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The Need for an International Insolvency Procedure

State insolvencies and a more institutionalized process of dealing with them

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The international debt crisis has reached a critical stage where it seems doubtful whether its traditional responses (such as restructuring "public" state debts within the "Paris Club" or "private" state debts within the "London Club" setting) can still cope with its consequences. An analysis of current international restructuring/rescheduling practice both on the inter-state and state and private lenders level evidences a growing resemblance with domestic insolvency procedures. This forms the starting point for an argument — based on a comparative survey of domestic US- and Austrian bankruptcy/reorganization statutes — to develop a truly international insolvency procedure. It should be based on the principles of voluntariness, equality of creditors (within a given class), material debt reduction, macro-economic restructuring measures as a precondition for discharge, and carried out within an institutionalized framework of a judicial or quasi-judicial organ, an international supervisory body and representatives of both private and state creditors. Arguments against these innovations based on state sovereignty and financial interests — potentially raised by both debtors and creditors — are relativized by the expected beneficial effects to both lenders and borrowers.

Keywords: Debt crisis, sovereign debt restructuring, rescheduling, insolvency procedure, institutionalized international debt relief, state insolvency, bankruptcy laws.

1. The evolution of the debt crisis

The international debt crisis poses a constant threat to the global economic equilibrium. The first shock-waves went through the Western lending world in 1982 when Mexico declared its inability to honor its external debt obligations [1]. Since then more than 50 states, mostly less developed countries (LDCs), have followed suit and demanded debt relief from their creditors [2]. During the following decade the panacea for sovereign debtors was called "rescheduling"/"restructuring" [3]. Two inofficial fora have evolved to treat the delicate questions of state insolvency:

In the *Paris Club* an insolvent debtor would approach its state creditors to modify their loan agreements by granting longer repayment terms ("rescheduling") or substantially changing capital repayment requirements and interest rates and thus alleviating the total debt burden ("restructuring"). The frequency of sovereign restructurings increased explosive. While there were only a few debt renegotiations since the first Paris Club action in 1956 until 1982, *debt restructurings have been employed on a very frequent basis during the last decade.* Moreover, what was originally intended as a singular cure, became for some debtor countries an almost yearly undertaking.

A similar procedure is followed in the course of restructuring a state's private debt, i.e. debt owed to private creditors, where the banking community has formed *ad hoc* committees to negotiate with debtor states in what is commonly called the *"London Club"*.

2. The present system of sovereign debt restructuring

2.1. The restructuring of "public" state debts (Paris Club)

Since the first multilateral debt rescheduling in 1956 when the external debts of Argentina were renegotiated, such inter-state action — which has developed a certain recurrent pattern — takes place in a setting usually referred to as the "Paris Club" [4].

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[1] *Lowenfeld,* The International Monetary System, 282 ff.

[2] Cf. Special Sovereign Debt issue, 11 IFLR No. 8 (August 1992), 2.

[3] On rescheduling/restructuring — the terms will be used interchangeably — in general cf. Univ. Illinois L. Rev. (1/1982), 23 Col. J. Transnat'l L. (1/1984) and 17 N.Y.U. J. Int'l L. & Pol. (3/1984/85).

In terms of international law the Paris Club rescheduling efforts aim at *treaty modifications of the original loan agreements* [5]. Although the result of the negotiations, the "agreed minutes", are legally non-binding recommendations [6], their implementing bilateral restructuring agreements are clearly binding international treaties [7]. Among the modifications sought under a restructuring agreement are new (extended) periods for the repayment of capital and interest (genuine "rescheduling"), a different (lower) interest rate due on the loan and in rare cases even a change (reduction) of the amount of outstanding principal, etc.

Absent any (legal) institutionalization the Paris Club is not an international organization, but can be qualified as an international state conference on an ad hoc basis or simply as a "procedure" [8]. It is convened only upon the request of a debtor state who can show that its payment obligations are in danger of "imminent default" [9]. Only sovereign states, generally the major creditor countries, participate in the debt renegotiations with the debtor state which are regularly hosted by the French treasury in Paris (hence "Paris Club"). International Organizations, such as IMF, EC, UNCTAD, OECD, are often present as observers.

The creditors regularly make their consent to a restructuring conditional upon the debtor country's conclusion of a "stand-by arrangement" with the IMF [10], consisting of an "upper credit tranche" financing [11], which is in turn dependent upon the adoption of an IMF-supervised adjustment program *(so-called IMF conditionality)* [12]. This *de-facto*-requirement of "IMF-conditionality" has been criticized by the debtor countries for setting too heavy a burden on their domestic economic development [13]. The austerity cures of the IMF in its "structural adjustment programs" and stabilization programs designed for the monetary recovery of the debtor states have been viewed to conflict with the concerned country's (economic) sovereignty [14].

As far as the subject of the renegotiations, the "eligible debt" [15], is concerned some limitations have been generally observed:

Only "public" debts incurred or guaranteed by states vis-à-vis other states are restructured. As a rule previously rescheduled debts and short-term debts are not dealt with in Paris Club restructurings nor are debts vis-à-vis international financial institutions, such as the IMF, the Bank of International Settlements or the World Bank group, affected. It has been accepted by creditor states that those organizations' claims have to be satisfied in advance (they are repaid according to their original terms) and are thus treated preferentially [16].

As far as the creditor states themselves are concerned the major principle followed is that of *"equal treatment" for all creditors.* In many cases Paris Club restructuring agreements contain a "comparable treatment clause" obliging the debtor country to seek comparable restructuring terms from its commercial creditors [17] whose loans — as "privat" debts — are excluded from the Paris Club procedure which only deals with "public" debts [18].

2.2. The restructuring of "private" state debts (London Club)

While the restructuring procedure of the Paris Club is only open for a state's sovereign creditors (i.e. other states) *commercial creditors, mainly private banks, make similar efforts* to restructure their financial claims [19].

Since many of those debt restructurings with private creditors have taken place in London, as one of the international financial centers, they were

[4] Cf. for a detailed insider's view *Rieffel,* The Paris Club, 1978—1983, 23 Col. J. Transnat'l L. (1984/85), 83—110.

[5] For a detailed assessment of the Paris Club procedure see *Rieffel; Foscaneanu,* Endettement extérieur, renégotiation des dettes, controle du crédit transnational, 89 RGDIP (1985), 299—352; *Carreau,* Le rééchelonnement de la dette extérieure des états, 112 JDI (1985), 5—48, 18 ff; *Plan,* External Debt Rescheduling, Vienna (1985), 26 ff.

[6] *Hahn,* International Loan and Guarantee Agreements, 41 Law and State (1990), 29—52, 38.

[7] *Carreau,* 21 f.

[8] *Rieffel,* 91; *Hahn,* 37.

[9] *Carreau,* 20; *Rieffel,* 84 f.

[10] *Lowenfeld,* 33 ff.

[11] *Gianviti,* The International Monetary Fund and External Debt, 215 RdC (1989 III), 205—286, at 251.

[12] On the role of the IMF during restructurings *Plan,* 39 ff; *Meessen,* IMF Conditionality and State Sovereignty, in: Dicke (ed.), Foreign Debts in the Present and a New International Economic Order, PUPIL vol. 1, Fribourg (1986), 117—129, at 117 ff; on the conditionality mechanism in general *Lowenfeld,* 250 f.

[13] *Cartagena Communique,* 23 ILM (1984), 1175, calling for a review of the IMF conditionality.

[14] Cf. discussion remarks by *Ullrich* in *Meessen* (ed.), Internationale Verschuldung und wirtschaftliche Entwicklung aus rechtlicher Sicht. Baden-Baden (1988) (= Völkerrecht und Internationales Wirtschaftsrecht, vol. 14), 118; *Knieper,* Zurichtung nationaler Politik, 270.

[15] *Plan,* 28 f; *Rieffel,* 99 f.

[16] *Carreau,* 17.

[17] *Hahn,* 38.

[18] This distinction based on the person of the creditors should not be confused with the general and more common terminology differentiating according to the debtor person, cf. *Carreau,* 7.

[19] See generally on private debt restructuring *Walker/Buchheit,* Legal Issues in the Restructuring of Commerial Bank Loans to Sovereign Borrowers, in: *Gruson/Reisner* (eds.), Sovereign Lending: Managing Legal Risk, London Euromoney Publ. (1984), 139—165; *Carreau,* 26 ff; extensively: *Plan,* 55 ff.

aptly called "London Club" restructurings, though they lack any of the Paris Club's quasi-institutionalized structures. They are *in fact even more ad hoc than the Paris Club negotiations* and are usually negotiated by a "steering committee" on behalf of the creditor banks with the debtor country concerned [20]. *The "procedure" followed by London Club action largely resembles the Paris Club negotiations* as far as equal treatment for creditors, debt relief, voluntariness, etc. is concerned.

3. Insufficiency of the present system and calls for a genuine debt relief

Dissatisfaction with the present ad hoc practice of debt restructuring efforts has been widespread. Many scientific and scholarly contributions criticize the *lack of long-term planning* in dealing with the debt crisis [21]. *Especially debtor countries are very sceptical about the current methods of debt restructuring.* It was denounced as mere "muddling through" which would be inadequate to solve the problem [22].

Some debtor countries' fora openly call for a "general framework for reducing the debt or its servicing within an institutional context" [23], with the aim of effectively reducing the debt burden and at the same time ensuring the continuity of financing to participate in world economy [24]. Even if they acknowledge the fact of a country-by-country approach, their demands are clearly directed towards "general policy guidelines on the restructuring and refinancing of debts" [25] which ought to be the same in all countries' debt renegotiations.

4. The global implications of the debt crisis

It is clear, and has been stressed repeatedly, that today's debt crisis is a matter of global concern. It has important influences and repercussions not only on the global economy, but also on matters such as development, environmental concerns and political stability [26].

4.1. World-wide economic implications

The international debt crisis has reached a dimension where it is even purely economically no longer a matter of concern only to the debtor countries, but where its solution has become vital for the creditor countries' economies as well.

The overall exposure of Western (particularly US) banks has overstepped a level where a *total loss of outstanding claims* could possibly be internalized by the banks (through losses and reserves) and *would most likely entail their collapse* and with them *a major breakdown of the whole Western banking system* [27]. Although it has been argued that since the start of the current debt crisis in 1982 banks and other creditors have meanwhile provided those reserves to some extent, it seems that a substantial write-off on their outstanding claims would still have major adverse effects on the creditor countries' economies.

4.2. Implications on the development perspectives of debtor countries

It has been stressed, particularly by debtor states, that the constant and prolonged need to service their external debt effectively inhibits the LDC's efforts to achieve a higher level of development [28]. It forces them to generate foreign currency gains by exporting raw materials, instead of investing in industrialising programs or service operations like tourism.

4.3. Environmental concerns

In recent years, the global protection of the environment has received more wide-spread attention. Special concerns have been raised towards the *potentially destructive effects of the hyper-indebtedness of LDCs on their natural environment.* Their need to generate foreign exchange through export earnings to repay their debts might lead them to exploit their natural re-

[20] *Clark/Hughes,* Approaches to the restructuring of sovereign debt, in: *Gruson/Reisner* (eds.), Sovereign Lending: Managing Legal Risk, London Euromoney Publ. (1984), 131—137, 134.

[21] Cf. 1988 ILA-Resolution on International Monetary Law, part A) 12., ILA-Report of the 63rd Conference (Warsaw, 1988), 22: "The rescheduling process of the last few years has been only partially satisfactory. The process suffered from the absence of a perspective integrating all participants and policies, and it failed to offer long-range solutions. It appears doubtful whether the process should be continued without modification."

[22] *Belaunde-Moreyra,* Dramatic Action or Muddling Through Strategy in the Debt Problem, in: *Dicke* (ed.), Foreign Debts in the Present and a New International Economic Order, PUPIL vol. 1, Fribourg (1986), 10—25.

[23] Ministerial Document of March 11, 1989, Towards a solution of Latin America's external debt problem, UNCTAD Doc. TD/B/1213, 5.

[24] Ibid. 4.

[25] *Cartagena Communique,* 23 ILM (1984), 1171.

[26] See ILA-Report of the 65th Conference (Cairo, 1992), Committee on International Monetary Law (not yet published), 18.

[27] *Bothe/Brink,* Public Debt Restructuring, the Case for International Economic Co-operation, 29 GYIL (1986), 88.

[28] *UN* G.A. Res 45/214 of Dec 21, 1990 "International debt crisis and development: enhanced international co-operation towards a durable solution to the external debt problems of developing countries".

sources in a destructive fashion. Alerted by this prospect, creditor states, supported by non-governmental organizations, have designed special debt relief programs. By so-called *debt-for-nature swaps,* essentially a creditor forfeits parts of his claim in exchange for a guarantee by the debtor state to take environmental protection measures [29].

4.4. Repercussions on the political stability of debtor countries

Debtor countries have pointed out that the implementation of austerity programs in pursuance of economic adjustment plans often threatens their internal political stability [30].

> It is indeed an unfortunate experience of many developing countries that the adoption of IMF plans is frequently carried out at disproportional costs for the poor in a debtor country and might then lead to social unrest — as the Egyptian and Venezuelan "hunger-protests" against the liberalization of bread-price have evidenced [31].

Political instability might develop into a security risk for a whole region. In turn, regional insecurity, e.g. in Latin America or in the Mediterranean African states, could have dangerous repercussions for Western creditor states. The metaphor of the ticking-bomb debt crisis might be exaggerated [32], but it has its justification.

5. Current procedural proposals to cope with the debt crisis

Many scholarly proposals on how to deal with the present debt crisis discuss institutional reforms, but do not expressly call for new debt management institutions [33]. They frequently stress the need for an "international cooperative crisis management which duly takes into account the complexity of the situation" [34]. Generally they are merely enhanced versions of the present restructuring process.

While more conservative theoretical approaches — together with the majority of the banking community involved — share this view, developing countries — and under their dominance many UN organs — seem to be ready to demand a more institutionalized system of debt restructuring.

The UN General Assembly has called for a "durable, equitable and mutually agreed growth- and development-oriented solution to the debt problems of developing countries, taking into account their particular circumstances" to be achieved "through dialogue and shared responsibility" [35]. Other UN-sponsored institutions like UNCTC have asked even more explicitly whether an international insolvency proceeding would not provide more adequate relief than the present approach [36].

> Taking up these calls for a more institutionalized debt relief action, some authors have expressly advocated a bankruptcy procedure for sovereign states.

Most of these proposals are either very closely oriented towards the US domestic law of a Chapter 11 proceeding [37] as a model for an international action [38] or even expressly call for an extension of the US bankruptcy jurisdiction to cover sovereign insolvencies [39].

5.1. The necessity of a state insolvency procedure

The most crucial insight probably is that — when realizing that the debt crisis of the developing countries is for many of them not only an illiquidity problem which could be overcome by providing fresh money and deferring repayment obligations, but rather has become a true insolvency situation [40] — the illiquidity adequate approach of rescheduling and restructuring *without any substantial debt relief* (also in the sense of actual debt forgiveness) is no longer feasible. It might serve its purpose on a temporary basis, but without a miraculous economic recovery of the debtor states, it simply would not work in the long run [41].

[29] Cf. ILA-Report (1990), 477, discussing "debt-for-nature" swaps.

[30] Cf., inter alia, UNCTAD Doc. TD/B/1213; *Cartagena Communique,* 23 ILM (1984), 1171; UN G.A. Res 45/214 of Dec 21, 1990.

[31] *Gonzalo Santos,* Beyond Baker and Brady: Deeper Debt Reduction for Latin America Sovereign Debtors, 66 N.Y.U. L. Rev. (1991), 66—111, at 110.

[32] TIME-Magazine, The Debt Bomb Threat, January 10, 1983, 13.

[33] ILA-Report (1990), 476.

[34] *Bothe/Brink,* 101.

[35] *UN* G.A. Res 45/214 of Dec 21, 1990, para 8. Similarly: *Cartagena Communique,* 23 ILM (1984), 1172.

[36] *UNCTC,* Transnational Corporations and International Economic Relations: Recent Developments and Selected Issues. ST/CTC/SER. A/11, New York (1989), 42, "A bankruptcy law for sovereign States?" (hereinafter: UNCTC 1989).

[37] Cf. infra, the section on US bankruptcy law.

[38] *Cohen,* A Global Chapter 11, 75 Foreign Policy (1989), 109—127; *Gonzalo Santos,* 66—111.

[39] *Miller,* Sovereign Bankruptcy: Examining the United States Bankruptcy System as a Form for Sovereign Debtors, 22 Law & Policy in Int'l Business (1991), 107—131.

[40] For a discussion of the illiquidity vs. insolvency problem at the outset of the debt crisis cf. *Plan,* 10 ff.

[41] Even if *J. M. Keynes'* theorem "In the long run, we are all dead", has not yet been falsified, the wisdom of relying on a wrongly deduced principle of "Live today, pay tomorrow" might be open to doubt.

Thus, there is a clear need for international action to grant debt relief and at the same time to protect the exposed "sovereign" as well as state and private creditors. Since such needs have only been partly successfully served by the present debt management process a true international insolvency framework should be envisaged.

6. Methodological approach to arrive at an international insolvency law

The lack of any international "bankruptcy" law governing sovereign insolvencies *de lege lata* has been repeatedly and correctly stated [42]. The present state of customary international law simply does not provide for any rules governing the orderly adjudication and execution of financial claims against states, for a protection of the debtor states' basic needs, for an equal treatment of creditors, etc. Nor are there any treaties in force containing such provisions. It is only the current practice of rescheduling in the Paris and London Club setting — as described above — which comes close to an international insolvency law. It might well be that these "soft", rudimentary principles — at one point — will "harden" to customary international insolvency law. However, even if some of the material rules — like equal treatment, conditionality, debt relief, etc. — might receive a binding legal character, it is unlikely that the present *ad hoc* practice will lead to a legally mandated "institutionalization". The only feasible and practical way to arrive at such an institutional framework would lie in a *consensual international law making effort*. Thus, the most adequate and effective way to arrive at such a novel body of international law would be the sponsoring of a multilateral convention, i.e. via treaty law [43].

In order to ensure that such envisaged treaty law does not contradict existing international rules, a close look on the present practice of dealing with state insolvencies during the debt crisis should be maintained. Because arguably, the statement that present international law does not contain any rules governing state insolvency has to be qualified. It might well be that some of the practices — generally strictly observed during Paris Club or private creditors' restructurings — might have obtained a status of customary international law [44]. Leaving aside the scholarly dispute as to whether this development has already taken place, it is interesting to note that even those actors and authors denying such a development share in the opinion that any future development of international rules governing state insolvency should take place along the line drawn by the present restructuring practice.

Thus, also from a political point of view aiming at a most widespread acceptance for a conventional approach to the insolvency problem *any "codification" of an international bankruptcy law should closely follow the rudimentary principles currently observed in the restructuring processes* [45] and deviate from them only where such "progressive development" is considered to be a necessary improvement of vital importance.

A second — and in the given situation probably most important — source of rules for an international insolvency law would lie in taking recourse to "general principles of law" [46]. Technically the need would be for a comparative examination of existing domestic insolvency laws aiming at the distillation of rules capable of being transferred on the inter-state level [47], and of being agreed upon by states as prospective parties to an international convention [48].

As far as the feasibility of transferring domestic law techniques to the inter-state level is concerned

[42] *Oechsli,* Procedural Guidelines for Renegotiating LDC Debt: An Analogy to Chapter 11 of the U.S. Bankruptcy Reform Act, 21 Virginia J. Int'l Law (1981), 305—341; *ASIL:* Comity, Act of State, and the International Debt Crisis: Is There an Emerging Legal Equivalent of Bankruptcy Protection for Nations?, 79 ASIL Proceedings (1985), 126—138 (hereinafter: ASIL Proceedings 1985).

[43] Cautiously suggested also by *Straus* in: ASIL Proceedings 1985.

[44] Cf., inter alia, *Carreau,* 23; *Zehetner,* Ansätze zu einem völkerrechtlichen Umschuldungsrecht, 32 Österreichisches Bank-Archiv (1984), 212—219, 217 f; *Leyendecker,* Auslandsverschuldung und Völkerrecht, Frankfurt a.M. (1988), 281; *Bothe/Brink,* 104; *Frankenberg/Knieper,* Rechtsprobleme der Überschuldung von Ländern der Dritten Welt, 8 Recht der Internationalen Wirtschaft (1983), 569, 572.

[45] See *Wood,* The lessons of state bankruptcy, 11 IFLR No. 8 (August 1992), 9, who recognizes with a view to the present restructuring process an "increasing approximation of the procedures of state insolvency to the procedures of formal corporate rehabilitation statutes".

[46] This approach was taken by the ICJ in another field of international economic law conspicuously lacking international rules. In the Barcelona Traction case, ICJ Reports (1970), 3, the Court filled the lacuna of international law determining the nationality of a corporation by identifying general principles common to various domestic corporate laws. See also *Dolzer,* Staatliche Zahlungsunfähigkeit: Zum Begriff und zu den Rechtsfolgen im Völkerrecht, in: Liber Amicorum *Partsch,* Berlin (1989), 531—554, at 540, who advocates their applicability in state insolvency cases.

[47] *Hailbronner,* Ziele und Methoden völkerrechtlich relevanter Rechtsvergleichung, 36 ZaöRV (1976), 190.

[48] For an account of comparative insolvency law cf. *Hanisch,* Insolvenzrechtsvergleichung. Bemerkungen zum Stand der deutschen Insolvenzrechtsvergleichung, FS *Riesenfeld,* Heidelberg (1983), 53—70.

maybe one should not forget that the core of the presently applied debt restructuring practice is based on principles of domestic rescheduling of corporate debt as developed by (mainly US-) banking practice [49]. Also specific techniques which were adopted in debt restructurings after the "pure" rescheduling approach of 1982—85 like debt-equity or debt-to-debt swaps, etc. are basically domestic debt relief operations which were successfully implemented on an international level [50].

One aspect has to be kept in mind, investigating domestic insolvency procedures should not aim at an extension of such procedures over foreign sovereigns [51]. Rather, a *true international procedure* should be envisaged.

6.1. Domestic insolvency procedures as a model for state bankruptcy

Most current proposals for an improvement of the present debt renegotiation process are oriented at some procedure comparable to a US Chapter 11 reorganization which is not aimed at liquidating the debtor's assets and distributing the remainder [52] — which could be hardly perceived in the international context — but rather focuses on restructuring the debtor's financial position in a way that he may continue to operate and eventually make profits again [53]. The following brief survey on US and Austrian bankruptcy provisions should serve as an example for domestic law solutions for identical problems offered by two fundamentally different law systems, one rooting in the Anglo-American case-law tradition, the other in continental European statutory law.

6.1.1. US insolvency law — Chapter 11

Chapter 11 [54], like most other insolvency laws envisaging a restructuring and not only the satisfaction of creditors through liquidating the debtor's assets, basically provides that with the date of filing a bankruptcy petition all outstanding claims are frozen, collected and — if disputed — adjudicated within a single procedure. A Chapter 11 procedure is initiated either by the debtor ("voluntary") or by his creditor(s) if his/their claim(s) reach(es) a certain value ("forced"). There is an automatic stay of any other legal processes or enforcement measures. During the bankruptcy proceeding — at a minimum 120 days from the filing of the bankruptcy petition — a detailed restructuring plan ("Rehabilitation Plan") of the debtor's enterprise is worked out in consultation with his creditors. In practice, not all creditors participate in this negotiation, only those in possession of the largest claims. They, together with representatives of other classes of creditors form a "Creditors' Committee" which is empowered to scrutinize the debtor's financial position, to cooperate in fashioning the rehabilitation plan and which might ask for the court appointment of a "Trustee". Normally, under a Chapter 11 reorganization the debtor remains in possession and control of his business, but in cases of fraud or gross mismanagement the creditors can demand that a trustee takes over the debtor's business. Unless such a trustee is nominated by the court, it will merely appoint an "Examiner" who has reviewing and investigating powers and will report to the court and to the creditors. Finally, a court approved payment plan is sought to satisfy — at least proportionally — the creditors' claim. The formulation of this plan is primarily reserved to the debtor himself who has to seek his creditors' approval (two-thirds in amount of claims and one-half in number of claims). Only if this result is not achieved within a certain time limit, may the creditors design their own reorganization plan. Ultimately the bankruptcy court can impose a reorganization plan on "fair and equitable" terms upon the debtor and his creditors deviating from their wishes.

If domestic law analogies are draw, a procedure more akin to a Chapter 9 reorganization (basically similar to Chapter 11, but dealing specifically with municipal insolvencies) would be most appropriate.

6.1.2. Austrian insolvency law provisions

Austrian insolvency law also starts from the basic distinction between a "forced" (or "straight") bankruptcy — with the aim of distributing the debtor's assets among his creditors in order to satisfy their claims ratably — and the idea of a genuine restructuring whereby a partial debt forgiveness coupled with the granting of grace periods is effectuated under the supervision of a bankruptcy court and court-appointed controlling organs. This dichotomy is reflected in *two separate statutes* governing *straight bankruptcies* on the one hand ("Konkursordnung") and *reorganizations* on the other ("Ausgleichsordnung") which were enacted as early as 1914 by Imperial ordinance [55].

[49] Cf. *Plan*, 60.

[50] *Buchheit*, The evolution of debt restructuring techniques, 11 IFLR No. 8 (August 1992), 11 f.

[51] Suggested by *Miller*, 107—131.

[52] E. g. *Oechsli*, 305—341.

[53] The US procedures as a possible model is also reflected by *UNCTC* 1989, 42, misleadingly referred to as "chapter II".

[54] 11 U.S.C. §§ 1101—1174 (Supp. III 1979), "Chapter 11" is frequently used pars pro toto for the US Bankruptcy Code. For a short account of its basic provisions cf. *Oechsli*, 329 ff.

[55] Reichsgesetzblatt (Austrian Imperial Law Gazetta) Nr. 337/1914.

The following will briefly outline the basic provisions of the reorganization procedure under the "Ausgleichsordnung". An insolvent debtor (only the debtor, not his creditor) can file a petition for reorganization with the bankruptcy court in order to seek debt relief and to avoid a straight bankruptcy. If approved, the coúrt will then appoint an administrator ("Ausgleichsverwalter") and a creditors' committee ("Gläubigerbeirat"), usually electing the debtor's largest creditors who will supervise the administrator's work. The administrator regularly does not actively run the debtor's business. He usually is an independent specialist whose tasks are to check the financial and economic position of the debtor, to supervise his normal and to approve his extraordinary business transactions and to scrutinize the creditors' claims. Unlike during a straight bankruptcy, the court approved start of a reorganization procedure does not generally deprive the debtor of his capacity to run his own affairs. Only some vital transactions — like the sale or encumbrance of real property — are rendered unenforceable without approval of the administrator. Most importantly, the initiation of the reorganization procedure automatically stays all single enforcement actions by creditors. Under the guidance of the administrator the debtor now elaborates a plan to reorganize his business and to satisfy his creditors' claims to at least 40% ("Ausgleichsquote"/reorganization quota). This plan is submitted to a formal vote by the creditors' assembly ("Gläubigerversammlung") under the supervision of the bankruptcy court. In order to be adopted, this reorganization needs a combination of an absolute majority of approving creditors with a $^3/_4$ majority of outstanding claims. After court approval this work-out ("Ausgleich") is an enforceable title which effectively discharges the debtor of all financial liabilities in excess of the accepted reorganization quota.

7. Hurdles on the way to an international state insolvency procedure

7.1. Likely opposition towards such an undertaking by debtor states and how such opposition could be overcome

Law is always a question of words, of notions and significations having special connotations. Default, bankruptcy or insolvency are such legally significant terms, which at the same time still carry an odious sense. There were times when businessmen who became bankrupt even without their fault were social outcasts, being insolvent meant a personal dishonor and the inability to repay their debts drove many into suicide. Attitudes have changed — notwithstanding the fact that the debt relief provided by today's insolvency laws has sometimes lead to abuses leaving the former moral standards totally incomprehensible — and what is seen more clearly on the domestic level should be recognized also on the international plane: *that an insolvency proceeding has basically a two-fold aim, beneficial to both the debtor and his creditors.*

It seeks a discharge for the debtor's obligations to enable him to recover financially and ultimately to re-participate in the business world. On the international plane it should aim at giving actual debt relief to the developing countries, helping them to escape the vicious circle of financial resources' outflow and curb their domestic economies so as to finally allow them to develop economically and to become reliable trading partners of their former creditors again.

7.1.1. Sovereignty

Especially in light of the developing countries' experiences with the IMF and IMF-prescribed austerity measures to achieve economic adjustment as a prerequisite for debt renegotiations, one of the possible objections of prospective debtors to an institutionalized insolvency procedure will relate to their suspicion that a proposed international insolvency tribunal might unduly interfere with their domestic affairs or curtail their sovereign rights [56].

These potential objections should not be taken lightly. It is, of course, true that a judicial or quasi-judicial determination of a debtor state's financial liabilities, the measures to be employed to remedy the economic situation and the ultimate share of the total debt that has to be repaid have a *strong implication on that state's economic sovereignty.* In order to respect those sovereign rights a maximum of legal voluntariness should be provided for — coupled with the exercise of a high degree of sensitivity in designing and employing the reorganization plan. Here again the domestic law analogy as well as due regard to the present restructuring practice provides a valuable guideline. If we focus on Chapter 11 (or 9) or on the Austrian "Ausgleichsordnung" as a model, we could deduce a system where the bankruptcy tribunal envisaged would be less involved itself in actually determining the debtor country's past economic performance or controlling its present debt repayments as the former international debt administrations have actually done [57]. This source of major friction

[56] *Plan,* 39 ff; *Meessen,* IMF Conditionality and State Sovereignty, 117 ff.

[57] Cf. *Folz,* State Debts, International Administration and Control, 8 EPIL (1985), 488 f.

with the debtor's sovereignty should be clearly avoided.

Rather, any insolvency tribunal should serve as an "impartial forum" supervising the negotiations between the debtor country, a specialized controlling agency and the creditors [58].

The institution of a state insolvency procedure *should not be possible against the debtor state's will, but rather* — in accordance with current Paris Club practice — *only upon its request.* Any element of a forced bankruptcy ought to be avoided. This should enable debtor states to realize that such a procedure would effectively be beneficial for them and integrate most of their long-voiced demands. In fact it would "enable sovereign States to seek protection from their creditors under the aegis of an international law of bankruptcy" [59].

7.2. Likely opposition towards such an undertaking by creditor states and how such opposition could be overcome

The creditors' main concerns are their fear of financial losses and their anxiety to reduce these seemingly inevitable losses to a manageable size. By holding to the present — basically consensual — restructuring process both state and private creditors have — at least legally — succeeded in keeping any debt modification, and most importantly any debt reduction, *within their sole control.* These concerns are, of course, well justified and in many cases simply a matter of survival, since major losses on their outstanding claims would drive them — due to their own total loan over-exposure — in turn into bankruptcy.

Any transfer of this power to effectuate a real debt discharge to an international judicial or quasi-judicial authority, e.g. in the form of an international insolvency court, will meet their strong *prima facie* opposition. Thus, the potential benefits for creditors, both states and private lenders should be clarified.

7.2.1. Indirect protection of the creditors' own interests (avoiding total break-down — avoiding "free-riders")

Without a regulated international procedure for sovereign insolvencies, creditors run a double risk of losing their financial "investment".

First, they might not recover anything, because no one receives anything. This worst-case and total breakdown scenario could occur, if the present system of constant renegotiating is perpetuated up to a point where the debtor's economy and (natural) resources are ruined to such extent that there will be nothing left to be "distributed".

Secondly, there is the constant risk that a creditor will remain unsatisfied because someone else has effectively secured his claim via preferential payments or individual enforcement steps on his own. While it is true that the creditors' discipline during the first decade of rescheduling since 1982 has been remarkedly high, the legal devices aimed at preventing individual action — like *pari passu,* negative pledge, most favorite creditor, mandatory prepayment, sharing or comparable treatment clauses [60] — have been largely untested in litigation and it remains to be seen whether and how long the patience of potential "free-riders" will hold on.

An orderly insolvency procedure would clearly limit those risks by

- enabling the debtor's economic survival and thus his eventual — even if only partial — repayment capacity [61], and by
- providing for an equal treatment of all creditors within a common group, thus securing a share of the total debt payments for each creditor according to his proportional claim and preventing unjust advantages of free-riders who manage to enforce their claims by winning the race to the court-house [62].

7.2.2. Solving the debt crisis would serve the creditors' trading interests

LCDs are not merely the developed countries' debtors, they are also (at least potentially) *important trading partners,* although the debt crisis had a substantially deteriorating effect on world trade. Still, by saving the LDCs' economies through a concerted debt relief action, instead of perpetuating the present rescheduling process and thereby aggravating the terms of trade for debtor countries and instead of cutting off any future economic relations with them by trying to unilaterally enforce their credit claims, the creditor countries would serve their own economies by securing their needed primary commodity imports as well as their own export markets [63].

7.2.3. Sovereign bankruptcy as part of sovereign risk

When dealing with foreign states *commercial entities* are used to take certain sovereign risks into

[58] *Straus* in: ASIL Proceedings 1985, 127.
[59] *UNCTC* 1989, 42.

[60] Cf. *Delaume,* Legal Aspects of International Lending and Economic Development Financing (1967), 251.
[61] *Gonzalo Santos,* at 97.
[62] *Cohen,* 127.
[63] *Bothe/Brink,* 101.

consideration [64]. They acknowledge the fact that their rights might be touched by events like state succession [65], that their claims might be rendered unenforceable by sovereign immunity [66] defences or courts respecting the act of state doctrine [67]. *They are unwilling, however, to accept any sovereign insolvency risk.* They simply hold on to the old belief that "states cannot become bankrupt". Facing an *overwhelming evidence to the contrary,* they at least insist on refusing to accept any of the domestically known legal relevances and consequences to such cases of state insolvencies. If one compares this behaviour with the risk assessment commercial lenders usually observe towards private borrowers, it almost reveals an inverse picture: There, procedural obstacles are practically reduced to nil, whereas banks do carefully calculate the insolvency risk they face when lending money. If one now takes into account the modern trend to minimize the traditionally accepted sovereign risks, especially the availability of the sovereign immunity defence, one could form a valid argument that commercial lenders should accordingly accept the "commercial risk" of state insolvency.

Following the modern view of restrictive sovereign immunity, the underlying *rationale* of not allowing a sovereign immunity defence to bar a domestic claim of a private plaintiff to recover from a sovereign obligor lies in the idea that *a state when acting commercially, iure gestionis* or "in the same manner as a private person" [68], *should be treated also like a private person in litigation* and should not benefit from a sovereign prerogative unrelated to the subject matter of the dispute. Thus, only state acts *iure imperii* would render a state exempt (immune) from the jurisdiction of a foreign domestic court. Applying these principles in the sovereign debt context clearly puts the "borrowing of money" outside the scope of acts *iure imperii* and thus provides no justification for granting state immunity in domestic proceedings [69]. A state borrowing money can be sued in domestic courts like a private debtor.

If this *principle of equality of market participants* is accepted as a basic principle of fairness on the market-place, it seems to be justified to demand its application *also in the case of insolvency risks.* If states should be treated like private persons because they act *iure gestionis,* they should also receive the same protection as any other participant on the market, at least they should have the possibility to have a bankruptcy court discharging them effectively of part of their obligations.

The sovereign insolvency risk — thus imposed on a state's creditors — would constitute the complementary consequence of the exclusion of the sovereign immunity risk. In fact, both stem from the same rationale of equal treatment for basically equal situations.

7.2.4. Moral argument

Debt relief, at last, could constitute a finally reached form of compensation for past (colonial) exploitation. What has happened to the developing countries during the last 500 years cannot be wiped out nor compensated. It has certainly contributed to the fact that those states are still developing countries. While it cannot be undertaken here to ascertain any international legal duty to compensate past exploitation [70], which might complement a corresponding obligation to a right to development of LDCs, attention should be drawn to the wide acknowledgement — also by developed countries — that there is at least a *moral duty to assist those countries* in their struggle for development.

A partial debt reduction within a regulated setting of an international insolvency procedure aimed at enabling the debtor countries to develop their domestic economies could be one of the most valuable contributions of the developed world to the future of the LDCs since it would not confine them to a perpetuated status of receiving development aid, but rather lay the foundations for their economic emancipation in accordance with the principle of substantive equality.

8. Procedural framework and material elements of an institutionalized international debt relief operation

8.1. Only "voluntary", no forced insolvency procedure

Whereas most domestic systems provide legal means for creditors not receiving payment to

[64] For the "Sovereign Risk Hypothesis" cf. *Plan,* 2 ff.
[65] Cf., inter alia, *Fiedler,* State Succession, 10 EPIL (1987), 446—456; *O'Connell,* State Succession in Municipal Law and International Law, 2 vols., Cambridge (1967).
[66] *Schreuer,* State Immunity: Some Recent Developments, Cambridge 1988; *Steinberger,* State Immunity, 10 EPIL (1987), 428—446.
[67] *Fonteyne,* Act of State, 10 EPIL (1987), 1—3.
[68] Article 7, European Convention on State Immunity 1972.
[69] *Steinberger,* 439: See also Section 3 of the British State Immunity Act, expressly including "any loan" as a "commercial transaction" for which no immunity will be granted. The US Foreign Sovereign Immunities Act lacks such an explicit inclusion of state borrowing as "commercial activity", but US-case-law in general denies immunity for loan-agreements as well. Cf. *Feldman,* Amending the Foreign Sovereign Immunities Act: The ABA Position, 20 International Lawyer (1986), 1398, at 1406.
[70] *White,* Legal Consequences of Wrongful Acts in International Economic Law, 16 NYIL (1985), 171.

declare the debtor insolvent and thus force him into bankruptcy proceedings, any *forced* insolvency coupled with a supervision against the debtor's will *would conflict with the principle of sovereign equality* and thus be inappropriate on the inter-state plane [71]. Only an international version of the voluntary filing for bankruptcy by the debtor would be conceivable to protect the legitimate sovereignty interests of debtor states and to exclude possible charges of interference in the internal affairs of those states, since any interference — to the extent it is implied by the proposed insolvency procedure — would be consented to [72].

This reflects the current rescheduling practice strictly observed by the Paris Club as well as by commercial creditors that only a formal request of the debtor state triggers restructuring negotiations.

8.2. A comprehensive procedure for all creditors

One of the basic ideas of domestic insolvency procedures is that all financial claims against a single debtor are treated in one single process. Claims not filed within the prescribed time-limit become unenforceable. Only this guarantees the effective discharge of the debtor and enables him to resume his business operations.

The envisaged procedure for an international insolvency should similarly *consolidate all claims against sovereign states in one framework* departing from the past practice of a Paris and London Club dichotomy of sovereign and private creditors [73]. This would not necessarily imply that they should be treated indiscriminately, since the domestic law example of different classes of creditors could be transferred on the international level, but it would eliminate the irritating fact of two parallel procedures insufficiently linked with each other.

8.2.1. Different classes of creditors

Domestic insolvency laws normally reflect the principle of equal treatment of creditors only in a relative way. Creditors should be treated equally and non-preferential, but only within one class of creditors. This recognizes the existence of different priorities for different classes of debts, ensuring their satisfaction according to a certain approved hierarchy. Usually public revenue claims like taxes rank in the upper ranges of such preferred claims followed by secured creditors and employees' wage claims leaving the ordinary unsecured creditors in the worse positions. A similar development has taken place in the international debt restructuring practice [74]. By determining the *"eligible debt"*, meaning the debt which will be subject to restructuring [75], in effect different classes of creditors are constituted. Like the fiscal claims in domestic proceedings it is one of the unwritten rules of the game that *debts vis-à-vis international financial organizations* like the IMF, the World Bank, regional development institutions and the like *are not "eligible" for restructuring* and thus will be satisfied according to their original terms. Similarly bondholders' claims are usually not rescheduled nor are short-term export credits affected. *Only within the remaining classes of creditors, states and medium- and long-term commercial lenders, the principle of equal treatment is observed.*

8.2.2. Equal treatment of all creditors within a class

One of the fundamental provisions of domestic bankruptcy laws is a *temporary freeze of the debtor's assets* prohibiting the insolvent debtor to make any (preferential) payments to single creditors linked to an automatic stay of individual creditors' actions. This is designed to protect the debtor and at the same time to guarantee equal treatment for all creditors whose claims will be enforced in a consolidated manner in one single bankruptcy proceeding.

In the rescheduling efforts of the past decade, especially in the private debt restructurings, this effect was achieved by *special provisions* in the (contractual) loan/restructuring agreements. *Pari passu* [76], negative pledge [77] and most importantly "mandatory prepayment" [78] and "sharing" [79] clauses have effectively discouraged single banks from individually trying to enforce their claims. Thus, one might conclude that they have at least by agreement accepted that they can

[71] *Bothe/Brink/Kirchner/Stockmayer*, Rechtsfragen der internationalen Verschuldungskrise, 115.

[72] *UNCTC* 1989, 42.

[73] *Oechsli*, 329.

[74] See also *Wood*, 9.

[75] *Plan*, 28 f, 90 ff.

[76] Under a "pari passu"-clause the debtor warrants that the loan obligation incurred in the agreement will rank equally — pari passu with all its other unsecured external indebtedness. (*Delaume*, 251.)

[77] A "negative pledge" dause obliges the debtor not to create any later security interests in favour of other creditors. (*Buchheit/Reisner*, The Effect of the Sovereign Debt Restructuring Process on Intern-Creditor Relationships, Univ. Illinois L. Rev. [1988], 493—517, at 497 f.)

[78] If a debtor state has preferentially prepaid one of its creditors, it is required by a "mandatory prepayment" clause to satisfy its other creditors pro rata.

[79] Under a "sharing" clause any creditor who receives a part or his entire outstanding claim is required to share these proceedes proportionally with his co-creditors.

no longer act in their own interest alone but are treated equally within their group [80].

The case law of some states evidences that even an "involuntary" equality of creditors — absent a contractual fixation of the principle of equal treatment for all banks — would not be a general novelty for creditors [81]. It is unclear, however, whether this precedent will be followed.

This *legal insecurity* and the resulting *incentive for potential free-riders* to seek their larger share by enforcing single claims could be avoided by adopting an orderly restructuring procedure mandating equal treatment.

8.3. Material debt reduction

What was originally a political demand from the developing countries that was taken up by various UN organs, has now become a generally accepted view — shared also by creditor countries — that an effective reduction of the total debt burden is the only means to successfully cope with the debt crisis [82].

While the initial strategy of creditor countries was clearly restricted to a rescheduling in the strict sense of the term, materially providing for a prolongation of repayment terms only, a strategy principally unaltered by the Baker Plan of 1985, even the US has acknowledged the necessity to reduce the debt burden by a — at least partial — debt forgiveness as evidenced by the 1989 *Brady Plan* [83]. Similarly, the World Bank has supported *Debt and Debt Service Reduction (= DDSR) Operations* by granting adjustment loans [84].

The *material amount of the discharge* to be given to debtor countries is likely to be the most controversial aspect. It seems doubtful whether a fixed minimum quota can be established to allow a sovereign bankruptcy discharge like in some national regorganization laws [85]. It *should be definitely based upon economic calculations* where the debt value as determined by the secondary market for sovereign debts could serve as a starting point [86]. Economic necessities on both creditor and debtor side would have to supplement these calculations *taking into consideration, inter alia, the maximum reduction sustainable by commercial creditors to prevent their collapse as well as the future payment ability of the debtor state measured by export possibilities and import requirements.*

The practice to pay due regard to the debtor state's paying capacity is already rudimentary reflected in present debt restructuring agreements linking the debt servicing obligations to a proportion of actual export gains [87]. Historical cases like the treatment of the German external debt both during the interwar period by the Dawes- and Young-Plans and in the London Agreement of 1953 [88] which effectively linked the German repayment obligations on its economic ability to make such payments have been repeatedly stressed as valuable precedents for successfully managing foreign indebtedness [89].

These economic base-lines for a debt reduction could be supplemented by equitable and political considerations.

8.4. Securing an "existential minimum"

Most domestic legal systems provide for an "existential minimum" to be reserved for the

[80] Although there have been "comparability" clauses inserted both in public and private debt restructuring agreements the principle of equal treatment stricly applies only within a group of creditors.

[81] Cf. the US Credit Francais decision, Credit Francais Int'l S.A. v. Sociedad Financiera de Commercio S.A., 490 N.Y.S. 2d 670 (N.Y. Sup. Ct. 1985), summarized in IFLR, (July 1985), 39, where a New York court has dismissed an action of a creditor bank which participated in a syndicated loan agreement since this singular action would effectively prevent an "orderly restructuring" of the debt reasoning that only the agent bank and not an individual consortium member would have legal standing to sue in such a situation. Some authors have even concluded that such an opinion might give rise to a judicial development of the law requesting a general (re-)negotiating duty for participating banks in "insolvency" cases (*Dolzer,* 539). On a close look, however, the Credit Francais court seemed to reach its decision rather strictly as a matter of interpretation of the original syndicated loan agreement which it constructed as a joint venture between the banks members to the loan syndicate and not by a cogent principle of law applying absent a contractual will of the parties. The correctness of this interpretation of a loan syndicate as a joint venture has been strongly criticied insisting on the "several and not joint" rights and obligations of syndicate members including an individual right to sue on the outstanding loan (*Asiedu-Akrofi,* Sustaining Lender Commitment to Sovereign Debtors, 30 Col. J. Transnat'l L. [1992], 7).
In a case decided shortly after Credit Francais, A.I. Credit Corp. v. Government of Jamaica, 666 F. Supp. 629 (S.D.N.Y. 1987), the "traditional" approach was upheld granting an individual right to sue for a bank member to a syndicated loan agreement.

[82] *UNCTC* 1989, 39, "a reduction in the present value of debt servicing obligations".

[83] *Gonzalo Santos,* 75 ff.

[84] *Asiedu-Akrofi,* 39 f.

[85] Cf. the "Ausgleichsquote" (minimum quota) of 40% under Austrian Law.

[86] *UNCTC* 1989, 39.

[87] Already demanded in: *Cartagena Communique,* 23 ILM (1984), 1174; see also *UNCTC* 1989, 39.

[88] Cf. *Coing,* London Agreement on German External Debts (1953), 8 EPIL (1985), 364—367.

[89] *Bothe/Brink,* 108.

debtor when his creditors seek enforcement measures. It has been submitted that this principle could be regarded a general principle of law within the meaning of Art 38 Sec 1 lit c of the Statute of the ICJ [90]. The question remains whether, in a "reorganization" analogy, the "existential minimum" protection is necessary at all. While in cases of "straight bankruptcies" where a distribution of the debtor's assets is sought, the exemption of certain property or a certain amount of income from execution and distribution serves the "survival" of the debtor, a reorganization does not contemplate a distribution of the debtor's assets, thus arguably *the "existential minimum" protection is not necessary.* An equivalent effect could be reached in the reorganization envisaged by leaving control over the economy to the debtor and mandating the supervising organs to take into consideration the domestic needs of the debtor state.

8.5. Linking approval to domestic economic restructuring

One of the crucial elements of domestic insolvency proceedings is the conditionality of a debt discharge by the bankruptcy court upon the adoption of a business restructuring with an expectation to create future gains.

In the international context, debtor states are familiar with a similar requirement to receive debt relief in current debt renegotiations, the so-called *IMF conditionality* [91].

> The conclusion of an economic adjustment loan agreement with the IMF is a *de facto* precondition for receiving the creditors' assent to any restructuring agreement. The conclusion of such a credit agreement with the IMF is in turn conditional (hence "IMF conditionality") upon the debtor state's adoption of domestic economic improvements.

They usually aim at more privatization, lowering of government spending, improved productive efficiency, the development of domestic energy resources, increased export earnings, restrained domestic consumption, etc.

It is especially this most bankruptcy law like feature of current debt reschedulings that has received strong support by international law scholars [92]. Thus, it would seem to be mandated to respect such principles in an international setting.

[90] *Dolzer,* 547.

[91] Cf. *Gold,* Conditionality, Washington D.C. (1979) IMF Pamphlet Series No. 31; *Meessen,* IMF Conditionality and State Sovereignty.

8.6. Re-organization of sovereign economies instead of distribution of assets

In a sovereign bankruptcy procedure, alternatives to asset distribution are sought. In line with the basic difference in domestic insolvency procedures between straight bankruptcies ("Konkurs") seeking a liquidation of the debtor's assets and distribution of the proceeds and an insolvency reorganization ("Ausgleich") which aims at restoring the debtor's ability to conduct his business, and for reasons of respecting the debtor countries' sovereignty *only the reorganizational models should be adopted on the international level.* Here imaginative use of domestically familiar debt relief operations is called for. One technically successful, though not very widely used method provides for direct enterpreneurial involvement of the (former) creditor in the debtor's business by allocating direct business interests (shares, etc.) to him in exchange for his debts claims [93]. Such *debt-equity conversions* have been applied in the sovereign insolvency practice as well, especially during the last seven years.

8.7. Main actors in an institutionalized insolvency procedure

8.7.1. An independent International Insolvency Tribunal

The ultimate approval of the reorganization sought in an international insolvency procedure is the task of an independent tribunal. Impartiality and expertise are the two main prerequisites for such an organ. *An important policy decision in this context is whether already existing organizations should be entrusted with such functions or new institutions should be set up.*

The IMF, the World Bank or related — maybe jointly sponsored — agencies would certainly provide a large experience in the field of debt restructuring [94]. The *political acceptability* for debtor countries of such a proposal, however, seems to be *rather questionable.* Thus, it might be necessary to establish a *new international institution.* The more important question, however, remains to be solved: *What kind and range of competence and authority should the envisaged insolvency tribunal be entrusted with?*

[92] ILA-Draft Resolution. ILA-Report of the 65th Conference (Cairo 1992), Committee on International Monetary Law (not yet published), 24 f: "In particular, those states which have successfully implemented such adjustments should receive beneficial treatment in the form of additional debt relief."

[93] Cf. *Rubin,* Guide to Debt Equity Swaps, Constance (1989).

[94] Suggested by *Cohen,* 125.

This organ should not be involved in the actual debt renegotiation and economic adjustment planning. Its role should be rather limited and restricted to a final approval of the plan adopted by creditors and the debtor state. Here, *two alternatives* are conceivable: The insolvency tribunal's power might be either limited to a purely certifying role supervising and approving the reorganization plan worked out by the debtor state and its creditors under the guidance of supervisory organ or it could be endowed with some additional decisional powers to adjudicate and determine the individual claims and the quota which has to be performed by the debtor.

8.7.2. A supervisory organ

While it does not seem to be advisable to grant the role of the ultimate debt arbitrator to the *IMF,* its proper role in a perceived internationalized state insolvency proceeding could lie in a *reinforced and enlarged function of supervising the debtor's macro-economic performance.* This would be similar to the tasks carried out by an administrator or examiner in domestic proceedings. The IMF should abstain from any direct involvement in the day to day administration of the debtor state's economy, but rather fulfil an advisory — or maybe supervisory — task. Such an understanding of a supervisory (IMF or other) organ would also be in conformity with its present practice of surveillance and "enhanced surveillance" [95].

8.7.3. Creditors' representatives

Both domestic reorganization procedures and current restructuring efforts basically try to preserve a *consensual element* in dealing with bankruptcies. Under national procedures a reorganization plan — elaborated by the debtor under the guidance of a supervisory organ like an administrator and in coordination with a creditors' committee — is finally put to a vote by the entire body of creditors — usually organized as a creditors' assembly or the like. On the international level, a similar mechanism is followed when the "Paris Club members" or, in the case of commercial debts, a creditors' "steering committee" conduct negotiations with the debtor country the results of which are then presented to all creditors to formally approve of them either in bilateral restructuring agreements or in the signing of restructuring contracts. Under the present practice, the "London Club" private debt rescheduling process even more closely resembles this domestic law feature of a dichotomy of negotiating creditors and merely voting creditors.

[95] *Asiedu-Akrofi*, 43.

Thus for practical reasons, as in the case of domestic insolvencies, *two creditors' organs should be established.* A *creditors' committee* in charge of the actual negotiations with the debtor and of working out the terms of the reorganization plan and *a larger creditors' assembly* which should both encompass official creditors (states and international organizations) and private creditors and whose crucial task would be the formal adoption of the final restructuring plan.

9. Problem of sufficiently wide coverage of an international convention

Domestically, bankruptcy law works because all creditors are indirectly forced to take part in the insolvency procedure, since otherwise their claims would be precluded. On the international plane, the lack of a "world legislation" and of generally accepted customary law rules on this question, mandates a *treaty law solution* which, of course, would work only if all major creditor and debtor countries accepted it. Otherwise the presumably sought "extra deals" of non-signatories could effectively prevent comprehensive debt settlements.

An international debt settlement procedure establishing above described organs would have to ensure a sufficiently rigid system of domestic effect of its provisions in order to induce private creditors to abide by its rules.

Although many of the features decribed here would clearly embody a progressive development of the present state of the law, it might well be in line with current tendencies to strengthen international law in order to escape from a seemingly everlasting vicious circle.

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