

*Reforming the Process of
Sovereign Debt Restructuring: A
Proposal for a Sovereign Debt
Tribunal*

Panel Discussion on “Emerging Issues in External Debt Restructuring”

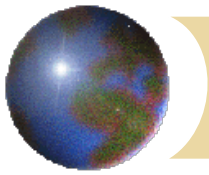
Second Committee, United Nations General Assembly

October 10, 2008

United Nations Headquarters, New York

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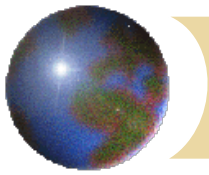
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Sovereign Debt Restructuring

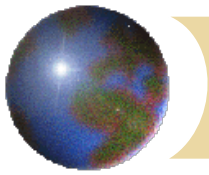
Reform: State of Play

- ✦ Basic issue—need for more orderly, efficient and predictable process
- ✦ Four major approaches
 - ✦ “Statutory” approach—IMF Sovereign Debt Restructuring Mechanism (SDRM) proposal
 - ✦ “Contractual” approach—collective action clauses (CACs)
 - ✦ Voluntary approach—Codes of Conduct
 - ✦ Existing institutions—Paris Club and London Club



Proposal for a Sovereign Debt Tribunal

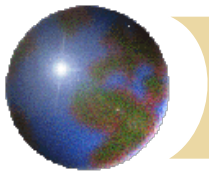
- ✚ Precedent: “Dispute Resolution Forum” in IMF SDRM proposal
- ✚ Recent example: Iraq restructuring (verification/reconciliation of claims)
- ✚ Desirability of comprehensive approach, but need to develop pragmatic approach in meantime



Proposal for Sovereign Debt Tribunal

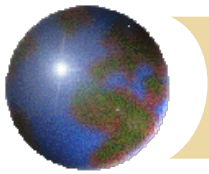
Tribunal (cont'd)

- ✦ Advantages of Sovereign Debt Tribunal
 - ✦ Based on consensus among key stakeholders
 - ✦ Neutral forum—"de-emotionalization" of disputes
 - ✦ Provides structure and cohesion to process
 - ✦ Create perception that there exists pool of experts to address these complex disputes



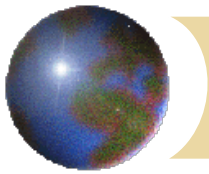
Where to Situate Sovereign Debt Tribunal

- ⊕ Existing arbitration institution (e.g., ICC, LCIA, etc.)?
- ⊕ Multilateral institution (e.g., World Bank, IMF, etc.)?
- ⊕ ICSID?
- ⊕ International Court of Justice?
- ⊕ NGO proposal for ad hoc arbitration?



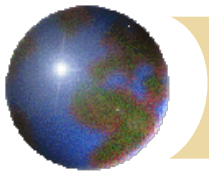
Where to Situate Sovereign Debt Tribunal (cont' d)

- ✚ Basic requirements
 - ✚ International institution of sufficient standing
 - ✚ Institution which is not potential creditor
- ✚ Need to gain widespread acceptance of choice of institution
- ✚ One possibility: United Nations



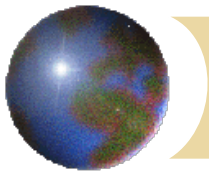
Establishing the Tribunal: Initial Steps

- ✦ If UN selected, Secretary General's role in selection of appointment panel or in direct appointment of arbitrators
 - ✦ see, e.g., SDRM model
- ✦ Election of president of tribunal
- ✦ Duties of president
 - ✦ Draft procedural rules
 - ✦ Decide on number of arbitrators for each case
 - ✦ Appoint arbitrators for each case



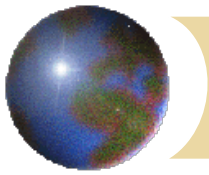
Jurisdiction of Tribunal

- ✦ Duties can be manifold
- ✦ Depends on ambitions of how far to extend influence of tribunal
- ✦ But depends on what is delineated by parties in relevant debt instrument (e.g., bond indenture, etc.)



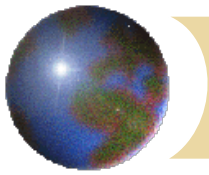
Jurisdiction of Tribunal (cont' d)

- ⊕ Minimum: verification of claims and voting issues
- ⊕ Arbitration clause as a product of interaction between issuer and investors/underwriters
- ⊕ Just narrow, technical legal issues?
 - ⊕ Legal validity of each claim
 - ⊕ Legal validity of sovereign's proposal



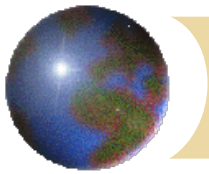
Jurisdiction of Tribunal (cont' d)

- ❖ Other potential issues for tribunal
 - ❖ What constitutes “sustainable debt”
 - ❖ Whether underlying economic assumptions are reasonable
 - ❖ Satisfaction of commencement criteria
 - ❖ Whether parties have engaged in good faith negotiations
 - ❖ Feasibility and/or reasonableness of restructuring plan
 - ❖ Whether debt is “odious debt”—but note caveats on this subject



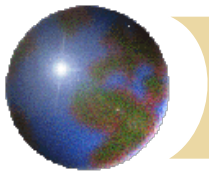
Who is to be Bound by Tribunal's Decisions

- ⊕ Basic rule—only those creditors whose underlying debt instrument contains arbitration clause
- ⊕ Issue of inter-creditor equity
- ⊕ But limitation if no arbitration clause in debt instrument



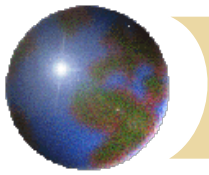
Triggers for Invoking Arbitration

- ⊕ Triggers
 - ⊠ Announcement of default
 - ⊠ Consider whether “imminent insolvency” to be included
- ⊕ Who Can Pull Trigger
 - ⊠ Sovereign alone, or creditors, too
 - ⊠ But will sovereign be willing to be subjected involuntarily to arbitration?
 - ⊠ Thus sovereign alone or sovereign and creditors acting in unison
 - ⊠ Yet contractual freedom of parties to decide



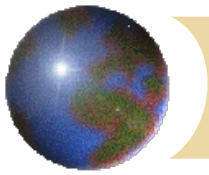
Governing Law and Applicable Insolvency Rules and Principles

- ⊕ Law of a particular jurisdiction?
- ⊕ If so, any role for public international law
- ⊕ Issue of inter-creditor equity where bonds issued under laws of different jurisdictions (NY law, UK law, German law, etc.)



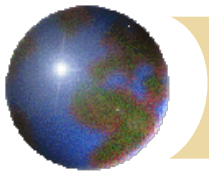
Governing Law (cont'd)

- ✚ Specific insolvency rules and principles
 - ✚ Not one jurisdiction, but “law merchant”
- ✚ General principles of insolvency set by multilaterals
 - ✚ UNCITRAL, World Bank, IMF texts on insolvency law
 - ✚ Need to adapt from commercial context



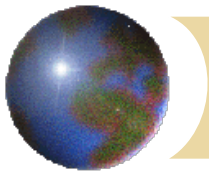
Representation of Creditors in Arbitral Proceeding

- ⊕ Need to avoid unwieldy process
- ⊕ Debt instrument would need to specify mechanism
- ⊕ Creditors' committee?
- ⊕ Indenture trustee?



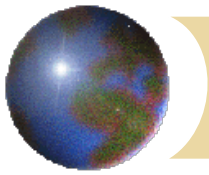
Mediation as Precursor to Arbitration

- ⊕ Will mediation be formal prerequisite to invoking arbitration?
- ⊕ Potential role for mediation regardless of whether formal prerequisite
- ⊕ Complement to restructuring negotiation



Financing and Support for Tribunal

- ⊕ Need for sponsoring organization to provide secretariat and office space
- ⊕ Cost of any particular arbitration (including fees of arbitrators) to be borne by parties
- ⊕ Arbitration can be expensive process so parties need to factor into decision as to whether to arbitrate



Conclusion

- ✦ Attempt to develop pragmatic approach
- ✦ Depends on prior contractual agreement of parties
- ✦ Necessary to develop new approaches as globalization increase number of actors in sovereign finance
- ✦ Possible confidence-building measure for embracing broader objectives