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The Challenge of Legitimacy in Sovereign Debt Restructuring

Odette Lienau*

ABSTRACT

Since the emergence of the post-World War II international economic system, policymakers have lamented the absence of a global sovereign debt restructuring mechanism. This disappointment has only intensified in recent years, as the failure to provide prompt, comprehensive, and lasting debt relief becomes even more apparent. As a result, scholars and key international actors have argued for the development of a more coherent global approach to debt workouts. But to date this discussion lacks a sustained focus on questions of legitimacy—a fact that is exceptionally puzzling in light of the voluminous scholarship on the legitimacy deficits of international economic institutions once they have been established.

This Article bridges that gap, arguing that serious attention should be paid to these questions in advance of negotiating a possible debt workout mechanism, and considering what such attentiveness might mean in practice. It highlights the political complexity and distributional ramifications of legitimacy arguments, and develops an analytical framework for understanding the concept along with a preliminary application to the debt restructuring context. It then analyzes the institutional and historical background of debt restructuring in light of this typology, and assesses how domestic insolvency regimes and investment treaty arbitrations incorporate features purported to advance legitimacy. Finally, the Article considers how a future debt workout institution might respond to calls for legitimacy—based on its initial establishment, ongoing processes, and final outcomes—and briefly discusses existing proposals and likely political obstacles in light of these themes. In foregrounding these concerns, this Article draws attention to issues and controversies that will likely be relevant for some time, and contends that the tensions, distributional issues, and power dynamics implicated in questions of legitimacy should inform negotiations on any sovereign debt workout mechanism going forward.

INTRODUCTION

Something of a scholarly cottage industry exists to assess the legitimacy of major international organizations once they have been established, including by focusing on the degree to which these powerful actors are sufficiently

* Associate Professor of Law, Cornell University Law School. This Article is based on a discussion paper prepared for a working group organized by the United Nations Conference on Trade and Development (“UNCTAD”) on a potential sovereign debt workout mechanism. The original paper, which articulated how principles of legitimacy and impartiality might apply to a debt workout mechanism, benefited greatly from the input received from the expert members of that group. The views expressed in this Article, however, should not necessarily be attributed to any member of the working group or to UNCTAD as an organization. In addition, I am grateful for comments received at the Women in International Law Workshop at Duke Law School and the Cornell Law School Faculty Workshop. Finally, I wish to thank Molly Doggett, Becca Donaldson, Kelsey Jost-Creegan, Daniel Severson, and Jooyoung Song, along with the other members of the editorial team at the *Harvard International Law Journal*, for their excellent comments and assistance in preparing this Article for publication.

participatory, accountable, and respectful of fundamental values. This academic writing resonates with similar concerns voiced by civil society groups and the broader public, and the attention to these questions is unsurprising given that these institutions have become a focal point for popular discussion in recent decades. The international economic organizations, which now govern a significant swathe of transnational economic life, have been among the foremost targets in this commentary. Recent writing investigates the legitimacy of the World Trade Organization (“WTO”), the World Bank, the International Monetary Fund (“IMF” or “the Fund”), and the constellation of institutions and practices that make up the investor-state arbitration system.¹

Notably absent from this list is any dedicated transnational institution or mechanism for addressing sovereign debt issues—the myriad troubles that arise when sovereign state borrowers find themselves unable to pay their creditors, many of whom may be located overseas. This institutional omission hardly results from an absence of contemporary problems in the global debt arena, as anyone having even a cursory familiarity with international financial issues is well aware. Nor does it result from a historical failure to imagine the utility of such a mechanism on the part of key architects of the post-World War II economic system. Harry Dexter White, special adviser to the U.S. Treasury on international financial issues at the time, envisaged a dedicated commission that “could approach the problem [of sovereign debt] with a great deal more objectivity than could be true of a bondholders’ committee It could in its recommendations take a broader point of view.”² Ultimately, a mechanism designed to deliberately incorporate this broader point of view, presumably addressing the reasonable concerns of both credi-

1. See, e.g., Jacqueline Best, *Legitimacy Dilemmas: The IMF’s Pursuit of Country Ownership*, 28 *THIRD WORLD Q.* 469–88 (2007); Jeffrey Dunoff, *The WTO’s Legitimacy Crisis: Reflections on the Law and Politics of WTO Dispute Resolution*, 13 *AM. INT’L ARB.* 197 (2002); Daniel C. Esty, *The World Trade Organization’s Legitimacy Crisis*, 1 *WORLD TRADE REV.* 7–22 (2002); Robert Howse & Kalypso Nicolaïdis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity*, in *EQUITY, EFFICIENCY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM* 227 (Roger Porter et al. eds., 2001); Leonard Seabrooke, *Legitimacy Gaps in the World Economy: Explaining the Sources of the IMF’s Legitimacy Crisis*, 44 *INT’L POL.* 250 (2007); Dennis Leech & Robert Leech, *Reforming IMF and World Bank Governance: In Search of Simplicity, Transparency, and Democratic Legitimacy in Voting Rules* (U. Warwick Dep’t of Econ., Warwick Econ. Res. Paper Ser. No. 914, 2009).

2. Harry Dexter White, “Preliminary Draft: United Nations Stabilization Fund and a Bank for Reconstruction and Development of the United and Associated Nations,” March 1942, *quoted in* ERIC HELLEINER, *FORGOTTEN FOUNDATIONS OF BRETTON WOODS: INTERNATIONAL DEVELOPMENT AND THE MAKING OF THE POSTWAR ORDER* 112 (2014). White tentatively imagined that such a committee and the ensuing restructuring mechanism might be housed at or appointed by the International Bank for Reconstruction and Development (precursor to the World Bank Group), which might of course generate some concern today. See ODETTE LIENAU, *RETHINKING SOVEREIGN DEBT: POLITICS, REPUTATION, AND LEGITIMACY IN MODERN FINANCE* 130–32 (2014). John Maynard Keynes was less explicit on the need for a sovereign debt restructuring mechanism, and the proposal never made it to the multilateral discussions at Bretton Woods. However, his preference for debt restructuring (or debt leniency) in the case of post-World War I Germany is well known. See, e.g., JOHN MAYNARD KEYNES, *THE ECONOMIC CONSEQUENCES OF THE PEACE* (1919).

tors and debtors, never made it into the modern international economic order.

The resulting gap in the international financial architecture has produced deeply problematic outcomes. Commentators have found the “non-system” of sovereign debt sorely lacking—fragmented, inconsistent, and providing insufficient relief to reboot economic growth.³ Recent developments in sovereign debt litigation, including the extended and rancorous stalemate surrounding Argentina’s 2001 debt default and subsequent restructuring, not to mention the specter of Greek exit from the Euro due to debt problems, have only deepened the widespread dissatisfaction with the current approach. As a result, key actors have called for serious consideration of a more coherent and comprehensive mechanism for debt workouts. The IMF recently undertook a major review of sovereign debt restructuring,⁴ and in October 2014 the United Nations General Assembly voted in favor of working toward a permanent restructuring system.⁵ This policy effort has joined and built upon significant academic attention to diagnosing the current problems and also proposing potential solutions.⁶ Although progress is hardly guaranteed, and previous efforts have come to naught, this work proceeds apace, and there is no indication that the need for more rationalized sovereign debt restructuring will subside anytime soon.

Given all this activity, it is surprising that the published writing thus far has lacked a specific focus on the question of legitimacy—even more so in light of the fact that this question is virtually guaranteed to frame *ex post* commentary on any institutionalized debt workout mechanism (“DWM”) that does emerge. This Article seeks to bridge that gap by arguing that serious attention should be paid to the question of legitimacy *in advance* of negotiating and establishing a possible sovereign debt restructuring institu-

3. See, e.g., Anna Gelpern, *Hard, Soft, and Embedded: Implementing the UNCTAD Principles*, in *SOVEREIGN FINANCING AND INTERNATIONAL LAW: THE UNCTAD PRINCIPLES ON RESPONSIBLE SOVEREIGN LENDING AND BORROWING* 347 (Carlos Espósito et al. eds., 2014) (noting the existence of a “non-system” that is routinized and well-known but highly unsatisfactory). For an excellent overview of some of the problems in contemporary debt restructuring, see the contributions in *A DEBT RESTRUCTURING MECHANISM FOR SOVEREIGNS: DO WE NEED A LEGAL PROCEDURE?* (Christoph G. Paulus ed., 2014) [hereinafter, *A DEBT RESTRUCTURING MECHANISM FOR SOVEREIGNS*].

4. IMF, *The Fund’s Lending Framework and Sovereign Debt—Preliminary Considerations*, Staff Report (June 2014), <http://www.imf.org/external/np/pp/eng/2014/052214.pdf>.

5. G.A. Res. 68/304, *Towards the Establishment of a Multilateral Legal Framework for Sovereign Debt Restructuring Processes* (Sept. 9, 2014). More recently, the General Assembly voted in favor of adopting a series of basic principles on sovereign debt restructuring, including a (very brief) principle of legitimacy. G.A. Res. 69/319, *Basic Principles on Sovereign Debt Restructuring Processes* (Sept. 10, 2015) (136 in favor, 6 against, with 41 abstentions), http://www.un.org/en/ga/search/view_doc.asp?symbol=ARES/69/319. Civil society actors have also been active on this front, and even the pope recently seemed to endorse a sovereign bankruptcy process. Press Release, Jubilee USA, *Pope Francis Calls for Global Bankruptcy Process* (July 14, 2015), <http://www.jubileeusa.org/en/press/press-item/article/pope-francis-calls-for-global-bankruptcy-process.html>.

6. See, e.g., *A DEBT RESTRUCTURING MECHANISM FOR SOVEREIGNS*, *supra* note 3; Mark L.J. Wright, *Sovereign Debt Restructuring: Problems and Prospects*, 2 *HARV. BUS. L. REV.* 153 (2012); *SOVEREIGN DEBT MANAGEMENT* (Lee Buchheit & Rosa Lastra eds., 2014).

tion, and by considering more concretely what such attentiveness might mean in practice. Explicitly addressing these concerns early on may make such an institution more successful, both by helping to attract support *ex ante* (that is, in the initial development of any treaty, *ad hoc*, or soft law restructuring mechanism) and also by encouraging states and their creditors to actually use a DWM *ex post*. Such attention to legitimacy is especially important in the international arena, given the absence of a clear global enforcement mechanism and in light of the historical resistance of some states and other institutional actors to the development of a DWM.

But why would it matter on the ground whether a debt workout framework is considered legitimate? What might perceptions of legitimacy *do* for any given sovereign debt restructuring? A restructuring can be a fairly traumatic economic, social, and political event in the life of a country. While it should ideally offer financial relief in the form of extended payment schedules or a debt write-down, the process also can entail a fiscal consolidation that results in cuts to government programs and other austerity measures. Setting aside for now the question of when such measures can become counterproductive, these policies often have significant domestic distributional ramifications, and the resulting anger may erupt in economically and politically disruptive ways.⁷ While entirely understandable, this second-order disruption can add to and extend the distress and sacrifice already generated by the restructuring itself.

How does legitimacy play into this dynamic? Perhaps the unique feature of institutions or rules that are considered legitimate is their ability to encourage voluntary compliance—to command a higher degree of support or acquiescence than might otherwise exist in the absence of coercion or self-interest.⁸ A DWM perceived to be more legitimate could thus encourage a greater willingness on the part of domestic groups to engage in consensual restructuring processes and then implement the resulting agreements with relative equanimity, thereby minimizing the second-order disruptions that can accompany a restructuring. Of course, this is hardly to deny that the anger arising out of debt restructuring is frequently justified, and that it can direct attention to important imbalances of power both domestically and internationally. But if a consensual debt workout frequently *is* the right choice, which I assume for the purposes of this Article, then we should establish mechanisms to achieve restructuring in a smooth, efficient, and minimally disruptive manner. Ideally, any anger that remains would materialize not as destructive expressions of dissatisfaction with a DWM or a narrow restructuring outcome. Rather, it would be more productively channeled

7. For an overview of possible distributional ramifications resulting from a decision to restructure (or the decision to delay restructuring), see Odette Lienau, *The Longer-Term Consequences of Sovereign Debt Restructuring*, in SOVEREIGN DEBT MANAGEMENT 85, 89–90 (Lee Buchheit & Rosa Lastra eds., 2014). For a discussion of both the practical problems with austerity measures and their intellectual history, see MARK BLYTH, *AUSTERITY: THE HISTORY OF A DANGEROUS IDEA* (2013).

8. See discussion *infra*, Part I.A.

into holding internal political elites accountable or perhaps into longer-term efforts to alter the structures and rules of global economic and political life. And, of course, this instrumental value of legitimacy only supports the inherent value of institutions that enable individuals and groups to comply with agreements as a result of considered choice rather than perceived duress or coercion.

All that said, a number of tensions and difficulties immediately emerge with an explicit focus on legitimacy, particularly given that the concept means different things to different people. Applying such a conceptually slippery term to the complex world of sovereign debt is no easy task. How do we define legitimacy, and what are the appropriate sources for such a definition? Which elements might enhance or diminish perceptions of the legitimacy of a DWM? To what degree do these factors fit together seamlessly, and how might they be in tension? Ultimately, what is reasonable to expect from something so politically fraught as sovereign debt restructuring? These are among the questions that this Article seeks to address.

Part I of this Article begins the discussion by introducing the multifaceted concept of legitimacy itself, laying out different schools of thought on the characteristics of a legitimate institutional order and developing a preliminary list of features applicable to the DWM context. Part II considers the institutional and historical background of debt restructuring in light of these themes to better understand the political and economic context of current discussions of a possible DWM. Part III lays out how two cognate domestic and transnational institutions attempt to meet standards associated with ideas of legitimacy, focusing on domestic insolvency laws and on investment treaty arbitration rules. Finally, Part IV of this Article offers preliminary recommendations for how a future DWM might attempt to satisfy calls for legitimacy, and briefly assesses existing proposals in light of these themes. This last section also highlights several political obstacles to incorporating the institutional features most associated with legitimacy, which stakeholders must consider and address in any negotiations. In foregrounding these concerns, this Article draws attention in advance to issues and controversies that will likely be relevant for the foreseeable future: any DWM will take some time to develop and, once established, will no doubt be subject to criticism (and perhaps modification) throughout its lifespan.

I. THE ELUSIVE CONCEPT OF LEGITIMACY

While calls for legitimacy do not always include a clear definition of its content, policymakers tend to acknowledge that it does matter.⁹ Interest-

9. This acknowledgment, of course, sometimes requires consistent prodding by other parties to begin. The IMF, for example, eventually came to acknowledge explicitly its own legitimacy problems. See *Important Milestone Reached to Reinforce IMF Legitimacy*, IMF SURVEY MAGAZINE: IN THE NEWS (Mar. 3, 2011), <http://www.imf.org/external/pubs/ft/survey/so/2011/NEW030411A.htm>.

ingly, one reason for the failure to establish a coherent sovereign debt restructuring mechanism as part of the post-World War II financial architecture may have been a concern that any such mechanism would be perceived as insufficiently even-handed. U.S. Treasury Secretary Henry Morgenthau, ultimately doubtful of embedding such a mechanism in financial institutions constructed by the post-war victors, “did not wish to be a party to any debt-collecting arrangement smacking as clearly of dollar diplomacy”¹⁰—a delegitimized and much-decried early twentieth century U.S. foreign policy approach that explicitly tied American geostrategy to commercial interests.¹¹

Still, if there is a general sentiment that legitimacy is a valuable goal, and that perceptions of illegitimacy can be problematic, there is much less agreement on how these concerns translate into practice. Labeling any particular institution, mechanism, or action as legitimate is a fraught exercise, given that the term’s content can be difficult to pin down. Indeed, important legal scholars have justifiably criticized “legitimacy speak” for its “fuzziness and indeterminacy.”¹² Martti Koskenniemi, for example, has argued that “[l]egitimacy is not about normative substance. Its point is to avoid such substance but nonetheless to uphold a semblance of substance.”¹³ And, indeed, claims of “legitimacy” have been used to justify deeply controversial policy actions.¹⁴ Still, while these cautionary notes highlight the importance of humility in any legitimacy-oriented endeavor, they do not undermine the fact that maximizing the degree to which stakeholders *perceive* a DWM to be legitimate is essential to furthering its goals. More than determining right or wrong actions, any successful DWM will need to foster the agreement and thus command the respect and compliance of a multitude of stakeholders across varying national and international institutional settings.

The goal of this section, then, is relatively circumscribed. It does not aim to formulate a comprehensive or universal typology of legitimacy applicable across all arenas.¹⁵ Rather, it lays out different approaches to defining the

10. LIENAU, *supra* note 2, at 130.

11. More specifically, dollar diplomacy, launched by President William Howard Taft and continued by Woodrow Wilson, repaid European loans to countries with American money and established customs receiverships to guarantee this debt. This was primarily targeted to countries in the Caribbean, an important focus of U.S. geostrategy at the time. For an early (and still classic) overview of dollar diplomacy in the early twentieth century, see generally DANA G. MUNRO, *INTERVENTION AND DOLLAR DIPLOMACY IN THE CARIBBEAN, 1900–1921* (1964).

12. James Crawford, *The Problems of Legitimacy-speak*, 98 ASIL PROC. 271, 271 (2004).

13. Martti Koskenniemi, *Miserable Comforters: International Relations as New Natural Law*, 15 EUR. J. INT’L REL. 395, 409 (2009).

14. Perhaps the best known is the assessment of the Independent International Commission on Kosovo that the NATO military intervention in Kosovo was “illegal but legitimate.” THE INDEP. INT’L COMM’N ON KOSOVO, *THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED* 4 (2000).

15. Indeed, understandings of legitimacy are necessarily variable and historically grounded. For a study of how shifts in conceptions of legitimacy ground systemic change in international society, see IAN CLARK, *LEGITIMACY IN INTERNATIONAL SOCIETY* (2005). Joseph Weiler suggests that forms of international lawmaking, including the legitimacy arguments with which they are associated, are best under-

characteristics of a legitimate order and proposes a preliminary framework that could be appropriate for thinking about legitimacy in the DWM context. As part of this effort, the section presents an initial understanding of institutional features that might cause a DWM to be deemed more (or less) legitimate in the current, complex global setting. The final determination of which elements are ultimately included in a DWM is of course a matter for key global stakeholders to negotiate. This involves decision making that will necessarily be embedded within the broader goals of pragmatic feasibility, timeliness, and cost effectiveness. Still, negotiators should think in advance about elements that might enhance or diminish the perceived legitimacy of any debt workout institution, particularly given that the output of their deliberations will certainly be scrutinized along these lines after the fact.

A. *The Broad Audience for Assessment*

At the most basic level, *a rule, mechanism, norm, or institution can be understood as legitimate if it is considered worthy of voluntary compliance and/or support.* If a rule or mechanism is perceived as legitimate, then approval and compliance result at least in part from that assessment, rather than from coercion, habit, self-interest, or other possible reasons for action.¹⁶ Part of the special virtue or power of a legitimate rule therefore lies in its capacity to coordinate preferences and decisions effectively even in the absence of other bases for action. This potential coordination becomes especially important in the international arena—including for a globally supported DWM—where no supranational authority with broadly accepted powers of coercion exists. As discussed more fully below, legitimacy may derive from the initial *source* of, ongoing *processes* of, or ultimate substantive *outcome* resulting from a rule, mechanism, or institution, or from some combination of these three basic components.

The importance of legitimacy as a basis for action has long been understood in the social sciences and in legal studies. For example, Max Weber formulated a definition relevant for sociological theory to the effect that “a norm or institutional arrangement is legitimate if, as a matter of fact, it finds the approval of those who are supposed to live in [the affected] group.”¹⁷ Thomas Franck proposed a working definition of legitimacy intended for international law, initially formulated to apply among states, as “a property of a rule or rule-making institution which itself exerts a pull

stood not as periodization but rather, drawing from geology, as stratification, in which sediments of past practices continue into the present. Joseph Weiler, *The Geology of International Law—Governance, Democracy and Legitimacy*, 64 ZAÖRV 547 (2004).

16. See, e.g., Christopher A. Thomas, *The Uses and Abuses of Legitimacy in International Law*, 34 OXFORD J. LEGAL STUD. 729 (2014).

17. Wilfried Hinsch, *Justice, Legitimacy, and Constitutional Rights*, 13 CRITICAL REV. INT’L SOC. & POL. PHIL. 39, 40 (2010).

toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.”¹⁸ In the last several decades, questions of legitimacy have become even more central in both academic and policy writing, and scholars and activists have built upon and extended these themes.¹⁹ In one recent influential article, Allen Buchanan and Robert Keohane emphasize that the concept of legitimacy appeals to a “common capacity to be moved by what might be called *normative reasons*,” and a “complex belief” that institutions may deserve support even if they fail to maximize self-interest and also fall short of (inevitably divergent) understandings of perfect justice.²⁰

Central to these formulations is the idea that the legitimacy of the mechanism itself *through the belief or normative approval of the relevant audience* motivates conforming action. As Ian Hurd makes clear, legitimacy is “a subjective quality, relational between actor and institution, and defined by the actor’s perception of the institution.”²¹ This interactive element leads to several preliminary implications. First, the relevant audience for legitimacy purposes in a DWM should include all those affected by a rule, norm, or institution—that is, all of those normatively addressed by the rule or living in the group to which the rule or mechanism applies. This audience encompasses those without the position or power to enact or enforce rules, including citizens of countries undergoing a debt workout and small creditors who may have had minimal voice in the restructuring process. This accords with one of the general goals of establishing a legitimate order, which is to encourage voluntary adherence by all relevant actors to the extent possible.²² This includes those individuals who may not have participated in either institutional design or particular restructuring processes, but who are nonetheless affected by their outcomes and who may therefore object to or impede implementation once decisions are made.²³

18. THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 24 (1990).

19. See, e.g., JUTTA BRUNNÉE & STEPHEN TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW* (2010); *LEGITIMACY IN INTERNATIONAL LAW* (Rüdiger Wolfrum & Volker Röben eds., 2008); *LEGITIMACY, JUSTICE, AND PUBLIC INTERNATIONAL LAW* (Lukas H. Meyer ed., 2009).

20. Allen Buchanan & Robert Keohane, *The Legitimacy of Global Governance Institutions*, in *LEGITIMACY IN INTERNATIONAL LAW* 25, 30–32 (Rüdiger Wolfrum & Volker Röben eds., 2008).

21. Ian Hurd, *Legitimacy and Authority in International Politics*, 53 *INT’L ORG.* 379, 381 (1999).

22. *Id.*

23. The popular frustration with sovereign debt restructuring decisions, encompassing an opposition to austerity measures as well as anger at procedures seemingly dominated by external creditors, has stoked popular anger in a number of Eurozone countries. In Greece, for example, this popular anger helped bring to power the left-populist Syriza party in January 2015, which strenuously attempted to rework the basic contours of the debt deal agreed to in 2012, though with little success. Charles Forelle et al., *Syriza Win in Greek Election Sets Up New Europe Clash*, *WALL ST. J.* (Jan. 26, 2015), <http://www.wsj.com/articles/syriza-win-in-greek-election-sets-up-new-europe-clash-1422168982>; see also Maria Margaritis, *Syriza Couldn’t End Austerity in Greece—Here’s Why Voters Re-elected Them Anyway*, *NATION* (Sept. 21, 2015), <http://www.thenation.com/article/syriza-couldnt-end-austerity-in-greece-heres-why-voters-re-elected-them-anyway/>.

This broader definition of the relevant audience for (and determiner of) legitimacy differs somewhat from conventional understandings of international decision makers, and can be understood as a distinctive feature of any focus on legitimacy for a DWM. Those with sufficient power to compel compliance—such as the sovereign states, major creditors, or international bodies involved in high-level negotiations—are not the only actors who assess legitimacy. Attention should also be paid to the likely concerns of less traditionally central individuals or groups, who are implicated in determining legitimacy but who are not usually involved in international discussions. The contention that a broad audience is relevant for assessing legitimacy does not mean that universal acceptance or adherence is required. For example, it is possible that certain actors will remain intransigent even in the face of a rule, institution, or outcome generally determined to be legitimate, in which case *opposition* might well be considered illegitimate.²⁴ However, care should be taken when drawing these lines, particularly given the political import and distributional impact of claims about legitimacy or illegitimacy.

B. *Where to Look?*

Given these basic contours for understanding the concept, where should we look for particular features or characteristics that might enhance perceptions of DWM legitimacy? One place to find these elements is in the traditions of international law that explicitly address questions of governance and authority. However, the diversity of the audience that will ultimately judge DWM legitimacy, including not only lawyers but also other decision makers and publics, suggests that drawing from legal frameworks alone may not suffice. Different audience groups, all of which will have a say in the establishment and use of any sovereign debt restructuring institution, may privilege less legalistic approaches.

1. *International Legal Approaches*

Drawing from the legal tradition first, two approaches within international law and global governance explicitly focus on the exercise of authority over broad publics and on the coordination of public and private authorities in the provision of global public goods. These traditions—international public authority (“IPA”) and global administrative law (“GAL”)—pay special attention to situations in which those most affected by key decisions are not necessarily the decision makers themselves, either directly or through clear lines of representation. While other legal traditions exist as well (such as global constitutionalism), the IPA and GAL schools of thought offer espe-

24. The particular recognition that creditors might oppose a debt restructuring even despite some measure of fairness is the basis of so-called “cramdown” provisions in domestic insolvency frameworks. These permit court approval of a restructuring that meets certain requirements even over the objections of creditors opposed to (but ultimately bound by) the reorganization plan.

cially pertinent frameworks for thinking through factors that might enhance the perceived legitimacy of a DWM.

Armin von Bogdandy and Matthias Goldmann have very clearly argued that sovereign debt restructuring can be understood as an exercise of international public authority.²⁵ Public authority in this framework exists when “the author of an authoritative act may claim to have acted on a legal basis entitling it to enact unilateral decisions which deeply affect individuals or communities”²⁶ One key ramification of such an understanding of sovereign debt is that the act might be legitimated by satisfying the requirements of international public law.²⁷ Although von Bogdandy and Goldmann are careful to note the absence of a clearly binding treaty to regulate the legal legitimacy of debt restructuring, and also acknowledge the absence of any objectively correct understanding of “justice,” they highlight the possibility of an “incremental emergence of legal concepts and principles” that might nonetheless prove relevant.²⁸ In the arena of debt restructuring, they suggest that “issues of competence, procedural fairness, review, and human rights” should be considered.²⁹

A related framework for dealing with authoritative global action is presented by global administrative law. As articulated by Benedict Kingsbury, Nico Krisch, and Richard Stewart, the approach of global administrative law is understood to involve “the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies”³⁰ Subjects of this area of law include formal and informal bodies that exercise “transnational governance functions of particular public significance,” and which “regulate and manage vast sectors of economic and social life through specific decisions and rulemaking.”³¹ Key bodies and intergovernmental networks involved in sovereign debt restructuring are deeply embedded in this form of global governance, and the practices and decisions that result certainly have broad public impact. As such, as with the IPA framework, global administrative law too can help think through factors associated with legitimacy in the sovereign debt arena. In particular, GAL draws from domestic law principles to suggest that bodies and activities subject to GAL should meet adequate standards of “transparency, participation, reasoned decision, and legality,” and should also allow for effective review of resulting rules and decisions.³²

25. Armin von Bogdandy & Matthias Goldmann, *Sovereign Debt Restructurings as Exercises of International Public Authority*, in *SOVEREIGN FINANCING AND INTERNATIONAL LAW: THE UNCTAD PRINCIPLES ON RESPONSIBLE SOVEREIGN LENDING AND BORROWING*, *supra* note 3 at 39, 49.

26. *Id.* at 46.

27. *Id.* at 41.

28. *Id.* at 53.

29. *Id.* at 55.

30. Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 17 (2005).

31. *Id.*

32. *Id.* at 17, 37–42.

2. *The Need for a Plurality of Traditions*

While the principles and practices suggested by explicitly legal frameworks offer the initial groundwork for the approach taken here, a more comprehensive assessment of potential DWM legitimacy should be open to other traditions as well.³³ Within the larger definition of legitimacy, scholars distinguish between multiple subcategories, including legal, moral, social, and political legitimacy.³⁴ Although sovereign debt workouts can be characterized as implicating legal standards, they also may be understood through a social and political lens. Indeed, a plurality of approaches to legitimacy in a DWM, including an explicit embrace of multidisciplinary or interdisciplinary approaches, is important given the subjective and interactive element of legitimacy. Thus, possible features or characteristics for improving perceptions of a legitimate rule or order also should draw insights from the social sciences and social and political theory.

While this Article has thus far referred to a singular “audience” for legitimacy, in practice this audience is likely to be composed of multiple groups, whether the issue is the initial establishment of a transnational DWM or a particular instance of debt restructuring. These multiple groups (and different individuals within those groups) will likely have varying perspectives on the relevance and importance of one or another approach to legitimacy. For example, arguments framed principally through legal legitimacy may most persuade trained international lawyers or national courts and arbitral tribunals.³⁵ Conversely, such argumentation may have less currency with politicians and policy officials, economists, and other social scientists, who will also play a role in the approval and use of any DWM, and those actors may find assertions framed through economic-utilitarian or political understandings of legitimacy more convincing. Individual citizens, relatively distanced from any of these interpretations, will likely consider legitimacy through inchoate and general views of fairness, perhaps linked more closely to the idea of impartiality. Each of these constituencies, along with many others, is part of the broad audience for determining the legitimacy (and therefore affecting the efficacy) of a DWM. Thus, in aiming for the broadest possible consideration and acceptance, this Article pays special attention to emergent legal principles but also draws from a number of other traditions in identifying key features that might enhance perceptions of DWM legitimacy.

33. Indeed, even within international law, we see competing understandings of law and legitimacy. See, e.g., Harlan Grant Cohen, *Finding International Law, Part II: Our Fragmenting Legal Community*, 44 N.Y.U. J. INT'L L. & POL. 1049 (2012).

34. For one recent discussion that offers a helpful typology and focuses on the various uses of legitimacy in international law, see Thomas, *supra* note 16.

35. For a careful consideration of the relationship between legality and legitimacy, see generally BRUNNÉE & TOOPE, *supra* note 19.

C. *Components of Legitimacy: Source, Process, and Outcome*

The preceding discussion should make clear that determining one limited set of indicators for legitimacy would be overly simplistic. Indeed, for any context and historical moment, legitimacy can be understood as “a composite of, and an accommodation between, a number of other norms, both procedural and substantive.”³⁶ This section thus lays out key features that frequently play a part in claims about legitimacy. Drawing from multiple schools of thought, there are three main approaches to legitimation.³⁷ These, in turn, correspond to three questions relevant for the formulation and implementation of a DWM: (1) *Source Legitimacy*: First, how is a DWM, or particular rules associated with a DWM, to be formulated and by whom? A rule, mechanism, or institution may be perceived as legitimate if its source and initial establishment satisfy the key values of the legitimating group. (2) *Process Legitimacy*: Second, once the DWM is established, do the processes by which it works line up with broadly accepted procedural standards? The ongoing processes or procedures through which an institution works or a rule is implemented—distinct from either the initial development of the rule or its results—may confer an additional and separate layer of legitimacy. (3) *Outcome or Substantive Legitimacy*: Is the DWM able to generate successful outcomes, understood in terms of substantive goals? Aside from considerations on the source or process front, an institution or rule may be considered legitimate if it generates desired outcomes. Key follow-up questions here include how to define and determine positive substantive outcomes, and also who should make this assessment.

Again, given the large and multiple audiences for DWM legitimacy, different groups will likely put more or less weight on particular levels or understandings of the concept. Although this oversimplifies somewhat, a DWM that aims to incorporate key features drawn from each level may have the best chance of being considered more legitimate by a broader audience. Of course, there can be tensions between particular legitimizing characteristics—for example, maximum efficiency and broad participation. As I discuss briefly in Part IV below, these would have to be balanced at both a general institutional level and within any particular debt workout situation. To begin with, however, this section offers an overview of which elements actually merit consideration by DWM negotiators attentive to legitimacy issues.

1. *Source (or Establishment) Legitimacy*

One central understanding of legitimacy involves a focus on how a rule, mechanism, or rule-giving institution is originally established. To the ex-

36. CLARK, *supra* note 15, at 207.

37. This organizational framework and language is selected to be relatively simple, colloquial, and appropriate for the issue area. For related typologies applied in different applications, see generally Vivien A. Schmidt, *Democracy and Legitimacy in the European Union Revisited: Input, Output and ‘Throughput’*, 61 POL. STUD. 2 (2013); Thomas, *supra* note 16.

tent that this initial establishment falls in line with core values of the applicable audience or community, the rule or institution may be considered more legitimate. There are several possible ways to think through DWM legitimacy at the source level, including four ways that will be discussed here: *state consent*, *democratic legitimation*, *participatory legitimation*, and *expertise or authority*.

The classic legitimating mode in international law and global relations is *state consent*.³⁸ In this traditional view, states are considered the key actors in and creators of international law as well as its primary (and perhaps only) subjects. Their explicit contractual consent, for example in a hard law treaty or in agreeing to a particular limitation of their sovereignty, is necessary and in some cases sufficient for source legitimacy under this view.³⁹ Although this approach has been soundly criticized, in particular for failing to consider the legitimacy or illegitimacy of states themselves, it remains a widely acknowledged standard for source legitimacy in international law and global affairs.⁴⁰

Democratic legitimation is a central legitimating framework in many nations, and is increasingly discussed at the global level as well.⁴¹ Here, the legitimacy of a rule, mechanism, or governance body is only achieved if it is grounded in the support and input (either directly or through representa-

38. The most frequently cited example of state consent, in particular to conventions or treaties, as a source of binding international law is provided in article 38, paragraph 1 of the statute establishing the International Court of Justice. See Statute of the International Court of Justice, art. 38(1). Some scholars disagree on the degree to which state consent remains central as a legitimating feature. See, e.g., Duncan B. Hollis, *Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137 (2005); Matthew J. Lister, *The Legitimizing Role of Consent in International Law*, 11 CHI. J. INT'L L. 663 (2011).

39. The work of Emer de Vattel is often cited as a theoretical foundation for this approach, particularly in establishing that one source for the law of nations (in addition to the law of nature) involved state consent. See EMER DE VATTEL, *THE LAW OF NATIONS* 17 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund 2008) (1797). For contemporary defenses of the continued importance of state consent in legitimating at least some forms of international law, see Hollis, *supra* note 38, and Lister, *supra* note 38. Curtis Bradley and Mitu Gulati have suggested that consent (and the right to withdraw consent) is relevant even to customary international law. See Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202 (2010).

40. For criticisms of the state consent model, see Buchanan & Keohane, *supra* note 20, at 35–36; von Bogdandy & Goldmann, *supra* note 25, at 48. However, Benedict Kingsbury highlights the distributional ramifications of a commitment to sovereign state equality and state consent, noting, “a decline in the traditional sovereign system weakens the relationship of mutual containment between sovereignty and inequality.” Benedict Kingsbury, *Sovereignty and Inequality*, in *INEQUALITY, GLOBALIZATION, AND WORLD POLITICS* 66, 92 (Andrew Hurrell & Ngaire Woods eds., 1999). And as Joseph Weiler points out, even norms such as state consent grounded in earlier ideological periods may still have some resonance today. See Weiler, *supra* note 15.

41. For a classic consideration of questions of democracy in the global order, see DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE* (1995). See also Daniele Archibugi, *Cosmopolitan Democracy and Its Critics*, 10 EUR. J. INT'L REL. 437 (2004); Patrizia Nanz & Jens Steffek, *Global Governance, Participation and the Public Sphere*, 39 GOV'T & OPPOSITION 314 (2004). From an explicitly left perspective, Susan Marks offers a critical consideration of how the discourse or ideology of democracy in international law at multiple levels falls far short of its potential. SUSAN MARKS, *THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY, AND THE CRITIQUE OF IDEOLOGY* (2000).

tives) of the underlying people or citizens. Such support, perhaps offered through majoritarian electoral institutions or other mechanisms, can legitimately bind even those not in favor of a particular rule.⁴² One vision of global democracy might characterize all the inhabitants of the globe as citizens, and attempt to aggregate their voices directly through a mechanism that bypasses states and other intermediaries. However, this latter approach is far from workable at this point, even were it normatively desirable. A general attentiveness to the voices of individuals (rather than only states or other group entities), however, may offer some element of democratic legitimacy to a DWM.⁴³

Participatory legitimation would aim for the participation of important (and potentially divergent) groups in the initial establishment of a DWM or the propagation of associated rules.⁴⁴ Less demanding than strict democratic legitimation, this approach does not narrowly specify the identity of the stakeholders or the mechanism of participation and control. It does, however, mandate that a good faith effort be made to identify and involve an appropriately broad, or at least broadly representative, array of stakeholders through meaningful participatory mechanisms.⁴⁵ Central to this legitimating element is the principle that participatory mechanisms should be *impartial*, not favoring or biased toward one particular group.⁴⁶ This form of source legitimacy resembles the procedures and concerns of process legitimacy discussed below, though applied to the earlier point of DWM establishment.

Expertise or authority represents a final form of source legitimacy. If accepted authority figures play central roles in developing rules or institu-

42. This is widely regarded as central to democratic forms of governance. See, e.g., PIERRE ROSANVALON, *DEMOCRATIC LEGITIMACY: IMPARTIALITY, REFLEXIVITY, PROXIMITY* 1 (Arthur Goldhammer trans., 2011).

43. Although generally individuals in an international setting would express their views through representative structures—ideally, though of course indirectly, those of their own states—other mechanisms might include notice and comment procedures, openness to statements akin to *amici curiae* briefs in court settings, or the appointment of an ombudsman as used in some domestic institutional settings.

44. Christiana Ochoa, among others, highlights the deficiencies of ideas of representative democracy in the international arena, and suggests the desirability of other forms of direct participation, or “participatory lawmaking,” by individuals or groups that are *not* mediated by the state. Christiana Ochoa, *The Relationship of Participatory Democracy to Participatory Law Formation*, 15 *IND. J. GLOBAL LEGAL STUD.* 5 (2008).

45. Along these lines, Terence Halliday highlights the potential importance of what he calls a representative basis for the legitimacy of international organizations, which involves “persuading prospective audiences that future products of an organization have been formulated by actors that share their interests or attributes.” Terence C. Halliday, *Legitimacy, Technology, and Leverage: The Building Blocks of Insolvency Architecture in the Decade Past and the Decade Ahead*, 32 *BROOK. J. INT’L L.* 1081, 1084 (2007).

46. Ochoa acknowledges concerns that participatory lawmaking can be “potentially a very elite-centered activity.” Ochoa, *supra* note 44, at 16. This impartiality or equal access element is central to any theory that places weight on the importance of broad participation, and is well acknowledged beyond the purely academic arena. See, e.g., Martín Carcasson & Leah Sprain, *Key Aspects of the Deliberative Democracy Movement*, *PUB. SECTOR DIGEST* 6, 8 (2010), www.indiana.edu/~pace/forms/Carcasson,Sprain.pdf (noting that such processes should not privilege one viewpoint over another and “must strive to be inclusive and represent the whole community”).

tions, then the rules may be considered more legitimate.⁴⁷ Classic forms of authority-based source legitimacy involve religious and moral codes, science or technical expertise, traditional governmental forms, and law (originally natural law but now other forms of law that might be considered authoritative).⁴⁸ Deeper questions of the underlying basis for such authority or expertise are left aside here; the proper authority of religious figures, for example, is well beyond the scope of this paper. However, to the extent that such authority or expertise is understood to exist—for example in economics, international relations, insolvency mechanisms, and applicable international law—it may be relevant for maximizing the source legitimacy of a DWM. In general, source legitimacy drawn from this basis will only appeal to specific sub-groups that validate the relevant authority. However, certain forms of authority—such as that grounded in scientific or technical expertise—tend to be more broadly accepted, and therefore the participation and support of these experts may be perceived to enhance DWM source legitimacy. In addition, it may be worth appealing to other more specialized authority figures in discussion of a DWM with certain groups.

2. *Process (or Implementation) Legitimacy*

A second level of legitimacy can be understood as process or implementation legitimacy. Once a DWM (or associated rule) is actually established, the nature of its implementation and ongoing functioning may also affect perceived legitimacy. In particular, processes that adhere to certain procedural standards, including those that guard the impartiality of the DWM and its decision makers, may grant the DWM greater legitimacy in the eyes of key constituents. These standards are central to the traditions and emerging legal principles of international public authority and global administrative law, discussed above. I review seven types of procedural standards here: *participation*, *country ownership*, *comprehensiveness and full involvement*, *transparency*, *reason giving*, *efficiency*, and *review*. One key caveat to keep in mind in terms of process, however, is that certain generally desirable elements—for example, broad participation and transparency—may be less feasible in specific emergency or crisis management situations. As such, the establishment of any

47. This expertise-based possibility for supporting institutional legitimacy is widely understood but also considered controversial. See, e.g., Sigrid Quack, *Law, Expertise and Legitimacy in Transnational Economic Governance: An Introduction*, 8 SOCIO-ECON. REV. 3, 7 (2010) (noting “expertise-based effectiveness” as one standard for normative evaluation of legitimate rule-making). Sigrid Quack notes findings suggesting that authority claims based on expertise are more socially accepted when combined with procedures that promote inclusiveness and procedural fairness. *Id.* at 10. For additional critical takes on the role of experts, see, among many others, David Kennedy, *Challenging Expert Rule: The Politics of Global Governance*, 27 SYDNEY L. REV. 5 (2005); A. Claire Cutler, *The Legitimacy of Private Transnational Governance: Experts and the Transnational Market for Force*, 8 SOCIO-ECON. REV. 157 (2010).

48. These examples are certainly not exhaustive. Perhaps the most famous typology of authority along these lines is Max Weber’s classic discussion of traditional, charismatic, and rational-legal authority, first translated by Hans Gerth into English from the 1922 German original as *The Three Types of Legitimate Rule*, 4 BERKELEY PUBLICATIONS SOC’Y & INSTITUTIONS 1 (1958).

DWM should likely include a discussion of whether modified procedures are appropriate for such situations, and a mechanism for delineating when the application of a modified process might be warranted.

Even after an institution or rule has been established, the *participation* ideal that undergirds one form of source legitimation (mentioned above) can continue to play a role. In line with ideas of procedural fairness, the ongoing involvement and input of affected individuals and groups, particularly before key decisions are made, could enhance perceptions of DWM legitimacy. Such participation might work through either direct access or representative structures. In order to ensure the presence of a broad array of voices, participatory processes can also allow for input from third parties, such as nongovernmental organizations (“NGOs”), acting as *amici curiae*.⁴⁹ More specifically, this could involve the opportunity to be heard or provide comments on possible restructuring plans, the allowance of debt claims, and other issues. The notice and comment procedures present in administrative law and specified in the GAL framework, along with the claim allowance procedure in some domestic insolvency proceedings, may provide guidance on this front.⁵⁰ And the mechanisms for ongoing participation would ideally strive to be impartial, not inappropriately privileging one or another viewpoint.

One exception to this general preference for impartial procedures involves the idea of *country ownership*, which would allow a special attentiveness to the concerns of the sovereign debtor undergoing a restructuring. In the DWM context, this might include granting these debtors greater control of the process when fair to other parties. Ownership of adjustment and reform programs, particularly those mandated by international financial institutions (“IFIs”) such as the IMF and the World Bank, has been considered an important element of process legitimacy in other global governance settings.⁵¹ This comports with ongoing commitments to self-determination and sovereign control, which remain overarching principles in international law.⁵²

49. See, e.g., J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-state Arbitration Through Transparency and Amicus Curiae Participation*, 52 MCGILL L.J. 681 (2007).

50. For several notice and comment examples relevant to global administrative law and global governance, see, for example, Kingsbury et al., *supra* note 30, at 33, 35, 38; Anne Peters, *Dual Democracy*, in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 318–19 (Jan Klabbers et al. eds., 2009).

51. Mohsin S. Khan & Sunil Sharma, *Reconciling Conditionality and Country Ownership*, 39 FIN. & DEV. 28 (June 2002); see also J.H. Johnson, *Borrower Ownership of Adjustment Programs and the Political Economy of Reform* (World Bank, Discussion Paper No. 199, 1992). As another example, the Millennium Challenge Corporation, a U.S. government aid agency, has explicitly adopted country ownership as central to its approach. See MILLENNIUM CHALLENGE CORP., ISSUE BRIEF: PRINCIPLES INTO PRACTICE: COUNTRY OWNERSHIP (2011), <http://permanent.access.gpo.gov/gpo41579/issuebrief-2011002094201-principles-country-ownership.pdf>.

52. The basic principle of self-determination is enshrined in the United Nations Charter, which refers to “self-determination of peoples.” U.N. Charter art. 1, ¶ 2. However, its meaning has expanded to include a general preference for allowing countries and their populations to have greater control over political and economic outcomes, particularly vis-à-vis powerful external actors. For an example of such usage related to debt relief, see Noel G. Villaroman, *The Loss of Sovereignty: How International Debt Relief Mechanisms Undermine Economic Self-Determination*, 2:4 J. OF L. & POL. 3–16 (2009).

Like process legitimacy itself, country ownership also can have instrumental value. As pointed out in a study of the challenges in reconciling country ownership with conditionality, “program ownership, by reflecting a firm commitment from the government, implies that the difficult policy measures . . . are more likely to be implemented.”⁵³

Comprehensiveness and full involvement presents a particular challenge for any governance body, especially at the global level where disparate parties often fail to take collective action. This certainly is the case in sovereign debt issues, and scholars and policymakers have identified lack of creditor coordination and forum fragmentation as key problems in the current system.⁵⁴ The formulation and successful implementation of procedures that address collective action and coordination problems would thus be especially relevant to perceptions of the process legitimacy of any DWM. The goal here is to ensure not just that there is an opportunity to participate (through transparency and comment opportunities, for example) but also that all relevant parties in fact *do* participate to the extent possible. In addition, this comprehensiveness would serve to promote impartiality or the limitation of bias, discussed more fully below. In particular, to the extent that all claims are dealt with at once, the identification and correction of any bias or preference across creditors can be dealt with more quickly.⁵⁵ This element of comprehensiveness is likely to have an impact on outcome legitimacy as well, as full involvement by relevant parties is more likely to result in a final resolution of debt claims, a return to economic growth, and an enhanced capacity to access capital markets at better rates.

Transparency has value in and of itself and also supports many other elements associated with process legitimacy.⁵⁶ To begin with, it is a precondition

53. Khan & Sharma, *supra* note 51, at 28.

54. See, e.g., Anna Gelpern, *A Skeptic's Case for Sovereign Bankruptcy*, 50 Hous. L. Rev. 1095, 1106 (2013). This is a key problem identified by UNCTAD in its work on thinking through a potential sovereign DWM. U.N. Conference on Trade and Dev., *First Meeting of the Working Group on a Debt Workout Mechanism on 2 July 2013, Debt Workout Mechanism Framing Paper 3* (Sept. 2, 2013) [hereinafter *Debt Workout Mechanism Framing Paper*].

55. This comprehensiveness or full involvement element is essential for domestic insolvency systems, which generally require that all creditors submit claims by a specific date in order to be included in the collective recovery or reorganization process. See the discussion below, *infra* Part IV.A, on domestic insolvency systems.

56. For the argument that transparency should be understood as a general legal principle that must govern any DWM, see Matthias Goldmann, *Good Faith and Transparency in Sovereign Debt Workouts* 17–23 (Second Session of the UNCTAD Working Group on a Debt Workout Mechanism, Jan. 2014), http://unctad.org/en/PublicationsLibrary/gdsddf2014misc3_en.pdf. In addition, transparency has been highlighted as a general principle of global administrative law and an important emerging feature of international law and global governance. See, e.g., Kingsbury et al., *supra* note 30, at 37–39. See generally TRANSPARENCY IN INTERNATIONAL LAW (Andrea Bianchi & Anne Peters eds., 2013); Alexandru Grigorescu, *Transparency of Intergovernmental Organizations: The Roles of Member States, International Bureaucracies and Nongovernmental Organizations*, 51 INT'L STUD. Q. (2007). For a cautionary note on the risks of transparency, see David Stasavage, *Open-door or Closed-door? Transparency in Domestic and International Bargaining*, 58 INT'L. ORG. 667 (2004) (highlighting several risks to transparency, including the possibility that participants will adopt aggressive positions in order to posture to external audiences, making agreement more difficult).

tion for ongoing participation, as it allows for the dissemination of information and policy proposals about which parties may have an opinion. Furthermore, it allows stakeholders to determine whether an institution or mechanism functions in line with their goals and is likely to result in positive outcomes. It is thus unsurprising that agencies involved in global governance, including the IMF and the World Bank, have tried to improve their transparency, albeit sometimes in response to significant external pressure.⁵⁷

Reason giving, that is, clarifying the reasons for particular decisions, includes providing the analytical and informational or evidentiary foundations underpinning final outcomes.⁵⁸ Closely related to transparency, reason giving helps to ensure that the views of various stakeholders have in fact been taken into account, and that improper bases for decision making have not impacted the outcome.

Efficiency of procedures also constitutes one element of process or implementation legitimacy. Parties will be more likely to accept an institution, rule, or mechanism if the procedures with which it is associated do not divert undue resources, time, and attention away from the pursuit of other important goals.⁵⁹ This element also implicates outcome legitimacy, as even generally positive results, such as a return to debt sustainability or the achievement of satisfactory levels of socio-economic rights, will be undermined if they are not achieved in a reasonably timely fashion. The 2012 United Nations Conference on Trade and Development (“UNCTAD”) Principles on Promoting Responsible Sovereign Lending and Borrowing, which require that any debt restructuring “should be undertaken promptly, efficiently, and fairly,” very explicitly incorporate this element.⁶⁰

57. The IMF, for example, now undertakes regular reviews of its transparency policy with a view to disclosing “documents and information on a timely basis unless strong and specific reasons argue against such disclosure.” IMF, *Guidance Note on the Fund’s Transparency Policy* 4 (Nov. 2013), <http://www.imf.org/external/np/pp/eng/2013/112613.pdf>.

58. The importance of reason-giving in an international adjudicatory setting is accepted in, for example, the statute of the International Court of Justice, which states in article 56(1) that “[t]he judgment shall state the reasons on which it is based.” Statute of the International Court of Justice, art. 56(1). Armin von Bogdandy and Ingo Venzke note that reason-giving permits “decisions to be discursively embedded and to be critiqued before the court of public opinion.” Armin von Bogdandy & Ingo Venzke, *On the Democratic Legitimation of International Lawmaking*, 12 GERMAN L. J. 1341, 1343 (2011).

59. As such, efficiency is a central goal of organizational management studies. See, e.g., Derick W. Brinkerhoff, *Organizational Legitimacy, Capacity, and Capacity Development* 6 (Eur. Center for Dev. Pol’y Mgmt., Discussion Paper No. 58A, 2005) (noting that “[o]rganizations that meet stakeholders’ expectations for effectiveness and efficiency are generally assessed as legitimate”). Of course, efficiency may be in tension with other elements thought to enhance legitimacy, including factors associated with participatory legitimacy. Any DWM, like any institution, will need to balance both of these elements. For an effort to think through these issues in the context of the IMF, see Carlo Cottarelli, *Efficiency and Legitimacy: Trade-offs in IMF Governance* (IMF, Working Paper No. 05/107, 2005); see also Andrew F. Cooper & Bessma Momani, *Re-balancing the G-20 from Efficiency to Legitimacy: The 3G Coalition and the Practice of Global Governance*, 20 GLOBAL GOV. 213 (2014).

60. UNCTAD, PRINCIPLES ON PROMOTING RESPONSIBLE SOVEREIGN LENDING AND BORROWING 13 (Jan. 10, 2012) [hereinafter UNCTAD Principles], http://www.unctad.info/upload/Debt%20Portal/Principles%20drafts/SLB_Principles_English_Doha_22-04-2012.pdf.

Finally, the possibility of *review* by an external entity of the procedures and decisions of a DWM may help to support fair and impartial processes as well as outcome legitimacy.⁶¹ Improper biases or procedural irregularities could be corrected or compensated for, responding to those dissatisfied by particular outcomes or at least ensuring that their specific concerns have been heard. Perhaps more important, the possibility of review can heighten internal monitoring, encouraging DWM parties and decision makers to more closely scrutinize their own actions, and thus magnifying the impact of all of the other elements associated with process legitimacy just discussed.⁶² In addition, external review may help to ensure that restructuring outcomes comply with the substantive principles and goals established by the mechanism's stakeholders.

3. *Outcome or Substantive Legitimacy*

A final set of standards relevant to the perceived legitimacy of a DWM would involve its ability to generate successful outcomes, understood in terms of substantive goals. It is easy to imagine that the capacity of a rule, institution, or mechanism to produce results that satisfy the needs or desires of key constituencies will almost always confer an important degree of legitimacy.⁶³ While it is unlikely that any institution could produce absolutely optimal outcomes, however defined, the mechanism in question would still need to meet a minimum threshold of success to be acceptable.⁶⁴ The type of outcome that characterizes "success" necessarily varies across issue area, but I consider several possibilities that are especially relevant for a DWM here: *economic and financial results, human impact, other substantive principles, and consistency across cases.*

Positive *economic and financial results* will feature importantly in the perceived outcome legitimacy of any institution or mechanism that deals with economic issues. From the sovereign debtor perspective, a successful DWM outcome would involve a return to debt sustainability and economic growth, and perhaps also an eventual improvement in creditworthiness and return to capital market access. From a creditor perspective, it would involve reasonable recovery on an investment. Outcome considerations calibrated according to more specific standards—for instance, approaches associated with "global justice" advocated by certain groups—may consider other economic results

61. See, e.g., Kingsbury et al., *supra* note 30; Theodor Meron, *Judicial Independence and Impartiality in International Criminal Tribunals*, 99 AM. J. INT'L L. 361 (2005).

62. See Meron, *supra* note 61 at 361.

63. In the EU context, this has been called "output-oriented" or "output legitimacy" by Fritz Scharpf, Vivien Schmidt, and others. See, e.g., FRITZ SCHARPF, *GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC?* 6 (1999); Schmidt, *supra* note 37, at 2.

64. Buchanan and Keohane refer to this more instrumental perspective as a concern with the "comparative benefit" of one as compared to other possible institutions (or presumably as compared to the more extreme alternative, the absence of an institution altogether). Buchanan & Keohane, *supra* note 20, at 46–47.

to be desirable, such as global redistribution of wealth. Asset recovery may also feature as a desirable financial outcome and could partially relieve the need for creditor losses or harsh austerity measures.

Basic *human impact* in the restructuring country would also serve as a basis for evaluating any global governance institution. Under this broad rubric, alternative approaches might focus on a simple concern for basic well-being, or on the active improvement of outcomes for individuals in terms of a more expansive conception of human rights. In addition, there may be questions as to which standards are sufficiently established and internationally appropriate to ground outcome judgments of a DWM, particularly if a human rights rubric is adopted.⁶⁵ In short, although this element must certainly be present in any consideration of DWM legitimacy, the particular content and meaning of an attentiveness to human impact will likely be politically sensitive and controversial.

Adherence to *other substantive principles* or doctrines may also be relevant to judging outcomes. Drawing from the domestic legal arena, doctrines of equitable subordination, unconscionability, and fraudulent transfer could reasonably filter into what is considered an acceptable and fair outcome in sovereign debt restructuring.⁶⁶ In addition, concerns about governmental responsiveness to and responsibility for underlying populations might be relevant in determining acceptable outcomes.⁶⁷ Debts tainted by corruption or undertaken without sufficient consideration for the underlying population might merit differential treatment by a DWM focused on delivering substantive results in line with perceptions of legitimacy.

Consistency across cases of sovereign debt restructuring provides one final feature that could be associated with perceptions of DWM outcome legitimacy.⁶⁸ Such consistency would enhance the predictability and stability of

65. Different country stakeholders may well have different opinions about the applicability of rights associated with political or civil activity, social capacity, and economic well-being. In discussing outcomes along these lines, Buchanan and Keohane refer simply to “minimal moral acceptability” and a “non-violation of human rights.” Buchanan & Keohane, *supra* note 20, at 46.

66. See, e.g., Lee C. Buchheit & Mitu Gulati, *The Dilemma of Odious Debts*, 56 DUKE L.J. 1201, 1230 (2007); Adam Feibelman, *Equitable Subordination, Fraudulent Transfer, and Sovereign Debt*, 70 L. & CONTEMP. PROBS. (2007); Anna Gelpern, *Odious, Not Debt*, 70 L. & CONTEMP. PROBS. 171. (2007); Robert Howse, *The Concept of Odious Debt in Public International Law* (UNCTAD, Discussion Paper No. 185, 2007).

67. For a discussion of the various ways that a government may be considered the agent for the underlying population, see LIENAU, *supra* note 2, at 21–24, 41–43.

68. This element of consistency has been incorporated into understandings of legitimacy and rule of law across multiple areas. See, e.g., Lorraine Elliot, *Cosmopolitan Militaries and Cosmopolitan Force*, in FAULT LINES OF INTERNATIONAL LEGITIMACY 279 (Hilary Charlesworth & Jean-Marc Coicaud eds., 2012) (noting that normative consistency is one element of emerging ideas of consistency); Jürgen Kurtz, *Building Legitimacy Through Interpretation in Investor-State Arbitration: On Consistency, Coherence and the Identification of Applicable Law*, in THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW 257 (Zachary Douglas et al. eds., 2014); Karen Steyn, *Consistency—A Principle of Public Law?*, 2 JUD. REV. 22 (1997). But see, e.g., Thomas Schultz, *Against Consistency in Investment Arbitration*, in THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE, 297 (Douglas et al. eds., 2014) (expressing concern that a focus on consistency could do more harm by applying bad rules consistently).

markets, a benefit for both sovereign borrowers and investors alike. Forum fragmentation and variations in (and possibly inconsistent interpretations of) the laws, principles, and procedures that apply to debt restructurings currently undermine this consistency.⁶⁹ That said, as a cautionary note, it is important to keep in mind that the consistent application of a problematic mechanism—perhaps leading to uniformly substandard results—is not necessarily favorable in and of itself. As such, consistency perhaps should be understood as a subsidiary standard in the DWM context. In addition, given the political, social, and economic variability that can exist among sovereign debt situations, any DWM should likely not focus on consistency at the expense of attentiveness to the situation at hand.

D. *The Importance of Impartiality*

A central support for legitimacy in the international arena is the ideal or principle of impartiality. For the purposes of this Article, I consider impartiality to be a core factor underpinning the more comprehensive category of legitimacy and applicable to its various components. Particularly in the context of decision-making bodies such as tribunals, impartiality and independence have been called “the most important determinant of political legitimacy at the international level,” with legitimacy requiring that such bodies “be sufficiently independent of the powerful actors that dominate the political sphere to take less powerful and minority interests into consideration.”⁷⁰ Thus, although impartiality has already been mentioned as an element of several of the legitimating features mentioned above, it deserves further explication in its own right. I organize this brief discussion into a consideration of *institutional* impartiality, *actor* impartiality, and what I call *informational* impartiality.

Generally speaking, impartiality can be understood as a way of thinking, decision making, or acting that is free of bias or preference and that is grounded in independence and objectivity.⁷¹ It is an essential component of colloquial understandings of justice and fairness.⁷² Impartiality may be compromised by biases or preferences grounded in national, regional, political, ideological, or personal affiliation.⁷³ Although these biases are perhaps most

69. See, e.g., sources cited in *supra* note 3.

70. Eyal Benvenisti & George W. Downs, *Prospects for the Increased Independence of International Tribunals*, 12 GERMAN L.J., 1057, 1058 (2011).

71. Steven Ratner, for example, describes impartiality as “a way that individuals and institutions decide and act, one based on disinterestedness, consistency, and fairness and not merely personal motives.” Steven R. Ratner, *Do International Organizations Play Favorites? An Impartialist Account*, in LEGITIMACY, JUSTICE, AND PUBLIC INTERNATIONAL LAW 123, 128 (Lukas H. Meyer ed., 2009).

72. For a key academic work that has shaped this discussion over the last two decades, see BRIAN BARRY, *JUSTICE AS IMPARTIALITY* (1995).

73. Of course, as Martha Minow points out, these factors can also inform the rich life experience that might be valuable in a decision maker, particularly in certain contexts. Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1203 (1992) (considering this tension in the context of judges and jurors).

easily cognizable in how individuals think and act, they can also impact how institutions are established and can therefore affect institutional goals and operating processes.⁷⁴ As a central underpinning of legitimacy, impartiality plays a role not only through actual objectivity and independence, but also through perceptions and acknowledgment of objectivity and independence by relevant constituencies. In other words, the interactive or audience element of legitimacy discussed above translates to impartiality as well.⁷⁵ Although complete impartiality (like universal legitimacy) is perhaps impossible to achieve, impartiality remains an important factor to consider in the establishment of any DWM.

To maximize *institutional impartiality*, any debt workout organization would be constructed to avoid systematic bias in favor of one or another interested group. One key subfeature that could support this larger goal is institutional independence: a DWM would ideally minimize its affiliation with groups, institutions, or actors—such as particular debtor states or major creditors—that may be affected by the DWM's processes or decisions. This separation might include attentiveness to financial independence, personnel independence, and perhaps—where possible—physical independence (such as through geographic location in a neutral setting). This would be especially important to the extent that any DWM takes the shape of a more permanent organization, rather than working through ad hoc settings. Transparency-enhancing and review procedures, discussed above, could enhance this type of impartiality by making an institution's inner workings more visible to interested parties, and by serving as a check on those procedures.

To the extent that any DWM envisions a central role for third party decision makers, whether serving as mediators, facilitators, or adjudicators, it would be important to ensure *actor impartiality* as well. Perhaps the central feature of actor impartiality involves independence, or ensuring that decision makers and mediators remain independent of the negotiating parties, both individually and as a group (in multiparty decision-making situations).⁷⁶ As part of actor impartiality, decision maker disclosure requirements may be appropriate. Furthermore, requiring decision makers to specify the rationale for any decision through processes of reasoned judgment can help to support actor impartiality. This practice ensures that decision makers clarify for themselves that the underlying analysis is impartial, and also allows other actors to provide a check on any bias that may exist. Finally, the use of

74. For a consideration of this in the context of the ICJ, see Gleider I. Hernández, *Impartiality and Bias at the International Court of Justice*, 1 CAMBRIDGE J. INT'L & COMP. L. 183 (2012).

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

76. This gives rise to the expectation or requirement in many domestic and international judicial settings that judicial decision makers recuse themselves from cases in which they may be biased or be perceived to be biased.

multiperson decision making may help to mitigate actor bias, as decisions will have to be discussed and justified.⁷⁷ This depends, of course, on a balanced initial selection of individuals, as well as on a commitment on the part of these individuals to think and act as impartially as possible.

A third dimension of impartiality includes what I call *informational impartiality*, or the impartiality of informational inputs. Although information may be presented as objective, such inputs can embed biases in subtle ways. This can affect both a restructuring outcome and also the final opinion or assessment of its success. Indicators constitute one central informational input into any sovereign debt restructuring, and recent work has highlighted the governance function played by indicators, and even the potential economic and legal aspects of the use of indicators in a DWM.⁷⁸ In addition, social science models, which predict the likely outcomes of restructurings and related domestic measures (in terms of GDP growth, social costs, and other metrics), can feature importantly in any sovereign debt decision. They may be used by debtors, creditors, and other decision makers to determine the ex ante feasibility of a particular restructuring plan, and in particular to determine the extent of relief necessary to return a debtor to sustainability. Although such models are no doubt presented in good faith, they can fail to characterize the situation fully and may thus favor one or another group in a debt crisis, even when relevant actors and institutions aim for independence and objectivity in their assessments.⁷⁹ For example, in the first days of 2013, IMF chief economist Olivier Blanchard copublished a working paper—interpreted by many as a *mea culpa*—suggesting that the organization’s models had misjudged and underestimated the negative effect of austerity measures on growth in European countries during a debt crisis.⁸⁰ The question of which models and methodologies are appropriate, and of who should make

77. For more on this general insight, and in particular its application in a political theory context, see HÉLÈNE LANDEMORE, *DEMOCRATIC REASON: POLITICS, COLLECTIVE INTELLIGENCE, AND THE RULE OF THE MANY* (2012).

78. See GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH CLASSIFICATION AND RANKINGS (Kevin Davis et al. eds., 2012). In the sovereign debt policy context, see Michael Riegner, *Legal Frameworks and General Principles for Indicators in Sovereign Debt Restructuring* (UNCTAD, Working Paper, 2014), <http://www.unctad.info/upload/Debt%20Portal/Riegner%20DWM%20indicators%20legal%20paper%20-%20final%201%20May%202014.pdf>; Jasper Lukkezen and Hugo Romagosa, *Early Warning Indicators in a Debt Restructuring Mechanism* (UNCTAD Working Group Paper, Apr. 29, 2014), http://www.unctad.info/upload/Debt%20Portal/Lukkezen_Romagosa_%20debrindicatorsFinal_29apr2014.pdf.

79. See, e.g., Willem H. Buiter & Ebrahim Rahbari, *Why Governments Default*, in SOVEREIGN DEBT MANAGEMENT, *supra* note 6 at 257, 277–79 (discussing the IMF and debt sustainability analysis). For other IMF-oriented examples suggesting the unreliability of such models, see Ben Fine & Degol Hailu, *Convergence and Consensus: The Political Economy of Stabilization and Growth* 5 (Ctr. for Dev. Pol’y & Res., Discussion Paper No. 2202, 2002); NGAIRE WOODS, *THE GLOBALIZERS: THE IMF, THE WORLD BANK, AND THEIR BORROWERS* 182 (2006).

80. See Olivier Blanchard & Daniel Leigh, *Growth Forecast Errors and Fiscal Multipliers* (IMF, Working Paper No. 13/1, 2013); Howard Schneider, *An Amazing Mea Culpa from the IMF’s Chief Economist on Austerity*, WASH. POST ONLINE (January 3, 2013), <http://www.washingtonpost.com/news/wonkblog/wp/2013/01/03/an-amazing-mea-culpa-from-the-imfs-chief-economist-on-austerity/>.

this selection, can thus be quite controversial. While the consideration of particular models is beyond the scope of this Article, care should be taken to ensure that the selection and use of social science models reflects an understanding of their political character and distributional ramifications.⁸¹ Soliciting broad feedback on these informational inputs might be appropriate to enhance perceptions of DWM impartiality.⁸²

E. Power Dynamics in Legitimacy

While disaggregating the concept of legitimacy helps to clarify possible features of a sovereign DWM, it does nothing to address one core concern with the concept itself—namely, that its indeterminacy may mask and therefore amplify power dynamics.⁸³ In particular, the successful characterization of an action or institution as legitimate can help to forestall inquiries into its deeper political or distributional ramifications. Thus, a more fine grained analysis of the potential meanings of legitimacy can still leave intact the explicit and implicit relations of control that underpin global interactions. This does not mean that a concern for legitimacy should be abandoned altogether, or that working through the sub-elements implied in legitimacy claims may not mitigate these problems. In fact, providing a typology of the features associated with legitimacy based on source, process, or outcome can offer insight into where these dynamics and pathologies are likely to arise. This analytical framework can thus make actors more alert to power issues and perhaps help to rebalance these dynamics when possible.

As one example, a DWM oriented toward source or process legitimacy may inadvertently privilege powerful players who are better able to control the establishment and ongoing work of any DWM. At the level of source legitimacy, certain players will inevitably have a greater capacity to engage in the initial formulation of any institution.⁸⁴ This is the case across both international actors and states, which may differ significantly in their institutional ability to develop the background and expertise necessary to pro-

81. This insight is central to the discipline of international political economy. For volumes emphasizing the contingent and politically conditioned nature of economic models, see for example *MONEY AND ORDER: AMBIGUOUS ECONOMICS, UBIQUITOUS POLITICS* (Jonathan Kirshner ed., 2003); *CONSTRUCTING THE INTERNATIONAL ECONOMY* (Rawi Abdelal et al. eds., 2010).

82. This feedback of course implicates the impartiality and appropriateness of the *sources* of any such inputs, including the institutions and individuals whose expert opinions restructuring participants rely on. Further, any reliance on expert opinions raises more general questions about the use of experts (and possibly expert testimony) in a DWM, linking to concerns about “battles of the experts” in domestic dispute resolution procedures. While such questions may be worthy of future consideration, they are beyond the scope of this Article.

83. See, e.g., Crawford, *supra* note 12, at 271; see also Koskeniemi, *supra* note 13, at 409.

84. For this reason, some observers worry about the capacity of developing countries in particular to participate fully in negotiations. See, e.g., Pamela Chasek & Lavanya Rajamani, *Steps Toward Enhanced Parity: Negotiating Capacity and Strategies of Developing Countries*, in *PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION* (Inge Kaul ed., 2003); see also Sheila Page, *Developing Countries: Victims or Participants—Their Changing Role in International Negotiations* (Overseas Dev. Inst., 2003), www.odi.org/resources/docs/2418.pdf.

vide initial feedback in the formulation of a DWM. This might be due to variation in terms of employee knowledge and expertise and also in terms of resources, including financial resources and the availability of trained individuals who could participate on behalf of interested parties.⁸⁵ Thus, a mechanism for establishing a DWM that merely invites or allows for participation, without making efforts to actually ensure the wherewithal to participate, might paradoxically grant a false “source legitimacy” imprimatur to any DWM ultimately established.

This range of concerns extends to process legitimacy as well. Once a DWM has actually been established, legitimation can be claimed through its ongoing work in dealing with particular sovereign debt situations. Wealthier and better-trained actors are more likely to have the capacity to participate in any given debt restructuring, for example by taking advantage of enhanced notice and comment procedures, or to digest and use information made accessible by improved transparency measures.⁸⁶ This discrepancy is likely to emerge across international-level actors such as states and creditors, which may vary by type and size, and also across different socioeconomic actors within any given country. Sovereign debt decisions affect domestic financial and commercial groups, government agencies and other public and semipublic actors, and individuals affected by welfare programs, but each actor will have varied resources available to express its concerns. In short, emphasizing source and process as the basis for legitimacy, and more generally emphasizing the importance of “voice” in sovereign debt restructuring, could thus magnify the impact of this capacity variation. In the absence of appropriate safeguards, more capable actors will have disproportionately greater voice in sovereign debt.⁸⁷

The impact of power dynamics hardly disappears if we attend to outcome as the basis of legitimacy claims. In particular, a focus on substantive out-

85. See, e.g., Chasek & Rajamani, *supra* note 84; Page, *supra* note 84.

86. In other words, the public goods of transparency, information, and openness, while generally desirable and applicable, are arguably most beneficial to those who can best take advantage of them, and so can inadvertently skew outcomes in their favor. This dynamic forms part of the basis for criticisms of global administrative law and related approaches by proponents of “Third World Approaches to International Law” and other writers explicitly concerned with global justice. For example, B.S. Chimni argues, “without a concurrent concern with substantive law, GAL may only legitimize unjust laws and institutions. By focusing exclusively on GAL, a false impression may arise that existing international institutions are becoming more participatory and responsive to the concerns of developing countries and their peoples.” B.S. Chimni, *Co-optation and Resistance: Two Faces of Global Administrative Law*, 37 N.Y.U. J. INT’L L. & POL. 799, 800 (2006). This also grounds Buchanan and Keohane’s assessment that more shallow understandings of transparency and accountability are insufficient for any real conception of legitimacy. See Buchanan & Keohane, *supra* note 20, at 53–55.

87. See Buchanan & Keohane, *supra* note 20. Writing in the context of the WTO, Greg Shaffer similarly notes, “process-based review also raises serious concerns, in particular, because processes can be manipulated to give the appearance of consideration of affected foreigners without in any way modifying a predetermined outcome Powerful actors can thus go through the steps of due process without meaningfully considering the views of the affected parties.” Gregory Shaffer, *Power, Governance and the WTO: A Comparative Institutional Approach*, in *POWER IN GLOBAL GOVERNANCE* 154 (Michael Barnett & Raymond Duvall eds., 2005).

puts can grant control to those claiming an ability to deliver the desirable outcome. Obviously, it is difficult (indeed, impossible) to fully control or predict the endpoint of any restructuring, whether through a DWM or through the ad hoc procedures dominant today. The arena of sovereign debt can depend on a range of factors that may be quite unpredictable: global market sentiment and market stress, exchange rate movements, the demand for a debtor state's export commodities, the supply and cost of essential imports, and international interest rate fluctuations.⁸⁸ Furthermore, as noted above, it is not always easy to secure the agreement of various parties on what constitutes a good outcome, or on the particular substantive goals of any transnational institution, including a DWM.⁸⁹ However, to the extent that a desirable outcome is identified, powerful actors may gain control of establishing the initial DWM—or of particular sovereign debt restructurings—by promising a favorable substantive result. And in order to facilitate this outcome, these actors may ask other stakeholders to minimize their process legitimacy requests, including for participation, transparency, and country ownership. In this way, a DWM or a particular debt restructuring can be constructed in favor of more powerful actors, regardless of whether the desirable outcome is ever actually delivered.

It is worth pointing out that the pressure to focus principally on substantive outcome can be especially acute in emergency or crisis management debt workout situations. In these cases, certain elements of process legitimacy—such as broad participation or transparency—may prove less practicable and could even be considered undesirable. When a narrower focus on outcome is suitable or inevitable, greater accountability for those actors who gain control of the situation might be appropriate.

In short, accounting for inevitable power imbalances and their distributional effects casts another layer of analysis onto considerations of legitimacy in sovereign debt restructuring. Even beyond an awareness that legitimacy claims themselves can mask problematic power dynamics, emphasizing one understanding of legitimacy over another can itself have distributional consequences. These considerations should inform any application of the more

88. See, among many other pieces discussing relevant factors, Balazs Csonto & Iryna Ivaschenko, *Determinants of Sovereign Bond Spreads in Emerging Markets: Local Fundamentals and Global Factors vs. Ever-changing Misalignments* (IMF Working Paper, No. 13/164, 2013) (finding global factors to be the main determinants of sovereign bond spreads in the short-run and both global and country-specific elements important in the long-run); Martín González-Rozada & Eduardo Levy-Yeyati, *Global Factors and Emerging Market Spreads*, 118 *ECON. J.* 1917 (2008) (finding that global factors such as international interest rates and risk appetite affected emerging market foreign currency bond spreads). Of course the range of factors will depend on whether sovereign bonds are issued in foreign or local currency. See, e.g., Blaise Gadanecz, Ken Miyajima & Chang Shu, *Exchange Rate Risk and Local Currency Sovereign Bond Yields in Emerging Markets* (Bank of Int'l Settlements, Working Paper No. 474, 2014) (reviewing factors relevant to local currency bonds and finding that increased exchange rate volatility leads investors to require greater compensation for holding emerging market local currency bonds).

89. This difficulty in identifying clear substantive outcomes to which all can agree is part of the reason for caution in the legal approaches mentioned above. See, e.g., von Bogdandy and Goldmann, *supra* note 25, at 55.

specific sub-elements implied in legitimacy claims to the DWM context, whether at the source, process, or outcome level.

II. THE CURRENT FOUNDATIONS FOR DEBT RESTRUCTURING

How does this analytical framework map onto the system currently in place to deal with sovereign debt issues? Given the failure to establish a coherent system as part of the international financial architecture in the post-World War II era, what has emerged to fill the void? Conceptual arguments about legitimacy alone do not provide enough background to think through sovereign debt problems, particularly as the views of many stakeholders—countries, creditors, and other players—will be framed through their own concrete experiences and their interpretations of how previous debt restructurings have unfolded. As such, this section briefly considers the institutional and historical background of debt restructuring in light of the typology of legitimacy set out above. Some attention to the perceived problems and successes of previous episodes can deepen an understanding of the political, legal, and economic context of ongoing discussions of a potential DWM.⁹⁰

Although the predicament of unsustainable sovereign debt has existed as long as sovereigns have borrowed, the modern era of debt restructuring dates from the debt crises of the 1980s. These restructurings saw the concretization of institutional features developed in the preceding decades, including the interactions of the Paris Club and London Club, and also witnessed the rise to prominence of the IFIs, particularly the IMF.⁹¹ The processes that have emerged since then provide the foundations for the informal system that exists today. This Part thus looks at several key institutions in light of legitimacy concerns, and then briefly turns to recent experiences in debt restructuring for further illustration.

A. *Filling the Institutional Vacuum: Key Players*

1. *The Paris Club of Bilateral Official Creditors*

While a large number of institutional players participate in the sovereign debt arena, one core institutional player in the existing informal framework

90. Elements of the discussion here are drawn from LIENAU, *supra* note 2, ch. 6. For additional overviews focused on sovereign debt restructuring, see Udaibir S. Das et al., *Sovereign Debt Restructurings 1950-2010: Literature Survey, Data, and Stylized Facts* (IMF, Working Paper No. WP/12/203, 2012); Eugenio Bruno, *Lessons from History: Structuring, Defaulting and Restructuring and the Emerging Markets*, in *SOVEREIGN DEBT AND DEBT RESTRUCTURING: LEGAL, FINANCIAL AND REGULATORY ASPECTS* 189 (Eugenio Bruno ed., 2013); Eugenio Bruno, *Lessons from the Most Recent Restructurings*, in *SOVEREIGN DEBT AND DEBT RESTRUCTURING: LEGAL, FINANCIAL AND REGULATORY ASPECTS* 193 (Eugenio Bruno ed., 2013); ALEXIS RIEFFEL, *RESTRUCTURING SOVEREIGN DEBT: THE CASE FOR AD HOC MACHINERY* (2003); WILLIAM R. CLINE, *INTERNATIONAL DEBT REEXAMINED* (1995).

91. See, e.g., LIENAU, *RETHINKING SOVEREIGN DEBT*, *supra* note 2 at 166–71 (discussing the development of a unified creditor framework for dealing with sovereign debt).

has been the Paris Club. Founded by creditor governments in 1956, the Paris Club addresses the debt owed by sovereign borrowers to official bilateral creditors—other sovereign states—at regularly scheduled meetings at the French Treasury.⁹² Although its centrality has waned somewhat in the last decade—in part due to more comprehensive efforts at bilateral debt relief—it has featured prominently in the contemporary history of debt restructurings and remains an important player. What is more, the rise of emerging market official creditors, such as China, suggests that bilateral credit issues will remain a feature in sovereign debt going forward. Indeed, the Paris Club has recently reached out to emerging market lenders in an effort to harmonize approaches to sovereign lending.⁹³

The Paris Club has no legal or institutional personality and no written charter. Perhaps in line with this relative informality, it has not sought source legitimacy by soliciting the opinions of other stakeholders in establishing or maintaining its basic negotiating mechanisms.⁹⁴ Although it aims to work in the public interest, the particular goals of its state members drive its deliberations. On the process legitimacy front, consensus among participating Paris Club creditors is required for action, thus ensuring that interested members have their voices fully heard.⁹⁵ Setting aside for now the narrow membership and the power dynamics that might exist between the Paris Club members, the consensus model at least technically goes beyond the majority or supermajority standard that might be required for some conceptions of state consent. In addition to its member creditors, the Paris Club may invite other official creditors implicated in a particular country case to join as well. The IMF, World Bank, UNCTAD, and other official international and regional institutions have observer status, and debtors must already have agreed to an IMF-approved program before entering into

92. For more on the Paris Club, see, e.g., MARTIN A. WEISS, CONG. RESEARCH SERV., RS21482, *THE PARIS CLUB AND INTERNATIONAL DEBT RELIEF* (2013); see also RIEFFEL, *supra* note 90 at 56–94. For a consideration of the uniquely political character of much of this official debt, see Gelpert, *supra* note 66.

93. Hugh Carnegy, 'Rich Country' Creditors Seek Emerging Markets Lender Accord, *FIN. TIMES* (Oct. 23, 2013), <http://www.ft.com/cms/s/0/0fbfae36-3bd6-11e3-b85f-00144feab7de.html#axzz3nW3Kzvl6>. For an additional overview of the Paris Club's evolution, along with recommendations for improving its processes and a suggestion that it may be the only feasible intergovernmental debt restructuring mechanism (at least in the absence of a more comprehensive effort), see Enrique Cosío-Pascal, *The Emerging of a Multilateral Forum for Debt Restructuring: The Paris Club* (UNCTAD, Discussion Paper No. 192, 2008), http://unctad.org/en/Docs/osgdp20087_en.pdf.

94. See WEISS, *supra* note 92, at 1; see also Alexis Rieffel, *The Role of the Paris Club in Managing Debt Problems* 3 (Princeton U., Essays in Int'l Fin. No. 161, 1985) (describing the Paris Club as "not an international organization [but] . . . a set of procedures"). On its website, the Paris Club introduces itself as simply "an informal group of official creditors." PARIS CLUB, www.clubdeparis.com (last visited Oct. 29, 2015).

95. This is one of the six key principles of Paris Club negotiations. *The Six Principles*, PARIS CLUB, <http://www.clubdeparis.org/en/communications/page/the-six-principles>. Of course, the general power dynamics that apply among the members outside of the Paris Club context likely translate into this setting as well.

negotiations with the Paris Club.⁹⁶ The Club has generally excluded from negotiations civil society actors and private creditors, however. Nonetheless, the Paris Club agreements have contained “comparability of treatment” clauses, which prevent private creditors from free riding on public creditor (and therefore taxpayer) concessions by preventing debtors from offering borrowers better terms than those obtained at the Paris Club.⁹⁷ Particularly beginning in the 1990s, this has generated dissatisfaction among private sector creditors, some of whom have resented that Club decisions may affect their investments without incorporating their input.⁹⁸ Perhaps in part as a result of this exclusion, debtors have sometimes had difficulty securing the agreement of private creditors to the Paris Club’s established terms.⁹⁹ Civil society groups have expressed more general concern that not all parties affected by the Paris Club decisions have an equal voice in the negotiations.¹⁰⁰

Also relevant to process legitimacy, the Paris Club has historically resisted calls for increased transparency, only beginning in 2003 to post publicly the basic contours of negotiated agreements.¹⁰¹ It does not have written rules, though it aims to work according to stated principles and makes reference to precedent, and may be fairly flexible across different country cases.¹⁰² The virtue of the Paris Club is its ability to act relatively quickly, at least once an IMF package is in place. It also is able to achieve significant debt relief when motivated, through both the official bilateral agreements and

96. An overview of procedures is available through the Paris Club website, *supra* note 94. UNCTAD is unique among the observer international economic organizations, in part because it is not a creditor to sovereign borrowers. It has participated in over 260 debt reschedulings for over 60 countries since 1978, often providing technical support to debtor countries preparing for and participating in Paris Club negotiations. UNCTAD offers this assistance in accordance with resolutions 165 (S-IX) and 222 (XXI) of its Trade and Development Board.

97. See note on comparability on the ‘The Six Principles’ page of the Paris Club website, *supra* note 95. For more on how comparability of treatment works, see, for example, RIEFFEL, *supra* note 90, at 72–75.

98. See, e.g., Brian Caplen, *Paris Club Comes Under Attack*, EUROMONEY (Sept. 2000), <http://www.euromoney.com/Article/1004144/Paris-Club-comes-under-attack.html>.

99. JÜRGEN KAISER, RESOLVING SOVEREIGN DEBT CRISES: TOWARDS A FAIR AND TRANSPARENT INTERNATIONAL INSOLVENCY FRAMEWORK 13 (2013), <http://www.eurodad.org/files/pdf/527caff1b5c61.pdf>.

100. See, for example, the criticism of the Paris Club presented by the German civil society group Erlassjahr: *Debt Management à la Louis XIV—A Short Promenade through the Programme and Practice of the Paris Club*, ERLASSJAHR.DE 3 (Margery Cartledge trans., 2001), http://www.erlassjahr.de/cms/upload/eng/lish/dokumente/Debt_Management_a_la_Louis_XIV.pdf.

101. The Paris Club website (www.clubdeparis.org) provides this basic information. The agreed minutes, which constitute the basis for binding bilateral agreements between the debtor and particular official creditors, remain unavailable.

102. The “Evian Approach” to negotiations enshrined this case-by-case approach. The Evian Approach aims to remain attentive to the possibility of an insolvency (vs. just a short-term liquidity) problem and may involve some discussion with private creditors in advance of a Paris Club meeting. For UNCTAD’s brief take on the Evian Approach, see *The Evian Approach*, UNCTAD, <http://vi.unctad.org/debt/debt/m3/Evian.htm> (last visited Oct. 29, 2014). Given that political considerations may play a part in the determination of appropriate solutions, the background goal of consistency is sometimes entirely set aside. The restructuring of Iraq’s debt after the fall of Saddam Hussein offers a case in point. See LIENAU, *supra* note 2, at 210–15.

the leverage offered by the principle of comparable treatment. For example, multilateral debt restructurings like the Heavily Indebted Poor Countries (“HIPC”) Initiative, launched in 1996 and coordinated by the IMF and the World Bank, made countries eligible for Paris Club cancellations of up to 90% (or more) of bilateral debts.¹⁰³

2. *The London Club of Commercial Bank Creditors*

Although international capital flows in the initial post-World War II era moved largely through public creditors, private lenders returned to the global arena en masse in the 1970s. Initially most of this private capital moved through commercial banks, whose enthusiastic lending practices through the 1970s resulted in their being deeply implicated in the 1980s debt crisis.¹⁰⁴ To coordinate a response to debtor payment problems that emerged with this new lending, private banks established ad hoc processes to negotiate this debt jointly. These private banks working as a group came to be called the London Club.¹⁰⁵ The importance of these negotiations has diminished with the move away from commercial bank lending. However, the London Club remains relevant for certain debt workouts, and the memory of these restructurings—particularly those of the 1980s, discussed below—continues to affect current views.

The London Club’s meetings and associated processes are even more ad hoc than those of the Paris Club. Notwithstanding the “London” moniker, there is no institutional base or regular meeting location, and any particular iteration of the London Club is dissolved at the conclusion of a restructuring.¹⁰⁶ The Club has no written rules and there may be significant flexibility across different country cases, though historically bank participants were very concerned about setting precedents for future restructuring terms.¹⁰⁷ A London Club meeting is generally convened when a sovereign debtor contacts its major commercial bank creditors seeking to negotiate. These key

103. The major multilateral financial and economic institutions waived their debt claims to the extent necessary to meet debt sustainability standards. For an IMF overview of HIPC, see IMF, *Debt Relief Under the Heavily Indebted Poor Countries (HIPC) Initiative*, Factsheet (Sept. 2015), www.imf.org/external/np/exr/facts/pdf/hipc.pdf. For a more critical take on HIPC, see RIEFFEL, *supra* note 90, at 178–87. The subsequent Multilateral Debt Relief Initiative (“MDRI”), launched in 2005, targeted concessional loans from the multilateral institutions’ soft loan windows for cancellation and made countries eligible for up to 100% debt cancellation from the IMF, World Bank, and the African Development Fund. See IMF, *The Multilateral Debt Relief Initiative*, Factsheet (Sept. 2015), www.imf.org/external/np/exr/facts/pdf/mdri.pdf.

104. For an overview of trends in lending through the 1970s and 1980s, and in particular the increased integration of lending (and then debt restructuring) frameworks, see LIENAU, *supra* note 2, at 154–160.

105. The initial foundations for this process were built in the mid-1970s; prior to this time no real multi-bank restructuring process existed. For an overview of the London Club, see RIEFFEL, *supra* note 90, at 95–131.

106. Indeed, the name is especially misleading as many major Bank Advisory Committee (“BAC”) meetings took place in New York. See *id.*, at 102–03.

107. See, e.g., LIENAU, *supra* note 2, at 178 (discussing the Nicaraguan restructuring case of the late 1970s).

banks then establish a Bank Advisory Committee (“BAC,” or “creditors’ committee”), which undertakes negotiations toward a broadly acceptable agreement. These agreements might include the extension of debt maturities, provision of new lending, or reduction of the face value of the debt. Once an agreement is reached between the BAC and a sovereign debtor, the lead banks present the agreement to other implicated banks, which must then agree to the outcome in order to finalize a debt restructuring.¹⁰⁸ In comparison to the current system of bond restructuring, the London Club process appears relatively coherent. This is not to say that unanimity existed among member banks; indeed, disagreements and holdouts remained common.¹⁰⁹ However, the London Club process in its heyday generally did not include banks that became creditors with the intention of holding out for preferential treatment, as we see with some distressed debt (or vulture) funds today.¹¹⁰ In addition, internal disciplining mechanisms within the commercial bank group, including carrots and sticks, were available. Eventually, these mechanisms helped to ensure fairly broad creditor participation, even if certain creditors objected to these processes as unfair and unrepresentative of their interests. BAC efforts were supported by major public actors, including the finance ministries of the largest creditor countries, who were concerned with the systemic implications of a failed restructuring.¹¹¹ Again, this participant background contrasts with the less systemically relevant private funds at the center of current discussions of holdout creditors.

3. *The International Monetary Fund*

Multilateral creditors, such as the IMF and the World Bank, have also featured centrally in debt restructuring over the last several decades. The IMF in particular has been essential in addressing the external payment and debt problems of its members. Initially established to support the gold-dollar standard of the Bretton Woods monetary regime, which was abandoned in the early 1970s, the IMF has multiple overlapping mandates, including the broad maintenance of global financial stability.¹¹²

In interpreting these mandates, the IMF has emerged to play several roles relevant to debt workouts. In particular, it engages in interrelated programs of surveillance, technical assistance, and conditional financial assistance, all of which may be brought to bear in sovereign debt.¹¹³ To begin with, the

108. For an overview of the BAC process and types of terms negotiated, see RIEFFEL, *supra* note 90, at 116–29.

109. See Das et al., *supra* note 90, at 17; BRUNO, *supra* note 90, at 185.

110. For more on these funds, see the discussion *infra* Part II.B.3.

111. See LIENAU, *supra* note 2, at 168.

112. For an excellent overview of the IFIs, see WOODS, *supra* note 79. For a general overview of the IMF, see, among others, Rosa Lastra, *The Role of the International Monetary Fund*, in SOVEREIGN DEBT MANAGEMENT, *supra* note 6.

113. The IMF’s Articles of Agreement specify these three functions: article IV (surveillance), article V, section 3 (financial assistance), and article V, section 2(b) (technical assistance).

IMF has developed considerable expertise on a range of financial and economic matters, enabling it to provide countries with policy analysis and advice, some of which has admittedly been controversial. And, of course, accepting this policy advice (after negotiations) may also be effectively mandatory for certain debt restructurings, such as through the general requirement that an IMF-approved program be agreed upon before states receive Paris Club debt relief.¹¹⁴ As noted above, this has been a central feature of the HIPC and subsequent Multilateral Debt Relief Initiative (“MDRI”) programs for low-income countries.¹¹⁵ Once a restructuring has been agreed upon, the IMF may also monitor the debtor to ensure that the conditions of the agreement are met. This program-specific monitoring complements the more general surveillance function that the IMF plays within global finance. Finally, the IMF can become a lender in its own right as part of conditional crisis financing, which may be organized in conjunction with a broader restructuring agreement and coordinated with private creditors.

Although the IMF is legally accountable to its 188 member countries, according to IMF governance structures the largest global economies have the strongest voice on its Executive Board.¹¹⁶ While the IMF Board of Governors (through which state members are represented) votes on major issues, in practice the Executive Board largely directs IMF policy. Historically, the Board, and indeed the IMF bureaucracy as a whole, has resisted process legitimacy concerns as well as receiving input on specific issues from its member states and especially from civil society actors.¹¹⁷ Nevertheless, since the turn of the millennium and particularly within the last decade—and perhaps in response to what has been called the IMF’s “legitimacy crisis” since the Asian financial crisis of 1997–1998—the organization has become more politically aware and more concerned about perceptions of its own representativeness and impartiality.¹¹⁸ The IMF has progressively committed itself to the ideal of transparency, introducing in 2009 a “Transparency Principle” indicating that the Fund will “strive to disclose documents and information

114. See discussion *supra* Part II.A.1, in particular text associated with *supra* note 96. Indeed, more generally, IMF loans tend to be viewed as “less attractive than private sector loans because they have many strings attached, including both formal conditionality and informal pressures and influences.” WOODS, *supra* note 79, at 70. This perception can have the perverse effect of making countries less likely to approach the IMF in advance of a crisis, when (arguably) IMF funds and advice would be most useful. See *id.* at 200.

115. See discussion *supra* Part II.A.1, in particular text associated with *supra* notes 96–103.

116. For a discussion of U.S. influence in particular, see WOODS, *supra* note 79, at 27, 29–32. For an evocative description of the IMF Executive Board, see PAUL BLUSTEIN, *THE CHASTENING: INSIDE THE CRISIS THAT ROCKED THE GLOBAL FINANCIAL SYSTEM AND HUMBLING THE IMF* 33–36 (2001).

117. INDEP. EVALUATION OFFICE OF THE IMF, *GOVERNANCE OF THE IMF: AN EVALUATION* 8–9 (2001), http://www.ieo-imf.org/ieo/files/completedevaluations/05212008CG_main.pdf.

118. For more on the legitimacy crisis, see, e.g., Leonard Seabrooke, *Legitimacy Gaps in the World Economy: Explaining the Sources of the IMF’s Legitimacy Crisis*, 44 *INT’L POL.* 250 (2007).

on a timely basis unless strong and specific reasons argue against such disclosure,” and following up with regular reviews of its transparency policy.¹¹⁹

Given this new attempt at openness, the multiple roles played by the IMF, and its concern for financial stability, the Fund is, in some ways, uniquely well situated to take a global view on the international financial architecture and the role of sovereign debt restructuring within it. It is hardly surprising that the much-discussed Sovereign Debt Restructuring Mechanism (“SDRM”) proposal of the early 2000s originated within the IMF.¹²⁰ Nonetheless, it is also reasonable to wonder whether the Fund’s multiple roles mean that it could be subject to internal conflicts of interest. Such conflicts could compromise the degree to which it is able to act in an impartial and independent manner in a debt restructuring context, and also may undermine (and indeed has undermined) perceptions of its impartiality in sovereign debt situations. The practice of IMF conditionality—the requirement that sovereign debtors undertake a series of sometimes controversial policy reforms as a key condition for IMF lending—makes these criticisms more pressing.¹²¹

In addition, the IMF’s broad mandate of supporting global financial stability has in some situations required it to pay special attention to the systemic importance (and fragility) of major international banks. Their collapse under the pressure of sovereign debt crises could well undermine global financial and economic well-being as a whole—perhaps more so than the continued underperformance of a given debtor state.¹²² As such, IMF attentiveness to bank concerns may be sensible in light of this general mandate, at least so long as these financial institutions remain potentially destabilizing. However, this orientation is arguably in tension with the goals of impartiality and fair burden sharing that feature prominently in conceptions

119. The most recent review was conducted in 2013. See IMF, *2013 Review of the Fund’s Transparency Policy* (May 2013), <https://www.imf.org/external/np/pp/eng/2013/051413.pdf>. Of course, this is hardly a panacea. Although summaries of Board discussions and decisions are made available, a report published by the IMF’s own independent evaluation office noted that “four-fifths of Executive Board respondents and almost three-quarters of senior IMF staff respondents indicated that stand-alone summaries . . . are sometimes or often vague and/or contradictory.” JEFF CHELSKY, SUMMARIZING THE VIEWS OF THE IMF EXECUTIVE BOARD 5 (IMF Indep. Evaluation Office, Background Paper Series No. BP/08/05, 2008). Unsurprisingly, then, reformers continue to call for improved access to information, in particular a publication of Board transcripts. See, e.g., WOODS, *supra* note 79, at 210. For an overview of concerns related to transparency in the IMF, see Luis Miguel Hinojosa Martínez, *Transparency in International Financial Institutions*, in *TRANSPARENCY IN INTERNATIONAL LAW* 77 (Andrea Bianchi & Anne Peters eds., 2013).

120. See discussion *infra* Part IV.B.1.

121. For a critical take on IMF conditionality practices, see JESSE GRIFFITHS & KONSTANTINOS TODOULOS, *CONDITIONALLY YOURS: AN ANALYSIS OF THE POLICY CONDITIONS ATTACHED TO IMF LOANS* (European Network on Debt and Development ed., 2014), <http://eurodad.org/files/pdf/533bd19646b20.pdf>.

122. Indeed, sovereign debt crises themselves are often deeply intertwined with national banking crises. For an overview of these interrelationships, see generally Anna Gelpern, *Sovereign Debt and Banking Crises: An ‘Aerial View,’* in *SOVEREIGN DEBT MGMT.* 205 (Lee Buchheit & Rosa Lastra eds., 2014). For a recent take on the IMF’s actions in financial crises, see JOSEPH P. JOYCE, *THE IMF AND GLOBAL FINANCIAL CRISES: PHOENIX RISING?* (2013).

of legitimacy applicable to a DWM. The unequal voices of countries on the Executive Board, along with the IMF tendency to hire staff out of economics departments in the English-speaking Global North, where creditors historically have been concentrated, only deepen this tension.¹²³

B. *Historical Layers in Sovereign Debt*

How has this institutional framework actually worked in the recent history of sovereign debt restructuring, and how has the history been perceived? The underpinnings of sovereign debt have remained relatively constant for several decades, involving the presence of the key players just discussed. Nonetheless, debt workouts have unfolded through several distinct periods, and the perceived successes and failures of each period shape the perspectives of stakeholders in ways relevant to considerations of legitimacy for a DWM.

1. *1980s Debt Crisis and Bank Negotiations*

Sovereign debt restructuring through the 1980s debt crisis centered on the London Club mechanism, as commercial banks constituted the major creditors of the period.¹²⁴ Falling export commodity prices and the U.S. Federal Reserve decision to sextuple interest rates (from 3% to 20%) precipitated Mexico's 1982 announcement of its inability to continue debt servicing, followed soon after by similar announcements from other states in Latin America and elsewhere.¹²⁵ BACs responded by agreeing to reschedule loan payments—extending the time frame for paying back debt—and to provide bridge loans to sovereign debtors, effectively treating the crisis as a temporary (if lingering) liquidity problem. This allowed countries to continue interest payments and also allowed banks to avoid declaring the loans to be nonperforming. This approach helped to forestall banking crises in powerful Northern countries—a significant concern for their finance ministries as well as for the IMF, as noted above—given that the exposure of major banks to Latin American debt in some cases exceeded these banks' entire capital.¹²⁶

However, this relief proved insufficient for debtor countries themselves, many of whom had to return to the London Club for serial rescheduling. The relatively harmonized and comprehensive creditor process of the 1980s thus did not correlate with positive debtor outcomes, and perhaps offers a

123. For an overview of how IMF staffing may impact particular policy inclinations, see WOODS, *supra* note 79, at 53–55.

124. For an overview of these procedures, see, for example, LIENAU, *supra* note 2, at 166–68; see also discussion *supra* Part II.A.2.

125. See, e.g., WOODS, *supra* note 79, at 47. For a perspective on the Mexican predicament from that period, see Timothy Rush, *Volcker's Interest-rate Pressure Throws Mexico into a Debt Squeeze*, 8 EXEC. INTELLIGENCE REV. 8, 8 (1981).

126. For more on this dynamic, see, for example, LIENAU, *supra* note 2, at 166–171; Bruno, *supra* note 90, at 184–86; VINOD K. AGGARWAL, INTERNATIONAL DEBT THREAT: BARGAINING AMONG CREDITORS AND DEBTORS IN THE 1980S, 21–23 (1987).

cautionary note against too heavy an emphasis on creditor coordination problems today.¹²⁷ In the 1980s such coordination allowed for an oligopoly of sorts, in which banks were collectively able to demand terms that sovereign debtors may have considered objectionable.¹²⁸ Furthermore, the treatment of all bank debts through a single process made it effectively impossible to challenge those debt contracts that arguably violated substantive principles of equity or incipient principles of responsible sovereign lending.¹²⁹ But in the absence of any institutionalized commitment to such principles—and given the dearth of alternative capital sources—there was little option but to acquiesce to these demands.

The IMF interaction with private banks and sovereign debtors through much of the 1980s only aggravated perceptions in the Global South of a partial system biased toward creditors.¹³⁰ BACs required debtors to agree to IMF adjustment programs as part of rescheduling agreements, and throughout the 1980s the IMF did not lend into arrears—that is, the Fund refused to extend loans to sovereign debtors until they reached an agreement in principle with private creditors.¹³¹ Although banks too had to agree to the negotiated terms for IMF participation, this Fund policy placed considerable pressure on debtors and arguably granted additional leverage to banks, leading to charges that the IMF was serving as a “debt collector” for private banks.¹³² As the decade drew to a close, public actors including the IMF and

127. See, e.g., WOODS, *supra* note 79, at 48–51 (describing the debt situation during the 1980s, particularly for Latin American countries, as leading to “severe contraction,” “ever deeper . . . recession and indebtedness,” and “not improving”).

128. For example, the Philippine deal to which Corazon Aquino’s administration reluctantly agreed in 1987 bowed to the banks’ insistence that the new (post-Marcos) regime acknowledge not only government debt but also Marcos-era private debt as a condition for future lending. LIENAU, *supra* note 2, at 188. For a discussion of the Philippine case generally, see *id.* at 184–90.

129. Again, the Philippine case offers a telling example. During its negotiations, government officials objected to a loan made by Credit Suisse First Boston (“CSFB”) on the basis of the bank’s “unclean hands” in the loan’s origin. However, the bank advisory committee’s insistence that all debt simply be negotiated in bulk dissolved these principled distinctions. *Id.* at 188.

130. In some quarters, this perception of a pro-creditor bias in IMF policy has continued well past the 1980s. See, e.g., Lucio Simpson, *The Role of the IMF in Debt Restructurings: Lending into Arrears, Moral Hazard and Sustainability Concerns*, G-24 Discussion Paper No. 40, U.N. Doc. UNCTAD/GDS/MDPB/G24/2006/2, at 9 (2006), http://unctad.org/en/docs/gdsmdpbg2420062_en.pdf (suggesting that the later lending into arrears policy itself had a “pro-creditor bias”).

131. This policy has since been revised several times, with the initial revision in 1989. For the IMF consideration of the arrears policy in light of the 1980s and 1990s debt crises, see IMF, *IMF Policy on Lending into Arrears to Private Creditors* (1999), <https://www.imf.org/external/pubs/ft/privcred/lending.pdf>.

132. See, e.g., CHRIS C. CARVOUNIS & BRINDA Z. CARVOUNIS, UNITED STATES TRADE AND INVESTMENT IN LATIN AMERICA: OPPORTUNITIES FOR BUSINESS IN THE 1990s 62 (1992). Barry Eichengreen explains this dynamic as follows: “the banks realized that they could use [the IMF lending policy] as a club in their battle with governments. If countries refused to settle on favorable terms, the banks could veto new IMF money in addition to denying their own.” Barry Eichengreen, *Bailing in the Private Sector*, in *THE ASIAN FINANCIAL CRISIS: ORIGINS, IMPLICATIONS, AND SOLUTIONS* 401, 411 (William C. Hunter et al. eds., 1999). Similar charges still occasionally emerge in more recent discourse. See Simpson, *supra* note 130, at 9. Of course, the IMF also helped to exert pressure on resistant commercial banks by agreeing to lend only if all implicated commercial banks agreed to reschedulings and to committing new funds for bridge loans. Bruno, *supra* note 90, at 185.

the U.S. Treasury eventually assumed a greater role in bringing the debt crisis to an end, in part due to frustration with the recalcitrance of some banks.¹³³ Most important, U.S. Treasury Secretary Nicholas Brady announced a plan to securitize the sovereign debt, converting bank loans into freely tradable bonds, commonly called Brady bonds.¹³⁴ This allowed commercial banks to exit the debt market, after accepting a write-off on the original face value of the debt, and launched a new period of disintermediated sovereign lending, during which sovereign states borrowed directly from investors without the intermediary of commercial banks. Thus, although the approach of the 1980s forestalled a Western banking crisis, it is called the “lost decade” for Latin American development, and the memory of both the restructuring processes and their outcomes continues to shape policy dialogue and perceptions of legitimacy—or rather illegitimacy—in the sovereign debt arena.¹³⁵

2. 1990s Bail-outs and the Return of Bonds

The Brady bond plan that ultimately helped to resolve the 1980s debt crisis was widely hailed as a success, and private investors enthusiastically returned to sovereign debt markets in its aftermath.¹³⁶ Perhaps naively, many assumed that the bonds themselves—unlike previous bank loans—were “inviolable.”¹³⁷ Payment on these bonds was in fact ensured through much of the 1990s, though not necessarily by the debt sustainability of the sovereign borrowers themselves. When Mexico’s financial turmoil in 1994 raised the specter of default, which some feared could have systemic effects paralleling the 1980s debt crisis, the U.S. Treasury and the IMF stepped in with up to \$50 billion of financing. This swift and significant attention by major public actors, including the direct lending of public funds, allowed Mexico to continue payment on its bond debt, constituting a significant shift from 1980s practices.¹³⁸

This public sector involvement in Mexico created a template for similar actions in Thailand, Indonesia, and South Korea following the Asian financial crisis and financial problems in Brazil and Russia.¹³⁹ In each of these

133. Some major banks did eventually announce losses on sovereign debt, with Citibank leading the way in 1987. See Bruno, *supra* note 90, at 186.

134. See, e.g., WOODS, *supra* note 79, at 52.

135. See, e.g., José Antonio Ocampo, *The Latin American Debt Crisis in Historical Perspective*, INITIATIVE FOR POLY DIALOGUE NETWORK PAPER 1 (Mar. 25, 2013), http://policydialogue.org/files/publications/The_Latin_American_Debt_Crisis_in_Historical_Perspective_Jos_Antonio_Ocampo.pdf.

136. See, e.g., the assessments noted in JOYCE, *supra* note 122, at 66–67; JAMES M. BOUGHTON, *TEARING DOWN WALLS: THE INTERNATIONAL MONETARY FUND 1990–1999*, 411–12 (2012).

137. Lee C. Buchheit, *A Quarter Century of Sovereign Debt Management: An Overview*, 35 *Geo. J. Int'l L.* 637 (2004).

138. For an overview and policy discussion of the so-called “Tequila Crisis,” see Frederic S. Mishkin, *Lessons from the Tequila Crisis*, 23 *J. BANKING & FIN.* 1521–33 (1999); BOUGHTON, *supra* note 136, at 455–96.

139. See, e.g., BLUSTEIN, *supra* note 116; BOUGHTON, *supra* note 136, at 497–572.

cases, with the exception of Russia, official sector bailouts of sovereign debtors allowed them to remain current on their debt to private creditors and so maintain their engagement with international capital markets.¹⁴⁰ As such, the 1990s bailouts benefited the bondholders at least as much as they did sovereign borrowers.¹⁴¹ Furthermore, as a condition of IMF involvement, sovereign debtors accepting these rescue packages undertook a series of policy reforms, generally involving significant deregulation and privatization of key economic sectors and the curtailing of public expenditures (including on subsidies and social welfare programs)—the so-called Washington Consensus.¹⁴² Such programs tended to be unpopular within these countries, where some felt that the IMF, the target of much ire, had placed the entire burden of financial crisis adjustment on debtor state populations while expecting that private creditors would be paid in full.¹⁴³ Such feelings were aggravated by the expectation, in some cases, that sovereign states also take responsibility for the debt of private domestic banks that owed significant amounts to international investors.¹⁴⁴

3. *2000s Bond Restructurings and the Rise of the Holdout Problem*

Though official sector bailouts have of course continued to play a central role in debt crises, the era of near-continuous bailouts to ensure uninterrupted service of privately held debt ended in 2000 with the restructuring of Ecuador's Brady bonds.¹⁴⁵ Restructurings covering sovereign bonds issued by Pakistan, Ukraine, Uruguay, and others followed shortly thereafter, with each adding to the available techniques for bond restructurings. When the proposal for a sovereign debt restructuring mechanism put forth by Ann Krueger and the IMF staff in 2001–2002 failed to make headway,¹⁴⁶ practitioners and policymakers dealing with sovereign debt intensified their efforts to promote the use of Collective Action Clauses ("CACs"), which allow

140. For a journalistic account of the Russian default, see BLUSTEIN, *supra* note 116, at 235–77.

141. This dynamic led to concerns of moral hazard, as creditors were effectively guaranteed returns through significant public sector involvement. See, e.g., Olivier Jeanne & Jeromin Zettelmeyer, *International Bailouts, Moral Hazard, and Conditionality*, 16 *ECON. POL'Y* 408–32 (2001).

142. This term was originally coined by John Williamson at the end of the 1980s. See John Williamson, *What Washington Means by Policy Reform*, in *LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED?* 7 (John Williamson ed., 1990). However, the term itself has developed its own meaning and political valence. For a postmortem on the Washington Consensus, see the discussions in *THE WASHINGTON CONSENSUS RECONSIDERED: TOWARDS A NEW GLOBAL GOVERNANCE* (Narcis Serra & Joseph E. Stiglitz eds., 2008).

143. For example, by Christmas week of 1997 the IMF had disbursed \$9 billion to South Korea, but virtually all of these funds were immediately used to pay foreign banks. BLUSTEIN, *supra* note 116, at 8.

144. Indeed, private indebtedness proved to be a significant factor in the Korean, Thai, and Indonesian cases. See, e.g., BLUSTEIN, *supra* note 116, at 128.

145. Lee C. Buchheit, *How Ecuador Escaped the Brady Bond Trap*, 19 *INT'L FIN. L. REV.* 17 (2000). Although this restructuring was considered to be a significant success, these bonds were implicated in the subsequent 2008 default. For more on the 2008 Ecuador default, see the discussion in LIENAU, *supra* note 2, at 215–22.

146. Anne Krueger, First Deputy Managing Dir., IMF, Speech Before the Bretton Woods Committee Annual Meeting: Sovereign Debt Restructuring and Dispute Resolution (June 6, 2002).

a debt restructuring to bind all holders of the bond so long as it receives a threshold level of support.¹⁴⁷ These became more common in bonds issued by major emerging market economies in the United States, and have also been required in bonds issued by Eurozone countries since January 2013.¹⁴⁸ Official sector support has remained central in certain cases, with IMF bailouts organized in Argentina, Brazil, Seychelles, Iceland, Hungary, and Ukraine since 2000.¹⁴⁹ Such official sector involvement has played a major role in the European sovereign debt crisis, featuring in the Greek restructuring and in the IMF-EU loan agreements with Ireland, Portugal, and Cyprus.¹⁵⁰ Again, however, this reliance on official sector liquidity support has been criticized for, among other things, incentivizing short-term lending, risking public funds, and delaying needed reforms.¹⁵¹

Parallel to these developments, and suggesting the insufficiency of purely contractual debt resolution mechanisms, has been the full emergence of the holdout creditor problem in bond restructurings. This is particularly associated with the investment strategies of distressed debt or vulture funds, which purchase sovereign debt on the secondary market at deep discounts—sometimes targeting countries that have been identified by public actors as particularly vulnerable and in need of debt relief—and then sue for the full face value.¹⁵² In the 1999 case of *Elliott Associates v. Banco de la Nacion*, Elliot obtained a judgment that entitled it to full principal payment plus interest, along with an attachment order against Peru's U.S.-based property used for commercial activities.¹⁵³ Peru ultimately chose to settle rather than risk any interference with its Brady bond payments.¹⁵⁴ The more recent case involv-

147. See, e.g., RIEFFEL, *supra* note 90, at 266.

148. Inclusion of the Euro-area Model CAC was required by the European Stability Mechanism Treaty, art. 12, para. 3. For a closer analysis, see Michael Bradley & Mitu Gulati, *Collective Action Clauses for the Eurozone*, 18 REV. FIN. 2045–102 (2014).

149. See generally IMF, *The Fund's Lending Framework and Sovereign Debt—Preliminary Considerations*, Staff Report (June 2014) [hereinafter IMF, *Preliminary Considerations*], <http://www.imf.org/external/np/pp/eng/2014/052214.pdf>.

150. See *id.* The Irish rescue package, like those of the 1990s, involved the use of official sector funds to cover what had originally been private bank debt (especially that of Anglo-Irish). This package generated internal criticism from some parliamentarians and civil society groups akin to that aimed at restructurings in the 1990s. See LIENAU, *supra* note 2, at 223–24.

151. See, e.g., Martin Brooke et al., *Sovereign Default and State-Contingent Debt* (Bank of Can., Discussion Paper 2013-3, 2013). The desire to reduce reliance on official sector bailouts features importantly in the recent IMF review, *Preliminary Considerations*, *supra* note 149. The paper falls short of calling for a comprehensive debt restructuring mechanism, however, recommending instead debt reprofiling, or an extension of maturities, under certain circumstances.

152. Vulture fund litigation provides part of the impetus for the renewed attention to a possible global debt restructuring mechanism, and is a significant source of concern for multilateral banks and other international financial organizations, particularly those affiliated with the Global South. See, e.g., *Vulture Funds in the Sovereign Debt Context*, AFRICAN DEVELOPMENT BANK GROUP, <http://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-legal-support-facility/vulture-funds-in-the-sovereign-debt-context> (last visited Nov. 14, 2015).

153. See *Elliott Assoc. v. Banco de la Nacion*, 194 F.3d 363 (2d Cir. 1999).

154. See, e.g., *Peru Settles Four-Year Legal Dispute with Hedge Fund on Brady Payments*, WALL ST. J. (Oct. 2, 2000), <http://www.wsj.com/articles/SB970434692640754040>.

ing Argentina and NML Capital (also owned by Elliot Management) may prove more intractable. A Second Circuit decision, denied certiorari by the U.S. Supreme Court, entitles Elliott to full payment plus interest and actually prevents Argentina's trustee (BNY Mellon) from making disbursements to restructured bondholders unless payment is also made to Elliott.¹⁵⁵ As of this writing, no final settlement has been reached, and the ultimate resolution of the situation remains unclear.¹⁵⁶

To deal with the holdout problem, individual states may choose to block these investors' access to courts in their jurisdiction or to cap the amount they can recover, as did the United Kingdom in 2010 and Belgium in 2015.¹⁵⁷ However, as it stands, the NML decision threatens to undermine the current informal system of debt restructuring by rewarding holdouts and disincentivizing investors from agreeing to restructurings. Although CACs can be helpful in promoting orderly restructuring, they do not apply retroactively to previously issued bonds. In addition, even those outstanding bonds with CACs tend to rely on supermajorities within individual bond series, so holdout problems may remain in certain circumstances.¹⁵⁸

The constellation of actors, institutions, and processes that has developed since the 1980s debt crisis has constructed a patchwork sovereign debt restructuring mechanism to some degree.¹⁵⁹ However, to the extent that such a system exists, it is incomplete and suboptimal. Each sub-element of the mechanism as well as the system as a whole has problems with regard to perceptions of legitimacy. The fragmented nature of the sovereign debt arena means that each group of creditors is heavily focused on coming to an

155. See *NML Capital v. Republic of Argentina*, 727 F.3d 230 (2d Cir. 2013).

156. At the expiration of a 30-day payment grace period on July 30, 2014, BNY Mellon remained unable to disburse the funds sent by Argentina to pay creditors who had agreed to restructure debt, due to the Second Circuit ruling, and Argentina was declared in default by the major credit rating agencies. See, e.g., Camila Russo & Katia Porzecanski, *Argentina Declared in Default by S&P as Talks Fail*, BLOOMBERG BUS. (July 30, 2014), <http://www.bloomberg.com/news/articles/2014-07-30/argentina-defaults-according-to-s-p-as-debt-meetings-continue>. For one among many comments following the U.S. Supreme Court's denial of certiorari, see *Argentina's 'Vulture Fund' Crisis Threatens Profound Consequences for International Financial System*, UNCTAD (June 24, 2014), http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=783&Sitemap_x0020_Taxonomy=UNCTAD. NML Capital subsequently attempted to claim assets of Argentina's Central Bank under an alter ego theory, but this effort was rejected by the Second Circuit in *EM Ltd. v. Banco Central de la República Argentina*, Nos. 13-3819-cv (L), 13-3821-cv (CON), 2015 WL 5090694 (2d Cir. 2015).

157. See, for example, the discussion in LIENAU, *supra* note 2, at 201 (discussing the U.K. law); *Belgium Adopts Law Against 'Vulture Funds'*, EURACTIV (July 2, 2015), <http://www.euractiv.com/sections/euro-finance/belgium-adopts-law-against-vulture-funds-315934>.

158. This remains a problem in the mandated Euro-CACs as well, although CACs generally have proven helpful in some circumstances. See generally Bradley & Gulati, *supra* note 148.

159. Von Bogdandy and Goldmann suggest as much, *supra* note 23, at 52–53. They also highlight that the ICSID tribunal in *Abaclat v. Argentina* recognized the existence of an informal restructuring mechanism made up of the institutions and processes discussed here. *Abaclat v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Nov. 14, 2011) ¶ 40; see also Gelpert, *supra* note 3, at 358 (noting the existence of a “sovereign debt restructuring process [that] is routinized and well known to countries and institutions that participate”). Gelpert also provides a pictorial representation of this system (or, rather, “non-system”). *Id.* at 357.

agreement that meets its own institutional goals and constraints; there is little need to compromise, think more comprehensively across creditors, or provide a venue for broader representation. Once the disparate pieces of a sovereign borrower's debt puzzle are put back together, the final outcome may prove insufficient to return the debtor to sustainability and to deal fairly with all creditors and stakeholders. In addition, the principles and procedures governing a particular sovereign state's debt can vary, and they may also vary across different debtor states. This variation undermines the predictability and stability of the sovereign debt market, in addition to being problematically inconsistent in the eyes of many debtors. The IFIs, particularly the IMF, offer a more global view, given their explicit concern with the long-run economic sustainability of debtor countries and the financial system as a whole. However, the multiple roles played by the IMF, including that of a lender in its own right, tend to undermine perceptions of its own impartiality in debt workouts.

III. HINTS FROM CONTEMPORARY PRACTICE

If the current, informal sovereign debt restructuring system is problematic when compared against ideas of legitimacy, what can we learn from cognate institutions or practices? This Part looks at several features of two regimes that are connected to sovereign debt restructuring to help fill out the ways in which a possible DWM might incorporate design elements associated with legitimacy claims. The first section will focus on domestic insolvency and debt restructuring institutions, primarily as interpreted through the United Nations Commission on International Trade Law ("UNCITRAL") Legislative Guide on Insolvency. The second section will consider rules associated with two institutional players involved with investor-state arbitration.

A. Seeking Legitimacy in Domestic Insolvency Regimes

Given certain parallels with the sovereign debt situation, it is useful to consider the degree to which features associated with legitimacy claims play a central role in domestic insolvency proceedings. The last decades have seen an explosion of interest in insolvency, in particular for business organizations, with significant attention paid at the international level to encouraging and harmonizing the rules and mechanisms governing insolvency. Perhaps the most comprehensive and successful effort to formulate both shared principles for insolvency and possible models for their implementation has been that undertaken by UNCITRAL in its development of the UNCITRAL Legislative Guide on Insolvency, initially published in 2005.¹⁶⁰

160. U.N. COMM'N ON INT'L TRADE LAW, LEGISLATIVE GUIDE ON INSOLVENCY LAW (2004) [hereinafter UNCITRAL Guide]. Additional sections were added in 2011 and 2013. The foundational text of

The UNCITRAL Guide was developed on the basis of representation and through the auspices of a working group attuned to source legitimacy concerns.¹⁶¹ This representation involved official state delegations, observer state delegations, IFIs, international governance organizations, and professional associations. Expert-based source legitimacy also derived from the involvement of these professional associations, along with the use of experts from practice, academia, policy, and other arenas in more ad hoc drafting sessions.¹⁶² General state consent to the process and to the product was offered through General Assembly Resolution 59/40,¹⁶³ though of course the actual enactment and implementation of insolvency laws work through the national level.

Domestic insolvency proceedings tend to place considerable emphasis on process legitimacy and procedural fairness, including impartiality, which may be understood as a norm applicable to insolvency more generally and thus translatable to the global level as well. One of the key objectives of insolvency procedures, as laid out in the UNCITRAL Guide, is to provide for a “timely, efficient and impartial resolution of insolvency.”¹⁶⁴ The Guide further emphasizes the centrality of transparency, noting that enacted laws should “[e]nsure a transparent and predictable insolvency law that contains incentives for gathering and dispensing information.”¹⁶⁵ In every jurisdiction, debtors can voluntarily commence insolvency proceedings, which helps to encourage ownership of the process. To balance this debtor control, however, some jurisdictions require an eligibility determination before the insolvency mechanism is technically triggered and standstill provisions, or stays on collection and litigation, are put in place.¹⁶⁶ Broadening the range of participation, domestic insolvency proceedings ideally seek to provide fair

the UNCITRAL Legislative Guide is available at http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf. For a fascinating overview of its development, as well as the ways that global-local tensions can result in implementation gaps, see TERENCE C. HALLIDAY & BRUCE G. CARRUTHERS, *BANKRUPT: GLOBAL LAWMAKING AND SYSTEMIC FINANCIAL CRISIS* (2009). Comparative insolvency laws are of considerable interest to practitioners as well, with a number of comparative guides published, particularly for corporate insolvency. See, e.g., GLOBAL LEGAL GROUP, *THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO CORPORATE RECOVERY & INSOLVENCY* 2015 (9th ed.) (presenting 35 country-specific insolvency overviews contributed by top insolvency firms).

161. This attentiveness to legitimacy was deepened because of UNCITRAL’s recognition that it had been brought into the process in part as a result of the legitimacy problems of other institutions, in particular the IMF and the World Bank (due to suspicion of their activities among some developing countries and their association with Washington, D.C.), INSOL and the IBA (primarily insolvency and legal practitioners, respectively, with possible professional biases and associated pecuniary interests), and the regional development banks. HALLIDAY & CARRUTHERS, *supra* note 160, at 127–29.

162. *Id.*

163. G.A. Res. 59/40, U.N. Doc. A/RES/59/40 (Dec. 2, 2004).

164. UNCITRAL Guide, *supra* note 160, at 14 (recommendation 1(e)). These goals fall in line with the emphasis on process in legal traditions of international public authority and global administrative law, mentioned above.

165. *Id.* at 14 (recommendation 1(g)).

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

process and a right to be heard for creditors whose claims will be determined and possibly curtailed. Given the large number of creditors involved in some proceedings, many national jurisdictions contemplate the use of creditor committees as a mode of participation.¹⁶⁷ However, the Guide notes that steps should be taken to ensure that such committees are truly representative and impartial as to the interests of its members, for example by disallowing the appointment of unduly partial creditors to a committee.¹⁶⁸

In addition, comprehensiveness is central to perceptions of legitimacy in domestic insolvency systems. A distinctive feature of insolvency law is its recognition of a debtor's inability to pay creditors as a group—as opposed to just one particular creditor—and therefore its commitment to dealing with this unsustainable debt on a collective basis. This collective element means that to an important degree creditors may be in tension with one another rather than only with the debtor.¹⁶⁹ But creditors as a whole should gain from cooperation, as compared to the situation in which each seeks payment for itself but risks the prospect of complete nonpayment in the event of coming late to the game. As such, to the extent that creditors intend to make any claim on the debtor's assets, their participation in the process is required. This fact ensures a high degree of involvement, and is accompanied by procedures that allow for the full participation of interested creditors or creditor groups, at least through representation. In the words of Rosalind Mason, “insolvency law features the notion of collective impartiality . . . [because] there is a moratorium on creditor action and proceedings and a consolidation of the conduct of litigation. Individual claims are addressed through the collective administration, which balances the disparate interests of the various parties.”¹⁷⁰

As part of these process legitimacy features, explicit attentiveness to impartiality tends to be incorporated into domestic insolvency proceedings. In terms of institutional impartiality, there is considerable variation among states in the settings for insolvency proceedings. For example, certain civil law countries (such as France) mandate significant court involvement for any major decision.¹⁷¹ At the other end of the spectrum, Australia advocates that

167. Of course, there are differences in the form and primary goals of these committees. See, e.g., Susan Block-Lieb, Juraj Alexander & Evgeny Kovalenko, *Representing the Interests of Unsecured Creditors: A Comparative Look at UNCITRAL's Legislative Guide on Insolvency Law*, in *INTERNATIONAL INSOLVENCY LAW: REFORMS AND CHALLENGES* 323 (Paul Omar ed., 2008).

168. See UNCITRAL Guide, *supra* note 160, at 204 (recommendation 131).

169. For one early overview, see Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 780–89 (1987).

170. Rosalind Mason, *Cross-Border Insolvency Law: Where Private International Law and Insolvency Law Meet*, in *INTERNATIONAL INSOLVENCY LAW* 27, 32 (Paul Omar ed., 2008).

171. See, e.g., HALLIDAY & CARRUTHERS, *supra* note 160, at 147 (noting the French requirement of court approval for all major decisions); William W. McBryde & Axel Flessner, *Principles of European Insolvency Law and General Commentary*, in *PRINCIPLES OF EUROPEAN INSOLVENCY LAW* 15, 29 (W.W. McBryde et al. eds., 2003) (noting the comparatively greater day-to-day court management in France). See generally Marie-Danielle Schödermeier & Françoise Pérochon, *National Report for France*, in *PRINCIPLES OF EUROPEAN INSOLVENCY LAW* 257–58 (W.W. McBryde et al. eds., 2003).

debtors dealing with insolvency avoid court oversight to the extent possible.¹⁷² The UNCITRAL Guide remains neutral, not requiring court involvement in every instance. However, it does specify that competent and independent courts should be available, at least as a backstop measure. Even greater focus is placed on actor impartiality, particularly as the Guide contemplates (but does not mandate) the appointment of an “insolvency representative” such as a trustee, administrator, or judicial manager to oversee the proceedings.¹⁷³ Any such individual must not only be knowledgeable but also have the attributes of “integrity, impartiality, and independence.”¹⁷⁴ The Guide recommends that any insolvency law “require the disclosure of a conflict of interest, a lack of independence or circumstances that may lead to a conflict of interest or lack of independence” and also that this obligation “continue throughout the insolvency proceedings.”¹⁷⁵

In terms of outcome, the UNCITRAL Guide, as well as most national insolvency procedures, sets a baseline of acceptable creditor recovery. The first key objective of the Guide, namely achieving a balance between liquidation and reorganization, includes the provision that in any restructuring “creditors would not involuntarily receive less than in liquidation.”¹⁷⁶ Given the nonapplicability of financially liquidating a sovereign state, this is difficult to translate into a DWM context. However, it relates to the general requirement that creditors be treated in good faith, and that they not be required to accept a lower payout than is necessary for the debtor’s recovery. On the debtor side, as a general matter, restructuring plans should not be agreed to or confirmed (to the extent that court confirmation is required) unless they are likely to actually rehabilitate the debtor in question.¹⁷⁷ Thus a restructuring plan considered to be “too little” for the debtor problems at issue would not be considered outcome-legitimate, and therefore likely should not be confirmed or agreed to under general insolvency principles.

172. See, e.g., HALLIDAY & CARRUTHERS, *supra* note 160, at 147. For general overviews of Australian insolvency law, see, for example, Rosalind Mason, *Insolvency Law in Australia*, in *INSOLVENCY LAW IN EAST ASIA* 463–507 (Roman Tomasic ed., 2006); JOHN DUNS, *INSOLVENCY LAW AND POLICY* (2002). In certain English or Scottish proceedings as well “the court may even serve merely as a standby authority—by giving advice or a decision only when requested in difficult matters.” McBryde & Flessner, *supra* note 171, at 29.

173. UNCITRAL Guide, *supra* note 160, at 188 (recommendation 115). The Guide discusses the insolvency representative in considerable detail. *Id.* at 174–86.

174. *Id.*

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

176. *Id.* at 14–15 (quoted in HALLIDAY & CARRUTHERS, *supra* note 160, at 141).

177. In the U.S. Chapter 11 context, for example, a court may not confirm a reorganization plan unless it meets the requirement of feasibility, in that it is not likely to result in an eventual liquidation. See 11 U.S.C. § 1129 (2012).

Many states have ratified the major human rights conventions, which could be considered an additional element of outcome legitimacy (as well as binding international law). Indeed, the UNCITRAL Guide notes that in determining whether a natural person debtor's assets should be excluded from creditor recovery, "consideration might need to be given to applicable human rights obligations, including international treaty obligations, which are intended to protect the debtor and relevant family members and may affect the exclusions that should be made."¹⁷⁸ This would allow for "the minimum necessary to preserve the personal rights of the debtor and allow the debtor to lead a productive life."¹⁷⁹ The more general implication could be that such human rights should be protected regardless of how natural persons are situated in an insolvency—that is, regardless of whether individuals are debtors themselves or are simply among those impacted by a sovereign debtor's restructuring.¹⁸⁰

In short, domestic insolvency law, and particularly UNCITRAL's clarification of globally applicable and accepted insolvency law principles, emphasizes features associated with claims about legitimacy. In so doing, these sources demonstrate a number of practices by which any eventual sovereign DWM might seek to bolster its own legitimacy.

B. *Efforts in Investment Treaty Arbitration*

Investor treaty arbitration lends additional support for attending to characteristics associated with legitimacy. Such arbitration, which may be incorporated into hard law instruments such as bilateral investment treaties or concession contracts, directly involves sovereign states and investors. By its nature such arbitration is ad hoc and not built upon systems of precedent, and some observers raise serious concerns about inconsistency, bias, and other problems. A recent study noted that "parallel tribunals can give rise to awards with inconsistent conclusions, and which may even be scandalously contradictory."¹⁸¹ Even more troubling—if contested—charges have been made that such arbitration may be systematically biased in favor of investor

178. UNCITRAL Guide, *supra* note 160, at 80.

179. *Id.* Additional references to human rights along these lines may be found in UNCITRAL Guide, Part IIA., ¶¶ 19, 29. Paragraph 19 notes that the rights of "a natural person debtor in insolvency proceedings may be affected by obligations under international and regional treaties such as the International Covenant on Civil and Political Rights and the European Convention on Human Rights." *Id.* at 166.

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

181. Bernardo M. Cremades, *Arbitration Under the ECT and Other Investment Protection Treaties: Parallel Arbitration Tribunals and Awards*, in 2 TRANSNAT'L DISP. MGMT. 1 (June 2005); see also, Stephen Jagusch & Jeffrey Sullivan, *A Comparison of ICSID and UNCITRAL Arbitration*, in THE BACKLASH AGAINST INVESTMENT ARBITRATION 80 (Michael Waibel et al. eds., 2010). For a cautionary note on overemphasizing consistency without sufficient attention to context, see Robert Howse & Efraim Chalamish, *The*

claimants.¹⁸² Nonetheless, certain procedural rules in these arbitrations offer insight into how characteristics designed to enhance legitimacy are broadly incorporated and acknowledged to be desirable, even in this arena and even when not fully successful. Two sets of rules commonly used, and thus referred to in this section, are the International Centre for Settlement of Investment Disputes (“ICSID”) Rules and the UNCITRAL Rules.¹⁸³

To begin with, it is important to highlight that one of the central purported benefits of arbitration is that parties enjoy a greater degree of control over the proceedings than in a conventional judicial dispute resolution setting. As such, by design, there is a lower degree of institutional independence in both the ICSID and UNCITRAL Rules than in standard domestic court settings. For example, the parties pay the arbitrators directly and have significant control over the arbitral location.¹⁸⁴ Still, some attention is paid to supporting process legitimacy through a degree of attentiveness to actor impartiality, particularly in the selection of arbitrators. ICSID rule 6(2) requires that all arbitrators sign a declaration of independence in advance of the first session that lists any factors that might compromise their impartiality.¹⁸⁵ In addition, article 39 of the ICSID Convention specifies that the majority of arbitrators be citizens of states other than the claimant-investor’s home state and the respondent state.¹⁸⁶ Similarly, in the event that the parties are unable to arrange a panel independently, arbitrators appointed by

Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz, 20 EUR. J. INT’L L. 1087, 1089–90 (2009).

182. Gus Van Harten, for example, suggests that “the system is flawed, above all because it submits the sovereign authority and budgets of states to formal control by adjudicators who may be suspected—because they are untenured and because only one class of parties can bring claims—of interpreting investment treaties broadly in order to expand the system’s appeal to potential claimants and, in turn, their own prospects for future appointment.” GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW VII* (2007). Van Harten acknowledges that certain arbitrators may develop reputations for fairness and balance, but suggests that there is nonetheless “an unreliable bias.” *Id.*; see also Pia Eberhardt & Cecilia Olivet, *Profiting from Injustice: How Law Firms, Arbitrators, and Financiers Are Fueling an Investment Arbitration Boom*, CORP. EUR. OBSERVATORY AND THE TRANSNATIONAL INST. (Nov. 2012). UNCTAD has also highlighted concerns with the current investor-state dispute settlement regime and laid out advantages and disadvantages to five potential paths to reform. See UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, 2 IIA ISSUES NOTE (June 2013), http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf. For a response to critics and a defense of the basic contours of the current system, see Charles N. Brower & Sadie Blanchard, *From “Dealing in Virtue” to “Profiting from Injustice”: The Case Against “Re-Stratification” of Investment Dispute Resolution*, 55 HARV. INT’L L.J. ONLINE (Jan. 2014).

183. INT’L CENT. FOR THE SETTLEMENT OF INV. DISPUTES, ICSID CONVENTION, REGULATION, AND RULES (2006) [hereinafter ICSID Convention], https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf; U.N. COMM’N ON INT’L TRADE LAW, UNCITRAL ARBITRATION RULES (2010) [hereinafter UNCITRAL Rules], <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>.

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

185. See ICSID Convention, *supra* note 183, Rule 6(2). Note that ICSID maintains a pre-screened Panel of Arbitrators considered to have sufficient expertise and professionalism to be appropriate. However, parties may select arbitrators that are not on this list, adding additional safeguards.

186. ICSID Convention, *supra* note 183, art. 39.

the Chairman of ICSID's Administrative Council must not be nationals of either the state party or the home state of the claimant-investor.¹⁸⁷ Finally, the default procedures for ICSID stipulate a three-person tribunal, with each party appointing one arbitrator and then agreeing on a third, who serves as the panel's president.¹⁸⁸

The basic orientation is very similar under the UNCITRAL Rules. Both prospective and appointed arbitrators have an ongoing duty to disclose circumstances that may raise doubts as to their impartiality or independence.¹⁸⁹ Although the UNCITRAL Rules do not specify nationality requirements for arbitrators, they do mandate that the appointing authority consider "the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties."¹⁹⁰ The UNCITRAL Rules also presume (but do not require) that three individuals will be appointed to the arbitration panel. Each party appoints one arbitrator, and then the two initial appointees consult and jointly select a third.¹⁹¹

Commentators have charged that even these procedures, in both sets of rules, fall short and that problems are more endemic.¹⁹² Critics note that, in any case, the parties have not followed the processes sufficiently to rid investor state dispute settlement of bias or the perception of bias.¹⁹³ However, it is clear that these institutional features, designed to promote impartiality, are central to efforts to enhance the legitimacy of investor-state arbitrations, such as it is, and continue to be the focus of discussion and improvement. They therefore provide a guideline—or perhaps a baseline—for thinking through elements that might support perceptions of the legitimacy of an eventual DWM.

Although actor impartiality is perhaps the core legitimating element in this arena, other features mentioned in Part I of this Article are present as well. As suggested in the discussion of impartiality above, the party ownership and control element of legitimacy is especially important in investor-state arbitration. Given the limited number of parties generally involved, their equal participation is less of a problem than it might be in other,

187. *See id.* art. 38.

188. *See id.* art. 37(2)(b), rule 3.

189. The 2010 changes to the rules clarified that this duty is ongoing and continues until issuance of the final award. *See* UNCITRAL Rules, *supra* note 183, art. 11. An annex to the revised UNCITRAL Rules even provides model "Statements of Independence" that can be used by arbitrators. *See* UNCITRAL Rules, *supra* note 183, at 29.

190. *See id.* art. 6(4).

191. Parties may also agree on a sole arbitrator, or on the appointing authority for a sole arbitrator, with the Secretary General of the Permanent Court of Arbitration serving as the default in the event that the parties fail to reach agreement. *See id.* art. 6.

192. *See, e.g.,* VAN HARTEN, *supra* note 182; Eberhardt & Olivet, *supra* note 182.

193. In *Vivendi II*, a particularly contentious ICSID arbitration, an ad hoc committee reviewing a tribunal's decision criticized one of the arbitrators for failing to disclose her board position at a bank holding shares in the claimant investor, but ultimately upheld the award. *See* *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Vivendi II)* ICSID Case No. ARB/97/3 (Annulment Proceeding) (Aug. 10, 2010).

larger settings. Notably, a series of amendments to the ICSID Rules in 2006 aimed to improve the transparency and participatory element of proceedings even for non-parties. In particular, rule 37 makes possible submissions by “non-disputing parties” through amici curiae, rule 32 covers the possibility of making hearings open to the public, and rule 48 governs the publication of awards.¹⁹⁴

In regard to efficiency, the ICSID Rules specify that a tribunal should be constituted “as soon as possible” and “with all possible dispatch” after an arbitration is requested, with a series of time frames for arbitrator appointments.¹⁹⁵ The UNCITRAL Rules similarly denote a time window for constituting the tribunal and appointing arbitrators, specifying that the appointing authority is required to make the selections “as promptly as possible.”¹⁹⁶ However, under both processes there exists the possibility of manipulation and delay by the parties, particularly through the process of appointing (and objecting to) arbitrators. As such, the process ownership and consent elements of investment treaty arbitration may undermine efficiency.¹⁹⁷

As with domestic insolvency, the rules governing investor treaty arbitration do value several mechanisms associated with process legitimacy. Although this incorporation is neither complete nor, arguably, entirely successful, it does indicate the degree to which these design elements are held in high regard and broadly utilized. It also offers more specific ideas for incorporating features associated with legitimacy claims into a potential future sovereign debt restructuring mechanism.

IV. RECOMMENDATIONS AND REALISM

How might all of this fit into improving current practices in sovereign debt, particularly with a view to establishing a more coherent global debt workout system that is considered legitimate by a broader range of actors? The foregoing discussion makes clear that the idea of legitimacy itself, though central to social cooperation and to successful exercises of authority,

194. Jason Yackee and Jarrod Wong review these amendments in detail, and generally consider them to be “modest, incremental, and conservative.” Jason W. Yackee and Jarrod Wong, *The 2006 Procedural and Transparency-related Amendments to the ICSID Arbitration Rules: Model Intentions, Moderate Proposals, and Modest Returns*, 2009-2010 Y.B. INT'L INV. L. & POL'Y 234 (2010). Still, third parties have become more aggressive in the submission of amicus curiae briefs. Very recently, for example, an ICSID tribunal granted leave to the World Health Organization to submit a brief in the pending case between Uruguay and affiliates of the Philip Morris tobacco company, citing “the public interest in the subject matter.” See Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Procedural Order No. 3, ¶ 32 (Feb. 17, 2015).

195. See ICSID Convention, *supra* note 183, arts. 37(1), 38, rules 1, 2.

196. UNCITRAL, *supra* note 183, art. 6(3).

197. For a brief description of delay tactics from a practitioner perspective, see Jagusch & Sullivan, *supra* note 181, at 84–85. Note that this comment refers to a previous version of the UNCITRAL Rules, but the themes remain pertinent.

means different things to different people. Given that legitimacy is a composite concept, which draws together multiple, specific subcharacteristics, it should also be apparent that no single institutional format can be perfectly “legitimate” for sovereign debt restructuring. This is particularly true given the significant financial and distributional ramifications at stake in debt restructuring outcomes, which result in the vocally divergent interests and opinions evident in the global arena.

As such, the goal here is not to deny that there will often be winners and losers in a debt restructuring. Rather, it is to limit the eventual losses by encouraging sovereign debtors to restructure (and recover) more quickly and more fully. A related aim is to make losing more politically palatable, in order to limit the potential second-order disruptions and distress mentioned in the introduction to this Article. With these more modest objectives in mind, the above discussion suggests that some key themes and design characteristics should remain in the foreground as policy actors establish and adjust any potential DWM. These elements would apply whether a future DWM is more or less centralized within a single global mechanism or institution. They also should be relevant regardless of whether a prospective restructuring process takes the form of a multilateral treaty, soft law mechanism, or even a shift in the norms governing the current ad hoc system. This final Part, then, first reviews core features that deserve special attention in any future DWM designed to address legitimacy concerns. The discussion draws in part on the insolvency and investor arbitration practices just highlighted and in part on criticisms of previous historical restructuring episodes. It then briefly assesses several contemporary DWM proposals in light of these themes and characteristics. Finally, it notes several political obstacles that must be contended with in any effort to change contemporary sovereign debt practices.

A. Preliminary Suggestions

1. Sensitivity in DWM Establishment

One of the longstanding criticisms of the post-war global order focuses on the details of its initial establishment by the victors of World War II.¹⁹⁸ This concern points to the importance of attending to both the substance and the optics of establishing a DWM—that is, staying sensitive to source legitimacy issues. Given the continuing centrality of state consent to legitimacy in international affairs, proponents of any new DWM proposal should aim to solicit feedback and support from as broad a range of state actors as

198. This criticism often forms the basis for more contemporary calls to reform global governance. See, e.g., Colin I. Bradford & Johannes F. Linn, *Reform of Global Governance: Priorities for Action*, BROOKINGS INSTITUTION (Oct. 2007), <http://www.brookings.edu/~media/research/files/papers/2007/10/global-gov-ernance/pb163.pdf> (noting that the basic structure of global institutions has remained unaltered for over 60 years).

possible. Of course, such efforts would not alter ongoing structural disagreement in sovereign debt issues or shift imbalances in power and participatory capacity among states.¹⁹⁹ As an additional complication, broad state participation also raises the possibility that certain features that might be considered legitimacy enhancing to some parties—such as attentiveness to human rights—could become a source of tension and disagreement unless managed carefully. Still, efforts to include all states would help to forestall complaints that the initial establishment was problematic in some way, even if other substantive disagreements arise. This focus on initial participation should ideally expand beyond the state arena, with the identification and involvement of creditor groups, IFIs, NGOs, special rapporteurs and other appointed representatives, and perhaps additional interested parties. It could also prove helpful to consult with those considered to be experts in international debt, while keeping in mind that some individuals with valuable expertise may also be affiliated with institutions that have a particular stake in the distributional outcomes implicated in sovereign debt issues.

2. *Developing Fair Processes*

Many of the specific subfeatures most associated with legitimacy involve the establishment of fair processes. Even if certain actors consider the outcomes of a particular institutional framework less than ideal, they may be more likely to accept these results if they believe them to have emerged from acceptable procedures.²⁰⁰ As detailed in Part II above, today's patchwork of institutions has been considered lacking in this regard—fragmented, short on participation and transparency, and often unable to offer comprehensive relief.²⁰¹

To improve upon the current framework in terms of process legitimacy, then, the procedures of any future DWM should ensure that affected parties have a chance to be heard before decisions are made.²⁰² Ideally these parties would also be involved in the actual decision-making process, for example, through appropriate majority or supermajority voting procedures on a sover-

199. The votes for and against the September 2014 U.N. General Assembly Resolution on debt restructuring only demonstrate too well these dividing lines, with most of those states traditionally associated with creditor interests voting against or abstaining. For an overview of the resolution and the politics, see Bhumika Muchhala, *Historic UN General Assembly Vote on a Multilateral Sovereign Debt Mechanism*, THIRD WORLD NETWORK (Sept. 19, 2014), <http://www.twn.my/title2/unsd/2014/unsd140903.htm>.

200. As noted in *supra* Part I, this voluntary acceptance element is central to the idea of legitimacy.

201. See discussion *supra* Part II; see also sources cited *supra* note 3.

202. Depending on the size and complexity of the restructuring, this participation might work through representative structures such as committees or class/stakeholder groups, as happens through the Bank Advisory Committees of the London Club. To the extent that committees are utilized, care should be taken to ensure that there is fair representation within the committee structure. An opportunity to be heard should be available for, among other issues, possible restructuring plans and the allowance/disallowance of debt claims.

eign debtor's restructuring proposals.²⁰³ Drawing from administrative law procedures, including the approach of global administrative law, this type of participation might be supported by notice and comment procedures and perhaps by claim processes akin to those used in domestic insolvency systems. Furthermore, perceptions of process legitimacy could be enhanced by allowing participation from civil society actors, including NGO observers, and by accepting *amici curiae* briefs.²⁰⁴ Of course, care should be taken to balance the goal of broad participation with a commitment to timeliness, particularly in any crisis management situation. In addition, given that one of the perceived problems with the current process is a lack of comprehensiveness, features designed to promote a complete resolution of claims (including those of holdout creditors) would likely strike many observers as an improvement. In particular, making participation mandatory for any creditor that aims to make an enforceable claim on the debtor's assets would promote participation significantly.²⁰⁵ Ideally, the final outcome would bind all participants, so long as threshold voting requirements are met; to the extent enforceable under the DWM framework, the process should bind even those who elect not to participate.

To make all of this activity more palatable, especially for those disappointed by a given restructuring outcome, any DWM framework should aim for institutional impartiality. Negotiators would ideally construct the DWM to avoid systematic bias in favor of one or another interested group, perhaps by minimizing its affiliation—whether financial, personnel, or geographic—with parties and institutions whose interests are affected by DWM processes. While full independence is likely not feasible, measures could nonetheless be taken to limit improper influence and also to minimize perceptions of bias. As part of this effort, to the extent that any DWM envisions a central role for third-party decision makers (whether mediators or adjudicators), care should be taken to support their independence. Whether they act individually or through multiperson panels, these actors should be independent of the negotiating parties and, as with both domestic insolvency and investor-state arbitration, disclose any relationships that could

203. As part of any voting on a proposal, it may be necessary to organize creditors and other stakeholders into groups. The procedures involved in sections 1125 and 1129 of Chapter 11 of the U.S. Bankruptcy Code, have been noted as a potential model by some scholars. See, e.g., A DEBT RESTRUCTURING MECHANISM FOR SOVEREIGNS, *supra* note 3, at 204.

204. There is some evidence that participation from a very broad array of actors, including nonelite actors, is possible at least under some circumstances. See LAW & GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005). While I do not suggest that this type of participation achieves anything close to the access enjoyed by more elite global actors, participation along these lines could nonetheless be sought out and encouraged.

205. As noted in the discussion of domestic insolvency above, this creditor participation underpins the notion of “collective impartiality” central to insolvency procedures. See, e.g., Mason, *supra* note 170, at 32.

lead to bias or the perception of bias.²⁰⁶ In making any decisions under the DWM framework, these third parties would ideally also provide their underlying reasons, preferably in writing, including the analytical and evidentiary foundations underpinning final outcomes.²⁰⁷ To promote informational impartiality, discussed above, the use of indicators, debt assessments, and social science models that predict restructuring outcomes should be governed by principles and procedures that acknowledge their distributional ramifications and that promote, to the extent possible, the perceived validity and objectivity of these inputs.²⁰⁸ Of course, significant disagreement may nonetheless emerge as to their accuracy and applicability, in which case competing expert testimony—a key feature of other decision-making forums—may improve perceptions of a comprehensive and defensible assessment.

Applying practices of transparency and publicity, both to procedural information about the restructuring and to substantive decisions, would aid efforts to monitor impartiality and broad participation. Given the transnational scope of most sovereign debt restructurings, one complication might be that information would need to be easily accessible at a global level, with due care paid to variations in the technological capacity of different audiences.²⁰⁹ Of course, as part of this general move to transparency, any DWM could reasonably expect that sovereign borrowers should be transparent to external and internal audiences on issues related to sovereign debt and domestic financing as well.²¹⁰ And any deviations from a transparency norm should be exceptional, narrowly tailored to meet important policy goals, and time limited.

In addition to transparency, the possibility of review by an external body of the procedures and decisions arising from a DWM could serve as a check on the DWM's processes and outcomes. Of course, reaching agreement as to what might constitute a competent review body is no easy task, especially given the fact that any comprehensive sovereign debt workout could implicate a combination of financial, legal, political, and social issues. One possibility is that review could also be limited to particular subject matters over

206. This standard would track the emphasis on disclosure in both the insolvency norms and the investor arbitration rules discussed above.

207. Of course, more directly implicated parties (including the sovereign debtor and creditors) would be expected to provide the reasons underpinning their own positions as well.

208. This goal follows the recommendations in Riegner, *supra* note 78.

209. For example, although major transnational creditor groups have little trouble accessing information, the capacity of smaller scale domestic NGOs could vary greatly. Buchanan and Keohane highlight that to be useful in supporting legitimacy, information must be accessible "at reasonable cost," "properly integrated and interpreted," and "directed to the accountability-holders." Buchanan & Keohane, *supra* note 20, at 53.

210. This commitment to transparency also tracks principles 10 and 11 of the UNCTAD Principles on Responsible Sovereign Lending and Borrowing. See UNCTAD Principles, *supra* note 60, at 9–10.

which the reviewing institution has jurisdiction or expertise, though even these lines will be difficult to draw.²¹¹

Country ownership over DWM processes in any particular case of sovereign restructuring lies somewhat in tension with a focus on enabling broad and even participation, and perhaps with external review. This attentiveness to ownership corresponds to concerns prevalent in the interactions of sovereign states with institutions such as the World Bank and the IMF, and also links to ideas of debtor control in U.S. Chapter 11 bankruptcy proceedings, among other domestic examples.²¹² To promote ownership within any DWM restructuring process, the debtor state would ideally submit a (voluntary) formal request and perhaps have principal responsibility for proposing an initial restructuring plan.²¹³ In addition, attention could be paid to providing voice to a broader range of domestic institutions and groups in the DWM process, such as governmental branches and agencies beyond the finance ministry, as well as major civil society groups and perhaps political parties. In order to facilitate this inclusion, a DWM could consider hosting meetings primarily in the restructuring country itself—though this suggestion admittedly counters ideas of geographic impartiality and certainly departs from the practice of major institutions in the current system.²¹⁴

Efficiency concerns constitute another possible counterpoint to ideas of broad participation, particularly given that longer restructurings tend to correlate with poorer eventual outcomes.²¹⁵ There is always a risk, of course, that debtors could take advantage of, and try to extend, the reprieve granted by DWM processes to frustrate creditor collection efforts in bad faith—

211. To the extent that a review board would consider a range of different matters, provisions for an interdisciplinary body might be appropriate. Of course, in the domestic insolvency context, courts generally have final say on insolvency proceedings involving complex economic and financial matters as well.

212. See sources cited *supra* note 51. For an interesting discussion of the various narratives justifying debtor control in the Chapter 11 context, see, e.g., David A. Skeel, Jr., *Competing Narratives in Corporate Bankruptcy: Debtor in Control vs. No Time to Spare*, 2009 MICH. ST. L. REV. 1187 (2009).

213. Again, to use a U.S. Chapter 11 analogy, the debtor has an exclusive right to propose a plan for a designated (but extendable) period of time. See 11 U.S.C. § 1121(b) (2012) (specifying that “only the debtor may file a plan” for the first 120 days after the petition date).

214. Again, the Paris Club of official bilateral creditor countries uniformly meets in the French treasury in a closed process. London Club meetings are more flexible, but tend to be hosted in major financial centers, often (historically) New York City or London. See discussion in Part III above. Of course, neither a debtor country location nor, arguably, a major financial center such as New York or London, are especially neutral meeting venues. As such, it might make sense to schedule different meetings in the restructuring in different locations. For example, a preliminary meeting could be arranged in the debtor country to encourage a broad and accessible initial formulation of debtor country goals and concerns, with subsequent meetings elsewhere.

215. For an overview of the consequences of debt restructuring, with particular attention paid to short- vs. long-run consequences, see Odette Lienau, *The Longer-Term Consequences of Sovereign Debt Restructuring*, in SOVEREIGN DEBT MANAGEMENT, *supra* note 6, at 85, 95, 98 (noting that studies tend to show greater costs concentrated in the period of default, which highlight the importance of efficiency in restructuring). Concerns about efficiency are formalized in, for example, the UNCTAD Principles on Responsible Sovereign Lending and Borrowing. Principle 15 requires prompt, efficient, and fair rearrangements, and principle 7 notes that creditors “should seek a speedy and orderly resolution to the problem.” UNCTAD Principles, *supra* note 60.

though in fact most sovereign debtors tend to *avoid* dealing with debt problems, and then are very eager to exit any restructuring that does occur.²¹⁶ Nonetheless, specifying time frames for making an eligibility determination, appointing arbitrators or other key actors, formulating a restructuring plan, and other core procedural steps could all promote efficiency. Similarly, deadlines should be provided for any notice and comment procedures and the submission of creditor claims. Of course, given the huge variation in sovereign debt restructurings, time frames and deadlines might need to be calibrated, within reason, to the size and complexity of a particular case. And making DWM outcomes binding on all parties would help to deal with the problem of delays and intransigence on the part of creditors, including hold-out creditors. In short, ensuring efficient procedures will likely enhance the usefulness and broad acceptance of any DWM, though efficiency may cut somewhat against the goal of broad participation so central to many understandings of process legitimacy.

3. *Attentiveness to Outcomes*

Perhaps the most important test for any debt restructuring, including for sovereign state debt, is whether it comprehensively addresses the underlying debt problem. This economic outcome offers the best hope for long-term development, and avoids the need for disruptive serial restructurings. Of course, it is impossible to guarantee in advance the success of any restructuring, and exceedingly difficult to know if that restructuring will provide a sufficient basis for economic growth. However, to justify acceptance of a DWM, the actors utilizing its processes should have strong reason to believe that a restructuring plan is likely to succeed.²¹⁷

To facilitate positive outcomes and minimize politically problematic surprises, if a debt restructuring plan contemplates or depends upon significant domestic adjustment, this fact should be made clear well in advance to all stakeholders. To the extent that the success of the restructuring plan depends upon any contingencies—such as the passage of domestic legislation—sovereign debtors could be encouraged to lay the groundwork for these measures before creditor voting on the final DWM agreement, even if the domestic legislation's final entry into force is conditioned upon creditor acceptance of the restructuring agreement itself. In addition, it would be helpful for any DWM to deal as best as possible with the problem of debtor procrastination, which scholars and policy analysts have identified as a key issue undermining eventual debt restructurings.²¹⁸ Procedures that en-

216. See, e.g., FEDERICO STURZENEGGER & JEROMIN ZETTELMEYER, *DEBT DEFAULTS AND LESSONS FROM A DECADE OF CRISIS* (2006).

217. This belief would depend in part upon the careful determination, *ex ante*, of factors that would lead to long-term debt sustainability. To some degree, this leads back to the importance of economic models and indicators, mentioned in the context of informational impartiality above.

218. See, e.g., Gelpern, *supra* note 54, at 1103–04; *Debt Workout Mechanism Framing Paper*, *supra* note 54, at 3. This may well be due to debtor concerns of the costs of default, though of course such delay may

courage states to make use of the DWM process at a sufficiently early point—while not pushing states to restructure when it is not necessary—are likely to result in better economic outcomes. This might include the limitation of any stigma attached to a debt workout, to the extent possible, as this stigma only aggravates procrastination.

Furthermore, steps could be taken to encourage creditors and other stakeholders to remain committed to the debtor's economic recovery even *after* agreement has been reached. For example, bond exchanges as part of these agreements could allow for some flexibility in payment amounts on restructured debt, such as through the use of GDP-indexed bonds and contingent-convertible ("CoCo") bonds, which tie creditor payments to a debtor's economic health.²¹⁹ To limit the need for a return to the DWM, these agreements could also incorporate Collective Action Clauses ("CACs"), including aggregated CACs, which can offer a binding voting procedure even without a more formal institutionalized mechanism, and so help deal with holdout problems.²²⁰ In addition, a central element of long-term economic recovery will likely be the sovereign debtor's return to reasonably priced capital market access in a timely fashion. Thus, DWM designers might consider incorporating measures that would allow the sovereign debtor to demonstrate its creditworthiness—understood as both the capacity and the willingness to pay—following the restructuring. The capacity to pay should of course be improved by the sovereign state's improved debt profile and stronger economic foundations, and this point might be worth emphasizing in the restructuring. Demonstrating a willingness to pay will likely be more difficult, particularly given that creditors may be suspicious of debtors just emerging from a restructuring. To demonstrate this willingness, actors using DWM procedures could contemplate restructuring agreements that include some ongoing payment of the restructured debt. Although a complete (if discounted) buyback of the debt is appealing in some ways, because a sovereign debtor would then be free of payments going forward, continued payments might better reassure creditors of a willingness to service debt in the future.

exacerbate costs. See STURZENNEGER & ZETTELMEYER, *supra* note 216, at 49 (noting that "countries often desperately attempt to avoid debt restructurings even in situations where full repayment seems hopeless").

219. See Brooke et al., *supra* note 151, at 1. GDP-indexed bonds link principal and interest payments to the level of a country's nominal GDP. Sovereign CoCos would automatically extend repayment maturities if a country receives official sector emergency assistance. *Id.*

220. The International Capital Markets Association has published revised and updated aggregated collective action clauses, along with a new *pari passu* clause (the contract bone of contention in Argentina's litigation with NML), with a view to facilitating future sovereign debt restructurings. Int'l Capital Mkts. Ass'n, *Standard Aggregated Collective Action Clauses ("CACs") for the Terms and Conditions of Sovereign Notes* (2014), <http://www.icmagroup.org/assets/documents/Resources/ICMA-Standard-CACs-August-2014.pdf>. The IMF facilitated and endorsed this move. IMF, *Strengthening the Contractual Framework to Address Collective Action Problems in Sovereign Debt Restructuring*, Staff Report (Oct. 2014), <https://www.imf.org/external/np/pp/eng/2014/090214.pdf>.

Particularly given the inapplicability of liquidation bankruptcy in a sovereign state context, restructuring the country's debt burden to achieve sustainability and economic growth would likely be the primary goal of any DWM. However, collective and sufficient creditor recovery is also central to insolvency and restructuring systems, and essential to maintaining the long-term health of capital markets. Thus, to make a DWM sufficiently attentive to creditor outcomes, any modifications to the country's debt burden would have to be proportional to the needs of the sovereign state and not greater than what is required for debt sustainability.²²¹ The burden of adjustment should also be shared across stakeholders, including with the citizens of the restructuring state as well as creditors. To the extent relevant, priority and security interests that are enforceable outside of the DWM process could also be respected within the DWM to reflect this element of intercreditor fairness. And of course, asset recovery undertaken as part of any DWM process, including the recovery of improper transfers and perhaps multinational efforts to address tax evasion, would help to minimize creditor losses.

Finally, the on-the-ground human impact of restructurings features prominently in public discussions of debt workouts, and will certainly shape perceptions of legitimate outcomes. The expected impact of any debt restructuring is also likely to influence the willingness of a debtor state's domestic interest groups to cooperate in measures required by the restructuring. Although of course debt sustainability and economic development should in the long run improve outcomes across all demographic groups, in the short run the consequences may be more intense for those in lower socioeconomic brackets.²²² The framework would need to attend to this human impact both for its own sake and given the risk of domestic unrest and resistance for the broader success of the restructuring. This assessment could be undertaken in light of relevant treaties and other sources of applicable international law, including customary international law and general principles of law. Of course, the question of which treaties and standards would be relevant and politically palatable will likely be a sensitive topic for any DWM negotiations. To the extent that other substantive principles, including generally accepted legal principles and doctrines, are implicated by particular debts, these could also be considered in determining legitimate outcomes. These doctrines and principles may include, among others, unclean hands, unconscionability, fraudulent transfer, and the violation of a government's fiduciary duty to its population.

An element of outcome legitimacy relevant to the global restructuring system as a whole, which could also be a possible standard for judging and accepting particular debt workouts, involves consistency across cases. When similar cases or creditors are treated dissimilarly, this may provide a basis for

221. Of course, the characterization of debt sustainability itself can prove controversial, as noted in the discussion of informational impartiality in *supra* Part I.D.

222. Lienau, *supra* note 7, at 89–90.

complaint. Of course, the definition of “similar cases” is especially difficult across sovereign debt restructuring, and any DWM processes will have to keep in mind the unique political and economic situation of each country. However, establishing a unified set of principles and procedures should help to encourage consistency, particularly if that framework is then incorporated into or recognized by national legislation or jurisprudence.

Taken as a whole, then, a number of features exist at the source, process, and outcome levels that might be relevant to maximizing the public perception that a DWM, including its restructuring outcomes, is legitimate. These elements would be implemented differently depending on the particular form a DWM takes, and tensions between two desirable features, such as broad participation and efficiency, would have to be balanced for the DWM as a whole and in any given debt workout. Furthermore, in any institutional design situation, the initial wish list may well have to give way to the constraints of political feasibility, timeliness, and cost effectiveness. But these characteristics should be pertinent for thinking beyond the bare functionality of a DWM and to long-run perceptions of its desirability and acceptability.

B. *Assessing Current DWM Proposals*

How do the most frequently discussed proposals for an institutionalized approach to debt workouts fare against these characteristics associated with legitimacy? Multiple actors have called for the development of a more coherent debt restructuring mechanism for some time. In 1986, the *Trade and Development Report* published by the Secretariat of UNCTAD noted that “the lack of a well-articulated, impartial framework for resolving international debt problems creates a considerable danger . . . that international debtors will suffer the worst of both possible worlds . . . being judged de facto bankrupt . . . largely without the benefits of receiving the financial relief and financial reorganization that would accompany a de jure bankruptcy.”²²³ Since then, a number of multilateral and non-governmental organizations have proposed institutionally grounded DWMs akin to a sovereign bankruptcy. This section offers a brief and preliminary assessment of several of these proposals against the characteristics of legitimacy analyzed above.²²⁴

223. UNCTAD, TRADE AND DEVELOPMENT REPORT, at 141, U.N. Doc. UNCTAD/TDR/6, U.N. Sales No. E.86.II.D.5 (1986).

224. Of course, legitimacy is hardly the only standard relevant for evaluation; feasibility has a virtue all itself. For example, while advocating in favor of a more modest proposal based at the IMF, a paper published by the Brookings Institution acknowledges, “the first and best approach to addressing these problems would presumably be a fully fledged international sovereign insolvency-cum-crisis management regime . . . [b]ut such a regime is practically and politically unfeasible.” LEE C. BUCHHEIT ET AL., REVISITING SOVEREIGN BANKRUPTCY 29 (2013), http://www.brookings.edu/~media/research/files/reports/2013/10/sovereign-bankruptcy/ciepr_2013_revisitingsovereignbankruptcyreport.pdf.

1. *A Statutory Sovereign Debt Restructuring Mechanism Based at the IMF*

Perhaps the most discussed statutory sovereign debt workout proposal remains the Sovereign Debt Restructuring Mechanism (“SDRM”) presented by Anne Krueger, First Deputy Managing Director of the IMF, in 2001–2002. While the IMF board ultimately rejected it in 2003,²²⁵ the court decisions and stalemate in the *NML v. Argentina* case have encouraged prominent economists to suggest that it might be resuscitated.²²⁶ This proposal was organized primarily around the creation of a Sovereign Debt Dispute Resolution Forum (“SDDRF”), which would serve as the primary actor and decision maker on any debt-restructuring plan, presenting plans for approval by creditor groups.²²⁷ The SDDRF as recommended sought to address perceptions of impartiality, and the proposal included a suggestion that the office might be in a city other than Washington, D.C.²²⁸ Nonetheless, it remained heavily embedded in the IMF itself. For example, the IMF Managing Director would appoint key decision makers from a pool of candidates pre-screened by the IMF Board and chosen by an IMF-appointed selection panel.²²⁹ Furthermore, the IMF’s own loans (like those of other multilateral organizations) would not be subject to restructuring through the process.²³⁰

The primary benefit of the SDDRF idea was its capacity to aggregate the treatment of all private debt into a single forum, thus helping to deal with holdout problems aggravated by vulture (or distressed debt) funds. Furthermore, it would ensure that any agreement reached would be enforceable by

225. Although the basic contours of the SDRM proposal was originally presented in 2001, it was then updated and elaborated upon. See, e.g., IMF, *Report of the Managing Director to the International Monetary and Financial Committee on a Statutory Sovereign Debt Restructuring Mechanism* (Apr. 2003), <http://www.imf.org/external/np/omd/2003/040803.htm>.

226. IMF Managing Director Christine Lagarde suggested that, depending on the outcome of legal decisions in New York, “[t]he debt restructuring principles and the efficiency of collective action clauses will have to be reviewed,” but did not specifically mention the earlier proposal. *IMF’s Lagarde Says Argentina Default Not Market-shaking*, REUTERS (July 29, 2014), <http://www.reuters.com/article/2014/07/29/us-imf-lagarde-argentina-idUSKBN0FY1P420140729>. Economist Nouriel Roubini did suggest that resuscitating the earlier proposal might be appropriate. Nouriel Roubini, *Gouging the Gauchos*, PROJECT SYNDICATE (July 1, 2014), <http://www.project-syndicate.org/commentary/nouriel-roubini-criticizes-recent-us-court-rulings-that-impede-orderly-restructuring-of-sovereign-debt#6KPAivOY7vsFQRom.99>. UNCTAD also reiterated its longstanding call for a coherent DWM in light of the U.S. Supreme Court decisions to deny certiorari in the Argentina cases, though not specifically with reference to the IMF proposal. Cosio-Pascal, *supra* note 93.

227. The details of the SDDRF proposal are available in a supplemental document published by the IMF Legal and Policy Development and Review Departments. See IMF, *The Design of the Sovereign Debt Restructuring Mechanism—Further Considerations* (Nov. 2002) [hereinafter IMF, *Design of the SDRM*], <https://www.imf.org/external/np/pdr/sdrm/2002/112702.htm>.

228. See, e.g., *id.* ¶ 229.

229. See, e.g., *id.* ¶¶ 233–44. The IMF comments on the SDDRF clarify that “[c]ompetence and impartiality would be given priority over all . . . other criteria” by the selection panel. *Id.* at 240. While there is no reason to think that this should not be the case (particularly given that IMF debt would not be subject to SDDRF restructuring), some potential debtors might worry about embedding the mechanism within the IMF.

230. For a general discussion of these privileged creditors, see, for example, *id.* ¶¶ 60–65.

virtue of the role of the IMF, requiring an amendment of the IMF Articles of Agreement that would effectively bind all countries.²³¹ However, this proposal can hardly be considered especially impartial. Although it was intended to be independent, the various links to the IMF might bias the SDDRF directly and, just as important, could aggravate perceptions of bias. Furthermore, the exclusion of debt owed to multilateral organizations (including to the IMF) would only deepen concerns of unfairness, including among creditors.²³²

These possible objections do not necessarily doom such a proposal. Although the IMF itself recognized that a state member's discussions with the Fund would often influence that state's decision to use the restructuring facility, only a sovereign debtor could actually initiate a process through the SDRM.²³³ And were the SDDRF or a similar mechanism able to achieve desirable economic outcomes convincingly and efficiently, this could overcome concerns about impartiality. However, in light of some states' experiences with IMF involvement in debt restructurings in the 1980s and 1990s, the outcomes might have to be highly positive to overcome such worries.²³⁴

2. IMF-based Sovereign Debt Adjustment Facility

In October 2013, the Brookings Institution published a separate proposal that updated the earlier SDRM idea by suggesting the establishment of a Sovereign Debt Adjustment Facility ("SDAF"). The authors aimed to further two goals: (1) to commit the Fund *not* to bail out countries with unsustainable debts in the absence of a restructuring; and (2) to protect countries restructuring under the SDAF from holdouts.²³⁵ The SDAF shares some features of the earlier SDRM, most notably being based in the IMF itself,²³⁶ using a modification of the IMF Articles of Agreement as an institutional hook and as leverage against holdouts,²³⁷ and relying upon IMF technical expertise (including for sustainability determinations and similar assessments).²³⁸ However, the SDAF does not envision an associated tribunal for claims determinations, an automatic stay on litigation, or a mechanism to bind all creditors; although holdouts would be prevented from collecting on judgments, their legal claims would technically remain intact. Thus, although the close affiliation with the IMF remains, and presumably would

231. See *id.* ¶¶ 227, 274–82.

232. The World Bank offered an assessment of its sister organization's SDRM proposal in the 2003 Global Development Finance Report. See World Bank Grp., *Global Development Finance: Striving for Stability in Development Finance* (2003), http://siteresources.worldbank.org/GDFINT/Resources/334952-1257197848300/GDF_vol_1_web.pdf.

233. IMF, *Design of the SDRM*, *supra* note 227, ¶¶ 84–85.

234. See discussion *supra* Part II.

235. BUCHHEIT ET AL., *supra* note 224, at 32–35.

236. Rather than a separate institution, the SDAF would be a specially designed and dedicated IMF lending facility for sovereign debt adjustment. *Id.* at 32.

237. *Id.* at 34.

238. *Id.* at 33.

continue to raise questions of impartiality, the SDAF's somewhat less judicial role might alleviate these concerns. In addition, the proposed restructuring process itself seems to leave more in the hands of sovereign debtors, providing a greater element of country ownership. The proposal's authors explicitly acknowledge a preference for a comprehensive (and presumably more impartial) insolvency court but considered that development to be a remote possibility.²³⁹ They contend that locating an updated DWM in the IMF is most likely to be practical and effective.²⁴⁰ As with the original IMF SDRM proposal, if an SDAF were capable of providing positive outcomes for sovereign debtors efficiently and consistently, that would likely grant the mechanism a degree of legitimacy, even despite concerns about process and institutional partiality.

3. *Ad Hoc Debt Arbitration*

Commentators have also grounded a range of DWM proposals in the more informal process of ad hoc arbitration. In line with the discussion of investor-state arbitration above, commentators highlight that these processes generally share the key features of relatively low cost, party autonomy, possible confidentiality, and attentiveness to balancing parties' interests (rather than to enforcing legal principles and precedent).²⁴¹ One version of this ad hoc approach, proposed initially by Kunibert Raffer in 1990, suggested that parties use procedures akin to U.S. municipal bankruptcy (Chapter 9 of the U.S. Bankruptcy Code), which includes core elements of procedural fairness and transparency while making allowance for the sovereign character of the debtor.²⁴² However, significant variation is possible within the ad hoc arbitration framework, given that parties may adopt different sets of rules or principles to govern the arbitration.

Because of its informal and flexible nature, ad hoc arbitration could reasonably be expected to ensure actor ownership. This would be furthered by the ability of the parties in each arbitration to select which body of law should apply, such as international law or more specific principles of law applicable to sovereign debtor relations.²⁴³ Of course, this means that power dynamics in existence between parties outside of the arbitration context will be more likely to shape the restructuring itself. In addition, although safeguards along the lines of the UNCITRAL and ICSID rules would help to support arbitrator impartiality, the fact that arbitrators are selected on a case-specific basis could raise concerns of bias similar to those expressed with

239. *Id.* at 29.

240. *See id.* at 29, 32–34.

241. KAISER, *supra* note 99, at 19.

242. *See* Kunibert Raffer, *Applying Chapter 9 Insolvency to International Debts: An Economically Efficient Solution with a Human Face*, 18 *WORLD DEV.* 301 (1990).

243. The UNCTAD Principles on Responsible Sovereign Lending and Borrowing offer one possibility in this regard. *See* UNCTAD Principles, *supra* note 60.

regard to investor-state arbitration.²⁴⁴ Also, due to their voluntary nature, ad hoc arbitration processes may not be able to compel unwilling creditors to participate in negotiations.²⁴⁵ Even if they are established with a view to *enabling* comprehensive participation (as in the Chapter 9 proposal), it is hard to mandate participation in this context, particularly as the awards themselves are ultimately enforceable only against the arbitrating parties and not against nonparticipants.²⁴⁶

4. *International Insolvency Tribunal*

The most maximalist of DWM proposals envisions that debt restructuring arbitrations would be housed at an impartial international institution not directly implicated in sovereign lending. Possible institutional homes might be the Permanent Court of Arbitration (“PCA”) or a mechanism set up through the auspices of the U.N. Secretary General or another independent U.N. agency.²⁴⁷ The establishment of such a permanent home base would likely need to be grounded in treaty, which would also have the benefit of ensuring the compliance of the debtor and other countries and therefore the enforcement of restructuring outcomes against private creditors regardless of their location. As part of this reform, any legal decisions applicable to the restructuring would be governed by a body of law agreed to in advance as part of the DWM’s establishment—likely international law, including general principles of law applicable to sovereign debt. The tribunal would be able to hear particular debt claims and would be required to comply with emerging international standards for participation and transparency. At first glance, this proposal seems best able to incorporate many of the elements associated with process legitimacy. Unsurprisingly, it would also probably prove the most difficult to implement.

244. See brief discussion at the beginning of *supra* Part III.B.

245. As noted in the discussion of investor-state arbitration above, voluntariness and party control are considered two of the virtues of arbitration.

246. Arbitral awards are generally enforceable through the New York Convention on Recognition of Foreign Arbitral Awards. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 6, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. Another proposal offered as a correlate to ad hoc arbitration suggests that a forum be set up to promote early debtor-creditor dialogue and develop impartially a store of knowledge on best practices in sovereign debt restructuring. RICHARD GITLIN & BRETT HOUSE, A BLUEPRINT FOR A SOVEREIGN DEBT FORUM, 27 CIGI Papers (March 2014). The authors note the lack of support for statutory measures and aim for “a non-statutory, incorporated, non-profit, membership-based SDF that would provide an independent standing body to research and preserve institutional memory on best practice in sovereign debt restructuring . . . [and] to facilitate early engagement among creditors, debtors, and other stakeholders” *Id.* at 6.

247. See, e.g., Christoph G. Paulus, *A Resolvency Proceeding for Defaulting Sovereigns*, COLLECTIVE ACTION CLAUSES AND THE RESTRUCTURING OF SOVEREIGN DEBT 181, 195 (Klaus-Albert Bauer eds., 2013).

C. *Obstacles and Politics*

It is perhaps disheartening that the DWM proposal most likely to include features associated with legitimacy also seems to be the least feasible. Indeed, the attributes of the sovereign debt system that make the development of a DWM so important are the same elements that make it difficult. This does not mean that such proposals are futile or that we should abandon efforts to think about legitimacy as an *ex ante* institutional design consideration. But it does mean that we need to understand the political challenges involved in moving toward a more coherent and broadly acceptable approach to debt restructuring.

Forum fragmentation is frequently acknowledged as a key problem, preventing comprehensive and consistent treatment of a sovereign state's debt.²⁴⁸ However, specific creditors, such as Paris Club official creditors, may actually benefit from a disjointed system. Because there is no requirement that particular creditors attend to the concerns of all other creditors, any given creditor group will have greater control and thus be able to work more efficiently in this smaller format.²⁴⁹ Compared to a consolidated multiparty framework, such negotiations are less complex and more dyadic, involving just the debtor and the relevant group. As such, even if it is not ideal for the debtor, a fragmented system can be effective and functional for a subset of key investors. To the extent that this is the case, there may be minimal incentive for such actors to agree to an alternative, more comprehensive, and more coherent DWM.

Private creditor groups have also historically resisted the establishment of a DWM or indeed any greater institutionalization of debt restructuring. The Institute of International Finance ("IIF"), representing the interests of private creditors, prefers an ongoing commitment to purely voluntary, good faith negotiations.²⁵⁰ The IIF expresses particular concern that any unilateral debtor invocation of a standstill mechanism, including one condoned by the IMF, would "severely undermine creditor property rights and market confidence and thus raise secondary bond market premiums for the debtor involved and other debtors in similar circumstances," and it highlights the unilateral, non-negotiated deal offered by Argentina as especially problematic.²⁵¹ The IIF advocates strengthening market-based approaches, including clarifying the meaning of potentially problematic contract language and in-

248. See, e.g., sources cited *supra* note 3; Gelpern, *supra* note 54, at 1106. UNCTAD identified forum fragmentation as a key problem in its work on thinking through a potential sovereign DWM. See *Debt Workout Mechanism Framing Paper*, *supra* note 54, at 3.

249. For more on the Paris Club example, see discussion *supra* Part II.A.1.

250. See, e.g., RIEFFEL, *supra* note 90, at 247, 267. The IIF has worked with other industry groups on these issues since the early 2000s. See *id.* at 267.

251. SPECIAL COMM. ON FIN. CRISIS PREVENTION & RESOLUTION, INST. FOR INT'L FIN., VIEWS ON THE WAY FORWARD FOR STRENGTHENING THE FRAMEWORK FOR DEBT RESTRUCTURING 4 (Jan. 2014), <https://www.iif.com/news/capital-markets-and-emerging-markets-policy/iif-special-committee-financial-crisis-prevention>.

cluding aggregation clauses in Collective Action Clauses.²⁵² However, it calls for a balance between facilitating timely debt restructurings and protecting creditor property rights, noting that “excessive emphasis on eliminating the possibility of holdout creditors might be counterproductive.”²⁵³

It is also possible that certain public actors may resist any movement toward a DWM that limits their role, even while accepting the general need for more comprehensive approaches to sovereign debt restructuring. Essential actors such as the IMF might accept the general importance of features associated with legitimacy but highlight their own centrality and expertise in debt issues. They may also simply reject any effort to include their debt as part of a comprehensive restructuring, following the template of the earlier SDRM proposal. Given the central role played by these actors, they are important for any successful DWM. In addition, their technical expertise and global standing are essential in particular debt restructurings.

Finally, it is possible that some sovereign debtors will resist the establishment of a DWM as well, as happened with the IMF SDRM proposal in the early 2000s. This could result from objections to particular features of the proposed DWM—for example, lack of impartiality or fair process—or to concerns that the existence of something akin to sovereign bankruptcy will raise borrowing costs. Indeed, comments by the IIF and other groups representing international creditors tend to (and perhaps are designed to) exacerbate these fears, regardless of the degree to which they are well founded.²⁵⁴

Although the preferences of players in the sovereign debt arena are frequently deeply embedded, these difficulties are not insurmountable. Continued engagement with these actors on the instrumental value of a more coherent DWM for both debtors and creditors should help, particularly given the seeming inevitability of ongoing sovereign debt crises into the future. Certainly, the relatively swift global embrace of insolvency laws in recent decades covers over the serious struggles involved in establishing bankruptcy laws in the United States. Although Article I, Section 8 of the U.S. Constitution grants Congress the power to enact “uniform laws on the subject of bankruptcies,” Congress failed in its attempts to establish a stable

252. See generally *id.*

253. *Id.* at 5.

254. As far as I am aware, no empirical studies specifically assess whether the institution of a bankruptcy regime in a particular polity actually did raise capital costs. It would be difficult, of course, to isolate the impact of this particular variable across cases in a large-n study, though small-n research might offer interesting insights. Still, the general argument that any change in debt repayment outcomes—particularly when backed by a public imprimatur—is likely to wreak havoc on the health of capital markets remains very present in the scholarly literature. See, e.g., Deniz Anginer & A. Joseph Warburton, *The Chrysler Effect: The Impact of Government Intervention on Borrowing Costs*, 40 J. BANKING & FIN. 62 (2014) (rejecting the notion that investors perceived a distortion of debt priorities following the government bailout, which arguably elevated unsecured auto union claims over those of secured lenders, and finding that, to the contrary, bondholders of unionized firms reacted positively to the Chrysler bailout). To help deal with sovereign debtor fears along these lines, any DWM might make a concerted effort to minimize the stigma associated with debt restructuring.

bankruptcy system until passing the 1898 Bankruptcy Act a hundred and ten years after the founding.²⁵⁵ This is not to suggest that efforts to establish a uniform global approach for dealing with sovereign state debt will take a century or more. Rather, it is to highlight the fact that risk and interest assessments do adapt over time and are subject to political pressures and historical exigencies over which a greater number of actors may have some control.

CONCLUSION: LEGITIMACY IN DEGREES

If the architects of the post-World War II international financial system found it politically difficult to establish a unified sovereign debt restructuring mechanism, it does not seem to have become any easier in the intervening decades. In part this may result from the increasing complexity of the sovereign financing arena itself, which now implicates an even broader range of organizational players, each with its own somewhat disparate process for addressing debt problems. Unfortunately, this patchwork approach often fails to offer an efficient and comprehensive way for a sovereign state and its creditors to deal with untenable financial situations and return to debt sustainability and development. An additional complicating factor in the current system is the greater demand that any organization or institutional framework engaging in global governance be “legitimate.” Especially given the conceptual and political difficulty of defining a legitimate order, this final layer of complexity can make a DWM appear even more beyond reach, particularly as powerful actors resist certain features associated with the composite concept of legitimacy.

Yet none of these realities undermines the need to think about DWM legitimacy in advance, as proposals are constructed, assessed, and potentially put into practice. Indeed, this Article suggests that focusing on the various subfeatures associated with legitimacy, whether drawn from source, process, or outcome understandings, will likely make any eventual mechanism more broadly accepted and therefore more functionally successful. Of course success along this dimension is a matter of degree. Legitimacy does not work in a binary fashion—institutions and practices are never perfectly legitimate or illegitimate, however the terms are understood. As such, perhaps the goal should be to think explicitly about including the various subfeatures associated with legitimacy in formulating any potential DWM, while paying due regard to the balancing objectives of political feasibility, timeliness, and cost effectiveness. Even if including every desirable feature is impossible, explicit work along these lines eventually can shift understandings of what is plausible and reasonable in a sovereign debt institution. This discussion and activ-

255. For an excellent history of U.S. bankruptcy, see DAVID A. SKEEL, JR., *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* (2001).

ity might also encourage shifts in the practice of the institutions and mechanisms already in place in the sovereign debt arena. Regardless of whether change results from a conservative impulse—in particular, from an effort to forestall deeper systemic transformations—such moves can nonetheless have important distributional effects, and again may even alter background principles and expectations over time.

In short, given that a focus on legitimacy explicitly colors much of the criticism and reform activity targeted at international economic organizations once they have been established, it should feature more explicitly in *ex ante* discussions of a sovereign debt workout system. And in light of the fact that a broad and diverse audience will make the legitimacy assessments of any debt mechanism that does emerge, there is no easy way to escape the multidimensional nature of the concept. As such, the tensions, distributional questions, and power dynamics implicated in this composite analytical term should inform our background understanding for negotiations on a sovereign debt restructuring framework going forward.