Sovereign Debt Restructuring

and English Governing Law

Steven L. Schwarcz

Abstract: The problem of sovereign indebtedness is becoming a worldwide crisis because nations, unlike individuals and corporations, lack access to bankruptcy laws to restructure unsustainable debt. Decades of international efforts to solve this problem through contracting and attempted treaty-making have failed to provide an adequate debt-restructuring framework. A significant amount of outstanding sovereign debt is governed, however, by English law. This essay argues that the U.K. Parliament has the extraordinary power to help solve the problem of unsustainable country debt by changing English law to facilitate fair and consensual debt restructuring.

INTRODUCTION .................................................................................................................... 2
I. A MODEL LAW TO FACILITATE SOVEREIGN DEBT RESTRUCTURING ................................ 8
   A. Enacting the Model Law into English Law ................................................................. 8
   B. Key Provisions of the Model Law............................................................................. 10
II. FEASIBILITY .................................................................................................................. 24
   A. Legal Feasibility ....................................................................................................... 24
   B. Economic Feasibility ............................................................................................... 28
   C. Political Feasibility .................................................................................................. 30
CONCLUSIONS .................................................................................................................... 34
APPENDIX—SOVEREIGN DEBT RESTRUCTURING MODEL LAW ......................................... 36

1 Copyright ©2017 by Steven L. Schwarcz, the Stanley A. Star Professor of Law & Business, Duke University School of Law (schwarcz@law.duke.edu), and Senior Fellow, the Centre for International Governance Innovation (CIGI). Portions of this essay are based in part on Sovereign Debt Restructuring: A Model-Law Approach, 6 J. GLOBALIZATION & DEVELOPMENT 343 (2016) (hereinafter “A Model-Law Approach”).

2 For valuable comments, the author thanks Mark Jewett, Riz Mokal, Mark Weidemaier, Deborah Zandstra, and participants in a Finance & Law Faculty Workshop at Duke University’s Fuqua School of Business and the Brooklyn Law School symposium on “Decision Making and Legitimacy in Public Bankruptcies,” sponsored by The Brooklyn Journal of Corporate, Financial and Commercial Law and the Center for the Study of Business Law and Regulation. He also thanks Ryan A. Berger for excellent research assistance.
INTRODUCTION

In recent years, many countries—including Greece, Argentina, Ukraine, and perhaps now Venezuela—have found themselves indebted beyond their ability to pay. The threat of default can harm not only debtor nations and their citizens but also their creditors. An actual default can jeopardize the very stability of the financial system.

The problem of unsustainable sovereign debt is especially serious because international law—unlike domestic bankruptcy law for companies and individuals—does not yet facilitate reasonable debt restructuring. Sovereign debt restructuring has therefore been limited to contractual negotiation, raising the holdout problem. This is a type of

---

4 Cf. Joseph E. Stiglitz et al., Frameworks for Sovereign Debt Restructuring, IPD-CIGI-CGEG Policy Brief from a November 17, 2014 conference held at Columbia University, at 1 (stating that “[p]oorly designed arrangements for resolving sovereign debt problems can lead to inefficiencies and inequities . . . Delays in restructuring can be very costly. Insufficiently deep restructuring can force the economy through multiple crises and restructuring—at a high cost.”).
5 See, e.g., Jay L. Westbrook, Sovereign Debt and Exclusions from Insolvency Proceedings, in A DEBT RESTRUCTURING MECHANISM FOR SOVEREIGNS: DO WE NEED A LEGAL PROCEDURE?, at 251 (Christoph Paulus, ed. 2014). Cf. e-mail from Eva Hüpkes, Adviser on Regulatory Policy and Cooperation at the Financial Stability Board (FSB), to the author (July 14, 2015) (observing that “doubts about the ability of states to provide additional resources can make financial institutions more fragile, in particular where there are no regimes in place that provide authorities with powers and tools to resolve financial firms without use of public funds”). Sometimes a pre-default scenario can be destabilizing if, for example, it threatens debt securities that are widely held by financial institutions, motivating panicked sales that drive down prices.
6 Steven L. Schwarcz, Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach, 85 CORNELL LAW REVIEW 956, 960 (2000), also available at
collective action problem in which one or more creditors refuse to agree to a debt restructuring plan that proposes to change critical payment terms—such as principal amount, interest rate, and maturities, which may require unanimity to change—in order to extract more than their fair share of a debt-restructuring settlement.  

Some sovereign debt contracts—including bond contracts governed by English law—include provisions, called collective action clauses ("CAC"s), that attempt to mitigate the holdout problem by enabling a specified supermajority, such as two-thirds or three-quarters, of the contracting parties to change critical repayment terms. Relying solely on such a contractual approach, however, has been insufficient. Even in sovereign debt contracts that include CACs, holdouts may be able to purchase vote-blocking positions. More critically, a CAC ordinarily binds only the parties to the


9 Westbrook, supra note 5, at 255.


11 Many sovereign debt contracts simply lack CACs. Steven L. Schwarcz, Sovereign Debt: The Statutory Solution, INTERNATIONAL FINANCIAL LAW REVIEW (Dec. 2014); also available at http://www.iflr.com/Article/3405641/Sovereign-debts-statutory-solution.html. Cf. text accompanying note 70, infra (observing that even after years of trying to include CACs, relatively few Greek debt agreements actually contained such clauses).

12 See, e.g., John A. E. Pottow, Mitigating the Problem of Vulture Holdout: International Certification Boards for Sovereign Debt Restructurings, LAW & ECONOMICS WORKING
particular contract that includes it; hence, the parties to any given sovereign debt contract can act as holdouts in a debt restructuring plan that requires parties to all such contracts to agree to the plan. This explains the recent inability to restructure English-law governed Greek bonds that contained CACs.

To attempt to address this cross-contract holdout problem, the International Capital Market Association (“ICMA”) has proposed CACs that also aggregate voting across debt issues. But aggregate-voting CACs have some of the same limitations as other CACs, notably binding only creditors who are parties to agreements that include them. More importantly, even if all new sovereign debt contracts were to include

PAPERS 81 (2013), available at http://repository.law.umich.edu/law_econ_current/81 (vulture funds “may easily be able to marshal blocking positions, especially when a sovereign has issued multiple rounds of debt”). Cf. John Muse-Fisher, Starving the Vultures: NML Capital v. Republic of Argentina and Solutions to the Problem of Distressed-Debt Funds, 102. CAL. L. REV. 1671, 1707 (2014) (illustrating how holdouts can “bid up the price of defaulted bonds in order to achieve a blocking position”); Molly Ryan, Sovereign Bankruptcy: Why Now and Why Not in the IMF, 82 FORDHAM L. REV. 2473, 2502 (2014) (stating that “Greek bonds governed by U.K. law restructured in 2012 contained a CAC, but holdout investors successfully purchased blocking minorities in individual bond series that could not be offset by pro-restructuring majorities”). The higher the voting requirement (e.g., three-quarters), the easier it is to block the requisite vote.

Cf. International Monetary Fund, supra note 8, ¶ 25 at 18 (observing that “most existing CACs operate on a series-by-series basis”).

Sovereign Debt Restructuring, supra note 6, at 960.

International Monetary Fund, supra note 8, ¶ 4 at 5 (stating that of “the 36 [Greek] bond issuances governed by English law that were eligible to participate in the debt exchange, and which contained CACs, only 17 were successfully restructured using the CACs. The operation of the CACs in the remaining bond issues was effectively neutralized by holdout creditors . . . .”).

See Standard Aggregated Collective Action Clauses (“CACs”) For The Terms and Conditions of Sovereign Notes, International Capital Market Association, Aug. 2014, at 3. The IMF and the G20 have supported the effort to include these aggregate-voting CACs in sovereign debt contracts.

Cf. Stiglitz et al., supra note 4, at 2 (observing that ICMA’s CAC aggregate-voting clauses “are improvements over the old terms, but are not sufficient to solve a variety of problems faced in sovereign debt restructurings”).
aggregate-voting CACs, it will be many years before existing debt contracts, which do not include them, are paid off.\footnote{See, e.g., International Monetary Fund, Strengthening the Contractual Framework to Address Collective Action Problems in Sovereign Debt Restructuring 33-34 (2014), available at http://www.imf.org/external/pp/longres.aspx?id=4911 (observing that approximately 29% of all sovereign bonds outstanding, and 21.2% of all such bonds governed by English law, “will mature after ten years”).}

CACs are therefore an inadequate substitute for pursuing a more systematic legal framework for sovereign debt restructuring.\footnote{For a systematic comparison of contractual and statutory legal resolution frameworks, see Steven L. Schwarcz, Sovereign Debt Restructuring Options: An Analytical Comparison, 2 HARVARD BUSINESS LAW REVIEW 95 (2012), also available at http://ssrn.com/abstract=1872552.} However, a multilateral framework, such as a convention or treaty, is not currently politically feasible. In 2014, for example, the United Nations General Assembly voted to begin work on a “multilateral legal framework” for sovereign debt restructuring. The resolution—originally promoted by Argentina, apparently in response to the U.S. Supreme Court’s decision to let stand a lower court ruling enforcing pari passu clauses in Argentine sovereign debt—was introduced by Bolivia on behalf of the Group of 77 developing nations (of which Bolivia was then the chair) and China.\footnote{See current status here: http://www.un.org/press/en/2014/gaef3417.doc.htm.} But both the United States\footnote{Press Release, General Assembly, Proposal for Sovereign Debt Restructuring Framework among 6 Draft Texts Approved by Second Committee, U.N. Press Release GA/EF/3417 (Dec. 5, 2014) (“Also speaking before the vote, the representative of the United States was obliged to vote ‘no’ on the draft resolution as there was ongoing work on the technically complex issue in such bodies as the International Monetary Fund (IMF), which were more appropriate venues”).} and the European Union\footnote{Italy, speaking on behalf of the EU, stated that the IMF is the “primary forum to discuss sovereign debt restructuring.” Id. Apparently few, if any, developed economy countries supported the resolution, although many abstained rather than vote no. See Recorded Vote at 37th meeting, Dec. 5, 2014, available at http://www.un.org/en/ga/second/69/modalities.pdf.} opposed the resolution, to some extent paralleling opposition to an earlier International Monetary Fund (IMF) proposal for a Sovereign Debt Restructuring Mechanism
(“SDRM”) convention. Although the United Nations Conference on Trade and Development (UNCTAD) has been tasked with moving the General Assembly’s approach forward, there is skepticism whether any such framework is feasible without U.S. and E.U. support.

This essay proposes an inventive, and arguably more effective, approach to achieving a sovereign-debt-restructuring framework by focusing on the governing law. Most sovereign debt contracts are governed either by the debtor-state’s law or by New York or English law. For contracts governed by the debtor-state’s law, that nation itself could enact law to facilitate its debt restructuring. For contracts governed by New York law, I have elsewhere examined in depth how that state could enact law to facilitate sovereign debt restructuring. This essay examines how English law could be modified to facilitate the restructuring of sovereign debt contracts governed by that law.

To that end, Part I of the essay proposes modifications to English law based on a model law for sovereign debt restructuring (hereinafter, “Model Law”). Part I also

---

23 Cf. A Model-Law Approach, supra note 1, at 9 (discussing U.S. opposition to the IMF’s proposed SDRM). It appears that at least part of that opposition was due to lobbying by major financial industry associations. Sean Hagan, Designing a Legal Framework to Restructure Sovereign Debt, 36 GEO. J. INT’L L. 299, 391–93 (2005). I later compare that opposition to potential opposition to this essay’s proposed model-law approach. See infra notes 132-142 and accompanying text. The opposition to the IMF’s proposed SDRM is especially ironic in light of Italy’s comment, supra note 22.


distinguishes this approach from a legal treaty or convention,28 explains how the Model Law provisions could be enacted into English law, and discusses certain of those provisions. For example, although the Model Law provides for prospective application, it includes an option to be enacted with both prospective and retroactive application.29 Retroactivity would facilitate any needed restructuring of the immense stock—perhaps a quarter30 to a third31 or more32 of all outstanding sovereign debt contracts—of such contracts governed by English law.33 Part II of the essay analyzes the legal, economic, and political feasibility of a model-law approach. Finally, the essay’s Appendix suggests the Model Law’s text.

28 For a detailed discussion of the history of attempted treaty approaches to sovereign debt restructuring, see A Model-Law Approach, supra note 1.
29 See Model Law Article 1(2).
30 See, e.g., Michael Tomz, Empirical Research on Sovereign Debt and Default (Oct. 22, 2012), http://web.stanford.edu/~tomz/working/TomzWright2012-w18598.pdf (finding that around a quarter of sovereign debt contracts are governed by English law with 28% by value and 22% by number).
32 See, e.g., International Monetary Fund, supra note 8, ¶ 6 at 6 (estimating that international sovereign bonds governed by the laws of [England] represent approximately . . . 40 percent of the notional amount of the outstanding stock of international sovereign bonds"). This percentage references “international” sovereign bonds, which appears to mean sovereign bonds governed by the law of a jurisdiction other than that of the debtor-state issuing the bonds. Because some percentage of a debtor-state’s bonds tend, in my experience, to be governed by local law (in which case, the debtor-state itself could change that law to facilitate its debt restructuring; see supra note 26 and accompanying text), the actual percentage of sovereign bonds governed by English law is certainly less than 40 percent of all sovereign bonds.
I. A MODEL LAW TO FACILITATE SOVEREIGN DEBT RESTRUCTURING

A model law is suggested legislation for governments individually to consider enacting as domestic law in their jurisdictions. In contrast, a treaty or convention—the terms are synonymous—is a multilateral agreement or compact among nations. The more relaxed nature of a model-law approach can be more appealing than a formal treaty.

In the case of sovereign debt restructuring, for example, a model-law approach would bypass the current political impasse to achieve a treaty. A model-law approach could also be pursued in parallel as part of an overall strategy for developing a legal resolution framework for sovereign debt restructuring, thereby helping “to develop consensus around [debt restructuring] ideas that are commercially sound and legally effective.”

A. Enacting the Model Law into English Law

34 UNCITRAL, supra note 35.
35 See BLACK’S LAW DICTIONARY 164 (4th pocket ed. 2011) (defining convention as “[a]n agreement or compact, especially one among nations; a multilateral treaty”). See also FAQ – UNCITRAL Texts, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, available at http://www.uncitral.org/uncitral/en/uncitral_texts_faq.html (last visited Mar. 12, 2015) (defining a convention as “an instrument that is binding under international law on States and other entities with treaty-making capacity that choose to become a party to that instrument”).
37 See supra notes 20-24 and accompanying text.
38 Oonagh Fitzgerald, CIGI GLOBAL RULE OF LAW BLOG: “Next steps towards a multilateral debt workout process,” June 4, 2015, at 3-4.
English law refers to the law governing England and Wales, which are semi-autonomous subnational regions within the United Kingdom. Statutory changes to English law are made by the U.K. Parliament (“Parliament”).

Parliament would enact the Model Law in the same way it legislates any other bill, a process that normally involves four stages. The first stage is for a draft bill incorporating the provisions of the Model Law to be proposed for consultation by a government department and issued to interested parties or to select committees in the House of Commons or House of Lords. After approval by the applicable select committee, the second stage involves the bill being presented for debate before Parliament, as a proposal for a new law. In the third stage, the bill must be approved by a majority of both the House of Commons and the House of Lords. If the bill receives that approval, the fourth and final stage is to send the bill to the monarch for Royal Assent—which, unlike in the United States where the president holds an oft-used veto power, is regarded as more of a formality. After Royal Assent, the bill becomes an Act of Parliament, creating binding law.

---

39 See, e.g., Tom Bolam, Fladgate LLP, Common Mistakes in Choice of Law and Jurisdiction Clauses, Sept. 2015, available at http://www.lexology.com/library/detail.aspx?g=8f9476e8-b712-4726-b675-21463a3355e9 (explaining that the United Kingdom of Great Britain and Northern Ireland has three separate and distinct legal systems—Scotland; England and Wales; and Northern Ireland—and that English Law refers to the legal system of England and Wales).
41 See id.
42 Id.
43 Id. In each house, the bill must pass through a first reading, second reading, committee stage, report stage, and third reading with votes and amendments at each stage. Under certain conditions, and rarely used, the Parliament Acts 1911 and 1949 allow the House of Commons to pass a bill without the consent of the House of Lords. Id.
44 Id. Although the monarch ordinarily gives Assent to a bill that has been duly approved by both Houses, there appears to be no constitutional mechanism by which to require that Assent to be given. E-mail from Riz Mokal, barrister, South Square Chambers, & Honorary Professor, University College London Faculty of Laws, to the author (Apr. 3, 2017).
45 See supra note 40.
B. Key Provisions of the Model Law

The Model Law is designed to facilitate the restructuring of unsustainable sovereign debt contracts that are governed by English law. This essay next explains certain of the Model Law’s key provisions.

*Rationale.* The Preamble explains the reasons for the Model Law. The ultimate goals are to restore the debtor-state to debt sustainability, so as to relieve the undue economic burden on the debtor-state’s citizens; to enable the debtor-state to pay its debts, thereby avoiding a default that might have systemic economic consequences; to reduce creditor uncertainty, thereby reducing lending costs; and to reduce the need for costly and morally hazardous debt bailouts.

*Optional Retroactivity.* If and when enacted into English law, the Model Law would apply to future sovereign debt contracts that are governed by English law. As an option, Article 1(2) allows the Model Law to also apply retroactively.46 This provides a unique opportunity. As observed, numerous sovereign debt contracts are currently

---

46 The term “retrospectively” is sometimes used as a synonym for retroactivity under English law. See, e.g., “Taxing out of time: parliamentary supremacy and retroactive tax legislation” in *BRITISH TAX REVIEW* (“there has been some confusion in the jurisprudence regarding the use of the terms ‘retroactive’ and ‘retrospective.’ . . . [T]he context of legislation, each term is defined as a synonym of the other: a law is considered retroactive/retrospective where it is made operative at a past time. Different jurisdictions have, historically, favoured one term over the other.”). Even if the terms were synonymous, this essay uses the term retroactive because it has a clearer meaning internationally. Furthermore, there may well be a subtle difference in meaning between the terms. Cf. *Benner v. Canada (Secretary of State)*, 1997 CANLII 376 (S.C.C.), [1997], 1 S.C.R. 358 at para. 39 (adopting a distinction made in Elmer Driedger, *Statutes: Retroactive Retrospective Reflections*, 56 CAN. BAR REV. 264, 268-69 (1978)): “A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute operates backwards. A retrospective statute operates forwards, but it looks backwards in that it attaches new consequences for the future to an event that took place before the statute was enacted.”
governed by English law. Retroactive application would enable the Model Law to resolve problems of unsustainable sovereign debt that arise under those contracts.

Some might criticize retroactive application of the Model Law as impairing sanctity of contract. I later analyze the legal and normative consequences of choosing the optional retroactivity.

Claims Covered. Article 2(2) broadly defines the types of debt claims that the Model Law covers. Notably, its coverage is not limited to bond debt or other debt instruments traded as securities. The Model Law covers all payment claims against a debtor-state for monies borrowed or for the debtor-state’s guarantee of (or other contingent obligation on) monies borrowed.

Unlike the IMF’s proposed SDRM, which covered only long-term-maturity claims (of the types of claims it otherwise covered), the Model Law does not discriminate between, and thus covers both, long-term and short-term maturities. This recognizes that, increasingly, most sovereign debt “bailouts have come in response to the [rollover] of short-term claims.” Covering this important cause of a debtor-state’s inability to pay will help to facilitate necessary debt relief while also reducing short-term-lender moral hazard; short-term lenders can no longer assume that their claims against a financially troubled debtor-state will be paid in full. That, in turn, will reduce short-term sovereign lending and thereby reduce rollover risk—in this context, the risk that a debtor-state will be unable to borrow sufficient new funds to repay maturing short-term debt.

47 See supra notes 30-33 and accompanying text.
48 See infra notes 97-109 and accompanying text (analyzing the legal consequences under international and English law) and notes 109-121 and accompanying text (analyzing the normative consequences).
49 Setser, supra note 25, at 4.
of the sovereign debt restructuring practice at Cleary Gottlieb Steen & Hamilton LLP has called rollover risk one of today’s most critical sovereign debt problems.51

Article 2(2) also broadly defines “monies borrowed” to include a wide range of financing, other than trade accounts payable arising in the ordinary course of business. The Model Law’s coverage does not discriminate based on the nationality of the holders of the (otherwise) covered claims or the currency in which such claims are payable.52 Consistent with the historical norms of most sovereign debt restructuring, however, the Model Law does not cover a debtor-state’s internal operational debt claims, such as pension and retiree obligations, tax refunds, unpaid salaries to public employees, or social program payments. Normally these types of debts are paid in full in a later time.53

Supervisory Authority. The definition of “Supervisory Authority” in Article 2(5) of the Model Law references a “neutral international organization.” This is likely to be one of the Model Law’s most controversial provisions. It currently is unclear what organization might qualify as truly neutral. Imperfect options might include, among other

51 Luncheon speech of Lee C. Buchheit, March 27, 2015 Imperial College conference, supra note 2. Cf. Rollover Risk, supra note 50 (discussing rollover risk as the most likely cause of a possible debt default by the United States). CACs typically do not apply to short-term sovereign debt (maturity less than one year) because of perceived restructuring complexities giving the restrictive timing. Only experience will show whether that presents an insurmountable obstacle.


53 E-mail from Ignacio Tirado, Professor, Universidad Autonoma de Madrid, and advisor to the World Bank, to the author (Mar. 23, 2014).
possibilities, a neutral committee of the IMF, the World Bank, or UNCITRAL, or even a court of the debtor-state.\textsuperscript{54} There are concerns, however, that existing organizations are too political or conflicted.\textsuperscript{55}

More generally, the very issue of the need for a supervisory authority can raise confusion. Formal sovereign debt restructuring solutions, such as a convention, are often conflated with the need for formal supervisory bodies.\textsuperscript{56} Under the Model Law, however, no formal supervisory authority is needed to exercise discretion because disputes are adjudicated through binding arbitration.\textsuperscript{57} The main role of a Supervisory Authority under the Model Law is in fact ministerial: to fact-check information, to maintain a list of creditors and verify claims, and to oversee the creditor voting process.\textsuperscript{58}

Many commentators on sovereign debt restructuring have focused on supervision of the process and resolution of disputes. Professor Paulus contends, for example, that there should be a “neutral supervisor” that would follow procedural rules for restructuring

\textsuperscript{54} Professor Mooney proposes, in a different context, that a court of the debtor-state could serve as a supervisory authority in a sovereign debt restructuring. Charles W. Mooney, Jr., \textit{A Framework for a Formal Sovereign Debt Restructuring Mechanism: The KISS Principle (Keep it Simple, Stupid) and Other Guiding Principles}, 37 MICH. J. INT’L L. \textit{__} (forthcoming 2015). The Supervisory Authority might also consist of a rotating panel of III or CIGI members whose fees and expenses would be paid for by the debtor-state invoking application of the Model Law.

\textsuperscript{55} Prof. Westbrook argues, for example, that one of the SDRM’s flaws is that the IMF, the supervisor thereunder, would be conflicted, having responsibility for both funding and administering the proceeding as well as addressing rights and priorities. Westbrook, \textit{supra} note 5, at 256. \textit{Cf.} Joseph E. Stiglitz & Martin Guzman, \textit{A Rule of Law for Sovereign Debt}, available at \url{http://www.project-syndicate.org/commentary/sovereign-debt-restructuring-by-joseph-e-stiglitz-and-martin-guzman-2015-06} (arguing that the IMF “is too closely affiliated with creditors” to be neutral).

\textsuperscript{56} That might in part help to explain U.S. and E.U. opposition to U.N. efforts to reach a formal sovereign debt restructuring mechanism. \textit{See supra} notes 21-23 and accompanying text.

\textsuperscript{57} Model Law Article 10. \textit{See also Sovereign Debt Restructuring, supra} note 6, at 1023-29.

\textsuperscript{58} \textit{Cf.} Barry Eichengreen, \textit{Policy Proposals for Restructuring Unsustainable Sovereign Debt}, in \textsc{The New Public Finance} 444 (2006) (arguing that a sovereign debt resolution forum need only engage in ministerial actions).
and resolution.59 Others advocate the creation of a permanent institutional framework for supervision60 or argue that existing institutions may serve that purpose.61 And yet others advocate a contractually binding arbitration process.62 The author believes, however, that

60 Two senior fellows of CIGI have proposed, for example, the creation of a Sovereign Debt Forum (SDF), which would be an incorporated non-profit, membership-based organization that would provide an independent standing body to research and preserve institutional memory on best practices in sovereign debt restructuring. Richard Gitlin & Brett House, A Blueprint for a Sovereign Debt Forum (CIGI Paper No. 27, at 10) (Mar. 12, 2014), available at http://www.cigionline.org/publications/blueprint-sovereign-debt-forum. The concept of the SDF was borrowed and expanded from “The Sovereign Debt Forum,” a paper that Richard Gitlin presented in 2002 at the Council on Foreign Relations. The SDF, they argue, could also serve as a venue to facilitate early engagement among creditors, debtors, and other stakeholders when sovereign nations encounter financial trouble. Gitlin & House, supra at 18. Professor Howse, in contrast, proposes a debt workout mechanism (DWM) that ensures the participation of all relevant stakeholders. Robert Howse, “Towards a Framework for Sovereign Debt Restructuring: What Can Public International Law Contribute?” (forthcoming in Too Little, Too Late: The Quest of Resolving Sovereign Debt Crises, Columbia University Press, New York, 2016).
61 See, e.g., Brooks, Skylar and Domenico Lombardi. “Governing Sovereign Debt Restructuring Through Regulatory Standards”. Paper presented at IPD-CIGI Conference on Sovereign Debt Restructuring at Columbia University, September 22, 2015. Forthcoming, Journal of Globalization and Development. Brooks and Lombardi argue there is a governance gap for resolving debt crises that can be filled by the Financial Stability Board (FSB), which could serve as the focal institution responsible for overseeing the coordination and further development of soft law regulatory standards for sovereign debt restructuring.
if and when an international consensus emerges on the operative legal solutions needed to solve the holdout and funding problems, the institutional bodies needed for supervision and resolution will naturally follow.

**Debt Sustainability.** Article 3(2)(b) of the Model Law requires a debtor-state’s petition for relief to certify that the debtor-state “needs relief under this [Model] Law to restructure claims that, absent such relief, would constitute unsustainable debt of the State.” Although the debtor-state itself would make the determination of debt sustainability for purposes of Articles 3(2)(b) (and also for purposes of Article 6(6)), it should be guided by the best practices in making such a determination. There does not yet, however, appear to be a universally accepted view of what constitutes debt sustainability for nations. Even the IMF framework for conducting debt sustainability analyses has been criticized for creating intercreditor inequities and for being ineffective in detecting sustainability problems.

**The Holdout Problem.** Article 7 of the Model Law addresses the most critical problem that a debt-restructuring mechanism can solve—the holdout problem. A Model Law or other statutory approach to sovereign debt restructuring should be more effective institution. *Id.* at 5, 8. Cf. Jose Antonio Ocampo, “A Brief History of Sovereign Debt Resolution, and a Proposal for a Multilateral Instrument” (forthcoming in *Too Little, Too Late: The Quest to Resolve Sovereign Debt Crises*, Columbia University Press, New York, 2016) (proposing an arbitration and mediation approach similar to the WTO dispute mechanisms, including independent bodies of arbitrators and mediators).


65 Cf. *supra* notes 6-7 and accompanying text (explaining the holdout problem as a type of collective action problem). It should be emphasized that the Model Law preserves the holdout threat to the extent needed to motivate debtor-states to bargain fairly, and only seeks to limit that threat for rent-seeking holdouts who try to unreasonably extract value. *See infra* notes 119-120 and accompanying text.
in solving the holdout problem than a contractual approach.\footnote{Sovereign Debt Restructuring, supra note 6, at 1003.} Article 7(2), for example, legally mandates supermajority voting that (assuming the requisite percentages agree) can bind dissenting classes of claims. This eliminates the need for the contracts themselves to include CACs.\footnote{Although Article 7(2) proposes supermajority percentages that have been used successfully in U.S. bankruptcy law (see 11 U.S.C. § 1126(c)), other supermajority percentages could be substituted. It should be cautioned, however, that the higher the percentages, the easier it would be (other things being equal) for a vulture fund to buy a blocking position. See supra note 12 and accompanying text. Cf. infra note 69 and accompanying text (discussing how the Model Law’s aggregate-voting can also help to prevent that).} Article 7(3) of the Model Law, coupled with Article 6(1), also enables a debtor-state to use the Model Law to aggregate creditor voting beyond individual contracts. Aggregate-voting is critical for at least two reasons: it can prevent creditors of individual sovereign debt contracts from acting as holdouts vis-a-vis other sovereign debt contracts\footnote{Sovereign Debt Restructuring Options, supra note 19, at 109.}; and it allows a debtor-state to designate large enough classes of claims to prevent vulture funds (or similar holdouts), as a practical matter, from purchasing enough claims to block a restructuring plan or otherwise control the voting.\footnote{Cf. supra notes 16-17 and accompanying text (indicating ICMA’s efforts to introduce updated forms of CACs that attempt to aggregate voting across debt issues).}

In contrast, the Greek sovereign debt crisis has demonstrated that the CAC approach is insufficient to solve the holdout problem. Even after years of trying to include them, relatively few Greek debt agreements actually contained CACs, and those CACs were generally restricted to bond issues.\footnote{Recall that the Model Law covers a much broader range of a debtor-state’s debt. See supra note 52 and accompanying text.} Furthermore, most of the CACs that were included in those debt agreements did not contemplate aggregate-voting and thus did not purport to bind creditors to supermajority voting beyond the individual bond issue; that enabled any given bond issue to serve as a holdout vis-a-vis other Greek bond issues.\footnote{The Statutory Solution, supra note 11. See also supra note 68 and accompanying text.} In contrast, statutory supermajority aggregate voting is the tried-and-true method
by which corporate insolvency law successfully, and equitably, addresses the holdout problem.72

Interim Funding. Chapter IV of the Model Law addresses the critical need for a financially troubled debtor-state to obtain liquidity during its restructuring process. Although this funding has in the past often been provided by the IMF, the “IMF’s lending policy . . . is not enough to resolve the problems posed by debt burdens beyond the country’s ability to pay.”73 Absent the IMF, whose loans have de facto priority, no one would lend new money without obtaining a priority repayment claim. A contractual solution would be insufficient; it would be totally impractical to get all existing creditors to contractually subordinate their claims to the new money.74

A statutory mechanism can help, however, to give such new-money lenders priority over existing creditors.75 To minimize the risk of “overinvestment,” existing creditors should have notice and the opportunity to block the new lending if its amount is too high or its terms are inappropriate.76 Articles 8(2) and 8(3) of the Model Law, 77

72 Brett W. King, The Use of Supermajority Voting Rules in Corporate America: Majority Rule, Corporate Legitimacy, and Minority Shareholder Protection, 21 DEL. J. CORP. L. 895, 941 (1996) (noting that supermajority voting “protects the minority” and that the “tremendous growth in the size of the corporation as well as the number of shareholders probably extinguished any thought of returning to the unanimity rules … given the obvious potential for holdout rent seeking”).

73 Stiglitz et al., supra note 4, at 2.

74 The Greek debt restructuring may be an exception to this because “[m]ore than 90 percent of Greece’s 310 billion euro debt is owed to public institutions: other European governments, the International Monetary Fund and the European Central Bank.” Landon Thomas, A Bold Proposal to Offer Greece Some Financial Relief, N.Y. TIMES, July 11, 2015, at B1. Those institutions might therefore be persuaded, politically, to contractually subordinate their claims to a new-money lender.

75 Sovereign Debt Restructuring, supra note 6, at 988 (“granting priority should only minimally affect ex ante availability and cost of credit [] because granting priority will not lower the State’s debt rating, and also because an IMF loan already has de facto priority over other claims”). New-money lenders could thereby gain priority over existing creditors whose claims are governed by English law. See Model Law, Appendix—Chapter IV.

76 Sovereign Debt Restructuring, supra note 6, at 989-90. Prof. Westbrook favors the transparent public mechanism in the SDRM that would tie budget restructuring to the
respectively, provide that notice and (through reverse supermajority voting\textsuperscript{77}) opportunity. Article 8(4) also protects creditors whose claims are governed by the Model Law (or a similar law) from being outvoted by other creditors of the debtor-state.\textsuperscript{78}

Recently, the IMF has been considering more flexible options in funding sovereign nations “in the context of sovereign debt vulnerabilities.”\textsuperscript{79} When a troubled member nation seeks financing above its normal IMF-access limits, the IMF will have to decide whether that nation’s problems can be resolved with or without a debt restructuring. Under its current policy, “if the [IMF] determines that the member’s debt is sustainable with high probability, it may provide large scale financing without the need for a debt restructuring. However, if such a determination cannot be made, exceptional access may only be provided if a debt restructuring is pursued that is sufficiently deep to restore sustainability with high probability.”\textsuperscript{80}

The IMF is also exploring whether it should have a broader range of responses. For example, if a member nation is unable to obtain private-sector funding but its debt is considered (albeit not with high probability) sustainable without the need for a debt restructuring, the IMF is considering providing debt relief by extending the maturities of its own debt claims against that nation.\textsuperscript{81} In the author’s view, that would effectively granting of new finance. Westbrook, \textit{supra} note 5, at 255. That conditionality, however, would be politically volatile and might impose harsh conditions on the citizens of the debtor-state.

\textsuperscript{77} Reverse supermajority voting under Article 8(3)—as well as under Article 8(4); see infra note 78 and accompanying text—of the Model Law requires supermajority voting to approve, not to prevent, the priority.

\textsuperscript{78} That protection is needed because creditors whose claims are not governed by the Model Law would likely argue that their claims are not legally subordinated by supermajority voting under that Law.


\textsuperscript{80} Id. at 1.

\textsuperscript{81} Id.
constitute a unilateral debt restructuring—the IMF itself providing a form of debt relief without seeking a quid pro quo from the member nation.

Chapter IV of the Model Law also contemplates the possibility of a debtor-state financing its debt restructuring through the capital markets. Consistent with best practices in corporate bankruptcy cases, a debtor-state contemplating invoking application of the Model Law could pre-negotiate that financing in advance. Nothing in the Model Law prevents a debtor-state from also, or alternatively, obtaining such financing through a governmental or multi-governmental source, such as the IMF.

Arbitration of Disputes. The neutral international arbitration body referenced in Article 10(2) of the Model Law might include a newly created entity designed to arbitrate sovereign debt-related disputes, such as the free-standing “Sovereign Debt Tribunal” proposed by Paulus and Kargman.82 Even absent a statutory framework, the resort by sovereign-debt-restructuring parties to such a tribunal could be contractual. For example, such parties could agree—ex ante (via contractual agreement in their underlying loan documents) or ex post (by mutual agreement after the dispute has arisen)—to arbitrate sovereign debt-related disputes before the tribunal.

Stay of Enforcement Actions. The Model Law omits certain provisions that one might otherwise associate with a legal framework for sovereign debt restructuring. For several reasons, it does not propose a stay of enforcement actions. First, a stay does not appear to be critical to resolving sovereign debt problems. A debtor-state could unilaterally decide to suspend payments. And the main purpose of a stay, to prevent a grab race, is less significant in a sovereign debt context because creditors could only attempt to grab the State’s relatively few assets located in other jurisdictions.83 Second,
model laws are less likely than conventions to effectively impose enforcement stays. If a creditor’s claim against a debtor-state is governed by the law of a jurisdiction that has enacted the Model Law, such creditor would theoretically be prejudiced in a grab race by other creditors of that state whose claims are governed by the law of a jurisdiction that has not enacted the Model Law. That creates perverse incentives for creditors to want to have their claims governed by the law of a jurisdiction that has not enacted the Model Law. Third, a stay could be costly, leading to litigation over its scope and duration and also possibly affecting non-bankruptcy incentives, thereby increasing sovereign financing costs.84

_Cram Down._ The Model Law also omits a cram-down alternative in the event one or more classes of claims fails to agree. Although Article 7(1) makes a debt-restructuring plan effective and binding on the debtor-state and its creditors when it has been submitted by the debtor-state and agreed to by each class of such creditors’ claims designated in the plan, any such class of claims could stymie the plan’s effectiveness by failing to agree. To overcome the possibility of one or more classes of claims unreasonably withholding consent to a plan, corporate debt-restructuring laws often provide for a cram-down power—making a debt-restructuring plan effective and binding despite the objection of creditors, so long as a court finds the plan to be fair and equitable.85

Cram down has been applied in at least one governmental debt restructuring context: the application of Chapter 9 of the U.S. Bankruptcy Code to municipal debt restructuring. In that context, a municipal debtor can cram down—or force acceptance of—a debt-restructuring plan over the objection of one or more dissenting classes of creditors if, under the plan, the creditors are “receiving all they can reasonably expect to

---

cf. Eichengreen, _supra_ note 58, at 444 (arguing that a statutory approach to sovereign debt restructuring should include hard restraints on litigation).

84 _Sovereign Debt Restructuring, supra_ note 6, at 984-85.

85 The cram-down concept of Chapter 11 of the U.S. Bankruptcy Code, for example, requires the bankruptcy court to confirm a proposed reorganization plan that is, _inter alia_, “fair and equitable, with respect to each class of claims,” despite the objection of creditors). 11 U.S.C. §1129(b)(1).
receive under the circumstances.” The application of cram down under Chapter 9 has focused on whether the municipality has imposed reasonable austerity measures and has made reasonable use of taxation, so that the plan’s treatment of the dissenting classes is fair and equitable.

The difficulties with applying cram down in a governmental debt restructuring context are in determining what governmental austerity measures and levels of taxation are reasonable, in order to assess whether the creditors are receiving all they can reasonably expect under the circumstances. At the very least, these determinations

86 More specifically, Chapter 9 allows a court to confirm a proposed municipal bankruptcy plan, despite creditor objection, if the plan is “in the best interests of the creditors.” 11 U.S.C. § 943(b)(7) (“The court shall confirm the plan if . . . the plan is in the best interests of the creditors.”). In making this “best interests” determination, Chapter 9 incorporates the Chapter 11 “fair and equitable” cram-down test. 11 U.S.C. § 901(a). See also 6 COLLIER ON BANKRUPTCY §943.03 [1][f][i][B]; In re City of Stockton, 478 B.R. 8, 26 (Bankr. E.D. Cal. 2012) (holding that for a plan to be confirmed as to a dissenting class of creditors, it must be “fair and equitable” and “not discriminate unfairly”). For the purposes of Chapter 9, fair and equitable has been held to mean “all [the creditors] can reasonably expect to receive under the circumstances.” See e.g., Lorber v. Vista Irrigation Dist., 127 F.2d 628, 639 (9th Cir. 1942).

87 Cram down’s application must be different, of course, for corporate debtors and governmental debtors. In Newhouse v. Corcoran Irrigation Dist., 114 F.2d 690 (9th Cir. 1940), cert. denied, 311 U.S. 717, 61 S. Ct. 440, 85 L. Ed. 467 (1941), the court explained that the bankruptcy of a public entity is distinguishable from that of a private entity. In a public bankruptcy the entity may not be liquidated with the resulting value applied to its outstanding debts. Id. at 690-91. Therefore, the expectations of existing creditors must consider that a reorganization plan needs to account for the continued operation of the debtor. See Id. For further discussion of how the “fair and equitable” cram-down standard works under Chapter 9 of the U.S. Bankruptcy Code (regarding municipal debtors), and its potential usefulness in a sovereign restructure, see, e.g., Zack Clement & R. Andrew Black, How City Finances Can Be Restructured: Learning from Both Bankruptcy and Contract Impairment Cases, 88 AM. BANKR. L. J., 41-55, 72-84 (2014), and Zack Clement, Restructuring Government Finances – In Public and in Less Than a Year, 26 WESTLAW INSOLVENCY INTELLIGENCE 91-93 (2013).

would be complex, fact-intensive, and highly politically sensitive.\(^8^9\) In the Chapter 9 context, federal bankruptcy courts make these determinations, yet the decisions are far from consistent.\(^9^0\) In the sovereign debtor-state context, however, there is as yet no suitable judicial venue for making such determinations.

Furthermore, the “are creditors receiving all they can reasonably expect under the circumstances” standard is much vaguer in a sovereign debtor-state context than for domestic U.S. municipalities. In the United States, there are generally accepted norms about the range of what constitutes reasonable taxation. Also, the potential flight of residents to other municipalities—which is much less feasible in a sovereign nation context—sets pragmatic limits on taxation.

---

\(^8^9\) See, e.g., *Sovereign Debt Restructuring*, supra note 6, at 1008-09. Another concern with the use of cram down for sovereign debtor-states is that expectations regarding taxation and public operations among creditors may be much more varied than would be expectations in a Chapter 9 case. Compare, for example, the City of Detroit’s recent Chapter 9 case with Argentina’s debt crisis. Detroit’s creditors are principally U.S. organizations (e.g., pension funds and bond holders). See *Detroit’s 20 Largest Unsecured Creditors*, DETROIT FREE PRESS, July 19, 2013, http://archive.freep.com/article/20130719/NEWS01/307190029/detroit-bankruptcy-list-creditors. By contrast, Argentina’s largest creditors were public and private parties from all over the globe. Andrew F. Cooper & Bessma Momani, *Negotiating Out of Argentina’s Financial Crisis: Segmenting the International Creditors*, 10 NEW POL. ECON. 305, 306 (2005).

\(^9^0\) At least one court has held that a municipality is not required to raise taxes for a plan to be fair and equitable. In *In re Corcoran Hosp. Dist.*, 233 B.R. 449, 459 (Bankr. E.D. Cal. 1999), the court held that raising taxes is unnecessary if it would be futile, and a municipality cannot be required to do so. By contrast, a plan has been held to not be fair and equitable where a small increase in tax revenue is possible and sufficient to satisfy creditors. In *Fano v. Newport Heights Irr. Dist.*, 144 F.2d 563, 565-66 (9th Cir. 1990), the appellate court rejected the determination that the plan was fair and equitable and overturned the lower court’s confirmation because there was not a sufficient showing that the municipality’s taxing powers were inadequate to generate the revenue needed to pay the dissenting creditors. But, if an increase in tax revenues would make matters worse for the municipality than the plan the may be confirmed. In *Lorber v. Vista Irrigation Dist.*, 143 F.2d 282 (9th Cir); *cert denied*, 323 U.S. 784 (1944), the court held that because increasing taxes would cause further harm to the debtor, and the best remedy for creditors was fifty-five cents on the dollar, the plan was fair and equitable. *Id.* (finding that “55 [cents] on the dollar was the maximum that the District could reasonably pay on outstanding bonds”).
For these reasons, and also because including cram down at this nascent point in the model-law process could engender significant creditor opposition, the Model Law currently omits a cram-down power. Even without cram down, the Model Law would still be a major advance, from the standpoint of debtor-states, over the status quo. If, however, experience with the Model Law demonstrates that a cram-down power is needed, this essay is open to its later inclusion.

Creditors’ Committee. Finally, the Model Law does not provide for the formal creation of a creditors’ committee, to officially represent the debtor-state’s creditors in the debt restructuring. An official creditors’ committee does not appear to be necessary in a sovereign-debt-restructuring context because “the claims against a State are so large that many creditors, or at least a de facto committee of creditors chosen consensually, should find it economically feasible to participate in the restructuring process.” Some have even argued that an official creditors’ committee might be harmful, promoting collusive behavior among creditors. Even absent such a committee, however, the Model Law should help to create what Professor Paulus calls an “enforced community,” by including all of a debtor-state’s creditors in a resolution proceeding. Creating such a community, he contends, should promote inter-creditor fairness because all of those creditors—whether domestic or foreign, private or governmental—are affected by the debtor-state’s financial condition.

---

91 The Model Law should be much easier to ‘sell’ to creditors who (subject to being outvoted under supermajority aggregate voting) feel they have some control.
92 Cf. Sovereign Debt Restructuring, supra note 6, at 1009 (suggesting that cram down should be included in the Model Law if “experience later demonstrates that debtor-States and their creditors cannot reach consensual agreements without it”).
93 Sovereign Debt Restructuring, supra note 6, at 1002. But cf. Setser, supra note 25, at 7 (describing the refusal of debtor-states to agree to pay the expenses of bondholders creditors’ committees as “a seemingly small demand that looms surprisingly larger in the list of ‘rights’ [that] creditors wanted” debtor-states to respect).
94 Stiglitz et al., supra note 4, at 3.
95 Paulus, supra note 59, at 402.
96 Id. at 402-03.
Next consider the Model Law’s feasibility, focusing first on legal feasibility, then on economic feasibility, and finally on political feasibility.

II. FEASIBILITY

A. Legal Feasibility

This essay implicitly throughout has addressed the Model Law’s legal feasibility. Even given the optional retroactive effect,97 the Model Law’s principal operative provisions—supermajority aggregate voting, and the granting of priority to financiers of a debtor-state’s debt restructuring—should not be discriminatory or arbitrary.98 Those provisions should therefore be enforceable under international law.99

The Model Law (including the optional retroactivity) would also be valid and enforceable under English law if and when enacted by Parliament. The Sovereignty of Parliament doctrine recognizes Parliament as the supreme legal authority of the United Kingdom, with authority to create or end any law.100 Absent a written constitution,

97 See Model Law Article 1(2).
98 Steven L. Schwarcz, Global Decentralization and the Subnational Debt Problem, 51 DUKE L. J. 1179, 1227–28 (2002). Cf. Sovereign Debt Restructuring, supra note 6, at 1012-14 (analyzing those same types of retroactive provisions under international law and concluding that none of the provisions on “super-majority voting, discharge, and the granting of priority to financiers of the State’s debt restructuring … discriminates based on the nationality of the bondholders … [or] is arbitrary because all are essential to a debtor-State’s ability to restructure its debt”).
99 Legal retroactivity is respected under international law so long as it is neither discriminatory nor arbitrary. Sovereign Debt Restructuring, supra note 6, at 1012-13 (citing sources including 1 OPPENHEIM’S INTERNATIONAL LAW 918-921 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992)). The issue of legal risk is related to retroactivity. Legal risk refers to the risk that substantive provisions of a jurisdiction’s law change after an agreement is signed incorporating that jurisdiction’s law as its governing law. Legal risk is an inevitable risk in international agreements. See, e.g., Wood, supra note 25, at 15 (observing that “[i]t is not possible by contract to stabilise the law, e.g., that the governing law is that at the time of the contract. The fluctuating governing law must still be ascertained and will apply to this term of the contract. A change in the governing law will override.”).
100 See https://www.parliament.uk/about/how/role/sovereignty/.
Parliamentary sovereignty itself is considered “the most important part of the UK Constitution.” As a result—at least after Brexit, when any potentially conflicting E.U. law will no longer be relevant—even British courts cannot overrule Parliamentary legislation.

The only potential post-Brexit complication might be the First Protocol to the European Convention on Human Rights, which has been incorporated into English law. Article 1 of that Protocol provides that every person is “entitled to the peaceful enjoyment of his possessions,” raising a question about the Model Law’s optional retroactivity. At least one decision interpreting the First Protocol confirms that a right to payment, such as a claim against a debtor-state, is a “possession” thereunder. Nonetheless, the First Protocol, by its terms, can be trumped by laws that either deprive a person of possessions “in the public interest” or “control the use of property in accordance with the general interest.” Retroactivity under the Model Law should arguably satisfy both tests (although it would only need to satisfy either) because unsustainable sovereign debt can harm debtor nations, their citizens, and their creditors, and can also jeopardize the stability of the financial system. Moreover, after Brexit, the First Protocol could be modified or ended by Parliament acting alone.

101 See id.
105 See supra notes 4-5 and accompanying text.
106 See supra note 100 and accompanying text (observing that Parliament has authority to end any law).
Parliamentary sovereignty thus logically should allow the enactment of retroactive laws. Courts and commentators agree. Lord Rodger of Earlsferry, one of the most renowned justices of the Supreme Court of the United Kingdom, has observed that Parliament “can change the legal significance of past events,” including “provid[ing] that something which was lawful when it was done should be treated as having been unlawful, or conversely, that what was unlawful at the time should be treated as having been lawful.”

If, therefore, Parliament enacts the Model Law—even including its option of retroactivity—such Law’s only vulnerability would be changes thereto or revocations thereof enacted by a future Parliament. That begs the normative question, though, of why Parliament should want to enact the Model Law. The answer is that such enactment would provide significant social benefit and little harm, and thus should be morally imperative.

The significant social benefit would be the debt relief that the Model Law could provide to countries whose debt contracts are governed by English law. Recall that a quarter to a third or more of all sovereign debt contracts appear to be governed by that

107 Foreword, in RETROACTIVITY AND THE COMMON LAW 1 (Ben Juratowitch, ed. 2008).
108 Colonial Sugar Refining Co. Ltd. v. Irving, AC 360 PC at 366 (1906) (also stating that “Judges and scholars have commented frequently that the power of Parliament to legislate retroactively where it wishes to do so is ‘undoubted’”). These views of English law retroactivity are consistent with the view of Michael Crystal, Q.C., expressed to the author on June 15, 2015, at an International Insolvency Institute meeting in Naples, Italy.
109 Dicey, supra note 102, at 39 (stating that Parliamentary sovereignty means “Parliament thus defined has, under the English constitution, the right to make or unmake any law whatsoever”).
110 Cf. Sir Leslie Stephen, THE SCIENCE OF ETHICS 145 (1882) (observing that if Parliament “decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal”; but pointing out that “political constitutionalism as opposed to legal constitutionalism” explains why Parliament does not pass laws ordering the murder of blue-eyed babies: “it is political, not legal, factors—including, one hopes, legislators’ own sense of morality—that operate as the restraining force”).
Enactment of the Model Law, especially if retroactive,\textsuperscript{112} would give those countries the reasonable opportunity, if needed, to try to renegotiate that debt to sustainable levels. That, in turn, would reduce economic hardship to innocent citizens and deprivation of essential government services,\textsuperscript{113} forestall the likelihood of riots and other popular protests,\textsuperscript{114} and reduce the potential for financial chaos resulting from a country’s debt default.\textsuperscript{115} There is recent precedent for Parliament enacting law to facilitate sovereign debt relief.\textsuperscript{116}

Enactment of the Model Law would impose little harm. Even if that Law applies retroactively, the only parties whose expectations would be impaired would be holdout creditors, who oppose being bound by supermajority voting and demand payment according to their debt contract’s original terms. Any such impairment, however, would be limited to changes that are voluntarily agreed to by a supermajority of pari passu creditors\textsuperscript{117} based on the debtor-state’s deteriorating economic circumstances, and thus

\begin{itemize}
\item \textsuperscript{111} See \textit{supra} notes 30-32 and accompanying text.
\item \textsuperscript{112} See \textit{supra} notes 46-47 and accompanying text.
\item \textsuperscript{116} U.K. Debt Relief (Developing Countries) Act 2010.
\item \textsuperscript{117} See Model Law Article 7(3).
\end{itemize}
should reflect the economic reality—and therefore the reasonable expectations—of what those creditors expect to receive as payment under those changed circumstances.118

Admittedly, those changes might impair a holdout creditor’s expectation of blackmauling a country’s debt restructuring, in order to extract value from the other creditors.119 Such an expectation, however, would be morally repugnant—and thus impairing that expectation should not violate the moral sensibility that operates as the restraining force on members of Parliament.120

In short, enacting the Model Law, even with its option of retroactivity, should be reasonably necessary and appropriate to further the important public purpose of enabling countries to restructure their debt to sustainable levels.121

B. Economic Feasibility

The economic feasibility of the Model Law will turn on its costs and benefits, both to debtor-states and to their creditors. Certainly a nation whose debt has been restructured should be able to borrow at attractive rates. In the non-sovereign context, by analogy, lending rates to restructured companies are much lower than rates charged before the restructuring.122 But would a model-law approach increase a nation’s ex ante borrowing costs by making creditor claims more subject to bail-in?

118 Cf. Buffalo Teachers Fed’n v. Tobe, 464 F.3d 362, 368 (2d Cir. 2006) (“To assess whether an impairment is substantial,” a court should “look at ‘the extent to which reasonable expectations under the contract have been disrupted’.”) (quoting Sanitation & Recycling Indus., Inc. v. City of New York, 107 F.3d 985, 993 (2d Cir 1997)); Steven L. Schwarz, A Minimalist Approach to State ‘Bankruptcy’, 59 UCLA L. REV. 322, 336-37 (2011) (advocating for a consensual debt restructuring process that enables states to seek relief from their unsustainable debt burdens and also protects creditor expectations—other than those of holdout creditors who are trying to extract value from others).
119 See supra notes 6-7 and accompanying text.
120 See supra note 110.
122 Sovereign Debt Restructuring Options, supra note 19, at 110–11. This is because creditor support through participation, combined with operational restructuring that often
Leading economists have recently argued to the contrary—that uncertainty due to the absence of an effective sovereign debt resolution framework “increases the costs of borrowing.”\textsuperscript{123} However, even if such a framework would increase costs, overall sovereign borrowing rates should not be affected any more than if—as most agree would be desirable—workable collective action aggregate-voting clauses were in fact included in all sovereign debt contracts. Empirical analysis suggests that the inclusion of those clauses should not increase (and may even reduce) sovereign borrowing rates.\textsuperscript{124} That analysis has been since reinforced by the actual market pricing of sovereign bonds that include those clauses.\textsuperscript{125}

Furthermore, the possibility that a model-law approach might increase a nation’s ex ante borrowing costs should be viewed in a larger context. Any such cost increase should be offset by the cost saving that would result from a model law. By loose analogy to corporate bankruptcy,\textsuperscript{126} few economists would suggest that corporate bankruptcy accompanies debt restructuring, is viewed favorably by the market. The lower rates also reflect firms’ lower debt-to-equity ratios. Similarly, a debtor-state should have a lower debt-to-GDP ratio and thus should be less likely to default in the future. \textit{Id.}

\textsuperscript{123} Stiglitz et al., \textit{supra} note 4, at 1.

\textsuperscript{124} See Michael Bradley & Mitu Gulati, \textit{Collective Action Clauses for the Eurozone}, 18 \textit{REVIEW OF FINANCE} 2045 (2013) (finding that the presence of CACs is associated with a lower cost of capital, possibly due to an expectation of faster debt restructuring).

\textsuperscript{125} The first public offering of sovereign bonds that contained collective action aggregate-voting clauses, made by Mexico in November 2014, was priced at historically low interest rates. Mark Sobel, \textit{Strengthening Collective Action Clauses: Catalyzing Change—the Back Story}, 11 \textit{CAPITAL MARKETS LAW JOURNAL} 1, 10 (2016). The IMF reports that the subsequent inclusion of those clauses in sovereign debt issues appears to have had no observable impact on pricing. International Monetary Fund, “Second Progress Report on Inclusion of Enhanced Contractual Provisions in International Sovereign Bond Contracts” 6 (Dec. 27, 2016) (basing its report on “consultation with selected public debt managers and market participants (including through two surveys conducted by [IMF] staff in March and June 2015 of public debt managers”).

\textsuperscript{126} The analogy is at best loose because there are fundamental differences between restructuring a corporation’s debt and a sovereign nation’s debt, including that a corporation, unlike a sovereign, can be liquidated and its assets sold.
law—which imposes collection action aggregate-voting\textsuperscript{127}—should be repealed because it might increase the borrowing cost of solvent companies.

The economic feasibility of a model-law approach should also take into account its costs and benefits to creditors. Reduced uncertainty has already been mentioned as a potential benefit.\textsuperscript{128} A potential cost, however, is that the Model Law would facilitate the transfer of value from creditors to a debtor-state if a class of claims agrees to a restructuring that reduces its principal amount or interest rate. That transfer of value nonetheless would be bargained for; each class of claims has the power to veto the debtor-state’s restructuring plan.\textsuperscript{129} Furthermore, any transfer of value from creditors to their debtor-state would be less under the Model Law than under a typical corporate bankruptcy law, because the latter gives debtors cram-down powers.\textsuperscript{130}

C. Political Feasibility

This essay has already observed several reasons why a model-law approach to sovereign debt restructuring should be politically more feasible than a convention. Most significantly, a model-law approach would not require general acceptance by the world’s nations for its implementation.\textsuperscript{131} If English law incorporated the Model Law, a debtor-state whose debt contracts are governed by English law could realistically be able to restructure that debt. Experience shows that a model law’s more relaxed nature, being domestic law, and (for that reason) less formal enactment process and minimal

\begin{itemize}
\item \textsuperscript{127} See, e.g., 11 U.S.C. § 1126(c).
\item \textsuperscript{128} See supra note 123 and accompanying text.
\item \textsuperscript{129} See Model Law Article 7(1) (providing that a restructuring plan needs the agreement of each class of claims to become effective and binding).
\item \textsuperscript{130} See supra notes 84-92 and accompanying text (discussing that, unlike typical corporate bankruptcy law, the Model Law does not permit a debtor-state to cram down a plan over dissenting creditor classes).
\item \textsuperscript{131} See supra notes 34-36 and accompanying text. A model-law approach, unlike a treaty, thus would not face the “profound difficulties [of] building international consensus behind any sweeping change in global financial regulation.” Setser, supra note 25, at 3.
\end{itemize}
interference with sovereignty can succeed where a formal treaty approach can languish.\textsuperscript{132}

It is also informative to assess the political feasibility of a model-law approach from the perspective of the politics of the IMF’s failed SDRM. As mentioned, that approach failed because it was opposed by major financial industry associations and also by certain emerging market countries that feared it would raise their cost of borrowing.\textsuperscript{133} Part II.B of this essay has argued, however, that a model-law approach should reduce those costs.

A model-law approach should also surmount most other reasons suggested to explain the SDRM’s failure. At the time the SDRM was proposed, many believed that “[e]xchange offers, combined with the ability to amend a bond’s terms[,] provide a mechanism for [sovereign] debt restructuring even in the absence of a [statutory debt restructuring] regime.”\textsuperscript{134} Experience, however, has undermined that belief.\textsuperscript{135} Also at that time, “the major emerging economies—and particularly the Latin American economies—feared losing access to large scale emergency credit from the IMF in return for legal protection of only marginal value.”\textsuperscript{136} The new reality is that debtor-states cannot always count on the IMF for that credit,\textsuperscript{137} whereas the value of a model law’s protection should be significant.

\textsuperscript{132} Cf. Setser, \textit{supra} note 25, at 6 (observing that debtor-states opposed the SDRM because they were “keen to protect their sovereignty, and to prevent an international organization from gaining jurisdiction over their domestic-law debt”).

\textsuperscript{133} See \textit{supra} note 23 and accompanying text.

\textsuperscript{134} Setser, \textit{supra} note 25, at 5.

\textsuperscript{135} \textit{A Model-Law Approach}, \textit{supra} note 1, at 31.

\textsuperscript{136} Setser, \textit{supra} note 25, at 5.

\textsuperscript{137} See \textit{supra} note 73 and accompanying text. \textit{See also} Setser, \textit{supra} note 25, at 5 (observing that “it is unrealistic for the major emerging economies to think that the IMF will prevent all default”).
Finally, some may have opposed the SDRM because of “[s]uspicions about the role the IMF would play in a restructuring process designed by the IMF.”138 This appears to explain, for example, the financial industries’ opposition.139 The model-law approach is not designed by the IMF, nor is the IMF necessarily part of its supervisory process.140 Others have observed that some nations may oppose any international tribunal (even one that is otherwise neutral) interfering with sovereign political discretion.141 Because this essay’s proposed Model Law limits the supervisory process to ministerial actions,142 the Supervisory Authority managing that process would lack authority to interfere with political discretion.

A model-law approach could also provide clear positive political benefits. By helping to privatize interim funding to a debtor-state,143 it could reduce the burden on IMF creditor countries of funding IMF bailout loans.144 Reducing the need for IMF funding would also reduce the conditionality that the IMF, politically, imposes on borrowing nations, which can sometimes exacerbate the nation’s economic woes.145

138 Setser, supra note 25, at 17.
139 See, e.g., Hagan, supra note 23, at 391–93 (observing that the opposition to the SDRM by major financial industry associations was attributable to their suspicions regarding IMF motivation). Certain emerging market countries, including Turkey, Mexico and Brazil, also opposed the SDRM, concerned that it would raise interest rates on their sovereign bonds. Setser, supra note 25, at 6, 16.
140 See supra notes 53-54 and accompanying text. This essay’s proposed Model Law specifies that the Supervisory Authority must be a “neutral international organization.” Model Law Article 2(5).
141 Cf. Richard Conn, Principal and Managing Dir., Innovate Partners LLC, Keynote Address at the General Assembly of the United Nations, 6th Meeting, 2nd Working Session of the Ad Hoc Committee on Sovereign Debt Restructuring Processes (Apr. 28, 2015) (emphasizing that developed nations are concerned about international tribunals exercising what should be a nation’s political discretion in a sovereign debt restructuring).
142 See supra note 58 and accompanying text.
143 See supra notes 73-82 and accompanying text; see also Model Law Articles 8 & 9.
144 Cf. Setser, supra note 25, at 3 (discussing that many IMF creditor countries favored the SDRM for this same reason).
145 Jayadev & Konczal, supra note 88. Cf. supra note 76 (arguing that the conditionality that would have been imposed under the IMF’s proposed SDRM would be politically volatile and might impose harsh conditions on the citizens of the debtor-state).
Furthermore, a model-law approach could provide a political cover for painful decisions that can be attributed by state to a supervising entity or to legal requirements. 146

None of this means that a model-law approach to sovereign debt restructuring, or at least this essay’s proposed Model Law, will be politically feasible. For example, some debtor-states might oppose the Model Law’s similar treatment 147 of domestic and foreign claims. 148 Some private creditors might also oppose the Model Law’s supermajority aggregate voting, believing that the threat of holdouts is necessary to ensure that debtor-states will bargain fairly 149 (but failing to understand that the Model Law preserves that threat to the extent necessary to motivate fair bargaining 150).

At the very least, however, this essay should serve to increase a model-law approach’s political feasibility by explaining the approach and its potential benefits and limitations, including its ability to equitably relieve debtor-states from unsustainable debt burdens. An incremental approach to developing norms has strong precedent in the legal ordering of international relationships, 151 especially “where law reformers possess limited

146 Westbrook, supra note 5, at 256.
147 See supra note 52 and accompanying text.
148 Cf. Setser, supra note 25, at 19 (observing that including “domestic debt” claims in the SDRM “was a bridge too far for almost everyone”).
149 Id. at 7–8 (and also observing that some creditors believe that the existing contractual restructuring process is already favorable to debtor-states).
150 The Model Law preserves the holdout threat to the extent needed to motivate debtor-states to bargain fairly. See supra note 65. Absent a fair bargain, no creditor class would have an incentive to vote to approve a debt restructuring plan—and each class has the power to veto the debtor-state’s restructuring plan. See supra note 129 and accompanying text. The Model Law seeks to eliminate the holdout threat only for rent-seeking holdouts, who use that threat to unreasonably extract value (at least in part) from other similarly situated creditors. See supra note 6 and accompanying text.
151 Cf. Oona A. Hathaway, Between Power and Principle: An Integrated Theory of International Law, 72 U. CHI. L. REV. 469, 531 (2005) (observing that “states can be gradually led toward stronger legal rules . . . by starting with relatively weak international rules backed by little or no sanctions that all states feel comfortable joining, but then gradually pushing states to accept successively stronger and more challenging requirements”).
authority and where the subject is either controversial or technical,” such as “global insolvency law reform.”

CONCLUSIONS

Whether or not their fault, nations sometimes borrow at levels that become unsustainable. Until resolved, the resulting debt burden hurts not only those nations (such as Greece) but also their citizens, their creditors, and—by posing serious systemic risks to the international financial system—the wider economic community.

The existing contractual framework for restructuring sovereign debt is inadequate, often leaving little alternative between a bailout, which is costly and creates moral hazard, and a default, which raises the specter of financial contagion and chaos. Although global organizations, including the United Nations and the International Monetary Fund,

have tried to strengthen the sovereign-debt-restructuring framework through treaties, such a multilateral legal approach is highly unlikely to succeed in the near future.

This essay argues, in contrast, that a model-law approach should facilitate sovereign debt restructuring much more feasibly than a multilateral approach. Model laws have long been used in cross-border lawmaking, when treaties fail. Unlike a treaty, a model law does not require widespread acceptance for its implementation. In particular, if this essay’s model law were enacted into English law, that alone would enable the fair and consensual restructuring of the immense stock—perhaps a quarter to a third or more of all sovereign debt contracts—of such contracts governed by that law. And because it would achieve, by operation of law, the equivalent of the ideal goal of including aggregate-voting collective action clauses in all sovereign debt contracts, such enactment should ensure the continuing legitimacy and attractiveness of English law as the governing law for future sovereign debt contracts.

---

153 See supra notes 30-32 and accompanying text.
154 The Model Law’s application to existing sovereign debt contracts governed by English law assumes such Law’s enactment includes the option of retroactivity. See supra note 46-47 and accompanying text.
Preamble

The Purpose of this Law is to provide effective mechanisms for restructuring unsustainable sovereign debt so as to reduce (a) the social costs of sovereign debt crises, (b) systemic risk to the financial system, (c) creditor uncertainty, and (d) the need for sovereign debt bailouts, which are costly and create moral hazard.

Chapter I: Scope, and Use of Terms

ARTICLE 1: SCOPE
(1) This Law applies where, by contract or otherwise, (a) the law of [this jurisdiction] governs the debtor-creditor relationship between a State and its creditors and (b) the application of this Law is invoked in accordance with Chapter II.
(2) Where this Law applies, it shall [operate retroactively and, without limiting the foregoing, shall] override any contractual provisions that are inconsistent with the provisions of this Law.

ARTICLE 2: USE OF TERMS
For purposes of this Law:
(1) ‘creditor’ means a person or entity that has a claim against a State;
(2) ‘claim’ means a payment claim against a State for monies borrowed or for the State’s guarantee of, or other contingent obligation on, monies borrowed; and the term “monies

155 This refers to a jurisdiction that enacts a law in the form of the Model Law—in this essay’s specific case, English law. Articles 3(3) and 11 further expand the Model Law’s application.

156 This optional retroactive application would enable the Model Law to also resolve problems of unsustainable sovereign debt that arise under existing debt contracts. See supra notes 46-47 and accompanying text.
borrowed” shall include the following, whether or not it represents the borrowing of money per se: monies owing under bonds, debentures, notes, or similar instruments; monies owing for the deferred purchase price of property or services, other than trade accounts payable arising in the ordinary course of business; monies owing on capitalized lease obligations; monies owing on or with respect to letters of credit, bankers’ acceptances, or other extensions of credit; and monies owing on money-market instruments or instruments used to finance trade;

(3) ‘Plan’ means a debt restructuring plan contemplated by Chapter III;

(4) ‘State’ means a sovereign nation;

(5) ‘Supervisory Authority’ means [name of neutral international organization].

Chapter II: Invoking the Law’s Application

ARTICLE 3: PETITION FOR RELIEF, AND RECOGNITION

(1) A State may invoke application of this Law by filing a voluntary petition for relief with the Supervisory Authority.

(2) Such petition shall certify that the State (a) seeks relief under this Law, and has not previously sought relief under this Law (or under any other law that is substantially in the form of this Law) during the past [ten\textsuperscript{157}] years, (b) needs relief under this Law to restructure claims that, absent such relief, would constitute unsustainable debt of the State, (c) agrees to restructure those claims in accordance with this Law, (d) agrees to all other terms, conditions, and provisions of this Law, and (e) has duly enacted any national law needed to effectuate these agreements. If requested by the Supervisory Authority, such petition shall also attach documents and legal opinions evidencing compliance with clause (e).

(3) Immediately after such a petition for relief has been filed, and so long as such filing has not been dismissed by the Supervisory Authority [or this jurisdiction] for lack of good faith, the terms, conditions, and provisions of this Law shall (a) apply to the debtor-

\textsuperscript{157} The reason for inserting a time limit is to deter a debtor-state’s abuse of the Model Law’s provisions.
creditor relationship between the State and its creditors to the extent such relationship is governed by the law of [this jurisdiction]; (b) apply to the debtor-creditor relationship between the State and its creditors to the extent such relationship is governed by the law of another jurisdiction that has enacted law substantially in the form of this Law; and (c) be recognized in, and by, all other jurisdictions that have enacted law substantially in the form of this Law.

ARTICLE 4: NOTIFICATION OF CREDITORS
(1) Within 30 days after filing its petition for relief, the State shall notify all of its known creditors of its intention to negotiate a Plan under this Law.
(2) The Supervisory Authority shall prepare and maintain a current list of creditors of the State and verify claims for purposes of supervising voting under this Law.

Chapter III: Voting on a Debt Restructuring Plan

ARTICLE 5: SUBMISSION OF PLAN
(1) The State may submit a Plan to its creditors at any time, and may submit alternative Plans from time to time.
(2) No other person or entity may submit a Plan.

ARTICLE 6: CONTENTS OF PLAN
A Plan shall
(1) designate classes of claims in accordance with Article 7(3);
(2) specify the proposed treatment of each class of claims;
(3) provide the same treatment for each claim of a particular class, unless the holder of a claim agrees to a less favourable treatment;
(4) disclose any claims not included in the Plan’s classes of claims¹⁵⁸;

¹⁵⁸ Depending on the contractual terms, a debtor-state could, for example, decide to exclude claims that incorporate collective action aggregate-voting clauses from the Plan’s classes of claims and deal with those claims separately. The debtor-state then would be required to disclose those excluded claims.
(5) provide adequate means for the plan’s implementation including, with respect to any claims, curing or waiving any defaults or changing the maturity dates, principal amount, interest rate, or other terms or cancelling or modifying any liens or encumbrances; and
(6) certify that, if the Plan becomes effective and binding on the State and its creditors under Article 7(1), the State’s debt will become sustainable.159

ARTICLE 7: VOTING ON THE PLAN

(1) A Plan shall become effective and binding on the State and its creditors when it has been submitted by the State and agreed to by each class of such creditors’ claims designated in the Plan under Article 6(1). Thereupon, the State shall be discharged from all claims included in those classes of claims, except as provided in the Plan.
(2) A class of claims has agreed to a Plan if creditors holding at least [two-thirds] in principal amount and more than [one-half] in number of the claims of such class [voting on such Plan160] [entitled to vote on such Plan] agree to the Plan.
(3) Each class of claims shall consist of claims against the State that are pari passu in priority, provided that (a) pari passu claims need not all be included in the same class,161 (b) claims of governmental or multi-governmental entities each shall be classed separately,162 and (c) claims that are governed by this Law or by the law of another jurisdiction that is substantially in the form of this Law shall not be classed with other claims.163

159 Because the debtor-state itself makes the determination of debt sustainability, such determination could take into account whatever criteria the debtor-state deems relevant, including economic policy measures adopted by the debtor-state to help ensure the future payment of its debt.
160 The Plan can be more easily approved if this alternative is selected, but reliable notice to creditors then becomes more important.
161 The Plan can, for example, designate one or more classes of pari passu creditors from multiple debt issues.
162 This separate classification should apply only for entities that vote in good faith.
163 Article 7(3)(c) prevents creditors whose claims are governed by the Model Law (or a similar law) from being outvoted by other creditors of the debtor-state. Cf. infra note 164 and accompanying text (showing how separate voting protects those creditors from becoming unfairly subordinated to new-money financing).
Chapter IV: Financing the Restructuring

ARTICLE 8: TERMS OF LENDING

(1) Subject to the provisions of this Article 8, the State shall have the right to borrow money on such terms and conditions as it deems appropriate.

(2) The State shall notify all of its known creditors of its intention to borrow under Article 8(1), the terms and conditions of the borrowing, and the proposed use of the loan proceeds. Such notice shall also direct those creditors to respond to the Supervisory Authority within 30 days, stating (a) whether they approve or disapprove of such loan, (b) the principal amount of their claims against the State, and (c) the principal amount of those claims that are governed by this Law or by the law of another jurisdiction that is substantially in the form of this Law.

(3) Any such loan must be approved by creditors holding at least two-thirds in principal amount of the claims of creditors responding to the Supervisory Authority within that 30-day period.

(4) In order for the priority of repayment (and corresponding subordination) under Article 9 to be effective, any such loan must additionally be approved by creditors holding at least two-thirds in principal amount of the “covered” claims of creditors responding to the Supervisory Authority within that 30-day period. Claims shall be deemed to be “covered” if they are governed by this Law or by the law of another jurisdiction that is substantially in the form of this Law.164

ARTICLE 9: PRIORITY OF REPAYMENT

(1) The State shall repay loans approved under Article 8 prior to paying any other claims.

164 Article 8(4) protects creditors whose claims are governed by the Model Law (or a similar law) from being outvoted by other creditors of the debtor-state. See supra note 78 and accompanying text. Cf. supra note 163 and accompanying text (discussing how separate Plan classification protects those creditors from becoming unfairly outvoted).
(2) The claims of creditors of the State are subordinated to the extent needed to effectuate the priority payment under this Article 9. Such claims are not subordinated for any other purpose.
(3) The priority of repayment (and corresponding subordination) under this Article 9 is expressly subject to the approval by creditors under Article 8(4).

Chapter V: Adjudication of Disputes

ARTICLE 10: ARBITRATION
(1) All disputes arising under this Law shall be resolved by binding arbitration before a panel of three arbitrators.
(2) The arbitration shall be governed by [generally accepted international arbitration rules of (name of neutral international arbitration body)] [the rules of the International Centre for Settlement of Investment Disputes (ICSID)/ International Centre for Dispute Resolution/ ICC International Court of Arbitration].
(3) Notwithstanding Article 10(2), if all the parties to an arbitration contractually agree that such arbitration shall be governed by other rules, it shall be so governed. Such agreement may be made before or after the dispute arises.
(4) The State shall pay all costs, fees, and expenses of the arbitrations.165

Chapter VI: Opt In

ARTICLE 11: OPTING IN TO THIS LAW
(1) Any creditors of the State whose claims are not otherwise governed by this Law may contractually opt in to this Law’s terms, conditions, and provisions.
(2) The terms, conditions, and provisions of this Law shall apply to the debtor-creditor relationship between the State and creditors opting in under Article 11(1) as if such relationship were governed by the law of [this jurisdiction] under Article 3(3).

165 This is consistent with best practices in a corporate bankruptcy case, under which the estate normally pays all costs. Alternatively, the Model Law could provide that the parties to the dispute should pay their own expenses.