Good Faith and Transparency in Sovereign Debt Workouts

Paper prepared for the Second Session of the
UNCTAD Working Group on a Debt Workout Mechanism

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A. Executive Summary

This study intends to further the incremental approach set out by the Working Group at its first meeting. For this purpose, it explores the potential of good faith and transparency as general principles of law for the facilitation of sovereign debt workouts. Good faith is an established general principle of law. It provides a basis for a duty to participate in debt workout negotiations, a duty not to obstruct negotiations, and a prohibition of abusive creditor behavior aiming at the extraction of a preferential settlement. Transparency requirements for debt workouts might be partly based on the principle of good faith, partly on an emerging general principle of transparency. Disclosure obligations need to be balanced against legitimate interests in the protection of business confidentiality. The obligations thus derived from the principles of good faith and transparency need further specification in best practices or an international soft law document specifying, i.a., the timing, triggers, procedures, and applicable material standards. The last section of the study makes a tentative proposal for that purpose.

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B. Context and Methodology: The Incremental Approach

I. Context: The Incremental Approach to Regulating Sovereign Debt Workouts

This paper aims at furthering the approach set out in the UNCTAD Framing Paper.[1] This approach seems appropriate for the present situation. The legal and economic conditions of debt workouts are being questioned in the light of several new developments. First, past debt workouts have been criticized for being "too little, too late".[2] Debtor states did not receive conditions that were favorable enough to lead to lasting debt sustainability, sometimes because growth projections turned out to be overly optimistic.[3] Debt workouts were delayed, possibly because debtor state governments feared the political cost of adjustment.[4] Second, holdout creditors pursued increasingly aggressive strategies.[5] One domestic court issued an attachment order for a warship of the debtor states.[6] Courts in the United States received the right to intercept payments from the debtor state directed towards its compliant creditors that had exchanged their old bonds for new bonds.[7] Third, the scope of the debt problem has expanded. With the beginning of the Eurozone debt crisis, developed countries came into the focus for the first time in decades. Their situation has been aggravated by the transformation of private debt into public debt in the course of bank bailouts.

These developments indicate that some modifications of the political, economic and legal framework for the management of sovereign debt workouts might be apposite. Nevertheless, a number of important stakeholders do not seem to favor a solution that would involve any kind of "grand" institutional design, such as the establishment of a treaty-based Sovereign Debt Restructuring Mechanism. Rather, they seem to prefer innovative contractual solutions such as more robust aggregate collective action clauses.[8] While this solution would certainly constitute an important step forward, it also has its limitations. First, on a technical level, it would take time to integrate adequate clauses in all outstanding sovereign debt instruments. Legislative solutions like those chosen by the Eurozone which introduce statutory aggregate voting rules might speed up the process.[9] But in order to be effective, they need to be widespread across a large number of

[1] UNCTAD, Debt Workout Mechanism Framing Paper, 2 September 2013.
[2] Brookings Committee on International Economic Policy and Reform, "Revisiting Sovereign Bankruptcy" (2013), 5 et seq.
[3] Blanchard, Olivier and Daniel Leigh, "Growth Forecast Errors and Fiscal Multipliers", *IMF Working Paper* 1 (2013).
[4] C. Trebesch, "Delays in Sovereign Debt Restructuring. Should We Really Blame the Creditors?" (2008).
[5] On the rise of creditor litigation, cf. J. Schumacher, C. Trebesch & H. Enderlein, "Sovereign Defaults in Court. The Rise of Creditor Litigation 1976-2010", working paper, 15 February 2013.
[6] ITLOS, *Ara Libertad* (Argentina v. Ghana), Case No. 20 (2012).
[7] US Court of Appeals for the Second Circuit, *NML Capital Ltd. et al. v. the Republic of Argentina*, Case 12-105 (L), decision of 23 August 2013.
[8] E.g. IMF, "Sovereign Debt Restructuring – Recent Developments and Impications for the Fund's Legal and Policy Framework" (2013).
[9] Art. 12(3), Treaty Establishing the European Stability Mechanism (2012).

economically significant legal orders and broad enough to apply to all outstanding sovereign debt governed by the respective legal orders. Also, restructurings with aggregate clauses still requires an affirmative vote of the majority of all bondholders (75%-85%) and a majority among the holders of all bonds of one issuance (50%-66%). Investors holding a blocking minority of only one issue might still jeopardize a restructuring. Second, recent debt crises do not necessarily suffer from a coordination problem on the part of creditors.[10] Aggregate clauses would not necessarily provide sufficient safeguard against debtor-induced delays in debt workouts.

For these reasons, the Working Group opted for a hybrid, incremental approach. Instead of relying on one solution only, one might consider various alternatives. General principles of law might complement contractual solutions. Best practices, international soft law and domestic legislation lend themselves for the concretization of general principles and might contribute to the formation of custom or subordinate general principles. Any solution should be carved out in an interdisciplinary, expert-driven, multi-stakeholder process aimed at overcoming the dichotomy between statutory and contractual approaches.

The Working Group began its deliberations with a consideration of the economic value, legal nature, and possible content of a standstill rule.[11] The upcoming session will be devoted to the role of good faith and transparency. It emerged at the last session that the discussion might benefit from some more concrete proposals. This is why the current study submits a number of tentative suggestions for rules which might further concretize the principles of good faith and transparency, whatever legal nature they might ultimately have. The proposal aims at upholding public interest during sovereign debt workouts while taking into account to the extent possible the legitimate interests of various stakeholders.

II. Methodology: The Nature and Formation of General Principles of Law

The approach currently pursued by the Working Group explores the potential of general principles of law. They therefore deserve a closer look. General principles of law are a proper source of international law.[12] They were recognized at least with the adoption of the ICJ Statute. Before, their legal status had been heavily disputed,[13] although arbitral

[10] M. Gulati & A. Gelpern, "Sovereign Snake Oil", 73 *Law and Contemporary Problems* (2011) i-xii.
[11] Cf. M. Goldmann, "Necessity and Feasibility of a Standstill Rule for Sovereign Debt Workouts", Paper prepared for the First Session of the Debt Workout Mechanism Working Group (2013).
[12] This is why Koskenniemi designates them as "normative" general principles, see M. Koskenniemi, "General Principles: Reflexions on Constructivist Thinking in International Law" in M Koskenniemi (ed.), *Sources of International Law* (2000) 360-402, 364-5.
[13] A. Verdross, "Les principes généraux de droit dans le système des sources du droit international public" in Université de Genève, Faculté de Droit (ed.), *Recueil d'études de droit intenrational en hommage à Paul Guggenheim* (1968) 521-530, 521f.

tribunals had frequently taken recourse to them.[14] They are usually extrapolated from domestic legal orders by means of analogical and comparative reasoning.[15] According to Pellet,[16] a general principle is:

- *an unwritten legal rule of wide-ranging character.* Principles should therefore be distinguished from moral rules. They are just another form of legal rules, although of a more abstract and general character.[17] They usually express the ratio of more specific rules and serve as guidelines for their interpretation and application.[18] But it is also possible to base an argument about the legality of a certain act on its conformity with a specific general principle.

- *recognized in the municipal laws of States.* Most legal orders should be familiar with a principle considered to be a general principle, but not necessarily all.[19]

- *transposable at the international level.* This requires the principle to be of a somewhat abstract character. Principles which are contingent upon the existence of specific institutions which only exist on the domestic level may not be considered general principles.[20] A further indicator for the existence of a general principle of law is its applicability both in public law and private law contexts. But this criterion should not be overstretched since the distinction between public and private law as well as its significance varies from one legal order to another.

General principles of law serve international courts to fill lacunae[21] and to avoid judgments that would contradict basic principles of justice, only because the state practice necessary for the establishment of a customary rule cannot be proven. General principles thus presuppose the view that there is a universal international legal order which exceeds the sum of the manifestations of the will of its member states and comprises fundamental ideas of justice.[22] However, one should not equal general principles with natural law, since they require a basis in the practice of domestic legal systems.

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[14] A. Pellet, "Article 38", in A. Zimmermann et al. (eds), *The Statute of the International Court of Justice* (2006) marginal no. 247; V.D. Degan, "General Principles of Law", 3 Finnish Yearbook of International Law (1992) 1, 22ff.

[15] H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1977) 67ff. – From this type of general principle of law, one needs to distinguish general principles of international law, cf. G. Gaja, "General Principles", in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2007) marginal no. 17ff. The latter have no relevance for this study.

[16] Pellet (note 14), marginal no. 249.

[17] On the theoretical debate surrounding the distinction between rules and principles see R. Dworkin, *Taking Rights Seriously* (1977) 22; J. Habermas, *Faktizität und Geltung* (1992) 255, 309-17.

[18] R. Kolb, "General Principles of Procedural Law", in A. Zimmermann et al. (eds), *The Statute of the International Court of Justice* (2006) 793, marginal no. 2.

[19] According to Gaja (note 15) marginal no. 16, the International Court of Justice is reluctant to recognize general principles when it would require controversial discussions of comparative law.

[20] V.D. Degan, *Sources of International Law* (1997) 103.

[21] Pellet (note 14) marginal no. 245.

[22] R. Kolb, *La bonne foi en droit international public* (2000) 24-5, 45ff.; Degan (note 20) 58ff.

General principles of law result from a constructive effort in which domestic legal principles are extrapolated to the international level. Some have called this "doctrinal constructivism".[23] It consists in the construction of doctrinal propositions, such as general principles, by way of an analysis of past practice. The analysis is guided by overarching theoretical considerations, such as justice, legitimacy, or, as in the case of traditional international law doctrine, sovereignty. Those considerations provide selection criteria, allowing distinguishing relevant from irrelevant (or more relevant from less relevant) past practice.

Doctrinal constructivism is a task for both international legal scholarship and practice. Legal scholars and courts certainly should not claim to be law-makers. This would contravene Art. 38(1)(d) of the Statute of the International Court of Justice (ICJ), which designates them only as subsidiary means for the recognition of the law. But it would be a deception to assume that this process of "recognition" could be limited to a purely deductive exercise. Rather, the evolution of our understanding of language brought about by what is commonly referred to as the "linguistic turn" has shattered the assumption of a strict separation between law-making and interpretation. Accordingly, the meaning of legal rules is not only indeterminate, but also context-sensitive to the extent that it only emerges in the practice of their interpretation and application. Each interpretation of the law is thus tantamount with its further development.[24] In other words, the practice of courts and legal scholarship always contributes to the further development of the law. This is especially acute in international law, a relatively young and developing field of law characterized by decentralized institutions, cases and practice.[25]

However, this does not mean that "anything goes" and that doctrinal constructivism would be an act of unfettered discretion. First, in their role as scholars, lawyers may not engage in formal law-making processes.[26] The latter belong to the realm of politics, and to the extent that lawyers engage in such processes, their proposals are only expert opinions and require political affirmation by adequate procedures in competent bodies and organizations. Of course, the line between reconstruction and law-making might be thin at times. But as long as scholars advance *arguments* supporting the view that a certain rule exists, they are on safe ground and only exposed to reasoned criticism that their argument is wrong. As soon as their *argument* is that a rule does not exist yet but should exist, they are making a political statement.[27] The second limit concerns the overarching theoretical considerations underlying the doctrinal reconstruction of international law, including general principles. Legal scholars are not free to use

[23] A. von Bogdandy, "The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges Facing Constitutional Scholarship in Europe", 7 *International Journal of Constitutional Law* (2009) 364-400; with a view to international law: A. Peters, "Realizing Utopia as a Scholarly Endeavour", 24 *European Journal of International Law* (2013) 533-552, 545-6.
[24] Seminal on the concept of language advocated by the linguistic turn: L. Wittgenstein, *Philosophische Untersuchungen*, 16th edn (2004), 262 (sec. 43). On the significance of the linguistic turn for international law, see J. d'Aspremont, *Formalism and the Sources of International Law* (2011) 196ff.
[25] Peters (note 23) 533, 537; F. Tesón, "The Role of Academics in the Legal System: International Law", in P. Cane and M. Tushnet, *Oxford Handbook of Legal Studies* (2003) 941.
[26] Peters (note 23) 539.
[27] Habermas (note 17) 146-7, 397.

whatever normative premise they wish. Rather, the theoretical considerations have to be generally in line with the existing legal framework. If this is the case, legal scholarship is engaging in doctrinal constructivism. This is what separates the idea of legal positivism so firmly immersed in international legal thought from natural law.

General principles of law are, first of all, rules of international law. States need to comply with them as a matter of international law. However, their applicability in domestic legal orders depends on the status of international law in the latter. Some constitutions incorporate general principles into the domestic legal order, either directly by cross-referencing,[28] or indirectly, e.g. by way of the idea of comity.[29] Other legal order would need to enact appropriate legislation which implements general principles into their legal order.

C. Good Faith as a Principle in Sovereign Debt Restructurings

I. Function of Good Faith

The concept of good faith has a place in almost any theory of law, moral philosophy, or society.[30] It appears as an indispensable requirement for social interactions.[31] It has therefore played a role in virtually any theory of international law since early modernity.[32] Natural law theories associate good faith with the idea of reason.[33] In Confucianist thought, the principle of "chengshi xinyong", which stands for trustworthiness and honesty, has an equivalent function.[34]And modern theories of justice like that of John Rawls are built around the idea of fairness, a close relative of good faith.[35]

The concept of good faith usually assumes a very broad and general character, fulfilling a number of different functions in both private law and public law relationships. In horizontal, contractual relationships, both parties expose their property, interests or stakes to the other party to some extent when they enter into a contractual relationship. This requires a good dose of trust, which the idea of good faith is meant to create. According to D'Amato, good faith requires treating the other party fairly, represent one's motives truthfully, and to refrain from taking unfair advantage of them.[36] Similarly, Kolb understands the function of good faith as threefold: to protect legitimate expectations, to

[28] E.g. Art. 25 of the German Basic Law.
[29] C. Wheeler and A. Attaran, "Declawing the Vulture Funds: Rehabilitation of a Comity Defense in Sovereign Debt Litigation", 39 *Stanford Journal of International Law* (2003) 253.
[30] Aristotle, *Nicomachean Ethics*, Book V.
[31] H. Grotius, *De iure belli ac pacis libri tres*, vol. 3, Ch. 25, 1.
[32] Joseph F. O'Connor, *Good Faith in International Law* (1991) 45-79.
[33] Kolb (note 22) 86-92.
[34] M. Kotzur, "Good faith (Bona fide)", in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2009), marginal no. 6.
[35] J. Rawls, "Justice as Fairness: Political not Metaphysical", 14 *Philosophy and Public Affairs* (1985)
[36] A. D'Amato, "Good faith", in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 2 (1995) 599.

prohibit the abuse of rights, and to prevent the derivation of advantages from unlawful acts.[37] The idea of good faith is therefore often accessory to other duties, usually contractual or treaty-based ones.[38] It sometimes overlaps with other principles and duties. For example, does the principle of estoppel form an integral part of the idea of good faith, or is it merely one of its corollaries? *Pacta sunt servanda* is sometimes qualified as a principle deriving from and comprised within the idea of good faith.[39] One should not worry too much about these relationships in the abstract as long as the significance of good faith can be established in a concrete case.

In public law relationships, i.e. in vertical constellations like the one between citizens and the state, or between an organization and its members,[40] good faith overlaps with other, similar concepts such as cooperation and loyalty. Their function consists in the facilitation of effective and legitimate authority by prohibiting arbitrary exercises of authority on the part of the "upper" level and arbitrary jeopardy of legitimate authority on the part of the "lower" level.

II. Good Faith as a General Principle of Law

Good faith is widely accepted as a general principle of law. Most domestic legal orders recognize its coordinative function for private law relationships. It is more widespread and has a longer tradition in the civil law tradition than in common law. A famous manifestation of good faith is Art. 1134 of the French Code Civil. Other private law codifications contain comparable provisions.[41] By contrast, the concept of good faith entered into English law at a relatively late stage.[42] An exception from the 18th century is Lord Mansfield's famous claim that good faith constituted a "governing principle […] applicable to all contracts and dealings".[43] However, despite the hesitation in adopting the concept of good faith, English law recognizes estoppel as a principle which constitutes a concretization of good faith, or at least has a close affinity to it.[44] Also, one might consider equity as an entire normative order, today a subfield of the legal order, built on an equivalent of the idea of good faith. Be that as it may, the breakthrough for the

[37] R. Kolb, "Principles as Sources of International Law (With Special Reference to Good Faith)" 53 *Netherlands International Law Review* (2006) 1, 17-8.
[38] This does not exhaust the significance of the concept of good faith. Good faith might also refer to a psychological fact which is a requirement for certain legal consequences, such as the acquisition of property without legitimate title, see Kolb (note 37) 13-16. However, in the context of sovereign debt, this connotation does not bear any significance.
[39] O'Connor (note 32) 119.
[40] On the concept of public law in a pluralistic global environment, see M. Goldmann, "A Matter of Perspective. Global Governance and the Distinction between Public and Private Authority (And Not Law)" (2013), SSRN.
[41] E.g., Sec. 242 German BGB, Art. 422 Brazilian Civil Code. Overview: O. Lando, "Good Faith in the Legal Systems of the European Union and in the Principles of European Contract Law", in A. M. Rabello (ed.), *Aequitas and Equity* (1997) 332.
[42] B.M. Cremades, "Good Faith in International Arbitration", 27 *Am. U. Int'l. L. Rev.* (2012) 761, 774-5.
[43] *Carter v Boehm* (1766) 97 ER 1162, 1164 (Lord Mansfield).
[44] A. Martin, *L'estoppel en droit international public* (1979) 9-14.

concept of good faith in the common law came with the adoption of Sec. 1-304 of the Uniform Commercial Code, which recognizes good faith as a principle governing the performance and enforcement of contractual obligations.[45] It has therefore found recognition in international codifications of contract law, such as Art. 7 of the United Nations Convention on the International Sale of Goods or Art. 1.7. of the UNIDROIT Principles of International Commercial Contracts. Also, it plays a crucial role for international commercial arbitration.[46]

The vertical, public law dimension of the idea of good faith enjoys less recognition in domestic legal orders. It plays a role in federal states or membership-based entities and organizations in which the "member" level participates in the exercise of authority on the "federal" or organizational level. The prime example for this is the principle of sincere cooperation in the law of the European Union.[47] A similar principle of loyalty exists in German constitutional law. The law of the United States, by contrast, does not recognize such a principle since the structures of State and federal governments are much more separated.[48]

In international law, by contrast, the principle of good faith is widely recognized both in horizontal and in vertical legal relationships. It has both procedural and substantive connotations.[49] In horizontal relationships, it plays a role in almost any field of the law. Thus, the Friendly Relations Declaration attributes to good faith the status of an overarching principle for the conduct of international affairs.[50] It gives rise to a number of duties of cooperation with respect to the maintenance of peace, even though a general principle of cooperation may at best be emerging in international law.[51] The Vienna Convention on the Law of Treaties (VCLT) notes in its preamble that "the principles of free consent and of good faith and the pacta sunt servanda rule are universally recognized." Good faith plays a role in the creation of treaty obligations by virtue of acquiescence as one of its corollaries,[52] in the interpretation of treaties pursuant to Art. 31(1) VCLT, and in the performance of treaty obligations by virtue of Art. 26 VCLT, which stipulates that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." Eventually, good faith requires that fundamental change of circumstances might lead to a suspension or termination of treaty obligations.[53] Beyond treaty law, estoppel, arguably a principle in its own right, but also a corollary of good faith, guides the exercise of rights and duties under international law. Procedurally, good faith requires respect for duties of information and disclosure. It has thus a high

[45] A. Farnsworth, "Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant Conventions and National Laws", 3 *Tulane Journal of International ad Comparative Law* (1995) 47, 51-54.
[46] Cremades (note 42) 765.
[47] Art. 4(3), TEU.
[48] D. Halberstam, "Comparative Federalism and the Issue of Commandeering", in K. Nicolaidis & R. Howse, *The Federal Vision* (2001) 213-251.
[49] Kotzur (note 34) margin nos. 22-24.
[50] UN General Assembly, Res. 2625(XXV) 1970.
[51] R. Wolfrum, "Cooperation, International Law of", in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2010) marginal no. 13 et seq.
[52] E.g. Norwegian Fisheries Case, ICJ Rep. (1951) 136-7.
[53] Art. 62, VCLT.

affinity with the idea of transparency.[54] For example, the failure of a state to provide due notification to another state might entail damages.[55]

International law also knows a vertical dimension of good faith. Art. 2(2) of the UN Charter refers to the principle in the context of the charter obligations of the member states. This provision resembles a "vertical" version of Art. 26 VCLT, commensurate to the public law character of the relationship between the United Nations and its members.[56] One might also derive from Art. 2(5) of the UN Charter a principle of sincere cooperation, a corollary of good faith.[57] Art. 86 of the Rome Statue contains some more specific duties of cooperation, which exist in a number of other organizational statues, too. Some conclude on the basis of such provisions as well as the object and purpose of international organizations that there is a general principle prohibiting the paralysis of international organizations.[58] Further, according to the ICJ, the principle of good faith might narrow down the discretion of the United Nations with respect to decisions affecting its current or future members.[59]

In conclusion, good faith is a widely accepted general principle of law expressing basic ideas of fairness, both in procedural and in substantive respects. Normally, it is accessory to other legal provisions, be they of a horizontal (private law) or vertical (public law) character. One might break down its meaning into a number of sub-categories. Some of them constitute general principles in their own right, such as estoppel. One might also consider estoppel not as a corollary of good faith, but as a concretization of one and the same general principle. However, for reasons of legal certainty, it might be preferable to consider each of these concepts as separate general principles and to assess their requirements and consequences independently of each other. Finally, the open-textured nature of the principle of good faith makes it an excellent tool for handling lacunae in the positive law, and thus, for the further development of international law.[60]

III. Good Faith in Sovereign Debt Workouts

Good faith as a general principle has a bearing on sovereign debt workouts in a number of respects. The scope of the following analysis is limited to facts that occur after a state's debt has become unsustainable. It does not consider whether good faith has any relevance for any of the parties when states incur debt.[61] Whether good faith is applicable

[54] See below, D.
[55] Kolb (note 37) 20.
[56] Kotzur (note 34) 8.
[57] C. Feinäugle, *Hoheitsgewalt im Völkerrecht. Das 1267-Sanktionsregime der UN und seine rechtliche Fassung* (2011) 111ff.
[58] E. Zoller, *La bonne foi en droit international public* (1977) 167.
[59] Admission of a State to Membership in the UN Advisory Opinion, ICJ Rep (1948) 57.
[60] Kolb (note 37) 26f.; M. Panizzon, *Good Faith in the Jurisprudence of the WTO* (2006) 23.
[61] In that respect, one might also speak of fiduciary relationships, see J.R. Oyola & M. Sudreau, "Fiduciary Relations", in C. Espósito, Y. Li & J.P. Bohoslavsky, *Sovereign Financing and International Law* (2013) 213.

to the latter situations seems to be more controversial in common law than in civil law jurisdictions.[62] Be that as it may, the regulation of sovereign debt workouts receives guidance from the principle of good faith in at least four procedural or substantive respects, which are treated here in chronological order starting with the entry into negotiations about a debt workout and concluding with compliance with negotiated workouts.

1. Duty to Participate in Negotiations for Debt Workouts

There is at least an emerging conviction that good faith as a general principle, or an independent corollary thereof, imposes a duty on sovereign debtors and their creditors to enter into negotiations once the debt of a state has become unsustainable. This follows from overarching theoretical considerations and is supported by relevant domestic and international practice.

From a theoretical vantage point, good faith has the function of filling in lacunae in unforeseen cases and contributing to their cooperative solution. Debt instruments do not provide for an insolvency procedure, even if they contain collective action clauses. The latter is simply a voting mechanism. Debt negotiations might display a horizontal structure, such as those between states and traditional creditors' committees, or a more vertical one, such as those involving international institutions like the IMF or the Paris Club.[63] In particular by creating the latter institutions, states have established workout mechanisms which are effective even though they are informal. The ability to act entails a duty to act, at least in a moral sense.[64]

The proposition that creditors and debtors have a duty to enter into negotiations if sovereign debt has become (or threatens to become) unsustainable finds confirmation in domestic practice. One might derive an emerging duty to participate in debt workout negotiations from the principle of good faith, or from an independent, but corollary general principle to that effect. This requires analogical reasoning from domestic insolvency law, a typical step in the establishment of general principles.[65] On the domestic level, domestic creditors may not choose whether to participate in obligatory debt restructurings or not.[66] Rather, they need to respect the applicable law and the decisions of competent institutions, which may modify their claims unilaterally. To the extent that there are mechanisms on the international level which have a function equivalent to domestic insolvency proceedings, one might argue that there is a

[62] Cremades (note 42) 777.
[63] A. von Bogdandy & M. Goldmann, "Sovereign Debt Restructurings as Exercises of Public Authority: Towards a Decentralized Sovereign Insolvency Law", in: C. Espósito, Y. Li & J. P. Bohoslavsky (eds.), *Sovereign Financing and International Law. The UNCTAD Principles on Responsible Sovereign Lending and Borrowing* (2013) 39.
[64] Ibid., 56.
[65] See note 15.
[66] M. Goldmann, Responsible Sovereign Lending and Borrowing: The View from Domestic Jurisdictions (2012), 39 et seq.

corresponding duty to participate in negotiations in the frame of these institutions should the need arise.[67] Otherwise, one would defeat the purpose of these mechanisms.

Several developments on the international level corroborate this conclusion. First, the spread of collective action clauses occurred in light of the rejection of a Sovereign Debt Restructuring Mechanism. They were considered the less costly, more readily available, but functionally more or less equivalent solution. One might therefore conclude that the rejection to participate in debt workout negotiations defeats the purpose of collective action clauses. Further, in international arbitration, the parties to a dispute have a duty to negotiate before they submit a case to a tribunal.[68] Similarly, WTO law imposes a duty to negotiate first before imposing unilateral trade restrictions.[69] All these ideas are nothing but concretizations of the idea of good faith. Third, Principle 7 of the UNCTAD Principles on Promoting Responsible Sovereign Lending and Borrowing (UNCTAD Principles) obliges lenders to engage in good faith negotiations with debtor states in case their debt becomes unsustainable.

The duty to participate in negotiations can therefore be based on a general principle of law. In case creditor is a state, the duty applies directly as a matter of international law. In case the creditor is a private individual or entity, the existence of such a duty might play a role before international courts and tribunals. In case of domestic legal disputes, the duty must either be incorporated into domestic law,[70] or failing to do so, the principle of good faith should oblige the forum state not to recognize or enforce any contractual rights in violation of this duty.

A crucial question is whether the manifestations of the principle of good faith (or an independent corollary thereof) in this respect are sufficiently precise in order to guide debt workouts effectively.[71] Although one might agree on them in the abstract, sovereign debt workouts raise many questions which do not find an answer by way of deduction from highly abstract principles or by analogical reasoning from domestic law. The following issues require clarification, possibly through the establishment of best practices or soft law:

- When does the duty to negotiate set in? Which factors should trigger it? Certainly, it is up to the debtor state to initiate negotiations. But when should an invitation to negotiations be legitimate? Would it be appropriate to tie the legitimacy of an invitation to negotiations to the results of an IMF debt sustainability analysis?

[67] von Bogdandy & Goldmann (note 63) 57.
[68] M. Waibel, "The Diplomatic Channel", in: J. Crawford & A. Pellet (eds.), *The Law of International Responsibility* (2010) 1093, 1093.
[69] Panizzon (note 60) 81-84.
[70] See above, B.II.
[71] von Bogdandy & Goldmann (note 63) 57; opposite view: C. Tietje & M. Lehmann, "Legal Opinion concerning several points of law relating to public and private international law in connection with enforcing von [sic] claims arising from Argentine sovereign bonds in Germany" (2013), convenience translation, on file with the author, 16.

- Who should be obliged to participate in debt workout negotiations? Should this duty be incumbent upon every creditor directly, or should certain groups of creditors, such as retail investors, only be obliged to select representatives? What criteria should be applied for representation? [72] Should the debtor be obliged to negotiate with any creditor committee, no matter how representative it may be?

- Which factors would terminate the duty to participate in negotiations? How much time, how many resources and efforts are creditors or debtors obliged to spend on negotiations? Under which conditions may one of them legitimately terminate ongoing negotiations?

2. Duty Not to Obstruct Negotiations: Standstill and Repudiation

Good faith requires debtors and creditors participating in negotiations to allow the negotiations to be successful. Otherwise they would engage in contradictory, dishonest behavior. This has implications for creditors and debtors.

Creditors may not take recourse to enforcement action while negotiations are ongoing. In this respect, good faith as a general principle appears as a possible basis for a standstill rule. In fact, the US Federal Court of Appeals for the Second Circuit ruled against a holdout creditor in 1984 since Costa Rica seemed to be negotiating in good faith at the time. When the restructuring later amounted to a rather unilateral suspension of payments, the first ruling was reversed.[73] The problem with this approach is that the principle of good faith is relatively broad. It requires considerable deductive reasoning to establish that good faith requires standstill during negotiations. In addition, one might therefore consider standstill as at least an emerging general principle of its own.[74] But be that as it may, in the end, the precise qualification of any standstill rule is more of theoretical concern. In practical terms, whether standstill is recognized as a general principle of its own or as a concretization of good faith, it should ideally be complemented by best practices, soft law or domestic laws and regulations setting out the triggers, conditions, and duration of such standstill in order to enhance legal certainty.

On the part of the debtor, good faith demands refraining from any unilateral repudiation of debt during ongoing negotiations. Rather, the payment obligations of the debtor state remain unaffected, without prejudice and subject to the terms of the debt instrument. Certainly, the establishment of best practices or other instruments for the definition of the minimum periods, efforts, or resources which debtor would need to devote to the negotiations before they can be considered as failed would be advisable.

[72] Cf. von Bogdandy & Goldmann (note 71) 59.
[73] Case 83-7714, 18 March 1985, 757 F.2d 516; cf. Rogoff & Zettelmeyer, "Bankruptcy Procedures for Sovereigns. A History of Ideas 1976-2001", 49 *IMF Staff Papers* 3 (2002) 475.
[74] Cf. Goldmann (note 11).

3. Good Faith and the Content of Sovereign Debt Workouts

Different aspects of good faith come to mind which might have an impact upon the content of debt restructurings. First, the *clausula rebus sic stantibus* constitutes a concretization of the idea of good faith. It implies that fundamental changes of the circumstances which the parties to a contract or a treaty assumed to prevail at the conclusion of the contract or treaty might give rise to a termination or adjustment of contractual duties. The *clausula* is widely recognized in many jurisdictions. It also constitutes a general principle of law applicable to international treaties.[75] However, in almost all major jurisdictions, the principle is not applicable to cases of economic necessity, no matter whether the debtor is a state or a private person.[76] Debt crises are not considered as unforeseen, but as the result of the behavior of one or both contracting parties for which they have to bear responsibility.[77] Only unexpected circumstances like war or natural disaster might give rise to a right to adjust the terms of a contract or treaty.

Second, one might argue that debt workouts need to take into account the legitimate interests of all parties. This has consequences for the relationships between the debtor and its creditors, and for inter-creditor relationships. Concerning the debtor-creditor relationship, extracting undue, excessive advantages from a debt crisis would be against good faith. In this respect, good faith resembles the principle of proportionality. Thus, for example, a reduction in principal might constitute the ultimate measure in a debt workout since it leads to costly write-downs on the part of the creditors. If the creditors are banks, such write-downs could potentially deplete their capital and trigger systemic effects. Conversely, insufficient debt workouts which do not allow for the sustainable recovery of the debtor state and compel it to resume negotiations in the foreseeable future might contravene good faith, especially if knowingly based on overly optimistic assumptions.

For inter-creditor relationships, the public law dimension of the principle of good faith requires that creditors treat each other fairly and that no group of creditors extracts excessive advantages to the detriment of other groups of debtors. The Paris Club principle requiring the "comparability of treatment" of all groups of creditors in a restructuring, although formally imposed on the debtor states, expresses this idea of good faith among creditors.[78] However, "comparability of treatment" is an imprecise standard that is highly context-specific. The best way to ensure the comparability of treatment might be fair and inclusive negotiations. Conversely, one might argue that the outcomes of fair and inclusive debt workout negotiations respect good faith, unless proven otherwise. For this reason, it is important to define criteria for fair and inclusive negotiations as envisaged above. Also, the controversial issue of preferences for creditors granting debtor-in-possession financing can hardly be solved by mere reference to good

[75] Art. 62, VCLT. For an early analysis, see E. Kaufmann, *Das Wesen des Völkerrechts und die clausula rebus sic stantibus* (1911).
[76] M. Goldmann, Responsible Sovereign Lending and Borrowing: The View from Domestic Jurisdictions (2012), 37-8, based on a sample of 15 jurisdictions from all regions of the world.
[77] A. Reinisch, "Debt Restructuring and State Responsibility", in D. Carreau & M. Shaw, *The External Debt* (1995) 537, 570.
[78] http://www.clubdeparis.org/sections/composition/principes/comparabilite-traitement.

faith, since the idea of good faith does not lead to a straightforward solution but might lend support to different positions on this issue. It therefore requires a political decision.

Third, both the debtor and the creditors might consider certain claims as contravening the principle of good faith due to circumstances in relation to their issuance or purchase. However, despite the large amount of theoretical support it has received over time from various angles,[79] the debate on "odious debt" has yielded few tangible results so far.[80] The case of Iraq shows that international practice may find equitable solutions without establishing in a definitive manner the odious or non-odious character of certain debt.[81] Workout agreements should therefore be negotiated and concluded in a forward-looking manner, irrespective of the potentially odious nature of some debt, just as international humanitarian law needs to be observed irrespective of the legality of the recourse to armed force in question. Instead, questions of good faith might have an indirect impact on the terms of the debt workout agreement or the enforceability of certain debt.[82]

A final issue concerns the relationship between good faith and the international legal obligations of the debtor state, especially economic, social and cultural rights. This does not amount to the question whether creditors, including third states and private entities, are bound as a matter of legal obligation by guarantees of economic, social, and cultural rights applicable in the debtor state.[83] Instead, one might argue that it is a matter of good faith that creditors, international organizations and other actors do not request debt workouts and affiliated adjustment programs which would prevent the debtor state from fulfilling its international obligations in the field of economic, social, and cultural human rights. At least, there should be a presumption that debt workouts do not have such consequences. Should the contrary emerge, good faith might give rise to a re-interpretation or adjustment of debt workouts which allow the debtor state to respect its human rights duties.

[79] Pathbreaking: Alexander N. Sack, *Les effets des transformations des États sur leurs dettes publiques et autres obligations financières* (1927) 157; see also A. Gelpern, "Odious, Not Debt", 70 *Law and Contemporary Problems* (2007) 101.

[80] Cf. T.-H. Cheng, "Renegotiating the Odious Debt Doctrine", Law and Contemporary Problems 70 (2007) 7, 14ff.; S. Michailowski, *Unconstitutional Regimes and the Validity of Sovereign Debt* (2007) 37.

[81] C.G. Paulus, "Debts", in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2011) marginal no. 28.

[82] Cf. R. Howse, "The Concept of Odious Debt in Public International Law", UNCTAD Discussion Paper No. 185 (2007), at 8-9, who demonstrates that the concept of odiousness has played an important role in past negotiations.

[83] Cf. Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina, UN Doc. A/HRC/20/23, 10 April 2011, para. 9; Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, 34 *Human Rights Quarterly* (2012) 1084. Arguing that creditors need to respect human rights whenever the debt workout constitutes an exercise of public authority: von Bogdandy & Goldmann (note 71) 60-3.

4. Good Faith and the Acceptance of Debt Workouts: Voting and Holdouts

As a matter of good faith, creditors and debtors are bound to respect the terms of a debt workout and might not frustrate its purpose. However, this does not automatically amount to a duty of debtors or creditors to give their consent to the negotiated draft agreement. Otherwise, contractual clauses submitting such an agreement to the vote of creditors would be pointless. Good faith exceptions to this rule should not be taken for granted. For example, a party signaling support for certain elements of an agreement or its disinterest in others might be estopped from rejecting the agreement on the basis of those very reasons, unless the rejection is due to a change in circumstances which it did not and could not foresee doing the negotiations. If a party simply failed to articulate its concerns about a certain part of the agreement in time, good faith or any of its corollaries needs to protect the other parties, especially the debtor. Also, domestic institutions like the parliament of the debtor state should have the opportunity to exercise control over their government if their consent is needed domestically for the conclusion of the agreement.

Also, good faith does not necessarily require creditors to accept a majority decision as binding no matter whether the applicable bond includes a collective action clause or not.[84] Governments and courts have time and again emphasized the consensual nature of debt restructurings.[85] In practice, collective action clauses vary to some extent as to the majorities required and the list of "reserved matters" to which the qualified majority applies. Second-generation aggregation clauses are still in an experimental stage. The fact that recent bilateral investment treaties (BITs) bar access to investment arbitration if a negotiated workout has been agreed upon does not necessarily shift the tides in favor of non-consensual restructurings. The relevant clause in the US-Uruguay BIT only applies when collective action clauses included in the terms of the debt instrument have been used for the adoption of the debt workout agreement.[86] Thus, there is no general duty to accept majority decisions except if they are contained in the terms of a debt instrument.

However, two reservations are in order. First, conflicts of interest might bring the exercise of voting rights in conflict with the principle of good faith. Such conflicts of interest might arise when states buy back some of their bonds either directly or through intermediaries under their control. In the corporate context, treasury stock (or treasury shares) is usually excluded from voting since it is only legally part of capital, not in an economic sense.

Second, the argument that there is no general requirement to accept majority decisions does not necessarily imply that holdout litigation is in conformity with the principle of good faith. As stated in the implications to Principle 7 of the UNCTAD Principles,

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[84] In this sense, however, Tietje & Lehmann (note 71).

[85] Cf. Brief for the United States of America as Amicus Curiae in Support of Reversal, case 12-105-cv(L), 4 April 2012, 6 et seq.

[86] US-Uruguay BIT (2005), Annex G, Sovereign Debt Restructuring, available at http://unctad.org/sections/dite/iia/docs/bits/us_uruguay.pdf.

creditors who buy debt of troubled states for the purpose of extracting a preferential treatment act abusively. In the same vein, the *amicus curiae* brief submitted by the US government in the recent *NML v. Argentina* case, while formally insisting that debt workouts had to be voluntary, stressed that this should not allow individual creditors to thwart an entire workout.[87] The question is only what criteria allow qualifying the acquisition of such debt, or litigation based on it, as abusive. The UNCTAD Principles refer to the "intent" of the buyer of such debt, thus a subjective criterion that can hardly be proven unless it is corroborated by objective indiciae. In that respect, in order to establish that the acquisition of certain debt was abusive, one might take into account

- the difference between the nominal and market price at the time of the acquisition;

- the time of the acquisition;

- the volume acquired, especially if it amounts to a blocking minority under the applicable collective action clause;

- most importantly, whether the creditor made a good faith effort to reach a debt workout.

Further, holdout litigation might not only be abusive if the debt was acquired for the sole purpose of extracting a preferential treatment. The ratio underlying this constellation is the idea that free-riding violates good faith. This idea might as well apply to litigation that seeks to collect the full nominal amount of debt acquired in good faith before the debt situation of the debtor state became unsustainable. Such litigation might thwart debt workouts no less than holdout litigation by creditors that were of bad faith already at the time of the acquisition. Even creditors that were initially of good faith cannot expect sovereign debt to be a risk-free investment and need to be willing to bear the risks inherent in such debt. Otherwise they might act in bad faith, unless they can invoke pertinent reasons for their non-participation in the restructuring.

It might be conducive to legal certainty to carve out the criteria for the identification of abusive acts as well as the legal consequences deriving therefrom in best practices, international soft law, or domestic legislation. Regarding legal consequences, The 2010 United Kingdom Debt Relief (Developing Countries) Act provides a possible model. It reduces claims of private creditors against countries participating in the HIPC proportionate to the relief granted to them under the initiative. The idea of the comparability of treatment follows the same ratio,[88] although it refers to the content of the negotiations.

[87] Brief for the United States of America as Amicus Curiae in Support of Reversal, case 12-105-cv(L), 4 April 2012, 17.
[88] Cf. note 78 and accompanying text.

D. Transparency as a Principle in Sovereign Debt Restructurings

I. Function of Transparency

The concept of transparency has origins both in private and in public law contexts. In private law settings, the idea of transparency or disclosure has the function of enabling and stabilizing markets. The meaningful assessment of economic chances and risks requires a high level of information. Information asymmetries lead to inefficient allocations of resources and make markets unfair, since some market participants might have better knowledge than others. For that reason, the law imposes on market participants various duties of disclosure to their contracting parties or to the public. This also demonstrates the close relationship between transparency and good faith. Contracting parties are especially exposed to risks affecting their partner and should therefore know about them as early as possible in order to take necessary precautions. This is especially true for financial markets, given their speed and the risks involved. The market for sovereign debt needs to be able to price debt instruments in a manner which is appropriate to the risks. Otherwise, debt might be overvalued or undervalued, leading to funding difficulties or excessive borrowing. A lack of transparency might also trigger asset price shocks when crucial information about the financial situation of a country is suddenly revealed after having been kept secret for an extended period. A recent example is the 2009 revelation of the true Greek budget deficit which turned out to be much higher than expected.

In public law contexts, transparency has the function of legitimizing the exercise of authority. Free access to information enables citizens and elected representatives to question and control governmental authority. Kant suggested that all actions affecting the rights of others should be public in order to compel the actors to justify their actions and thereby ensure that they are in line with the categorical imperative.[89] John Rawls and Amartya Sen provided contemporary theoretical foundations for the value of public reasoning and its impact on good governance.[90] On a global level, transparency might help overcoming legitimacy problems of international organizations.[91] Also, transparency might induce compliance with international norms since it makes it more difficult to break them secretly.[92]

Nevertheless, both in private and in public law contexts, to the extent that market participants are affected, the advantages of transparency need to be weighed against the

[89] I. Kant, *Perpetual Peace* (1795), appendix 2.
[90] J. Rawls, *Political Liberalism* (1993) 212 et seq.; A. Sen, *The Idea of Justice* (2009) 321-7.
[91] M. Donaldson & B. Kingsbury, "Transparency in Global Governance" in: A. Bianchi and A. Peters (eds), *Transparency in International Law* (2013) 502, 519; von Bogdandy (note 112) 330; A. Peters, "Dual Democracy", in J. Klabbers, A. Peters and G. Ulfstein (ed.), *The Constitutionalization of International Law* (2009) 326ff.; M. Krajewski, „International Organizations or Institutions, Democratic Legitimacy", in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2008) 20ff.
[92] A. Chayes & A. Handler Chayes, "On Compliance", 47 *International Organization* (1993) 175-205.

benefits of business confidentiality. Also, public interest might occasionally require that certain information is kept secret at least for a certain period of time.

II. Transparency as a Principle in International Law

To the extent that disclosure obligations are part of the principle of good faith, they have the status of a general principle of law.[93] However, transparency or disclosure might also constitute a general principle of law of its own, being on the one hand a corollary of good faith and going beyond it on the other. Answering this question would require reviewing a lot of cases and materials which the present study may only touch upon in a preliminary fashion.

During the last couple of decades, domestic law has seen a steep rise in transparency requirements, affecting both private and public law relationships. With the development of more and more sophisticated markets, it became necessary to impose transparency requirements in relation to private law relationships in order to ensure the fairness of markets for all participants. The adoption of the Securities Act of 1933 and the Securities Exchange Act of 1934 in the United States constituted major steps which were replicated in many other jurisdictions. Regulators also use transparency requirements in order to impose market discipline on economic actors instead of, or in addition to, regulatory intervention. Examples for this is are the third pillars of the second and third Basel Accords, which oblige banks to provide the market with information on their financial soundness. Further, consumer protection relies in many jurisdictions on information requirements.

In public law matters, where office secrecy had been the prevailing paradigm for centuries,[94] the situation has also changed towards transparency in many jurisdictions. In particular, more and more jurisdictions have adopted legislation granting a right of access to public records. The earliest example is the Swedish freedom of information act dating from 1766. In the 20th century, the US Freedom of Information Act of 1966 set an example.[95] Since the 1990s, there has been a steep rise in domestic legislation to that effect.[96] In some cases like in Brazil or in Mexico, the right of access to information and public records has a constitutional basis. In India, the right to obtain information has the status of a fundamental right. In France, this right has been characterized as a "liberté publique", which means that decisions on requests for access to information are subject to judicial review. Jurisdictions without a constitutionally guaranteed right of access to information sometimes grant such a right on a legislative basis. Still, there are states like Egypt, where traditional principles of administrative secrecy prevail.

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[93] Kotzur (note 34) 22.
[94] M. Weber, *Wirtschaft und Gesellschaft* (5th edn 1972) 129, 572-3.
[95] 5 U.S.C. § 552.
[96] J.M. Ackerman & I.E. Sandoval Ballesteros, "The Global Explosion of Freedom of Information Laws", 58 *Administrative Law Review* (2006) 85-130; overview in T. Mendel, *Freedom of Information: A Comparative Legal Survey* (2008).

International legal developments also had an impact on the development of domestic law in this respect. Thus, the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters of 1998 for the first time introduced access of information rights in some of its member states and thereby triggered a process of reconsideration of the tradition of office secrecy. Article X of GATT, which obliges states to publish their rules on the classification of goods had similar effects, just as transparency provisions in the NAFTA agreement.[97]

On the level of public international law, calls for the transparency of international actors and procedures are a more recent phenomenon compared to the age-old principle of good faith. To a significant extent, this development was triggered by globalization.[98] During the last two decades, many international organizations have adopted transparency policies.[99] Individuals are increasingly the beneficiaries of such policies.[100]

The World Bank was an early mover, adopting a sound transparency policy in 1993 on pressure from the US Congress which wanted to ensure the Bank's accountability for the way it uses the contributions of its members.[101] It took the IMF longer to join the movement, presumably because it does not depend on member contributions to the same extent as the World Bank.[102] However, its internal policy also shows a clear trend towards more transparency.[103] A major step was the formalization of its transparency policy in a decision to that effect.[104] The recent review focused on speeding up the process of publication and introducing new types of documents. The publication of country documents is presumed to be the rule, but might still be prevented by the country concerned.[105] A recent guidance note sets out detailed rules on how to make information accessible.[106] Nevertheless, meetings of the IMF's executive board continue to be non-public, and the publication of board documents requires their special designation.[107]

International arbitration, for a long time probably one of international law's most arcane fields, has seen a remarkable shift towards transparency. Although parties choose

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[97] Carl-Sebastian Zoellner, "Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law", 27 *Michigan Journal of International Law* (2006) 580, 595.
[98] A. Peters, "Towards Transparency as a Global Norm", in A. Bianchi & A. Peters (eds), *Transparency in International Law* (2013) 534, 539.
[99] Overview in M. Donaldson & B. Kingsbury (note 91) 502, 510-13.
[100] Peters (note 98) 553.
[101] Last review: World Bank, World Bank Policy on Access to Information, 1 July 2010. Cf. Philipp Dann, "Der Zugang zu Dokumenten im Recht der Weltbank", 44 *Die Verwaltung* (2011) 313-325.
[102] D. Gartner, "Uncovering Bretton Woods: Conditional Transparency, the World Bank, and the International Monetary Fund", 45 *George Washington International Law Review* (2013) 121, 137.
[103] Luis Miguel Hinjosa Martínez, "Transparency in International Financial Institutions", in A. Bianchi & A. Peters (eds), *Transparency in International Law* (2013) 77, 79.
[104] IMF, Decision No. 13564-(05/85), 5 October 2005.
[105] IMF, 2013 Review of the Fund's Transparency Policy, 14 May 2013, http://www.imf.org/external/np/pp/eng/2013/051413.pdf.
[106] IMF, Guidance Note on the Fund's Transparency Policy, 26 November 2013, http://www.imf.org/external/np/pp/eng/2013/112613.pdf.
[107] Hinjosa Martínez (note 103) 88.

arbitration precisely because of its discreteness, among other reasons, calls for transparency have been made in order to better assess the performance of various institutions.[108] Arbitral awards are now often published, and the International Center for the Settlement of Investment Disputes now allows for submissions by non-disputing parities in accordance with Art. 37(2)(1) of its Rules and Regulations.

The European Union has also decided to grant access to its records to the public, perhaps also with a view to increasing its legitimacy. To that effect, it adopted a transparency regulation in 2001.[109] Since 2010, transparency has been included in the primary law of the European Union. Art. 11(2) and (3) of the Treaty on European Union stipulate transparency as foundational principles for the governance of the EU, while Art. 15(3) of the Treaty on the Functioning of the European Union guarantees right of access to documents of the Union.

Given the spread of transparency regulations throughout various legal orders, one might indeed conclude that transparency is a general principle of law. Nevertheless, such a conclusion presupposes that transparency is also applicable on the international level, namely that the domestic and international dimensions of transparency bear sufficient resemblance in order to be put on a par. Anne Peters concludes that there is no general principle of transparency as of yet, given the structural differences of the operation of transparency requirements on the domestic and international levels.[110] She argues that transparency on the domestic level is a means of compliance because state institutions might intervene in case transparency brings to light illegal activities such as corruption, while transparency requirements on the international level do not necessarily foster compliance with other regulations.[111] I do not find this argument compelling. First, transparency requirements for international institutions might very well have the purpose of fostering compliance, as the example of the World Bank shows. Second, the concern for compliance, which might be an important motive on the domestic level, has a lot to do with the concern for legitimacy, which might dominate transparency regulations on the international level. In fact, compliance and accountability are important requirements for the legitimacy of any institution exercising public authority. Thus, the idea that public authority should be legitimacy provides an overarching explanation for both domestic and international transparency regulations.[112] From this angle, transparency might very well be classified as a general principle of law.

The significance of this dispute is limited, since Peters concludes that transparency has become a customary norm. Nevertheless, one might hesitate to qualify transparency as a

[108] Mike McIlwrath & Roland Schroeder, "Transparency in international arbitration - what are arbitrators and institutions afraid of?" in A.W. Rovine (ed.), Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2010)
[109] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, O.J. L 145/43.
[110] Peters (note 98) 584-5.
[111] Ibid. 545.
[112] A. von Bogdandy, "The European Lesson for International Democracy: The Significance of Articles 9-12 EU Treaty for International Organizations" 23 *European Journal of International Law* 2 (2012) 315, 330.

fully-fledged general principle, since domestic and international law, despite showing a clear trend towards transparency, is by no means uniform. One might therefore speak of at least an emerging general principle of law. To the extent that transparency requirements are part of the principle of good faith, they apply as a matter of international law.

III. Transparency in Sovereign Debt Workouts

Like good faith, transparency also has two dimensions in matters of sovereign debt. First, states might provide for transparency when they incur new debt. This issue is addressed in UNCTAD Principle 10, relating to domestic decision-making processes to that effect. Second, the actors and institutions involved in a debt workout might have to meet transparency requirements. Only the latter aspect is of interest for the present study.

1. Data and Process Transparency

As a matter of good faith towards their counterparties, sovereign debtors should disclose information about their financial and economic situation, both during normal times and during workout negotiations. Such duties of transparency have received a codified form in UNCTAD Principle 11, which applies during normal times and *a fortiori* during debt workouts. With respect to the latter, UNCTAD Principle 15 stipulates that "[t]he sovereign borrower should provide the necessary information which would demonstrate that the sovereign is unable to normally service its debt." Before and during negotiations, good faith requires debtors to provide accurate macroeconomic information as well as information on their debt situation that might be relevant for debt restructurings, including information on maturities and the major legal specifications of debt, future borrowing plans, as well as contingent liabilities such as credit guarantees. Also, it should communicate such information timely in order to prevent unnecessary losses and a general aggravation of the situation. As a preventive measure, creditors might be held to register their debt in order to facilitate workout negotiations. Such a duty would require further specification in binding or non-binding instruments.

Besides good faith, one might derive transparency obligations from a general principle of its own, based on the idea of legitimacy. This could be considered to be at least an emerging general principle of law.[113] This presupposes an understanding of international debt workouts orchestrated by an array of international venues such as the Paris Club and the IMF as exercises of public authority.[114] Transparency and disclosure are important preconditions for the legitimacy of public authority. A debt workout always entails some degree of hardship for various groups, both creditors and people in the debtor state. Only if the people thus affected know what is at stake there is a chance that they accept the debt workout and its implementation over a longer period of time. Insofar it is quite

[113] Goldmann (note 66) 17.
[114] von Bogdandy and Goldmann (note 63) 60.

telling that transparency and information sharing is already required from defaulting states under existing IMF and Paris Club legal frameworks.[115] UNCTAD Principles 11 and 13 as well as the second explanatory paragraph of Principle 15 corroborate these rules.

The latter kind of transparency is especially important in case of negotiations through representatives and majority voting. Both aspects are standard in contemporary debt workouts, and both are indispensable for smooth decision-making in the frame of negotiations involving a multitude of creditors. While they reduce the direct influence of each individual creditor, an increase in transparency might provide a counter-weight which enables remote creditors to observe the negotiations and ensure that their essential interests are protected, or to instruct their representatives in accordance with their preferences. Further, creditors should know who the other creditors are. This is especially important in order to ensure a fair debt workout which treats different groups of creditors in a comparable manner.[116]

Transparency requirements thus find a basis in good faith, or in an emerging general principle of law. Nevertheless, the full range of transparency obligations would have to be spelled out in more detail, e.g. in best practices or international soft law. Such provisions would need to comprise answers to questions such as the following ones:

- Which information should be provided by debtors and creditors? The debtor state needs to provide information on its economic and financial situation in accordance with international reporting standards. Institutional creditors like banks might have to provide information on the consequences of restructurings for their soundness and in particular their capital ratios in order to mitigate systemic effects. Also, creditors might have to register their holdings of sovereign debt.

- To whom and at what time should the information be disclosed? Debtor states need to provide specific information in order to trigger a debt workout. Creditors should provide information on material facts as soon as they arise. The intermediate results of negotiations need to be disclosed to some extent at some point in order to ensure the legitimacy of the process. At the same time, premature disclosure might threaten the integrity of the negotiating process and jeopardize negotiation strategies. Smart disclosure procedures such as prior disclosure to specially affected parties might help avoid panic reactions by financial market participants.

[115] IMF Articles of Agreement, Article IV; disclosure is part of the Comparability of Treatment Clause, one of the Five Key Principles of the Paris Club, cf. http://www.clubdeparis.org/sections/composition/principes/cinq-grands-principes.
[116] Cf. supra, C.III.3.

2. Transparency and Business Confidentiality

The transparency requirements set out above might conflict with the need to ensure business confidentiality. This conflict is known from domestic and supranational freedom of information legislation. In the European Union, Art. 4(2) of the transparency regulation recognizes the need to ensure business confidentiality.[117] But requests for information may not be rejected on that ground in case of overriding public interests.[118] The European Court of Justice also emphasized that exceptions to the right of access to information should be construed narrowly.[119] Domestic freedom of information laws usually contain similar exceptions. However, not all of them provide that important public interests might prevail over the interest in business confidentiality. In stark contrast to the law of the European Union, the Best Practices for Formation and Operation of Creditor Committees elaborated by the Institute of International Finance require a high level of confidentiality from committee members.[120]

Certainly, transparency as a general principle pursuant to the public law approach as set out above would have to respect the legitimate interests of economic actors to preserve the confidentiality of sensitive information. A public law framework should not be insensitive to private rights and interests. But at the same time, the public law approach provides a compelling reason why business confidentiality cannot be absolute. Debt workouts raise many issues of public concern, such as the human rights situation in the debtor state, systemic effects and global financial stability. They cannot be compared to normal business transactions which the parties are free to keep confidential, at least to the extent that securities regulation permits. People affected by debt workouts have a legitimate interest in information pertaining to the debt workout. Therefore, one needs to balance fundamental public interests in the disclosure of information with diverging interests in the protection of confidential business information.[121] Both disclosure and the protection of confidentiality might increase the legitimacy of a debt workout, hence its actual acceptance and effectiveness. Since transparency is emerging as a global norm for public authority, it appears more appropriate to consider disclosure as the rule and confidentiality as the exception. The Best Practices of the Institute of International Finance seem to unduly favor confidentiality.

Given that transparency is still an emerging principle and that the balancing of the diverging interests requires a procedural framework, there is a need for the further specification of some rules relating to transparency, such as:

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[117] Cf. Note 109.

[118] No such limitation is contained in, e.g., 5 U.S.C. § 552(b)(4); Sec. 6, German Freedom of Information Act.

[119] Court of First Instance of the European Community, *Interporc/Commission*, T-124/96, para. 49.

[120] Institute of International Finance, Principles for Stable Capital Flows and Fair Debt Restructurings, 2011 Report on Implementation by the Principles Consultative Group, 39 (<http://www.iif.com/download.php?id=FwM6aDbqca0=> accessed 14 December 2012).

[121] Cf. ECJ, *Pfleiderer v. Bundeskartellamt*, Case C-360/09 (arguing for a case-by-case approach instead of wholesale exceptions to disclosure).

- The information that should regularly be disclosed, unless there are overarching private interests;

- The procedure for weighting business confidentiality and public interests in disclosure.

E. Technical Implementation

This study has revealed so far that good faith as a general principle of law and transparency as an aspect of good faith as well as an emerging general principle of its own have a bearing on sovereign debt workouts. However, in order to make these principles operational, it might be advisable to set out some issues in further detail, possibly in the form of best practices or a draft soft law instrument.

Such an instrument might stipulate the following points:[122]

A. Good Faith

1. Duty to Participate in Debt Workout Negotiations

    a. Creditors have an obligation to participate in debt workout negotiations on the request of the debtor state provided that a competent international organization has confirmed that its debt is unsustainable in the medium term.

    b. Creditors comply with this duty by choosing representatives for creditor committees. Retail creditors should choose such representatives. Committees should represent significant amounts of debt. Representation within a committee should reflect the financial interests of the creditors represented.

2. Duty Not to Obstruct Debt Workout Negotiations

    a. No party may terminate the negotiations unless it has made a good faith effort to set up a debt workout agreement. A good faith effort requires sufficient time and resources.

    b. As long as negotiations are ongoing, creditors should refrain from enforcing their claims. Debtors should refrain from repudiating debt.

3. Good Faith and the Content of Debt Workouts

    a. Debt workouts should lead to an economically sustainable outcome. They should be based on realistic assessments of the economic situation of both

[122] This proposal has been amended in order to reflect discussions at the December 2013 meeting of the Working Group.

creditors and debtors and be mindful of potential systemic effects. No party may extract undue advantages from debt workouts.

b. Debt workouts should be equitable. This requires comparable treatment for all creditors. While debt workouts in principle should be forward-looking, it might affect the terms of a debt workout or the enforceability of debt whether a party acted in good faith when it incurred the debt.

c. Debt workouts should lead to a legally sustainable outcome. This requires that they pay due respect to the international legal obligations of the debtor state.

4. Good Faith and the Acceptance of Debt Workouts

a. The exercise of voting rights should respect good faith. No party should reject debt workouts for reasons which it could have articulated during negotiations but failed to do so. States should refrain from exercising voting rights if they own debt instruments issued by themselves, either directly, or through intermediaries controlled by them.

b. Creditors who buy debt of troubled states for the purpose of extracting a preferential treatment act abusively. In establishing whether a creditor intended to extract a preferential treatment, courts or other competent institutions should take into account whether the creditor made a good faith effort to reach a debt workout. Further criteria might include:

i. the difference between the nominal and market price at the time of the acquisition of the debt;
ii. the time of the acquisition;
iii. the volume acquired, especially whether the creditor acquired a blocking minority under the applicable collective action clause;

c. Creditors who refuse to accept a debt workout for no pertinent reason other than to extract a preferential treatment act abusively.

d. Creditors acting abusively may only [sue for] [enforce] a fraction of their claims which affords them comparable treatment.

B. Transparency

5. Data Transparency

a. The debtor state needs to provide information on its economic and financial situation in accordance with international reporting standards. Such information should include the main legal specifications of debt such as

maturities and trustees, borrowing plans, and contingent liabilities. The debtor state should update the information whenever there is a material change.

b. There should be an international registry for sovereign debt instruments.

6. Process Transparency

a. Parties should provide timely information to competent international organizations and supervisory authorities on the effects of workout scenarios on their soundness.

b. Intermediate results of workout negotiations such as draft agreements shall be made public unless overriding public or private interests require their confidentiality.

c. Disclosure should respect the interests of entities or individuals specially affected by the information disclosed. Where appropriate, they shall receive the respective information reasonably soon before disclosure.

7. Business Confidentiality

a. States and international organizations shall normally disclose information on debt workouts, unless a party requests non-disclosure for reasons relating to the preservation of business confidentiality. The request needs to be corroborated by adequate evidence.

b. The institution hosting the workout negotiations [the chair of the negotiations] shall grant request which meet the conditions of point 4.a. unless it establishes the existence of an overarching public interest in disclosure.

c. The parties may appeal the decision pursuant to point 4.b. with a competent court or tribunal.