skeel 2004, 814).

However, the likelihood of a race to the bottom would depend crucially on the criteria a debtor uses to select a jurisdiction. If the debtor sees "debtor friendliness" as the most important criterion, a "race to the bottom" would in fact be a realistic scenario – provided in turn that a jurisdiction in a creditor home country could be "debtor-friendly" in the first place. But the greater the significance of other factors for the debtor's choice – e. g. the speed of proceedings or the expertise of the court in question (these factors likewise having pecuniary effects) – the more unlikely a race to the bottom would be from the creditor perspective – indeed: the higher in this case would be the probability of a race to the top in search of more prompt proceedings and greater expertise, which would benefit both sides.

Nor can the possibility be ruled out that debtors may simply give preference to jurisdictions in countries in which most of their bonds have been issued, that is, New York, London, Tokyo, and Frankfurt. Viewed from the creditor perspective, this would be a positive development in that precisely these locations have the reputation of being creditor-friendly (Bolton / Skeel 2004, 813 and 815).

Finally, it is important to clarify whether this proposal would meet with the approval of creditors holding only claims resulting from bank loans, and whose "locations" would not be given any (explicit) consideration – even though such creditors account for a lower share of claims than those held by bondholders.

For international insolvency procedures, both Schwarcz and Paulus propose the UN's main legal organ, the International Court of Justice (ICJ), or a legal body under its auspices (Schwarcz 2000, 1024; Schwarcz 2004, 1211). This would make all UN member states or countries that have ratified the ICJ capable of becoming parties in insolvency procedures. The ICJ would also meet the criterion of impartiality. This would also make it possible to select arbitrators from the Permanent Court of Arbitration in The Hague, which would obviate the need for a costly and time-consuming selection process. While, though,

the ICJ is in possession of expertise in the field of international dispute settlement, it lacks specific expertise in the field of insolvency. It is furthermore open whether the United States would accept the ICJ's jurisdiction. As an alternative, thought might also be given to making use of the World Trade Organization's (WTO) Dispute Settlement Body, which otherwise deals with trade disputes between member countries. In this case, though, a way would have to be found to ensure that nonmembers (including e. g. several Middle East countries or former republics of the Soviet Union) would be willing to submit to the WTO's jurisdiction.

This detailed presentation has shown that the relevant literature contains quite a number of different proposals on decision-making and arbitration bodies. Making use of existing institutions would entail a number of advantages. This would make it possible, first, to have recourse to the expertise of existing courts and, second, to limit the costs and time that go into the making of an insolvency procedure, at least compared to the alternative of creating new institutions for the purpose. Instead of a need to appoint an arbitral panel, a time-consuming process, this approach, which would require only one judge/arbitrator to be appointed, would make it possible e. g. to come to more prompt preliminary decisions. Third, this would also make it possible to build on the acquired reputation of a given institution. Ultimately, it would in this case not be necessary to create a new international institution, which would render the architecture of the international institutions even more complicated than it is at present.

One particular argument that can be advanced against the use of existing institutions is that there would have to be an institution available that is actually suited for the purpose. The discussion of the institutions that might qualify has shown that there is at present no institution that is properly suited for conducting international insolvency proceedings. National institutions are not particularly well suited for the purpose because of the risk that they may be rejected as impartial. National courts in a creditor country are faced with the same problem, in particular when the creditors involved stem from different countries. A close look at the arguments discussed above would therefore seem to indicate a need to create a new institution, either one conceived along the lines of the IDF or a small, independent arbitration panel.

2.2.3 Costs

Cost levels are a factor that plays a crucial role for an insolvency procedure. On the one hand, a sovereign debtor's incentives to initiative an insolvency procedure will be all the lower the higher the costs he will be obliged to bear. On the other hand, a procedure that entailed no costs for the debtor would increase the risk that a debtor might initiate an insolvency procedure without any proper justification (and would at the same time give rise to the question of alternative financing). However, only the SDRM, the IDF, and (briefly) Schwarcz devote any attention to the cost issue.[19]

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19 In speaking of the rule-of-law principle, Fritz and Hersel (2002, 6) make mention of cost-sharing between the parties involved in an insolvency procedure, but they do not explicitly regard this as a component of the FTAP – even though this would appear (intuitively) appropriate in the context of the FTAP. There are (as far as the authors have been able to determine) no other passages in the FTAP context that deal specifically with the cost issue.

Under the SDRM the IMF would generally bear the costs for the Dispute Resolution Forum, with the debtor bearing the costs of the proceedings themselves (IMF 2002c, 66). In cases involving the opening of an unjustified procedure, the debtor would have to assume the costs for the DRF as well. The debtor would furthermore be required to bear the costs of the creditor committee, although the reasonableness of these costs would be examined by the DRF, and they would be lowered if this appeared appropriate (IMF 2003a, 25).

Under the IDF the debtor, who would initiate an insolvency procedure, would also be required to bear its costs. The costs for the IDFS would be shared by debtor country, creditor countries, private creditors, and international financial institutions (Berensmann / Schröder 2006, 13 and 16).

The costs of the ad hoc dispute settlement committee (modeled on the ICSID) would be funded through fees (Schwarcz 2004, 1210).

Cost-sharing by all of the parties involved in a procedure would not only serve to resolve the funding question, it would also set incentives to conduct the procedure in a prompt and efficient manner. Assumption by the IMF of the costs e. g. for the DRF would serve above all to provide relief for the debtor and to lower his interim financing needs.

2.3 Creditor coordination

The aim of an insolvency procedure is to bring together the whole heterogeneous creditor community – the so-called “enforced community” (Paulus 2002, 402). This means coordinating communication not only between the debtor and the creditor community but also between the creditors themselves, in particular when both public and private creditors are involved in the restructuring process. Two issues are of particular importance in this connection: voting rules for creditor decisions and formation of representative creditor committees.

2.3.1 Voting rules

In an approach based on the model of the US bankruptcy code, the proposals advanced by Schwarcz, Paulus, the IMF as well as Bolton and Skeel provide for the restructuring plan conceived by the debtor to be presented to the creditors for a vote. This means that rules would have to be found for creditor votes; these rules would serve on the one hand to involve as many creditors as possible in the restructuring process while on the other hand laying the groundwork needed for creditors to reach agreement as quickly as possible. In keeping with the US bankruptcy code, the proposals named above would not require unanimity among creditors. This would serve in particular to reduce the risk of a holdout on the part of a creditor minority that could delay or block the decision-making process. The majority required could, for instance, be defined in terms of the volume and/or number of claims, or include all creditors with voting rights, or extend only to votes on certain classes of claims (Paulus 2002, 6-2-2).

Under the IMF proposal acceptance of a restructuring plan would require a qualified majority (super majority) based on 75 % of the volume of all verified claims (IMF 2003a,

13–14 and 26). Schwarcz proposes a more stringent voting rule modeled on § 1126(c) U.S.C.; it would be based on at least 75 % of the overall volume of claims *and* at least 50 % of the overall number of claims (Schwarcz 2000, 1033).

If, with a view to intercreditor equity, claims of equal status were summed up to form one class, the voting rules referred to above would (following the US bankruptcy code[20]) apply only within one class. However, the Schwarcz proposal would require unanimity between classes, that is, each class would have a veto right (Schwarcz 2000, 1033; Schwarcz 2004, 1216–17).

The Bolton / Skeel proposal would also require unanimity, with the difference, though, that the cramdown rule would apply under it (Bolton / Skeel 2004, 794–5). The cramdown rule gives the decision-maker in question the option to approve a restructuring plan even if one or more classes of claims have voted against the plan (§ 1129(b) U.S.C). The aim of the rule is to provide creditors with incentives to reach consensus and at the same time to contribute to lowering the risk of holdouts. But use of this rule would presuppose that the decision-maker judges a restructuring plan to be "fair and equitable." How the term "fair and equitable" would be defined poses certain problems here. In Chapter 11 procedures of a restructuring plan may be "fair and equitable" if the creditors who do not agree to it receive at least that share of their claims that would have been due to them in the case of a liquidation (§ 1129(a)(7) U.S.C.). However, since the concept of liquidation value is not applicable in the context of sovereign debt, one alternative would be to use going concern value in its place. However, it is difficult and time-consuming to determine a sovereign state's going concern value, and for this reason the concept has generally proven to be impracticable (Schwarcz 2000, 1006–9). The Schwarcz proposal therefore rejects use of cramdown rule in sovereign insolvency procedures.

The Bolton / Skeel proposal has one particular feature of its own: a two-stage voting procedure. In the first stage each creditor class would vote on the volume of the debt proposed for cancellation by the debtor. This would mean that decisions bearing on debt sustainability would be taken not centrally, by a panel or committee, but decentrally, in the form of an agreement reached between the debtor and the creditors. Here each creditor would have voting power proportional to the volume of the claims he holds. A simple majority would be sufficient – although a qualified two-thirds or three-quarters majority would be conceivable as well. In the second stage a vote would be taken on the distribution across creditor classes of the debt to be cancelled, i. e. on how, concretely, each debt class would be treated. This decision would require a qualified majority of e. g. two thirds of the nominal value of all claims in a given class (Bolton / Skeel 2004, 796–8).[21]

On the one hand, the voting process should be as simple as possible in order to ensure that a restructuring process is completed within a reasonable timeframe. It for this reason makes little sense to call for unanimity, and a qualified majority would do just as well. On the other hand, the process should be equitable and transparent – criteria met by all of the proposals referred to above that deal with the issue of voting rules.

20 Classification of claims as secured and unsecured claims, including a veto right for each class, is already practiced under the US bankruptcy code (§ 1122 U.S.C.; § 1129(a)(8) U.S.C.).

21 Raffer, the FTAP, and the IDF contain no information bearing on voting rules.

2.3.2 Creditor committees

Forming representative,[22] informal creditor committees or – in keeping with the US bankruptcy code[23] – representative formal committees can serve to fulfill two tasks. First, this is one means of improving and accelerating coordination within a sovereign debtor's large and heterogeneous creditor community. Creditor committees are important to form a common position among creditors. Second, it may serve to facilitate the creditor-debtor dialogue because in this case the debtor is forced to deal only with one negotiating party (Hagan 2005, 370).

Only the SDRM provides for the formation of one or more *formal* creditor committees; the existence of more than one creditor committee would in turn necessitate the creation of a steering committee to coordinate the work of the other committees. However, decisions made by creditor committees would have the character only of recommendations, and would thus not be binding for the creditor community (IMF 2002c, 42–44; IMF 2003a, 13 and 25). Viewed from the debtor perspective, though, the advantage involved in accelerating a procedure by making it easier and less time-consuming to bring a heterogeneous group of creditors together may be outweighed by the disadvantage of being obliged to assume the costs for the creditor committees. Primarily with a view to providing creditors with incentives to engage in formal coordination, this would mean that the debtor would be required to bear all of the costs involved, and that in turn would drive up the administrative costs of the restructuring process, increasing the debtor's need for fresh funding. This proposal could be rejected by debtors, especially in view of the fact that decisions taken by creditor committees would not be binding for the whole creditor community.

The informal creditor committees, on the other hand, would be funded by the creditors themselves. Schwarcz argues that creditors in any case have incentives to participate in the restructuring process and – if necessary – to organize on an informal basis, the reason being that claims held against sovereign states are as a rule very large. Schwarcz for this reason rejects the idea of formal committees (Schwarcz 2000, 1002). However, this argument applies only for major creditors; smaller investors are faced with greater problems in organizing their interests.

On the whole, creditor committees may be seen as an instrument well suited to accelerating and simplifying the restructuring process. Formal creditor committees would be better able to reach agreement on cost-sharing between debtor and creditors, in this way boosting the debtor's willingness to accept the formation of committees and at the same time lowering the risk that the costs might prove to be excessively high (without needing to be reviewed by a third party).

22 The SDRM provides a workable practicable definition of the term 'representative' as applied to creditor committees (IMF 2002c, 43).

23 § 1102 U.S.C. provides for the formation of at least one formal committee of private creditors holding unsecured claims; these creditors have a right to seek expert opinions from lawyers, auditors, investment bankers, etc., with the debtor bearing the costs.

2.4 The legal basis for an insolvency procedure

Under the proposals advanced by Schwarcz, and Bolton / Skeel an insolvency procedure would be established under international law and then – if necessary – transposed into national law. This would ensure the long-term predictability of insolvency procedures. This approach would, though, entail one drawback, namely the long period of time needed for the procedure to be fully implemented.

While Schwarcz proposes a new international convention, the IMF would base its SDRM on an amendment of the IMF's Articles of Agreement which is an international treaty. This would mean that an insolvency procedure would be immediately binding for all of the IMF's member countries, while a separate international convention would be binding only on the parties to the convention (IMF 2003a, 28–29). However, basing an international insolvency procedure on the IMF's Articles of Agreement would give rise to a problem mentioned above, namely that the IMF would in that case find itself in the dual role of creditor and arbitrator. Locating an insolvency procedure with a neutral institution – e. g. the United Nations – would serve to boost its acceptance among developing countries, especially in view of the fact that the latter have more voice in the UN (Berensmann 2003b, 42).

Instead of dealing with the type of legal underpinning required, Bolton and Skeel focus on the measure of the underpinning needed. They propose replacing the one-size-fits-all SDRM with a "tailor-made" or "designer SDRM", giving a uniform and binding form to only some of the basic features of the SDRM. Other arrangements (such as a stay on enforcement, majority voting, provision of fresh loans, classification) would be defined by contract on a case-by-case basis (Bolton / Skeel 2004, 818 and 821). This would give the debtor a measure of flexibility in pursuing certain of his objectives. There is, however, a risk that the absence of a uniform procedure could give rise to a competition between different procedures that would ultimately lead to an (ex post) uniform SDRM – though at a level of regulation that would be accompanied by the lowest possible credit costs. This would make restructuring as good as impracticable and at the same time lead to inefficient outcomes (Bolton / Skeel 2004, 819–21).

Both the Raffer and FTAP proposals and the IDF proposal would not need to be anchored in international law, although this is seen as desirable (Fritz / Hersel 2002, 16; Raffer 2005a, 5; Berensmann / Schröder 2006, 19). An arbitration panel could be set up as soon as a number of important creditors (e. g. the G7 countries) had agreed to do so (Raffer 2005a, 5). Under the Raffer and FTAP proposals as well as under the IDF – and unlike the other proposals under consideration – the arbitration panel could be implemented within the short to medium term because they require neither a new legal framework nor any adjustment of national law.

Generally speaking, it would be on the one hand important to anchor an insolvency procedure in international law as a means of creating a binding framework for debtors and creditors alike. But on the other hand, this might not prove practicable in that an international insolvency code designed to restructure debt would have to involve a good number of creditors from many different countries. It would no doubt prove very time-consuming for different countries to transpose such a procedure into their national law, assuming that it would be possible in the first place. Implementing an insolvency procedure in the form

of a designer SDRM could prove to be less costly and time-consuming because in this case only a few key components of the SDRM would have to be anchored in international law and then be transposed into national law.

2.5 Sanction mechanisms

It would prove difficult to enforce insolvency rulings if one of the two parties subsequently refused to accept a court or panel's decision. Enforcement would run counter to the principle of state sovereignty and prove inconsistent with the aim of resolving international disputes by means of consensus, not by force.

Only the Raffer and IMF proposals and the FTAP provide for sanction mechanisms. A tailor-made SDRM of the kind proposed by Bolton / Skeel would also provide room for sanction arrangements.

Under the SDRM the IMF would be able to impose sanctions in the framework of its adjustment programs. One of these sanctions (which would be imposed for any activation of an unjustified procedure) would require the debtor to assume the costs of the procedure (as well as of the DRF) (IMF 2003a, 14 and 27).[24]

Under the FTAP proposal each of the parties involved would have the option to reconvene the arbitration panel once an insolvency procedure had been completed if it is suspected that the arbitration ruling had been breached. If the arbitration panel confirmed that a debtor had taken unfair advantage of a ruling (e. g. by failing to make social expenditures he had pledged to make), it would be authorized to reactivate the insolvency procedure. In this case it would have the right to revise its original debt relief ruling. If the creditor side were shown to have violated a ruling (e. g. by seizing a debtor's assets abroad), the FTAP arbitration panel ruling would serve as a basis for the debtor to mount a legal challenge before a national court and to obtain the same treatment provided for under the New York Convention or the ICSID Convention[25] (Fritz / Hersel 2002, 13 and 25).

Under the Paulus proposal a restructuring plan would be declared null and void if the debtor failed to comply with it, and this would mean that the debtor would again be burdened with his original debt. At the same time, the debtor would be precluded from reopening a procedure within a period to be defined (Paulus 2002, 6-3).

It is generally difficult to create sanction mechanisms that can actually be enforced. While the IMF's programs do enable it to enforce sanctions on debtors, the fund is unable to sanction creditors (at least not in the framework of its adjustment programs) because most creditor countries are not part of such programs. Finally, it would not, for the reasons cited above, make sense to establish an insolvency procedure with the IMF. Paulus' proposal that a restructuring plan could be declared null and void, without any possibility to reopen the procedure, would be the easiest proposal to implement.

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24 No other sanctions are mentioned in the IMF proposal.

25 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which came into force on July 7, 1959, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on Oct. 14, 1966.

2.6 Information provision

The success of an insolvency procedure would hinge in key ways on the information available to the parties involved, above all the debtor and the creditors. Under the SDRM the debtor would be required to make all necessary information bearing on his debt available to the arbitration panel, i. e. information on the public entities included by him and information on debts not covered by the SDRM.[26] This information (claims notification) would be published by the DRF on a special SDRM website (IMF 2002c, 28–29; IMF 2003a, 24).

Under the IDF the permanent IDF-Secretariat would collect and analyze information on the economic situation and the debt of the countries concerned (Berensmann / Schröder, 12). Under the Raffer, FTAP, and IDF proposals, restructuring negotiations would – on the model of the US bankruptcy code[27] – be public and transparent in nature. This would be achieved by involving civil society in restructuring negotiations: under the IDF in the framework of public hearings in the debtor country's parliament and under the FTAP in hearings before the arbitration panel. Granting a right to be heard would contribute, among other things, to strengthening the debtor government's accountability to its own population. This would also serve to better ensure that the affected population's basic needs were secured (Fritz / Hersel 2002, 14-15; Raffer 2005a, 366; Berensmann / Schröder 2006, 16).

Under the Raffer proposal and the FTAP the right to a hearing would – in analogy to Chapter 9 – need to be approved, in this case by the arbitration panel. Unlike the context of civil law, in this case a sovereign debtor's entire population would be represented in the proceedings.[28] This could be accomplished by having e. g. grassroots organizations of the poor, nongovernmental organizations, international organizations like the United Nations International Children's Emergency Fund (UNICEF) or the World Council of Churches represent the population. Workers from the debtor country could be represented e. g. by labor unions or employees' associations. The FTAP furthermore calls for funds to be made available to disseminate information, e. g. countrywide campaigns in the media and in schools (Raffer 2001, 35; 2000, 230; Fritz / Hersel 2002, 14).

As important as involvement of civil society may be in theory, the idea would be difficult to implement in practice, e. g. when it comes to deciding how the relevant and representative civil society organizations are to be identified and reached, for instance, through information campaigns or targeted invitations to attend. There is also a risk that hearings could seriously delay an insolvency procedure.[29]

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26 The debtor state would be required to provide the following lists: (i) a list of all debt covered by the SDRM (SDRM Restructuring List); (ii) a list of debts set to be restructured outside the SDRM (Non-SDRM Restructuring List), and (iii) a list of debts not subject to restructuring (Non-Impaired List). See IMF 2003a, 24.

27 Rule 2018, Federal Rules of Bankruptcy Procedures.

28 § 902(4) U.S.C. provides a right to be heard not for the entire population of the affected municipality but only for "special taxpayers" who could be affected by a tax increase necessitated by a restructuring procedure.

29 The proposals advanced by Schwarcz, Paulus, and Bolton / Skeel do not deal explicitly with the aspect of information provision. Paulus suggests that (e. g. in the process of reviewing an application to open the procedure or an allegation that the debtor has engaged in acts detrimental to creditor interests) the

3 Debt restructuring

3.1 Determination of debt sustainability

A restructuring agreement conceived to enable a debtor to make a fresh start should contain both a restructuring of debt and – if necessary – a (partial) debt cancellation designed to reduce the debtor country's debt burden to a sustainable level. In keeping with the principle of equal treatment of creditors, any debt cancelled by creditors should be proportionate to the claims they hold (Meessen 1990, 273; Fritz / Hersel 2002, 15; Bolton / Skeel 2004, 796). Under the FTAP regional investment banks (like e. g. the African Development Bank) could be accorded special treatment (Fritz / Hersel 2002, 15).

The key criterion for the SDRM would be the IMF's customary definition of debt sustainability. The DRF would not be able to challenge this definition (IMF 2002c, 4, 6–7). The final volume of any debt relief that might be necessary would be specified in the restructuring plan, which would come about decentrally, i. e. as the outcome of restructuring negotiations between debtor and creditors (IMF 2003a, 26). All the same, the IMF's near-absolute discretionary powers in this matter have often come in for criticism (Kaiser / Schröder 2002, 15; Raffer 2005a, 2).

Under the Schwarcz and Bolton / Skeel proposals debt sustainability would also be determined in a more decentral manner, in negotiations between debtor and creditors, with the debtor presenting a restructuring plan and the creditors voting on it; under the Bolton / Skeel proposal the creditors would also vote separately on the proposed volume of debt cancellation (Bolton / Skeel 2004, 796–97; Schwarcz 2004, 1216).

Under the IDF proposal, the IDF Secretariat would have the task of establishing criteria (indicators and cut-off values) for the long-term sustainability of a country's debt. The secretariat would be able to draw on support from experts from multilateral institutions, the private sector, and the academic world (Berensmann / Schröder 2006, 12). However, the final restructuring plan would be worked by the IDF Commission (Berensmann / Schröder 2006, 13–14).

Under the FTAP as well, a third party, viz. the arbitration panel, would be responsible for working out a restructuring plan (Fritz / Hersel 2002, 15). This would serve, among other things, to ensure that the affected population's minimum basic needs were met and that the human rights and human dignity of the poor were respected. Basic needs would include e. g. cost-free primary education, basic medical care, and access to water and sanitary facilities. In analogy to Chapter 9,[30] however, the debtor's sovereignty would be respected, including his sovereign right to come to his own decisions on the provision of public services (Raffer 2001, 28–29 and 2005a, 4; Erlassjahr.de 2002, 1; Fritz / Hersel 2002, 14). A debtor state would also have this right under the Bolton / Skeel proposal: a designer SDRM framework would permit the sovereign debtor to protect certain public services

neutral third party should be given access to the databases of the IMF and the World Bank (Paulus 2002, 6-1-3 and 6-1-4).

30 § 904 U.S.C. prohibits the bankruptcy court from interfering in any way with sovereign and political powers, with the debtor's property or revenues, or with the uses to which the debtor puts the assets that generates his income if such an intervention is made without the debtor's consent or if it deviates from the restructuring plan adopted.

(Bolton / Skeel 2004, 819). Paulus calls for a provision that would secure a minimum means of subsistence, which would have to be defined; otherwise, it could prove nearly impossible for debtor countries to justify an insolvency procedure at home (Paulus 2002, 6-1-3).

Raffer also calls for full cancellation of all debts that the debtor would a) never be able to repay because repayment would exceed his productive potential (so-called phantom debt) or b) would only be able to service if he put the minimum subsistence level of the population at risk. As a means of reducing the budgetary impacts of such debt cancellation on the balances of public creditors, Raffer suggests that a fund should be set up to cover debt that had been cancelled. With a view to spreading their losses over a longer period of time, public creditors would continue to hold their claims against the fund until they fell due. To ensure that the funds released by debt cancellation were in fact used to benefit the poor, these funds could be transferred to a local currency fund set up for the purpose – in ways similar to those provided for under the Heavily Indebted Poor Countries Initiative or the Poverty Action Fund proposed by Anne Pettifor. The fund would be transparent and audited by an advisory body made up of representatives of the debtor and creditor sides (Raffer 2000, 221).

The principle hurdle facing the "basic needs before debt service" or "minimum subsistence level" concepts would be the need to translate them into manageable rules for the arbitration panel.[31] In view of the complexity of this decision, the Raffer, FTAP, and IDF proposals provide for an involvement of civil society (in particular representatives of the affected population) in restructuring negotiations, the aim being to ensure that the affected population would have an effective influence on the ultimate decision to be taken (Fritz / Hersel 2002, 14–15; Raffer 2005b, 366; Berensmann / Schröder 2006, 16).

Generally speaking, debt sustainability would be defined decentrally, in negotiations between debtor and creditors, with both parties seeking orientation in indicators commonly used to define debt sustainability, including e. g. debt level or debt service to exports ratio, gross domestic product, or national revenues. For low-income countries, the limits for these indicators could be geared to the Debt Sustainability Framework of IMF and World Bank. This framework contains a country-specific debt sustainability analysis and is designed to indicate ex ante any critical debt situations in developing countries (IMF / IDA 2002a, 2004b). A similar concept could be developed for middle-income countries. Because of the complexity involved in measurement, it would not be practicable to gear debt sustainability to minimum subsistence levels.

31 Although proposals have been advanced on approaches to concretize these concepts, they have not met with broad acceptance. The German debt relief initiative (Schuldenerlassinitiative) e. g. has proposed a model used by the Catholic Agency for Overseas Development (CAFOD) that provides for a blanket amount per capita that would be exempt from debt service, with only a certain percentage being earmarked to service external debt (Erlassjahr.de 2002, 2).

3.2 Inclusion of claims

3.2.1 Registration and verification process

One important issue in connection with insolvency procedures is which type of debt would be included in the procedure and how these claims would be registered. Only the proposals advanced by Raffer, Schwarcz, Paulus, and the IMF provide for a registration process.

Under the Raffer, Paulus, and IMF proposals all relevant claims would be subject to registration and verification by the arbitration body (Paulus 2002, 6-1-1; IMF 2003a, 28; Raffer 2005b, 365). Schwarcz calls for a registration of claims within 30 days after a procedure has been opened (Schwarcz 2004, 1216).

Under the SDRM all eligible claims selected by the debtor would be registered. Eligible claims would include those secured by contract and/or stemming from the economic activity of the debtor country. This would mean that the following claims would not be eligible: wages, salaries, pensions; claims for damages; claims stemming from human rights violations, wartime injuries, or expropriation. Further, the following claims would not be restructured: claims already subject to national law or the jurisdiction of national courts; claims that had been given privileged status by law, by courts, or under contracts; guarantees or securities that had not yet been used; and, finally, contingent claims that had not yet fallen due unless they had a market value (IMF 2002c, 18; IMF 2003a, 23–24). All registered claims would be verified in the SDRM framework if they had not been challenged by the debtor or a registered creditor within a given period of time (e. g. within 30 days). The DRF would have the task of working out detailed arrangements for the registration and verification process (IMF 2002c, 29–32; IMF 2003a, 13 and 25). In principle, all claims covered by the IMF proposal would be registered.

3.2.2 Scope of claims

In keeping with the principle of equal treatment for all creditors, all categories of claims would be included in a restructuring procedure.[32] The lowest common denominator of all of the proposals under consideration (except for the Bolton / Skeel proposal, which does not explicitly deal with the issue) would extend only to claims held by foreign private creditors. Excepting the SDRM, all proposals would restructure claims held by both multilateral and bilateral official creditors (Schwarcz 2000, 1006 and 1009; Fritz / Hersel 2002, 15; Paulus 2002, 6-2-2; Raffer 2005a, 4; Berensmann / Schroeder 2006, 14).

Official bilateral debt

The IMF proposal does not definitively clarify how bilateral public creditors would be treated: They would either be excluded entirely from the SDRM or treated as a separate class – within or outside the SDRM framework. In the latter case it would be possible to negotiate terms with the debtor (in coordination with private creditors) that could deviate from the terms accorded to private credits. For instance, it would be possible to exempt

32 The concept of equal treatment of creditors extends to both the shares of claims realized by creditors and the shares of any claims that are cancelled (Meesen 1990, 273).

private bilateral creditors from the obligation to participate in a debt cancellation if the private creditors had already reached agreement on reducing their claims (IMF 2002c, 23). In any case these claims should be restructured in close cooperation with the Paris Club as well as with the community of private creditors (IMF 2003a, 3–4 und 24; IMF 2006, B.2).

However, integration of bilateral public creditors into the restructuring process would offer the advantage of being able to include countries that are not members of the Paris Club. In addition, bilateral public creditors constitute the most important group of creditors outside the group of private creditors (Berensmann 2003a, 22). One disadvantage of an inclusion of bilateral public creditors occurs in the case of a cessation of payments. If a debtor suspended his repayment of export credits – which are as a rule granted by bilateral public creditors – in connection with an insolvency procedure, he could lose access to international financial markets (Berensmann 2003b, 22–23).

Official multilateral debt

The treatment that would be accorded to multilateral public creditors (like the IMF) is likewise an unsettled matter under the SDRM proposal: They would be excluded from the restructuring process either generally or in part. In the latter case it would e. g. be possible to anchor, in the IMF's Articles of Agreement, a list of the multilateral institutions that would be excluded (IMF 2003a, 24). Under the IDF the IMF would be eligible for special creditor status only if the restructuring negotiations succeed in reaching agreement on the conditionalities and the economic policy proposed (Berensmann / Schröder 2006, 14–15). One reason for excluding multilateral financial institutions from a restructuring procedure is their limited financing resources: Their ability to provide concessional credits would depend in important ways on the privileged status they had in restructuring procedures (IMF 2002c, 22; Berensmann 2003b, 22).

Domestic debt

In view of the fact that a sovereign debtor's ability to service his external debt also depends on his domestic financial situation, domestic debt would likewise have to be restructured (IMF 2002c, 21; Paulus 2002, 6-2-2; Berensmann / Schröder 2006, 15). Restructuring of domestic debt would be closely coordinated with restructuring of foreign debt, otherwise e. g. a stay on enforcement (which would apply only for external debt) would discriminate against national creditors and thus be inconsistent with the principle of equal treatment for all creditors (Hefeker 2002, 688).[33] The FTAP and the IDF for this reason provide for case-by-case decisions on whether domestic debt would be included in a procedure (Kaiser / Schröder 2002, 15; Berensmann / Schröder 2006, 15). On the other hand, under the SDRM domestic debt covered by existing national restructuring instruments would be barred from restructuring (IMF 2002c, 21–22).

The principle of equal treatment for all creditors should, in the end, require all external claims of all types to be included in a restructuring procedure. While domestic debt would

33 Only the SDRM contains this consideration. It is reflected in the debtor's obligation to specify how debt not covered by the SDRM (Non-SDRM Restructuring List and Non-Impaired List) would be treated in the framework of a restructuring plan. And for another thing, the SDRM would exempt all claims subject to national jurisdiction.

be given consideration, it would not be included in a restructuring procedure, because, first, there are national restructuring instruments available for the purpose and, second, the risk that a sovereign debtor might open a procedure without justification would increase if his domestic debt were included in the restructuring process.

3.3 Classification of claims

A system of uniform, previously defined rules could serve on the one hand to protect creditors from any treatment that failed to do justice to the priority of their claims, and on the other hand it would accelerate the restructuring process by eliminating the "struggle" among creditors for payment flows. Payment sequences not subject to fixed rules are more apt to have to contend with the risk of arbitrary behaviors, e. g. if they are dictated by debtor political rationales, financial needs, or prestige-related calculations (Gelpern 2004, 1121–22).

Schwarcz and – in more depth – Bolton and Skeel deal with the classification of claims. Under their proposals – patterned on the US bankruptcy code – efforts would be undertaken to at least ensure that claims that differed in terms of priority did not turn up in the same class. There would, however, be no need to ensure that all claims of equal status were grouped in one class (Schwarcz 2000, 1006 and 1033). Under the Bolton / Skeel proposal decisions on the depth of classification would be left to the sovereign debtor (Bolton / Skeel 2004, 801).

Adhering to the principle named above, it would be possible to group together claims held by multilateral institutions, bilateral public creditors, foreign private creditors, and – provided there are any – national creditors to form one class (Schwarcz 2000, 1006; Bolton / Skeel 2004, 801). A closer-meshed classification could be used e. g. to differentiate between bank loans and bonds or other securities. Primarily as a means of preventing existing debt from being diluted[34] by the addition to it of new debt, Bolton and Skeel propose the use of a first-in-time rule, i. e. classification of all unsecured claims in terms of their emission dates: The older a claim, the higher its priority (Bolton / Skeel 2004, 799–801). This would at the same time lower the debtor's incentive to overborrow.

Furthermore, Bolton and Skeel take up the idea of a global clearing center that was proposed at the 2002 Monterrey Summit. The center would have a publicly accessible database on all outstanding sovereign debt and would thus serve to improve the transparency of sovereign debt (Bolton / Skeel 2004, 800). The principal aim would be to prevent situations in which poorly informed creditors granted credits to an overindebted country that would then be treated in the restructuring process. This would be important in particular in cases where more recent credits would be given lower priority in keeping with the first-in-time rule. Setting up a clearing center of this kind would, however, require a medium- to long-term timeframe.

While the Paulus and IMF proposals do not rule out a classification of claims, they do not present any detailed arrangements. Under the SDRM the sovereign debtor would be able

34 On the discussion of "dilution," see Bolton / Skeel (2004, 788–93).

to classify the claims held against him as he sees fit, e. g. by dividing these claims (as under the two other proposals discussed above) into private and bilateral public claims, provided that bilateral public creditors were included as a separate class in the restructuring process (IMF 2003a, 26). Paulus also sees in the classification of claims a means to increase the incentives for creditors to participate in restructuring (Paulus 2002, 6-2-1).

A differentiated treatment of creditors based on fixed rules would serve to protect priority creditor rights when it comes both to payment priorities and voting procedures and would at the same time accelerate the restructuring procedure. At least one rough classification of debts into public and private, foreign and domestic (depending on how many debtors were to be included) would appear desirable. However, the effectiveness of rules of this kind would depend in key ways on the level of detail they were given, an issue dealt with only by the proposal advanced by Bolton and Skeel.

3.4 Cessation of payments and stay on enforcement

If a debtor were no longer able to service his debt immediately before or after an insolvency procedure had been opened, the question would be whether it would be possible or reasonable to order a cessation of payments.[35] If a debtor failed to make his interest and/or redemption payments, consideration would have to be given to whether it would be possible and reasonable to grant him protection by according him a stay on enforcement.

The proposals under consideration here differ on this issue. While Schwarcz argues against any automatic stay on enforcement (and thus also against any automatic cessation of payments), Raffer and Paulus – in analogy to § 922 und § 362(a) U.S.C. – come out in favor of a stay on enforcement that would come into force automatically when a procedure were opened (Raffer 2001, 23; 2005b, 365; 2005a, 1–2; Paulus 2002, 6-1-4).[36] The SDRM, the Bolton / Skeel proposal, and the IDF would take a more middle course: Instead of being automatic, a stay on enforcement would require certain conditions to be met. The FTAP is in part unclear as to whether there would be only a cessation of payments (CIDSE / Caritas 2002, 5; Erlassjahr.de 2002, 1; Halifax 2003, 19) or whether there would also be a stay on enforcement (Fritz / Hersel 2002; 19; Kaiser / Schröder 2002, 8; Halifax 2003, 18).[37]

The SDRM would not permit any general cessation of payments. The debtor would be expected to continue, as long as possible, to meet his contractual obligations. On application of the debtor, the DRF would be able to suspend all enforcement and other court-ordered measures if a qualified majority of all verified creditors approved the stay. The debtor's application would be expected to concretize his ideas on the duration of a stay.

35 Under § 726(a)(5) U.S.C. a solvent state is still obliged to pay interest that has accrued in the course of the restructuring process.

36 Under the Raffer proposal, though, the arbitration panel would have the option of rejecting a stay on enforcement. This decision would be taken immediately after the panel had been formed, as would a decision affirming a stay (Raffer 2005b, 365). Under the Paulus proposal application for an insolvency procedure would automatically entail a stay on any creditor recourse to the debtor's assets (Paulus 2002, 6-1-4).

37 The latter case is generally referred to as a "debt standstill" in FTAP proposals.

Furthermore, any given court-ordered enforcement measure could be suspended if the measure were seen as having the potential to endanger the restructuring process (IMF 2003a, 25).

As a means of depriving creditors of incentives to enforce claims established prior to a restructuring agreement (or more exactly: prior to certification), all privileges or payments achieved by a creditor on the basis of litigation would be given consideration in the restructuring procedure (i. e. they would be deducted). This would be something like the hotchpot rule[38] that is used as ex ante protection against a rush to the courthouse, and it would thus serve as a supplement to the ex post protection provided by a creditor-approved stay (IMF 2003a, 25).

Unlike the SDRM, the IDF would make a stay on enforcement for which a debtor country applied contingent on the approval of a qualified majority not of creditors but of G20 countries. The aim of this would be to boost the acceptance of the decision among debtor countries. Furthermore, the measure would be limited to 90 days with a view to accelerating the procedure (Berensmann / Schröder 2006, 15–16).

Likewise with a view to accelerating the procedure, Bolton / Skeel propose a differentiated treatment of the claims to which a stay on enforcement would apply (a targeted stay). Accordingly, an automatic stay would apply only for asset seizures, with ordinary litigation taking its normal course (Bolton / Skeel 2004, 784).

As an alternative to a targeted stay, the debtor could be granted a right to appeal to the court with jurisdiction for the restructuring negotiations. A simple affirmative or negative court ruling on the adoption of a stay would be sufficient in this case (the aim being to avoid a situation in which the court with jurisdiction for the restructuring procedure might be forced to assess or comment on the ruling of the court at which action was taken against the debtor). One drawback of this right to appeal is that is would be unable to prevent enforcement in the period of time preceding the appeal. For this reason Bolton and Skeel come out generally in favor of a stay on enforcement, even though they do not regard it as indispensable (Bolton / Skeel 2004, 785). Their proposal makes no mention of a cessation of payments.

One argument against a cessation of payments is that, on the one hand, certain payments (in particular for trade credits) would have to be made if a debtor's trade were to continue, i. e. if his economy were to continue to function. On the other hand, a cessation of payments would provide the debtor a respite that would serve to reduce his interim financing needs during the course of the restructuring process (Berensmann 2003b, 24). One objection raised to both a cessation of payment and a stay on enforcement is that any decision of this kind would require a comprehensive framework of regulations detailing e. g. its onset, its duration, and/or the exact volume to which it would apply. For this reason it has been proposed that other mechanisms be used in place of a stay – e. g. instead of a cessation of payments, a moratorium on payments that could be announced by the debtor country at any time and that would not be in need of any regulation (Schwarcz 2000, 985). But it can be countered that a moratorium would entail a loss of reputation for the country im-

38 The hotchpot rule applies for transboundary insolvency procedures and serves to guarantee intercreditor equity in procedures that fall under more than one jurisdiction (IMF 2002c, 37).

posing it, one that could impair its future access to capital markets. Nor could a moratorium prevent a country from continuing to make payments to certain creditors, which would undercut the principle of intercreditor equity (Berensmann 2003b, 24).

Another argument against stays on enforcement is that such stays entail a risk of rising credit costs, since creditors would as a rule seek to compensate for the damage done to them by a stay by raising interest rates. Furthermore, there is some doubt as to whether a sovereign debtor needs protection against creditor enforcement in the first place in view of the fact that it is more difficult to enforce claims against a sovereign debtor than against private debtors or municipalities. For there is no possibility to liquidate a sovereign debtor's assets, and there are limits to enforcement as well, i. e. enforcement is possible only in the case that the debtor has assets abroad (Schwarcz 2000, 985). However, this argument ignores the danger of a rush to the courthouse. A stay on enforcement would lower the likelihood of a rush to the courthouse by depriving creditors of their right to enforcement during the restructuring process, and it would also set incentives to engage in restructuring negotiations and to lose no time in coming to an agreement. Finally, a cessation of payment and/or a stay on enforcement would provide for intercreditor equity by ensuring that no one creditor would receive payments from the debtor or have recourse to his assets before other creditors (Berensmann 2003b, 24).

The advantages outlined above are a good argument in favor of including in a procedure at least an *option* to impose a stay on enforcement and cessation of payments. Involving the G20 in the procedure would offer the advantage of including both creditors and debtors in the decision-making process. This, though, would make sense only in the framework of the IDF, in which the G20 would have influence on other decisions as well. In other cases approval by the majority of creditors would be sufficient. It would furthermore make sense to impose a time limit on a stay on enforcement as a means of accelerating the procedure. However, letting the debtor decide on the time limit would entail the risk that the limit might turn out to be a protracted one, and this would reduce the debtor's incentive to come to a swift agreement. The IDF would for this reason prefer a uniform, predefined time limit (possibly with the option of an extension).

If agreement were reached on a stay on enforcement that would come into effect automatically when a procedure is opened, then it would be recommendable to opt for the Bolton / Skeel targeted stay, since it would not delay the procedure and would, also serve to ensure that the stay would be applied to the relevant enforcement measures.

3.5 Interim financing

With the exception of the Raffer and FTAP proposals, which do not deal with debtor-in-possession (DIP) financing, all of the proposals considered here come out in favor of providing the debtor fresh credits. During the restructuring process debtor countries tend to have major financing needs, because on the one hand they are required to finance the restructuring procedure and on the other hand they need funds (e. g. trade credits) to keep their economies operating. One way to address this problem is to provide the debtor fresh credits during the restructuring process.

Basically, there are two challenges that must be met in connection with the interim financing. For one thing, it is essential to create incentives to induce creditors to grant fresh credits in a phase in which the debtor has little creditworthiness. For another, the incentives must be set in such a way as to ensure that the debtor is not given more than he actually needs. Otherwise new credits would serve to dilute existing (in particular unsecured) claims, i. e. the future value of these claims would decline in relation to a situation in which no fresh credits were provided.

3.5.1 Setting incentives for creditors

It would be possible to provide fresh credits to the debtor only under the condition that these claims were accorded special treatment in the restructuring process. Otherwise only the IMF would be in a position to provide the fresh credits required.[39]

Under the Schwarcz and Bolton / Skeel proposals DIP claims would, on the pattern of the US bankruptcy code, be accorded priority over those held by all other creditors of a given debtor (superpriority rule). The aim here is to prevent a debtor from using fresh credits to settle existing claims, which would lower the probability that he would repay the new credits provided (Schwarcz 2000, 992; Bolton / Skeel 2004, 803 and 807). The fact that in this way holders of existing unsecured claims would be placed at a disadvantage because of the low priority of these claims would be compensated, or indeed overcompensated, for if fresh credits were used to improve the debtor's economic situation, thus increasing the future value of unsecured claims. This would apply precisely in the case that fresh funds were invested in projects whose yields would serve at least to cover the credit costs involved.

Under the Paulus and IMF proposals the credits made available in the restructuring phase would not be covered by the restructuring procedure (IMF 2003a, 13–14), and under the Paulus proposal they would also be exempt from an automatic stay on enforcement (Paulus 2002, 6-1-4).

3.5.2 Oversight of credit provision

One alternative approach would be to leave the decision on whether or not to provide fresh credits to the creditors themselves. This is the approach adopted by the SDRM: Fresh credits would require the approval of creditors holding at least 75 % of the volume of the claims set to be restructured (IMF 2003a, 26). The idea behind this approach is that creditors have an immediate interest in a successful course of restructuring and that major institutional creditors in particular will be well informed on the debtor's political and financial situation. However, the advantage of this approach would – due to the time pressure involved – depend in important ways on how well coordination of a heterogeneous creditor community would function, in other words, *how much time* it would take for the creditors to reach a decision on approving fresh credits (Bolton / Skeel 2004, 805).

39 For an overview of the discussion on IMF credits, see Schwarcz (2000, 961–67).

The decision-making process could be accelerated e. g. if – on the model of the US bankruptcy code – an insolvency court or the relevant decision-making body were given the task of overseeing the provision of fresh credits. It is, however, questionable whether this neutral body would have the competence required to adequately judge a sovereign state's financing needs (Bolton / Skeel 2004, 804).

Bolton and Skeel counter this objection by proposing a limit on the scope of the decisions that would be taken by insolvency courts. In connection with a preliminary selection, the decision-maker would be required to break all credit proposals down into two groups: presumptively permissible proposals, which would be approved immediately in order not to delay the restructuring process, and presumptively impermissible proposals, which would be in need of detailed examination. The criterion used to distinguish between the two would be credit volume and the use to which the funds would be put. Low-volume credits and trade credits needed to sustain the debtor's economy would be regarded as presumptively permissible. This would mean that provision of major credits would not be prohibited per se, but would require the approval of the insolvency court – or another decision-maker with expertise in the field. The decisions made by the competent body on approval of presumptively impermissible credits would either be open to appeal by creditors or conditioned on creditor consent. While the latter case would be more time-consuming, it would be easier to realize in political terms (Bolton / Skeel 2004, 807–9). The procedure proposed by Bolton and Skeel thus amounts to a compromise between the approach proposed by the IMF and that adopted in the US bankruptcy code.

Schwarcz likewise proposes that a third party should be entrusted with the task of overseeing the provision of new credits – e. g. the IMF, which has experience in providing credits to countries in times of crisis. According to Schwarcz, the IMF would best be able to exercise this function if it itself acted in the capacity of the interim financer. The IMF would borrow on a nonrecourse basis in capital markets and lend the funds to the debtor country, i. e. the IMF's creditors would receive securities from the IMF, but they would not have recourse to its remaining assets. Since they have priority rights, the claims the IMF holds against the debtor would serve as security. This would mean that creditors would be in the same position they would be in if they themselves had lent to the debtor. The IMF would in this case be in a position to control lending to the debtor that is by linking it to IMF adjustment programs (Schwarcz 2000, 989–90).

One drawback of this option would be its administrative costs, which the IMF would, in its role as interim financer, be forced to bear. These costs could e. g. be covered from the IMF's regular budget or be shared by countries that had signed the international convention establishing the sovereign insolvency procedure. Alternatively, it would even be possible to increase the interest rates on credits provided by the IMF to the debtor country (Schwarcz 2000, 992). The latter case would also lower the debtor's incentives to fall back on the IMF as an interim lender. In view of the conditionalities the IMF could attach to its credits and the control options this would entail for the IMF, this proposal could well be rejected by the debtor countries – in fact, the debtor countries did make numerous objections to the IMF's strong influence on the SDRM.

Generally, credits made available in the restructuring phase should be excluded from restructuring in order to give the creditors an incentive to make new sources of financing available. To ensure that the provision of fresh credits is properly supervised, the decision

on new credits should – as provided for in the SDRM framework – be left to the creditors, because they would be best able to judge the debtor's situation and thus also his need for fresh credits. However, provision of fresh credits should not – as it would be in the SDRM framework – be made contingent on the consent of creditors holding at least 75 % of the overall volume of claims; a figure of 51 % would be more appropriate in view of the fact that it could, in the former case, take too much time to coordinate a large number of heterogeneous creditors groups.

4 Concluding remarks

The present paper has provided an overview of the most important proposals advanced thus far for sovereign insolvency procedures, analyzing their individual elements. The authors have come to the conclusion that none of the proposals contains all of the optional framework conditions needed for the restructuring of sovereign debt. Each of the proposals under consideration has its strengths and weaknesses.

One key factor for the establishment of an insolvency procedure is that it would have to meet with the acceptance of the actors involved in the international financial markets, that is, both the private and public creditors and the debtor countries would have to be willing to make use of an insolvency procedure, since all these different actors would as a rule be involved in it as creditors or debtors. However, each of the proposals for an insolvency procedure, or the concrete design of individual elements of a given proposal, would inevitably tend to benefit the one actor or the other. This is the reason why the relevant actors differ in their acceptance of the individual proposals. This problem is illustrated above on the basis of examples concerning the choice of decision-making and arbitration bodies.

The IMF proposal has, for instance, been criticized for placing the IMF in the dual role of creditor and arbitrator. There has also been criticism of the fact that the IMF would play a key role in appointing the members of the arbitration panel. The private creditos tend generally to reject an international insolvency procedure, because they fear that any such procedure could reinforce debtor moral hazard: Since an arrangement of this kind would make it easier for debtors to open an insolvency procedure, the debtors, it is thought, could seek to take advantage of it. In other words, the challenge at hand is to work out a proposal that would meet with the approval of the majority of the most important actors in the international financial markets.

The International Debt Framework seeks to include as many as possible of the actors involved in the international financial markets. Even though the IDF would be linked institutionally to the G20, under it representatives of the most important actors in the international financial markets (international financial institutions, G20, groups of private creditors, including e. g. the Institute of International Finance) would be nominated to deal with the tasks in the IDF Secretariat referred to above. The IDF Commission would be made up of representatives of both the debtor country and the private and public multi- and bilateral creditors. All the same, the debtors and private creditors as well as countries that are not members of the G20 might see themselves at a disadvantage here. This is the reason why an international insolvency procedure should be linked to an internationally acknowledged institution like the International Court of Justice or the WTO's Dispute Settlement Body.

Even if agreement were reached on the decision-making and arbitration bodies, agreement would still have to be achieved on the choice of the other framework conditions required for an insolvency procedure. It is, however, quite difficult to put together an optimal international insolvency procedure from individual optimal elements, coming up with a new proposal, because these individual elements would have to fit into an overall concept. In addition, a new proposal would have to give consideration to new elements that would serve to invalidate the arguments advanced by various actors. Nonetheless, the present paper may provide a workable basis for new and practicable proposals, and it points, for individual elements, to approaches that could be used to improve proposals that have already been advanced.

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Annex

Table A1: Selected elements of the proposals advanced for sovereign insolvency procedures

	Raffer	FTAP	Schwarcz	SDRM	Bolton / Skeel	IDF
Decision-making and/or arbitration body	Arbitral panel	(i) Arbitral panel and (ii) possibly technical secretariat	(i) International Court of Justice or (ii) international dispute settlement body (modeled on ICSID)	Dispute Resolution Forum	National bankruptcy courts	(i) IDF Secretariat for crisis prevention and (ii) IDF Commission for dispute resolution
Establishment under international law	Not necessary	Not necessary	Yes, on the basis of an international convention	Yes, by amending the IMF's Articles of Agreement	Yes, with the option of establishing certain features of the SDRM under contract law (designer SDRM)	Not necessary
Range of claims	All claims	Claims held by all foreign creditors, possibly selected national creditors	All claims	Claims held by foreign creditors Claims held by bilateral public creditors either excluded or included as separate class Claims held by multilateral public creditors excluded either generally or in part (if explicitly referred to in the Articles of Agreement)	Not explicitly specified	Claims held by all foreign creditors, possibly selected national creditors. IMF credits could be excluded if it were possible to reach agreement with the debtor on credit-linked conditionalities.
Voting rules	Not specified	Not specified	Qualified majority of 75 % of amount and more than 50 % of number of claims of each class + unanimity between classes	Qualified majority of 75 % of all verified claims	Qualified majority of 2/3 or 3/4 within creditor classes + unanimity between classes; application of cramdown rule. Two-stage voting procedure: (i) level of debt cancellation; (ii) distribution of cancelled debt across creditor classes.	Not specified

Stay on enforcement	Yes, in analogy to Chapter 9	Yes, accompanied by cessation of payments (in most of the FTAP proposals)	No	Yes, conditioned on creditor consent; on application by debtor, time limit may be agreed on	Yes, only for asset seizures. No stay on ordinary enforcement.	Yes, conditioned on approval by the G20 countries and limited to 90 days
Interim financing	Not specified	Not specified	Yes, by providing priority rights; IMF would function as interim financer and overseer of fresh credits	Yes, by excluding fresh credits from restructuring	Yes, on the basis of a superpriority right. Credits regarded by the decision-maker as presumptively permissible to be approved immediately; presumptively impermissible credits only following detailed examination and/or approval of creditors.	Yes, through privileged (unspecified) treatment of fresh credits in the restructuring process
Assumption of costs	All costs shared between debtor and creditors	Not specified	International arbitral panel to be funded through fees; otherwise not specified	Debtor (with exception of costs for the DRF)	Not specified	Costs for IDF Secretariat shared; all other costs borne by the debtor
Sanctions	Not specified	In cases of violation by debtor: the procedure would be reopened; in cases of violation by creditors: possibility of appeal to national court	Not specified	In accordance with the IMF's Articles of Agreement	Not specified	Not specified

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