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TO: International Insolvency Institute, Fourteenth Annual Conference, Mexico City

FROM: Zack A. Clement

DATE: June 10, 2014

RE: Revised Proposal for Arbitration of Sovereign Financial Restructure

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I. Why This Proposal Should Be Implemented

A. Overview

This Proposal describes how political leaders of a sovereign state can take charge of and lead their country's financial restructure, providing a better chance for successful restructure, and giving themselves a better chance for a political survival.[1] It also describes why major creditors will have an incentive to agree to arbitrate some of the most difficult issues in a sovereign debt restructure.

When a sovereign state that owes substantial debt (a "Sovereign Debtor") becomes insolvent and is facing default, it will have difficulty refinancing. In that setting it begins to receive advice from the financial community about how much expense cutting austerity it must impose and when, and how much it must increase taxes and when, to make it attractive enough to obtain new loans that will be used largely to refinance its existing debt. Sometimes this advice is at odds with the advice of economists about how to stimulate the Sovereign Debtor's economy for growth and to avoid recession. Many politicians who try to follow the financial community's advice lose public favor and lose their office.

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[1] This Proposal was first presented at the Annual Conference of the International Insolvency Institute ("III") in Paris in June 2012. The essential text of Section I of this Revised Proposal was published in the IBA's Insolvency and Restructuring International, Vol. 8 No. 1, April 2014. It was presented again at the III Annual Conference in Mexico City in June 2014, and the Revised Proposal described herein contains material addressing issues raised at that Conference.

Potential refinancers of sovereign debt ("Refinancers")[2] often demand that the Sovereign Debtor (a) pursue austerity by lowering spending on social welfare programs, government worker expenses, pensions, and other things essentially involving services or payments to citizens and to employees, (b) raise taxes and (c) pursue other sources to raise revenues by selling assets or otherwise. A Sovereign Debtor could also be required to freeze or reduce payments to existing capital providers by cutting the principal amount owed on government bonds; however, to date, Refinancers have tried to avoid this in Europe. Refinancers tell the Sovereign Debtor that, if it accedes to their demands, they will be willing to lend it more money that will be used primarily to refinance some of its old debt.

This process inevitably involves spending cuts and revenue increases that the Sovereign Debtor does not really want, and a *de facto* loss of sovereign autonomy as Refinancers demand austerity and tax increase based on what they claim that the financial analysis requires.

The perception by citizens of a Sovereign Debtor that they must endure benefit cuts and higher taxes that are imposed at the behest of international financial institutions poses several risks. Politicians, who are seen as too identified with the goals of the Refinancers, can lose popular support. Greece's former prime minister, George Papandreou, left office after he asked the Greek electorate to decide whether to approve the financial restructuring agreement he had negotiated with the IMF and others.

More troubling, financial pain imposed by international financial institutions on a Sovereign Debtor's citizens can lead to the erosion of civil society. Although Greek voters approved the financial restructuring agreement that George Papandreou negotiated, the IMF continues to ask Greece for more austerity measures and higher taxes. As its economic troubles continue, Greece has experienced the rise of an extreme political party which criticizes "outside influence" and uses symbols of a discredited authoritarian approach to government.

The Revised Proposal described in this paper for use of an arbitration proceeding to restructure sovereign debt could counter the perception that "foreign" international financial institutions and weak local politicians are the cause of unfair economic distress. It suggests an alternate approach in which a Sovereign Debtor leads its own financial restructuring; and actually maintains more sovereignty by proposing a financial restructure plan to an arbitral panel containing the (i) austerity and timing therefore, (ii) taxation and timing therefore and (iii) discharge of sovereign bond debt that it believes appropriate. The arbitral proceeding provides a forum to contend publicly with its capital and labor creditors and Refinancers about whether its plan is fair, with an independent panel of arbitrators to make the final decision about the painful cuts and tax increases necessary to have a fair financial restructure plan that Refinancers will fund.

An arbitration concerning the fairness of a Sovereign Debtor's plan to restructure its finances (a "Plan") would work in the same manner as agreements to arbitrate large commercial disputes. It would begin when the Sovereign Debtor agrees with a sufficient number of its creditors holding a sufficient percentage of its outstanding debt (including existing lenders and

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[2] Refinancers might include a combination of the International Monetary Fund, the European Central Bank and other international financial institutions; they might also include large commercial banks and other supplies of capital.

labor which will probably wish to be included) plus potential Refinancers, to arbitrate their differences concerning the Sovereign Debtor's proposed Plan pursuant to a set of agreed "restructuring principles" (a "Submission to Arbitration").

A Submission to Arbitration can contain the parties' agreement on (1) the members of the Panel that will hear and decide the matter, (2) the restructuring principles to be applied, (3) the arbitral rules to be used, (4) the place of the arbitration, and (5) such other details as the parties wish to agree on.

B. The Panel

The first crucial issue in the arbitration of the financial restructuring of a Sovereign Debtor will be the selection of an arbitral panel (a "Panel"). A Sovereign Debtor, its creditors and possible Refinancers will not agree to arbitrate unless they perceive that they will be able to assert their views to a fair panel of arbitrators, under reasonable principles. Predictably, the Sovereign Debtor, capital creditors and labor creditors will want to select their own arbitrators. Issues of fairness and trust will be dealt with implicitly as the parties try to agree on a Panel.

Permitting the Sovereign Debtor (on one side) and its labor and capital creditors (on the other side) to pick an equal number of arbitrators will convince both that their views will be heard in the decision making process. To deal with a potential deadlock among arbitrators, a neutral head of panel -- someone whom everyone could trust in such a role -- will need to be selected. There are people in the insolvency and diplomatic fields with reputations for knowledge and fairness that could be trusted to be the neutral head of such a Panel. Requiring a majority vote or giving power to the neutral head of the Panel to break a tie and decide, means that picking the neutral will be an important measure of the parties' willingness to work together. If the Parties are unable to agree on a neutral head of the arbitral panel, they can pick an appointing authority to select the neutral.

C. Restructuring Principles

It will be important for the parties to agree to clearly delineated restructure principles that will govern the decisions of the Panel ("Restructuring Principles") and bring a measure of predictability to the arbitration. After the parties have agreed to these general substantive principles, the Panel can look for precedent in the law of the Sovereign Debtor, or in the restructuring laws of major commercial countries, including Germany, France, England, the United States, or such other countries' laws as it believes provide an appropriate source for precedent concerning the chosen Restructuring Principles. Unless specified by the parties, the Panel can decide what procedural rules it will apply (UNCITRAL, or other), and other details of the arbitration.

The insolvency and restructuring legal community can point to one existing body of law that already addresses restructure of government debt -- Chapter 9 of the U.S. Bankruptcy Code. United States' Circuit Court cases from the Great Depression analyzed the same issues that are now being raised by the IMF's demands for austerity and tax increase.

They analyzed whether the proposed plan was in the "best interest of creditors" because it provided them at least as much value as if they pursued their non-bankruptcy remedies to collect their claims.

They focused primarily on whether the proposed restructuring plan was "fair and equitable" because there had been enough austerity and use of taxation so that it could be said that bond creditors were being paid "all they can reasonably expect under the circumstances," even though substantial amounts of their debt was being discharged.

They also analyzed whether they proposed plan was "feasible" allowing the debtor to make the proposed restructured payments and still provide adequate service to its citizens.

These three principles: best interest of creditors, fair and equitable and feasible, are central Chapter 9 substantive principles and they are summarized generically in Exhibit A hereto.

D. <u>The Arbitration Process</u>

Unlike the usually confidential arbitrations of commercial disputes, arbitration of a Sovereign Debtor's financial restructuring should be an open, transparent and public process that can create a consensus among the participants and the Sovereign Debtor's citizens to accept the outcome of the arbitral process.

A prompt resolution of the arbitration could be achieved in as little as six months after the Submission to Arbitration, since the parties will have had months to prepare as they work through the details of agreeing to arbitrate. Within two months after the arbitration begins, the Sovereign Debtor could present its Plan and supporting financial studies. If creditors wish to contest the terms of the Plan and the supporting economic evidence, they can respond in two months with their objections and counter economic evidence.

A public trial could begin a month later giving the parties, citizens of the Sovereign Debtor and the world business and political community a chance to hear the debate about whether the Plan is fair and equitable, in the best interests of creditors and feasible. When the arbitral panel then rules, the basis for the pain of austerity, taxation and debt discharge needed to restore the Sovereign Debtor to solvency will be well known. All this can occur in six months to a year.

E. <u>Why Agree To Arbitration</u>?

Why would the potential parties agree to submit their disputes to such an arbitration? A Sovereign Debtor and its creditors (both capital and labor) will only agree to participate in such a process if they believe they will receive a fair hearing under fair principles, and have a chance of achieving something for their interests.

The Sovereign Debtor would be ceding some of its sovereign decision making power. International financial organizations and other capital creditors would be subjecting themselves to the decision of the Panel. Labor would be placing the interests of its constituents into the hands of outside arbitrators. Each will, however, have substantial reasons to agree to such an arbitration.

A Sovereign Debtor has an incentive to agree to arbitrate because it can exercise control over its destiny by preparing and proposing its restructuring Plan, picking its arbitrators, and advocating in a public hearing why its proposed (a) level of austerity and timing, (b) level of taxation and timing, and (c) bond debt discharge, are all fair and should be approved by the arbitral panel. It will have a public forum to advocate its views, and an arbitral order at the end of the case enforceable through the New York Convention, concerning, among other things, the amount of debt discharged. Finally, to the extent agreements cannot be reached on certain restructuring issues, it can point to the arbitrators as having made the politically and economically unpleasant, but "regrettably necessary," ultimate decisions about austerity and levels of taxation.

Capital creditors holding existing sovereign bond debt will have an incentive to agree to a public forum to argue that more austerity and taxes are appropriate to free up more money to pay them. They will have a chance to convince an arbitral panel that they are correct. Even though their debt may be reduced in such an arbitration, they will have an arbitral order that can be enforced against the Sovereign Debtor's assets all over the world under the New York Convention to pay that reduced principal amount.

This last point should not be understated. Bond creditors might currently have a claim for $100 but with poor remedies to collect it. Even if the arbitration award reduces this claim to $50, if it can be collected against the Sovereign Debtor's assets all over the world through the New York Convention, then the bondholders might be better off.

Labor organizations will also have a motivation to agree to arbitrate. Public employees and pension beneficiaries now often face austerity measures that have been determined in back rooms between sovereign debtors and the capital community, and are presented to them as a fait accompli. Public arbitration would give them a forum to argue for less drastic or more delayed austerity measures, and an arbitral panel that might agree with them.

Refinancers will have their own incentives to agree to such a process. They will have the comfort of a financial restructuring plan that has been thoroughly and publicly litigated as to its fairness, and is, thus, more likely to be sound. They too will be able to advocate their position in favor of more cuts and revenues, and will have a third party to make the final call on what must be cut or raised before the plan is found to be fair. They will benefit from not being seen as the party imposing these difficult measures.

F. The Legal Basis for Arbitration of Sovereign Insolvency

A recent article by a prominent U.S. Bankruptcy Judge[3] explains the legal basis for this Proposal. A. Gropper, *The Arbitration of Cross Border Insolvencies*, 86 American Bankruptcy Law Journal, 201 (2012), describes how parties can agree to arbitrate fundamental debt restructuring issues. According to it, "There does not appear to be any authority that parties should not be able to agree to arbitrate a core insolvency dispute on condition that non-consenting parties be left unimpaired." *Id.* at p. 237. "No authority has been found that arbitration of the type proposed in this paper is "incapable of being performed. " *Id.* at p. 237.

[3] U.S. Bankruptcy Judge Allan Gropper is a member of the National Bankruptcy Conference, the American College of Bankruptcy and the International Insolvency Institute.

"No legal authority has been found to the effect that insolvency disputes are not arbitrable because of the nature of the subject matter." *Id.* at p. 239. "Arbitration of insolvency issues should not raise public policy concerns to any greater extent than does a workout – provided that those parties who have not agreed to the arbitration are left unimpaired," id. at p. 240.

Judge Gropper noted that **"**In recent years, arbitration has been considered as a means of resolving disputes relating to sovereign debt defaults." *Id.* He cited with favor a proposal to establish a permanent arbitral tribunal to decide sovereign debt restructure issues.[4] Although entitled a proposal for a "tribunal" its authors do not envision an international court, but an "international arbitral tribunal for resolving disputes arising in sovereign debt restructurings." id. at p. 242." However, such a tribunal has not yet been established.

Nor has the sovereign debt restructure ("SDRM") proposed by the IMF been enacted. *See,* S. Hagan, *Designing a Legal Framework to Restructure Sovereign Debt*, 36 Georgetown Jour. Int'l Law, 299 (2005). This SDRM proposal "was eventually dropped in the face of political opposition from certain large shareholders of the IMF – particularly the United States." *Id*. R. Lastra and L. Buchheit, *Sovereign Debt Management* (Oxford 2014) at p. 21.

By contrast, a Sovereign Debtor can proceed now with an *ad hoc* arbitration as described in this paper, before a sovereign debt tribunal is established sometime in the future. This Revised Proposal would permit a Sovereign Debtor to keep the power to devise and propose a Plan, and advocate it through a public arbitration proceeding where it can explain why that Plan is fair in difficult circumstances. It can decide whether to modify its Plan in response to suggestions from the arbitrators to improve its chances of approval. For a Sovereign Debtor, this is a good mixture of retaining power to lead and allowing an arbitral panel to resolve some of the most difficult issues, and be ultimately responsible for requiring unpopular, but fair, restructuring measures.

G. Dealing With Holdouts

What about holdouts who will not agree to permit an arbitral panel to decide what is fair plan for the debtor country and its creditors? As the U.S. Supreme Court described in *U.S.* v. *Bekins*, 304 U.S. 27 (1938), U.S. federal bankruptcy power can bind all creditors to a debt discharge agreed to by a majority of creditors, overcoming the holdout problem.

Absent a bankruptcy court or some kind of sovereign debt restructure mechanism to order such a discharge, sovereign debtors have often dealt with holdouts by placing moratoria on payment of debt for those who refuse to restructure, to encourage them to accept the restructure offer. See R. Lastra and L. Buchheit, *Sovereign Debt Management*, at p. 17-18.

Sovereign Debt Management describes an *ad hoc* approach that was supported by the United States and implemented through the U.N. to assist restructure of over $130 billion of debt owed by Iraq.

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[4] "*See* Christoph G. Paulus & Steven T. Kargman, *Reforming the Process of Debt Restructuring—A Proposal for a Sovereign Debt Tribunal*. (Preliminary Draft Presented to the United Nations Workshop on "Debt, Finance and Emerging Issues in Financial Integration").

> The exit consent that re-immunized Uruguayan assets from attachment by holdout creditors in 2003 prefigured a much more sweeping action by the United Nations Security Council (UNSC) following the ousting of Saddam Hussein in that same year. By the time he was asked to leave office, Saddam had accumulated a debt stock, most of it in default, equal to about US $140 billion. *Iraq's economic recovery following the removal of the Saddam regime depended critically upon a satisfactory resolution of that gargantuan debt stock. UNSC Resolution 1483 (22 May 2003) was the instrument by which the international community sought to facilitate this debt restructuring.*
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> Among other things, [UN Security Council] Resolution 1483 strongly encouraged both Iraq and its Saddam-era creditors (official and private) to set about a comprehensive restructuring of those debts. *Recognizing that holdouts in such a restructuring could significantly undermine its effectiveness, however, the Security Council immunized all petroleum assets of Iraq against any form of attachment, garnishment, or execution', and clothed the proceeds of Iraqi oil sales (as well as the bank account into which the proceeds of all such oil sales were to be directed) with privileges and immunities identical to those enjoyed by the United Nations itself.* The obvious and intended effect of immunizing Iraqi assets in this way was to deflate any expectation on the part of prospective holdout creditors that a better recovery might follow litigation and enforcement of a judgment. The UNSC-mandated immunities for Iraq remained in place through the middle of 2011—long enough for Iraq to complete a successful restructuring of its Saddam-era debt stock that imposed an 89.75 per cent net present value loss on the affected creditors. Resolution 1483 was later described by the US Congressional *Research Service as 'a stay on the enforcement' of debt claims.'*

Sovereign Debt Management, at p. 20 (emphasis added).[5]

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[5] U.N. Security Council Resolution 1483, enacted May 22, 2003 stated fundamental support for the restructure of Iraq's sovereign debt.

> 2. *Calls upon* the international financial institutions to assist the people of Iraq in the reconstruction and development of their community, and *welcomes* the readiness of creditors, including those of the Paris Club, to seek a solution to Iraq's sovereign debt problems.

Resolution 1483 provided that all proceeds from the sale of Iraq's oil and gas assets should be placed ultimately in the Development Fund for Iraq (Resolution 1483, ¶ 20). More importantly, it provided that no matter where those proceeds might be all over the world they "shall be immune … and not be subject to any form of attachment, garnishment or execution …"

> 22. *Noting* … the desirability of prompt completion of the restructuring of Iraq's debt as referred to in paragraph 15 above, further decides that, until December 31, 2007, unless the Council decides otherwise, petroleum, petroleum products, and natural gas originating in Iraq shall be immune,

According to the U.S. Congressional Research Service, debt relief for Iraq was a priority for the U.S. government and it led to a "cancellation of a significant amount of Iraq's external debt."

> Following the ouster of the Saddam Hussein regime in spring 2003, Iraq's external debt was estimated to be around $130 billion. Reducing this debt to a sustainable level has been a priority of the U.S. government. Since 2003, debt relief negotiations have taken place in a variety of for a and led to the cancellation of a significant amount of Iraq's external debt.
>
> Iraq's debt relief remains a priority for both the Executive Branch and Congress. Debt relief is important to U.S. interests for several reasons, including releasing funds to help support Iraq's budget, pay for Iraq's security, and reestablish Iraq's financial standing with international creditors and the financial markets.

Iraq's Debt Relief: Procedure and Potential Implications for International Debt Relief, U.S. Congressional Research Service, March 29, 2011, at pp. i and 1.

The United States supported this debt relief for Iraq even though some argued that Iraq had the resources to pay back its debt over a longer period of time.

> An integral component of economic reconstruction following any conflict is resolving old debts and regaining access to the international financial community. *Iraq, however, was a unique case. Unlike many of the world's poorest countries, Iraq is considered a middle-income country because of its substantial petroleum reserves.* Iraq would likely be able to service its existing debts once its petroleum industry was functioning. Many analysts thus argued that Iraq appeared to be a good candidate for so-called "debt flow" treatment, involving rescheduling its official debts until it had the capacity to repay instead of cancelling them completely as is done for the poorest countries, which lack any natural resources that can be used to generate revenue. Others asserted that *if Iraq's future oil revenues were used to fund repayment of old debts, not enough would remain to fund its current and future economic needs.*
>
> Discussion of canceling Iraq's debt began soon after the ouster of the Hussein regime. Led by the Bush Administration, *a consensus was reached that Iraq would receive debt relief on terms that were*

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until title passes to the initial purchaser from legal proceedings against them and not be subject to any form of attachment, garnishment, or execution, and that all States shall take any steps that may be necessary under their respective domestic legal systems to assure this protection, and that proceeds and obligations arising from sales thereof, as well as the Development Fund for Iraq, shall enjoy privileges and immunities equivalent to those enjoyed by the United Nations… .

> *unique in light of its economic resources,* but not unprecedented given the political situation. The United States, for example, has provided special bilateral debt relief to Egypt, Pakistan, Jordan, and Poland, among many other countries.

Id. at pp. 4-5.

The United States was more willing to support the *ad hoc* approach to sovereign debt restructure used in Iraq than it had been willing to support the more permanent SDRM mechanism.

> The Iraq case thus illustrates that the United States and the international community are willing to shield a debtor from its creditors bankruptcy regime. This can be accomplished multilaterally through U.N. Security Council Resolution or bilaterally, on a case-by-case basis, through executive orders.

Id. at p. 9.

It has been argued that the European Union could use a similar *ad* hoc approach to facilitate restructure of European sovereign debt.

> It has been proposed elsewhere that the 2012 Treaty Establishing the European Stability Mechanism might be amended to immunize, within the eurozone, the assets of a debtor country receiving financial support from the European Stability Mechanism (ESM—the European bailout fund) against attachment by a creditor who was invited to participate in an ESM-approved debt restructuring, but declined to do so. The objective of such a measure would be similar to UNSC Resolution 1483 for Iraq: to encourage creditor participation in debt restructurings by dimming the outlook for a successful alternative litigation strategy.

Id. at pp. 20-21.

Whether done by the UN or some other group of cooperating sovereign states, imposition of limitations on exercise of remedies against assets of a sovereign could provide the power necessary to deal with creditors who would hold out from a restructure agreement reached by a majority of creditors, where the final details are agreed to be adjudicated by an arbitral panel.

A practice could be developed where the EU, UN or another entity with authority would issue a stay of enforcement of debt claims against the assets of a Sovereign Debtor which certifies that it has agreed with a majority of its creditors to submit to arbitration the question of whether its debt restructure Plan is in the best interests of creditors, fair and equitable and feasible.

II. Revised Proposal for Arbitration of a Sovereign Financial Restructure

A. An arbitration concerning the fairness of a Country's plan to reorganize its finances (a "Plan") can begin when the debtor Country agrees with representatives of its major suppliers of capital and labor to arbitrate their differences concerning the Country's proposed Plan pursuant to a set of Reorganization Principles (a "Submission to Arbitration").

B. A set of Reorganization Principles that could be used in such an arbitration is attached as Exhibit A. A simple form for Submission to Arbitration is attached as Exhibit B.

C. A debtor Country will not agree to such a Submission unless a sufficient number of its creditors (holding a sufficient percentage of its outstanding debt) and other parties in interest have agreed to the arbitration. Its creditors and possible Refinancers will not agree unless they perceive that they will be able to assert their views to a fair panel of arbitrators, under reasonable principles, with a reasonable chance of achieving something in favor of their position.

D. This Proposal permits a debtor Country to keep its power to devise and propose a Plan. It can advocate this Plan through a public arbitration proceeding where it can explain why it is fair in difficult circumstances. It can decide whether to modify its Plan in response to suggestions from the expert panel of arbitrators (a "Panel") to improve its chances of confirmation. If it prevails, it can enforce its Plan through the New York Convention. For a debtor Country, this is a good mixture of retaining power to lead and allowing an expert panel to resolve some of the most difficult issues, and be ultimately responsible for requiring unpopular, but fair, restructuring measures.

E. Creditors (both capital and labor) will only agree to participate in such a process, where the debtor Country could have the power to enforce its Plan at the end of the case, if they believe they will receive a fair hearing and have a chance of achieving something for their interests. Refinancers might actually take comfort that Plan terms, including covenants are enforceable.

F. A Submission to Arbitration can contain the parties' agreement on (1) the members of the arbitral Panel that will hear and decide the matter, (2) the Reorganization Principles to be applied, (3) the arbitral rules to be used, (4) the place of the arbitration, and (5) such other details as the parties wish to agree on.

G. Issues of fairness and trust will be dealt with implicitly as the parties try to agree on a Panel. Permitting the Country (on one side) and its labor and capital creditors (on the other side) to pick an equal number of arbitrators on the two sides will convince both that their views will be heard in the decision making process.

a. Requiring a majority vote or, failing that, giving power to the neutral head of the Panel to decide, means that picking the neutral will be a most

important measure of the parties' willingness to try to work together. There are people in the insolvency and diplomatic fields with such a reputation for knowledge and fairness that they could be trusted to be the neutral head of such a Panel.

b. If the Parties are unable to agree on a neutral head of panel for this Ad Hoc arbitration, they can pick an appointing authority to select the neutral.

H. The Panel can apply the chosen Reorganization Principles in a reasonable, fair and just manner, and may look for precedent in the law of the debtor Country, or in the reorganization laws of major commercial countries, including Germany, France, England, the United States, or such other countries' laws as the Panel believes provide an appropriate source for precedent concerning the chosen Reorganization Principles.

I. Unless specified by the Parties, the Panel can decide what procedural rules it will apply (UNCITRAL, or other), and other details of the arbitration. Conducting public hearings will help air the issues and build consensus toward acceptance of the final arbitral award.

J. The arbitration can begin with the debtor Country proposing a Plan to restructure its debts, including proposed austerity and revenue enhancement measures. Creditors will have the opportunity to be able to be finished in six month. There will be public hearings on the Plan to build greater public understanding and support for the process, and the austerity cuts and tax increases necessary to obtain approval of the Plan.

K. A prompt processing of the arbitration could involve the debtor Country preparing its Plan and papers supporting it in two months, creditors responding in one month, an arbitral hearing two weeks later and a ruling two weeks later, finishing in 4 months. These time periods could be adjusted to give the panel six weeks to decide and still finish in 5 months. Such a process certainly should be able to be finished in six months from when it begins by the debtor country proposing its plan and the evidence supporting it.

L. Awards of the Panel, including those concerning confirmation of the Plan, should be enforceable through the New York Convention.

M. A scholarly article, written by a prominent bankruptcy judge explains the legal basis for this Proposal. III member U.S. Bankruptcy Judge Allan Gropper published an article in the American Bankruptcy Law Journal describing how parties can agree to arbitrate fundamental debt restructure issues so that no bankruptcy case need be filed, as long as they do not adversely affect claims of entities that have not agreed to arbitrate (Restructure Arbitration). A. Gropper, The Arbitration of Cross Border Insolvencies, 18 ABLJ 201 (2012). According to that article,:

"There does not appear to be any authority that parties should not be able to agree to arbitrate a core insolvency dispute on condition that non-consenting parties be left unimpaired."

"No authority has been found that arbitration of the type proposed in this paper is "incapable of being performed."

"No legal authority has been found to the effect that insolvency disputes are not arbitrable because of the nature of the subject matter."

"Arbitration of insolvency issues should not raise public policy concerns to any greater extent than does a workout – provided that those parties who have not agreed to the arbitration are left unimpaired."

"[T]he principle that arbitration has no place in the insolvency sphere (that insolvency might be a subject not suitable for arbitration) has been subject to significant erosion in recent years."

"These same principles could be applied to the arbitration of sovereign debt restructuring. The International Monetary Fund's Sovereign Debt Restructuring Mechanism ("SDRM") has failed for various reasons. III members, Professor Christoph Paulus and Steve Kargman, have proposed in its place a **"Sovereign Debt Tribunal," which would be an "international arbitral tribunal for resolving disputes arising in sovereign debt restructurings."** 18 ABLJ at 242.

N. Under this Revised Proposal, the parties would pick an arbitral panel on an **ad hoc** basis, as a Sovereign Debt Tribunal has not yet been established.

EXHIBIT A

Reorganization Principles

1. Whether the plan of reorganization (the "Plan") proposed by a sovereign government (a "Sovereign Debtor") is in the best interests of creditors because it will pay creditors more than they would receive if they exercised their existing non-bankruptcy remedies.

2. Whether the Plan proposed by the Sovereign Debtor provides fair and equitable treatment to secured claims because it provides them with the value of their collateral.

3. Whether the Plan proposed by the Sovereign Debtor provides fair and equitable treatment to unsecured creditors because it proposes to pay them all that the Sovereign Debtor can reasonably afford:

    a. after reasonable austerity (that is reasonably adequate cutting of expenditures, including transfer payments, levels of service, levels of employment, wage rates and pension related payments), and

    b. after reasonable use of taxation.

4. Whether the Plan proposed by the Sovereign Debtor is feasible because the payments to creditors it provides for are likely to be paid and still leave adequate funds to provide appropriate services to citizens.

5. A creditor can block confirmation of a Plan if it is able to prove:

    a. that the Plan is not in its best interests as a creditor because it could obtain more by exercising its legal remedies without such a Plan of reorganization; or

    b. that the Plan is not fair and equitable; or

    c. that the Plan is not feasible.

EXHIBIT B

Agreement to Submit Dispute Concerning Debtor's Plan of Reorganization to Arbitration

1. **_______________ (the "Debtor" or the "Country") and certain of its creditors, including, (1) certain representatives of labor providers and pension and other benefits recipients, including: ________________ ("Labor Providers" and "Labor Representatives"); (2) certain providers of loans and other forms of capital ("Capital Providers" and "Capital Representatives"); (3) certain providers of other goods and services ("Other Creditors" and "Other Creditor Representatives"); and (4) certain parties that might act to provide new financing to the Country once its finances are reorganized (the Refinancers") and the "Refinance Representative")0 (collectively the "Parties" and the "Representatives") have a dispute concerning what is a fair plan of reorganization for the Country to reorganize its finances to reach a sustainable financial condition that will permit it to pay its obligations when they come due (the "Dispute" and a "Fair Plan"). Exhibit A hereto contains a list of the Parties and their designated Representatives.**

2. **Certain potential providers of additional financing have stated that they will only do so in connection with a Fair Plan (the "Refinancers"), [and subject to such additional conditions as they choose to impose.] The Refinancers wish to participate in this arbitration, [but not to be bound by it except as described herein].**

3. **The Dispute about what is a Fair Plan involves the following agreements, statutes and other documents (collectively the "Documents in Dispute"):**

    a. **Concerning the provision of capital by loans or otherwise (collectively, the "Capital Documents"):**

        (i) **____________ Loan Documents;**

        (ii) **____________ Bond Documents;**

        (iii) **Other agreements for the provision of capital, including_________;**

    b. **Concerning the provisions of labor (collectively, the "Labor Documents")**

        (i) **_________ Labor Agreements;**

        (ii) **__________ Pension Agreements;**

        (iii) **Other Agreements relating to Labor, including _________;**

        (iv) **The following statutes concerning labor and pensions, including _________;**

c. **Concerning the Country's expenditures**

(i) **________________ Statutory and budgetary information regarding the Country's expenditures, including for government jobs, pensions, social benefits and other similar things.**

(ii) **_________________ Analyses, studies and other information regarding potential austerity cuts and the effects thereof.**

d. **Concerning the ability of the Country to raise revenue (collectively, the "Revenue Documents").**

(i) **____________ Statutory and budgetary information regarding the Country's revenues from all sources under the Country's existing laws;**

(ii) **____________ Analyses, studies and other information regarding the potential revenues realistically realizable from reasonable and sustainable revenue enhancement measures, including both new measures and more rigorous enforcement of existing laws.**

4. **The Parties agree and hereby submit for final determination by arbitration the question of whether the Country's proposed Plan, as it may be amended, is a Fair Plan.**

5. **The arbitration shall be conducted by the Arbitral Panel as described and defined below which shall apply reorganization principles, as set forth in the Reorganization Principles attached hereto.**

6. **The Panel shall apply the Reorganization Principles in a reasonable, fair and just manner, and may look for precedent in the law of the Debtor Country, or in the reorganization laws of major commercial countries, including Germany, France, England, the United States, or such other countries' laws as the Panel believes are an appropriate source for precedent concerning the Reorganization Principles being used.**

7. **Refinancers shall be permitted to participate in the arbitration as if they were a Party. The Arbitral Panel shall not, however, have the power to compel them to provide any funding for a Plan confirmed as a Fair Plan; but Refinancers shall have, among other rights, the right to make as one condition of their funding that the Panel find the Plan, as it may be amended, to be a Fair Plan.**

8. **The arbitration shall be conducted by [five] arbitrators, appointed as provided in this Agreement. The Debtor Country hereby designates [___, and ____] as arbitrators. Creditor Representatives hereby designate [_______] as an arbitrator. Labor Representatives hereby designate [_______] as an arbitrator. [The Debtor**

Country, Creditor Representatives and Labor Representative have agreed that [_______] shall be the neutral presiding arbitrator.] [The arbitrators so designated by the Parties shall, within a period of [30] days from the date of this Agreement, jointly designate in writing the neutral presiding arbitrator. If the four named arbitrators do not jointly designate in writing the neutral presiding arbitrator within a period of [30] days of the date of this Agreement then, on the application of a party to this Agreement, the neutral presiding arbitrator shall be designated by the appointing authority].

9. **If a vacancy arises on the Arbitral Panel because any arbitrator dies, resigns, refuses to act, or becomes incapable of performing his or her duties, the vacancy shall be filled by the method by which that arbitrator was originally appointed. If that method fails, the appointment(s) shall be made by the appointing authority within [30] days of being requested to do so by one of the Parties.**

10. **The Arbitral Panel may make its awards by a majority. In the event that no majority is possible, the presiding arbitrator may make the decision(s) as if acting as a sole arbitrator.**

11. **After their designation, the arbitrators shall proceed forthwith to arbitrate and determine the Dispute. In so doing, the arbitrators shall act fairly and impartially as between the parties, giving each party a reasonable opportunity of presenting its case and replying to that of the other party. The arbitrators shall adopt procedures suitable to the circumstances of the Dispute, avoiding unnecessary delay or expense.**

12. **The arbitrators shall have the power to decide all procedural and evidentiary matters, subject to the right of the parties to agree concerning any matter, including:**

    a. **when and where any part of the proceedings is to be held;**

    b. **the language or languages to be used in the proceedings and whether translations of any relevant documents are to be supplied;**

    c. **whether, and if so, what form of written submissions are to be made, when these should be submitted, and the extent to which such statements can be amended;**

    d. **the extent to which documents or categories of documents should be subject to discovery between the parties;**

    e. **the extent to which interrogatories should be put to and answered by the respective parties, and when and in what form this should be done;**

f. **whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance, or weight of any material (oral, written or other) and the time, manner and form in which such material should be exchanged and presented;**

g. **whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law;**

h. **whether and to what extent there should be oral or written evidence or submissions.**

13. **The Arbitral Panel shall [use its best efforts to]/[will] render a final award within [six months of the appointment of the third arbitrator.**

14. **Every hearing held by the Arbitral Panel shall be open to the public to attend.**

15. **All information and documents arising out of or in connection with the arbitration shall not be confidential and may be disclosed to a third party without notice to the Parties or to the Arbitral Panel.**

16. **The Arbitral Panel [shall] [shall not] have the power to award a party all or part of its legal costs.**

17. **The seat of the arbitration shall be [____________]**

18. **The Arbitral Panel shall fix and state in their award their [reasonable] fees and expenses in connection with the arbitration, and each Party agrees to pay its pro rata share of the same. If the arbitrators so direct, the prevailing party shall pay the full amount of such fees and expenses and a pro rata portion of the same may be included in the award in its favor against the other Parties.**

19. **The Parties intend that the award of the Arbitral Panel shall conclusively determine the Dispute between them and hereby exclude any right which the Parties might otherwise have under applicable law to appeal or to challenge any award of the Arbitral Panel in any court of competent jurisdiction.**

____
Debtor Sovereign Representative

____
Capital Claim Representatives

____
Labor Claim Representatives