International Tribunal for State Financial Administration

Statute of the Tribunal

*Draft of the Sovereign Insolvency Study Group of the International Law Association*

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General comments

1. We should draw more heavily on Options B and C in our draft report, which we already carefully crafted, i.e. include the exact language from that option in this Statute and expand where necessary (eg Article 1-4, 5, 6, 8).

This Statute creates a Court to determine disputes between states in financial distress and their creditors. It builds on “Option C” the Interim Report of the Sovereign Insolvency Study Group (at pages 31ff), whose terms are incorporated and referred to inline below, or in the Model Rules.

The text below is written with commentary in italicized grey. The Sovereign Bankruptcy Tribunal created by this treaty may be referred to in the comments as the “SBT”. The Sovereign Insolvency Study Group ‘State insolvency: options for the way forward’ in International Law Association Report of the Seventy–Fourth Conference (The Hague 2010) (International Law Association, London 2011) 978 (Interim Report) may be referred to in the comments as the “Interim Report”.

The bankruptcy regime shall encourage expediency, certainty, finality, and principled resolution.

* TODO: e.g. List quid-pro-quo of bankruptcy in a state context
* Insolvent states may receive a partial discharge their debts in a reasonable timeframe on principles of insolvency, with a view to a sustainable economic recovery, in exchange for supervision over their economies and enhanced enforcement powers for creditors who give up parts of their claims.
* States shall give up state autonomy in exchange for the ability to Creditors receive voting rights in the workout regime analogous to domestic insolvency regimes and a heightened ability to enforce their claims, in exchange for their ability to litigate individually.
* Unequal treatment between creditors inherent to grab-races, individual enforcement and settlements, as well as debtor states, is reduced.

The Court operates on the basis of two primary instruments: a treaty that creates the institutional foundations, functions and powers of the court, and Model Rules that contain default rules in case member states fail to adopt a living will, such living wills contain gaps or run counters to mandatory rules of the model rules.

This treaty draws upon some of the statutes of some of leading international tribunals, with references in the commentary where the language for clauses in this treaty is drawn from one of these precedents:

[**ICJ**](http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0) **Statute** (ICJ)  
<http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>

[**ITLOS Statute**](http://www.itlos.org/fileadmin/itlos/documents/basic_texts/statute_e.pdf)(ITLOS)  
<http://www.itlos.org/fileadmin/itlos/documents/basic_texts/statute_e.pdf>

[**Rome Statute of the International Criminal Court**](http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf) (ICC)  
<http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf>

[**ICSID Convention**](http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf)(ICSID)<http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf>

[**WTO Dispute Settlement Understanding**](http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm) (WTO)  
<http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm>

[**European Court of Justice**](http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/statut_2008-09-25_17-29-58_783.pdf)(ECJ)  
<http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/statut_2008-09-25_17-29-58_783.pdf>

**1907 Convention for the Pacific Settlements of Disputes** (CPSD)<http://www.pca-cpa.org/upload/files/1907ENG.pdf>

**NAFTA – Chapter 20** (NAFTA)http://www.worldtradelaw.net/nafta/chap-20.pdf

This proposed treaty is distinguished from the precedents above in two broad categories:

1. The principles of insolvency as they apply to complex financial institutions: The underlying subject-matter of a state bankruptcy regime is fundamentally different from a dispute over rights and obligations pursuant to contracts, or criminality.
2. Numerosity: state bankruptcy is inherently a dispute between a single debtor and many creditors.

It is in particular on these two points that we must draw analogy from domestic regimes. This treaty draws in particular upon domestic laws of corporate bankruptcy, and common law civil litigation class proceedings.

In addition to the various domestic class procedures, there are precedents for class arbitrations. See e.g. “Complex arbitrations**:**multiparty, multicontract, multi-issue and class action”, Bernard Hanotiau (Kluwer Law International, 2005**)** <http://books.google.ca/books?id=uIo9AAAACAAJ>.

This Treaty is similar to the ICC in how it is funded and established as an independent court; similar to the ICSID, NAFTA and the WTO in the subject matter; similar to WTO in its relative autonomy.

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**Introduction**

This Treaty establishes the International Tribunal for State Financial Administration (ITSFA). This Treaty builds upon the options put forward by the Sovereign Insolvency Study Group’s paper ‘State insolvency: options for the way forward’ in International Law Association Report of the Seventy–Fourth Conference (The Hague 2010) (International Law Association, London 2011) 978 (Interim Report).

ITSFA provides facilities for mediation and trial of disputes between signatory states and its creditors.

The ITSFA Regulations and Rules comprise Administration and Financial Regulations; Rules of Procedure for Mediation; Rules of Procedure for Trial; and the Living Wills of each signatory state.

**Preamble**

The preamble describes the purposes of this Convention, and is an integral part thereof.

The States Parties to this Convention,

The following leads us to the conclusion that a Tribunal for resolving disputes in state bankruptcy-like proceedings is in the interests of global society.

**Acknowledge** that all states potentially run the risk of insolvency, and that such risk requires techniques for resolution should such eventuality materialize;

The above text is meant to express the acknowledgment that state insolvency is a perennial problem, which may arise with or without fault on behalf of debtors or creditors, and may affect states in any region of the world.

**Mindful** of the uncertainty and costs that are associated with delaying a resolution between a state debtor and its creditors;

This is a restatement of “justice delayed is justice denied”, a legal maxim that is perhaps particularly acute in cases of insolvency.

**Recognize**that structured process and a final binding determination of disputes between debtor states and their creditors:

1. Reduces harm to states in financial distress, their constituents, other states and creditors of the states, including:
   1. loss of confidence by creditors and investors;
   2. resentment, political dissent, and civil disorder;
   3. a forced and haphazard reduction in essential services;
   4. loss of infrastructure to wastage and civil unrest;
   5. the risk of contagion

The bankruptcy regime shall limit the time in which states remain insolvent, which reduces the time in which fear, uncertainty and doubt may spread; the regime shall also provide a baseline for negotiation that may be applied to states in similar financial situations.

* 1. The aggregate loss to creditors;

Delay in a resolution increases uncertainty and may have a negative effect on the aggregate losses to creditors, particular if contagion spreads and civil unrest undermines existing infrastructure.

* 1. The possibility of retributive or vindictive actions by creditors;

Under the UN Charter, and the earlier the Drago-Porter Convention, state defaults can only be settled by peaceful means, which rule is furthered by this Treaty.

1. Increases the confidence of citizens, businesses, neighbours and creditors in the financial capabilities of the state and the financial system;

Confidence is really the currency of financial stability, at least in a fiat system. Preserving that confidence, within the state to a limited degree, across financial markets underpins one of the most valuable contributions of a structured regime such as the one this treaty proposes.

1. Provides an impartial and independent forum for a hearing of the positions of parties, and a unequal treatment as between creditors

At present some creditors can be preferentially repaid, and there is the potential for unequal treatment, as between creditors, and as between different states in similar situations. Unequal treatment undermines confidence in the debt restructuring process and international governance.

**Understand**that the principles of insolvency have been incorporated into the laws of almost all states for individuals and corporations as bankruptcy regimes, and the principles of insolvency may be applied to states, *mutatis mutandis,* to form a regime to facilitate organized resolutions to state insolvencies;

Insolvency and bankruptcy has achieved significant success for individuals and corporations in domestic law, and elements of such regimes can be extrapolated to states.

**Accept that**uniform principles may require tailoring to the individual circumstances of each state;

This is the reason why this Treaty relies on Model Rules as default rules, which for the most part may be modified by the living will published by each state, or grouping of states, as the case may be.

**Agree** upon the following:

The preamble to this treaty is modelled on the preambles of the ICC, ITLOS and ICSID.

# Establishment of a Tribunal

This chapter encompasses the essential elements to creating the Tribunal – constitution of the Court, jurisdiction, etc.

## The Tribunal

This part deals answers the question “what is the tribunal?”

### Establishment

1. The International Tribunal for State Financial Administration (referred to in this document as the Tribunal) is constituted.
2. The purpose of the Tribunal shall be to provide a system for states in periods of financial distress to resolve disputes with their creditors.

The above is drawn from the ICJ Statute, UNCLOS and ICSID.

Note the use of “*periods* of financial distress” – *periods* is emphasized because as this treaty is not intended to address profligacy.

### Definitions

In this Treaty, applicable Rules and Directions, unless the context requires otherwise,

Some of the following definitions are derived from domestic insolvency regimes (eg Canada’s BIA and CCAA in particular)

“Administration” refers to the process of the Tribunal commenced as of the date of Declaration and ending on the date of a judgment that has not been appealed within the prescribed period for appealing the judgment.

“Debtor” and “Debtor State” refers to a state that has filed a Declaration;

“Tribunal” refers to the tribunal created by this Treaty;

“Credit” refers to a sum of a calculable amount payable by a debtor state in respect of a liquidated money demand, recoverable according to the legal process of the law chosen law by a debtor state in its Living Will or otherwise by agreement, as well as any other obligations of the debtor state that are specified as Credit in the Living Will;

Credit defines the subject-matter scope of this tribunal.

Stroud’s Judicial Dictionary defines “debt” as:

“a sum payable in respect of a liquidated money demand, recoverable by action”

Black's Law Dictionary, 6th ed. (1990) at p. 403 contains two definitions:

A sum of money due by certain and express agreement.  A specified sum of money owing to one person from another, including not only obligation of debtor to pay but right of creditor to receive and enforce payment.

A fixed and certain obligation to pay money or some other valuable thing or things, either in the present or in the future.  In a still more general sense, that which is due from one person to another, whether money, goods, or services.  In a broad sense, any duty to respond to another in money, labour, or service; it may be even a moral or honorary obligation, unenforceable by legal action.  Also, sometimes an aggregate of separate debts, or the total sum of the existing claims against person or company.  Thus we speak of the "national debt", the "bonded debt" of a corporation, etc.

Debts are as a general rule “agreements” of one form or another. Bankruptcy regimes ought to be expansive enough to include all agreements that may be subject to a haircut, so that no party is (or feels they are being) treated unfairly, but not so broad as to apply to agreements whose inclusion would cause collateral harm greater than the perception of unfairness. The limits of agreements included are where that inclusion causes more grief than benefit, for example agreements with providers of essential services.

Arguments in favour of a including any given agreement as “credit” include:

1. It prevents a grab race by putting a stay on litigation;
2. It puts the agreement under the scrutiny of the court for enforceability;
3. It prevents holders of the agreement from holding out;
4. Holders of the agreement would be treated fairly for all creditors in a similar class.

Arguments in favour of excluding a given agreement from “credit” include:

1. The agreement is not one where holders are likely to enter a grab race or hold out;
2. The agreement is one where the creditors have (or need) a priority, such as payment for an going concern;
3. Holders of the agreement would not receive preferential treatment e.g. they would in any event accede to a determination of the Tribunal

“Creditor” refers to any person with direct legal entitlement to enforce Credit against a Debtor State under the law chosen in the Living Will of the Debtor State;

Should creditors include indirect beneficiaries or assignees of partial rights, e.g. holders of derivatives?

“Class” refers to a set of Creditors who have common factual or legal interests that may be resolved together, as determined pursuant to the Living Will;

“Declaration” and “Declare” refer to the process under this Treaty whereby a state may commence a proceeding;

“Judgment” refers to a determination of the Court pursuant to this Treaty;

A Judgment is a determination based on a hearing of evidence.

“Judicial Council” refers to the Judges, the Vice President and President of the Tribunal;

“Living Will” refers to the Model Will adopted by each state party, with such modifications as that state may incorporate;

“Majority” refers to Creditors numbering more than 2/3 by value, or Creditors in a Class numbering more than 2/3 by value. The Model Will or Living Wills may alter these percentages, but in any case a Majority shall not be more than 95% of Creditors by value or less than 60% of Creditors by value.

Note: The term “Majority” should not prejudice the possibility of classes of creditors severing their claim and making a consensual work-out.

“Member State” refers to a state party to this Treaty;

“Model Living Will” refers to the applicable Living Will as may be amended from time to time by the Judicial Council.

The “Model Living Will” can be thought of as a baseline for a Living Will for states that is automatically adopted by states, subject to their amendments.

“Proposal” refers to a set of terms resolving all or part of the dispute, which terms have been agreed to by a Majority and the Debtor;

A proposal is a Work-Out that has not been approved by the Tribunal.

“Rules” refers to the set of procedural rules as may be established by the Tribunal pursuant to the Treaty.

The Rules are rules of procedure established by the Judicial Council and the Assembly.

“Work-out” refers to a Proposal that has been approved by the Court, and has the same force and effect as a Judgment.

### Seats

The tribunal is a permanent system with seats held in two cities in different parts of the world.

1. The Court shall be established in three states (“the host States”):
2. The city of Singapore in the Republic of Singapore;
3. Reykjavík in the Republic of Iceland;
4. Brazília in the Federative Republic of Brazil.

The above is drawn from Article 3 of the ICC at p.2. The cities suggested above are stable and neutral locations.

Two states offer geographic access, cultural diversity and ...

The Court shall enter into a headquarters agreement with the host States, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.

The above is from Article three of the ICC at p.2

The Court may sit elsewhere, whenever it considers it desirable, as provided in this statute.

Ibid.

## Jurisdiction

The tribunal needs the power to determine the dispute. It may be a matter of debate whether that jurisdiction ought to be exclusive.

Arguments in favour of exclusive jurisdiction:

1. It eliminates forum shopping;
2. Decisions are made public;
3. The panel would gain experienced panellists;
4. A body of jurisprudence would develop, increasing certainty and consistency.

Arguments in favour of non-exclusive jurisdiction:

1. States would have alternatives to the tribunal, and by having such alternatives the tribunal would be encouraged to adapt to the desires of states (insofar as the tribunal wouldn’t already do so in response to the wishes of the council of states).

Note that national security may be a defence to jurisdiction or disclosure or co-operation, though it is not mentioned further in this draft. See e.g. Article 72 of the ICC treaty (p.50).

### Jurisdiction

1. The adoption of this Treaty by a state shall be deemed to be consent by that state and all of its nationals to the jurisdiction of this Tribunal to resolve disputes over Credit with remedies over such proposals and agreements as deemed necessary by the Tribunal to administer justice.

The above is from article 25 of the ICSID treaty (p. 18) and Part V of the ICSID treaty (p.43). The jurisdictional subject-matter is framed as “disputes over Credit”, and remedies being “as deemed necessary by the Tribunal to administer justice”. Unlike ICSID, *ex ante* agreement to the Tribunal won’t exist.

1. The Tribunal shall be a permanent institution and shall have the powers to exercise its jurisdiction over persons and states where an application has been made to the tribunal pursuant to this for administration.

The above is based on ICC Article 1 (p.2). There are a number of jurisdictional questions, namely jurisdiction over the remedies that may be granted and the exclusive jurisdiction over a matter.

Creditors are deemed to attourn to the jurisdiction of the Tribunal where they file proof of claim, or they do not bring a motion before the Tribunal to declare the jurisdiction of the Tribunal *ultra vires* over their claims within the time prescribed by the Rules.

We have to define notice and the timeline in the Rules. Jurisdiction should be determined early and definitively, and a deadline with statutory attournment accomplishes this.

The Treaty or Rules should note those cases where an issue is outside the jurisdiction of the Tribunal.

There doesn’t appear to be a precedent for statutory attournment in treaties. It is important because disputes in insolvency should not be delayed to dispute jurisdiction.

### Competence-Competence

1. The Tribunal shall be the sole Judge of its own competence.

This is from ICSID article 41 (p.23), though this goes further by stating that the Tribunal will be the “*sole* Judge” of its own competence.

Any motion that the Tribunal lacks jurisdiction to determine a dispute shall be considered by the Tribunal, which shall determine whether to deal with it as a preliminary question or join it to the merits of the dispute.

The above is from ICSID article 41(2) (p.23).

One concern in the class proceeding is the possibility that many creditors would file more separate motions than the Tribunal may practically hear, that would lead to a denial of service. This issue may be dealt with elsewhere.

### Novel law

1. The Tribunal shall decide a dispute in accordance with such rules of law as may be set out in the Living Will. In the absence of such declaration, the Tribunal shall apply the law set out in the agreements in dispute (including its rules on conflicts of laws) and such rules of international law as may be applicable.

The above is from article 42(1) of the ICSID treaty (p.23).

1. The Tribunal may not bring in a finding *non liquet* on the ground of silence or obscurity of the law.

The above is from article 42(2) of the ICSID treaty (p.23).

The provisions of paragraphs(1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree.

The above is from article 42(2) of the ICSID treaty (p.23).

### Disclosure and discovery

1. The Tribunal shall have powers to make and enforce requests of states and their nationals for disclosure of documents and appearance for discovery.
2. If a State is requested by the Tribunal to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Tribunal.

Clause 2 above comes from Article 73 of the ICC (p. 51)

### Offences against administration of justice

These are legal principles to protect against corruption, bribery, undue influence, etc.

These articles draw on the ICC statute article 70 (p.49).

1. The Court shall have jurisdiction over the following offences against its administration of justice when committee intentionally:

Giving false testimony when under oath;

Presenting evidence that the party knows is false or forged;

Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;

Impeding, intimidating or corruptly influencing an official or agent of the Tribunal for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;

Retaliating against an official or agent of the Tribunal on account of duties performed by that or another official;

Soliciting or accepting a bribe as an official of the Tribunal in connection with his or her official duties.

1. The principles and procedures governing the Tribunal’s exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Tribunal shall be those provided for in the Rules of Procedure. The conditions for providing international cooperation to the Tribunal with respect to its proceeding under this article shall be governed by the domestic laws of the Debtor State.

The laws of the debtor state are unlikely to be effective in dissuading officials of that state from any of the practices this article seeks to prevent.

It may be appropriate that the Court can make an adverse finding in its decision for unseemly behaviours.

### Comity

The Tribunal may at its own discretion recognize the decisions of other Tribunals or Courts as it may in the circumstances deem appropriate for the administration of justice, including affirming such decisions or accepting findings of fact as evidence, with such reservations as may be appropriate.

I did not note any precedent for comity4 in a treaty.

## General principles

The following set the framework for a judgment and a baseline for a negotiated resolution.

The Powers of the Court ought to be limited to execution in accordance with these principles – the furtherance of the objectives of bankruptcy.

This is an area where language ought to be carefully chosen, as it is not relying upon any treaty precedent.

### Limits on Acts of State

1. The following shall not be construed by the Court to impugn the principles set out in this section, except in accordance with the Treaty:
   1. Any Direction;
   2. Any amendments to the Model Rules;
   3. Any Rules;
   4. Any existing or future contractual agreements;
   5. Any existing or future domestic state law;
   6. Any existing bilateral or multilateral treaty;
   7. Any other existing or future instrument otherwise binding as between the State and any Creditors.

The above is related to the interpretation, however rather than relating to interpretation, the above is intended to create a framework within which Judgments must operate.

It’s crucial that there be immutable principles that cannot be “escaped” by the debtor states so as to undermine the perception of fairness of the Court. Note that it’s important that this section not undermine things such as secured credit, creditor classes and debtor-in-possession style refinancing priorities.

### Expediency

1. The Court shall operate with all due haste so as to minimize uncertainty and prolonged harm.

### Equal treatment

1. Creditors within a Class shall be treated *parri passu*.

### National Treatment

1. No domestic Creditor shall receive treatment preferential to that of any Creditor who is not domestic.

### Most Favoured Class

1. No Class shall be given treatment preferential to another Class except as one may have a priority over the other as set out in the Rules.

### Stay on Litigation

1. All litigation against a State shall be stayed as of the day the State enters Bankruptcy until:
2. The State exits bankruptcy; or

The Court grants leave for certain litigation to proceed.

The stay on litigation to prevent unfair outcomes by prohibiting a grab race, forum shopping and hold-outs.

The particulars of the stay proposed in Article 5 of the Interim Report of the Sovereign Insolvency Study Group at page 33 ought to be reproduced in some manner in the Model Rules.

### Voidable Preference

1. Any priority shall be voidable at the discretion of the Court where that priority deprives creditors of equal and fair treatment and:
2. arises out of an act of state made one year prior to a declaration pursuant to this Convention; or

arises out of an intentional act of state that was made to avoid obligations to creditors.

The above is meant to undo unjust preferences.

### Currency

1. Credit denominated in foreign currency shall be determined using the law prescribed in the majority of those debts by amount, as normalized per the Rules.

There is some issue with “amount”; a process for normalizing the values ought to be in the Rules.

### Creditor majority interests

1. No agreement shall be binding upon the parties unless approved by not less than 50% of creditors by value.

This Convention ought not to permit a minority of creditors to determine the outcome of a proceeding.

Note: minority interests do require protections; they may be protected by equal treatment and most-favoured class clauses, as well as transparency.

1. This Article is without prejudice to the right of a State to adopt such Rules of creditor majority interests as it sees fit, so long as such adoption does not conflict with the foregoing.

### Disclosure and Discovery

1. Parties shall have a right to discovery and disclosure pursuant to the Rules.

A more detailed disclosure requirement ought to appear in the Rules, such as the “Disclosure statement” appearing as Article 6 of the Interim Report of the Sovereign Insolvency Study Group on page 33.

Mandatory disclosure and discovery ought to be presented somewhere other than the Rules (as such would represent an inherent weakness in the transparency as the State may define what it discloses).

### Preservation of contracts

1. The Court shall preserve terms of contract except and only insofar as those terms are inconsistent with the principles set out in this section or necessary to achieve justice.

### Integrity of the Court

1. No signatory shall impugn the integrity or the perception of the integrity of the Court.
2. The Court shall publish awards, and Judges shall provide the reasons for any awards they make.

### Creditor Conflicts

1. The Rules may provide that, and the extent to which, creditors are obliged to disclose and rights or obligations that are or may conflict with the objectives of the Court or interests of the State.

## Composition and role of court

### Judges

1. The Court shall be composed of fifteen members, elected regardless of their nationality from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in international finance and international law.

No two members shall be nationals of the same state. In the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution shall be assured.

The above provision draws on Article 2 Statute of the ICJ and Article 2 ITLOS.

1. Seven Members of the Tribunal shall sit in each permanent seat.

### President and Vice-President

1. The Tribunal shall elect its President and Vice-President for a non-renewable term of five years.
2. The President and the Vice-President respectively are responsible for the overall management of the court. The President and Vice-President shall rotate between the seats every 5 years, and be based in different locations.

See: Article 21 ICJ Statute.

**TODO: Voting & Appointment of Judges; Disqualification and replacement;**

# Procedures

## Rules and Procedures

The Tribunal shall have a set of rules and procedures that govern the process of advancing the dispute. These are the details that define the dispute.

### Declaration

A State shall declare its application for administration by filing with the Tribunal an application pursuant to the Rules.

State financial administration shall be started with an application.

There is an argument for discussion about whether creditors ought to be able to commence administration.

### Rules of procedure

**TODO: Incorporate eg ICSID Rules of Procedure or ICC Rules of Procedure & Evidence or WTO Understanding on rules and procedures governing the settlement of disputes.**

## Creditor Classes and Committees

As a class procedure, there have to be mechanisms for class representation and consensual binding. The two most common alternatives for class representation are: Representative party who has a contractual obligation, fiduciary duty or duty of *uberrima fides* to members of the class it represents, and democratic vote. The prior is more efficient but may result in decisions that non-representative creditors feel is unfair. The latter requires voting procedures. In the absence of a representative party, most class disputes become “lawyer-driven”, where an elected lawyer becomes the channel for options, recommendations and choices.

The balance might be a mix of democratic vote for important decisions, with a representative making strategic decisions about positions, participating directly in discoveries, etc.

The question of how disputes are resolved as between creditors is a matter for debate.

How much leeway should be given to creditors taking different positions – Should similarly situated creditors be entitled to take difference positions? Insofar as it advances the resolution (eg by a significant portion of creditors wish to consent to a work-out), it is probably worthwhile.

### Standing

As a class proceeding and bankruptcy regime, efficiency is of paramount concern. One way to make the process more efficient is to limit standing.

1. The following shall be granted a right to make submissions to the Court, which submissions shall be heard by the Court in coming to any Judgment:
   1. The Debtor State;
   2. A Creditor or Creditor Committee representing more than 1/3rd of the value of a class of creditors;
   3. Interveners;
   4. The Monitor.
2. Any party with standing may:
   1. Make submissions in accordance with the Rules;
   2. Call witnesses to a Hearing.

**TODO: Rules on forming Creditor Committees; Rules of Creditor Voting; Rules on Creditor Classes.**

## Model will and Living Will

This Part ought to draw on domestic insolvency Living Wills for corporations, and in particular large corporations.

TODO: Provide the scope of authority for Wills and procedure for creating/amending/etc.

Model Will - Opt out of changes  
Process for changes  
Administration union

## Disclosure, discovery, inspectors and monitors

Disclosure, discovery and inspection are crucial to dispute resolution. Transparency is integral to the perception of fair treatment, which perception underlies acceptability of work-outs and determinations.

This part draws on “Part V – Investigation and prosecution” of the ICC statute.

### Appointment of a Monitor

Monitors are delegates of the Tribunal whose position serves to collect information, provide advice to states and creditors, facilitate negotiations, attend depositions. The monitor is in effect a statutory *amicus curae*.

As a creature peculiar to insolvency law, there is no precedent in international law for a monitor.

The Monitor proposed here is meant to serve as the primary motivator and a “catch-all” that subsumes all creditors not represented by a Creditor Committee.

The only provision for minority creditor rights at the moment is through a willing Monitor.

1. The Tribunal shall engage the services of a Monitor as soon as may be possible after a declaration.

A Monitor may be a human or a organization, but in any case should have appropriate expertise.

The Tribunal may at its discretion enter into such agreements, not inconsistent with this Treaty, as may be necessary to facilitate the engagement of a Monitor.

The Tribunal may hire a monitor.

The Monitor shall have the power to:

* 1. Collect and examine evidence;
  2. Request the presence of and question persons which direct knowledge and information of the dispute;
  3. Request a written report from and presence of individuals with expertise relevant to disputed issues;
  4. Seek the co-operation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;
  5. Enter into such arrangements or agreements, not inconsistent with this Treaty, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;
  6. Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection and preservation of evidence.

The above is from the ICC article 54 (p.34).

## Pre-hearing

The objectives of a pre-hearing panel of the Tribunal ought to be:

1. Identify issues for trial;
2. Attempt to resolve issues in advance of trial, including work-outs for classes of creditors;
3. Issue orders and directions to advance negotiations, including demands for discovery and disclosure;
4. Ensure that no party is delaying resolution without adequate justification;
5. Set a matter down for a hearing.

A consensual work-out is often going to be preferable to a hearing and a “cram down”.

### Reference

The Court may bring a reference of any dispute or any severable component of any dispute to a court of competent jurisdiction within the State of the choice of law set out in the Rules.

The idea here is that the court would ask a national court for an opinion on a point of national law.

### Proposals

Proposals are consensual work-outs that have been accepted by creditor vote and the debtor but not approved by the Court.

Prior to being accepted by creditor vote and the debtor, a Proposal is an “Offer”.

The Rules shall have to deal with voting on Offers.

1. Any party with standing may advance a Proposal to resolve any disputes before the Court.

A Proposal is enforceable:

* 1. As a Judgment of the Tribunal after approval by a Judge; or
  2. As a contract where agreed to unanimously by all Participating Creditors.

Such proposals shall be submitted to the Court and made temporarily irrevocable, as set out in the Rules, for not more than 30 days.

### Limitations on Proposals

1. Unless otherwise specified in the Rules, a Proposal is invalid:
2. To the extent that it increases the liabilities of a Creditor without its consent;
3. If it is grossly unfair as between creditors or creditor classes;
4. If it is manifestly contrary to public policy or violates the principles of fundamental justice.

The above is from Article 4 on page 29 of the Interim Report of the Sovereign Insolvency Study Group.

### Remedies

1. The terms that may be incorporated into a Judgment include:
2. A waiver;
3. change of terms of agreements including payment terms;
4. an exchange;
5. a cancellation;
6. priority to any creditors providing new credit;
7. any other arrangement without limitation affecting claims.

The above is from Article 3 on page 28 of the Interim Report of the Sovereign Insolvency Study Group.

## Hearing

A hearing is a fall-back in those cases where a consensual work-out cannot be made.

A hearing shall be presided over by a “Hearing Panel”, a collection of three Judges of the Tribunal.

### Constitution of a Panel

1. The Panel of Judges of the Tribunal shall be constituted as soon as possible after Declaration.
2. The Panel shall consist of three Judges as selected by the Secretariat.

The above mirrors article 37 of the ICSID treaty (p. 22).

The majority of the Panel shall be nationals of States other than the Debtor State to the dispute.

The above comes from article 39 of the ICSID treaty (p.23). It is probably impractical to have creditors consent to a Judge whose nationality is that of the debtor state, though ICSID permits such consent.

### Decision

A Hearing Panel, having heard and considered the evidence submitted by those parties with standing, shall have the authority to make a decision on such terms as are just.

The above is too vague; it can be made more precise for a bankruptcy tribunal.

### Requirements for a decision

These provisions are from article 74 of the ICC (p.52).

See also, as an alternative, the ICSID treaty’s Section 4 (p.25).

1. All the judges of the Hearing Panel shall be present at each stage of the hearing and throughout their deliberations. The Judicial Council may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Hearing Panel if that member is unable to continue attending.

Note: If a Judge is absent from the Panel for a period, it should not prejudice the ability of the Panel to make a decision.

1. The Hearing Panel’s decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances alleged in the submissions of parties. The Hearing Panel may base its decision only on evidence submitted and discussed before it at the trial.

The above is from ICC article 74; the limitations on admissible evidence (eg “submitted *and* discussed”) may be stronger than is necessary or appropriate for a non-criminal dispute.

The Judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.

The deliberations of the Hearing Panel shall remain secret.

The decision shall be in writing and shall contain a full and reasoned statement of the Hearing Panel’s findings on the evidence and conclusions. The Hearing Panel shall issue one decision. When there is no unanimity, the Hearing Panel’s decision shall contain the views of the majority and the minority.

### Assumption of Powers of Pre-Hearing

A Hearing Panel shall have all of the powers of a Pre-Hearing Panel.

## Appeal

*In spite of the importance of finality and expedition, there is an interest in overturning patently unfair decisions.*

*The following shall contrast with Article 8 at page 34 of the Interim Report of the Sovereign Insolvency Study Group, which proposed an appeal structure to a Court of the chosen law.*

**TODO: Incorporate provisions such as those in Article 81*ff* of the ICC.**

## Enforcement

**TODO: Incorporate provisions of ICSID on awards.**

# Administration

## Administration of court

See e.g. Secretariat of ICSID (p.14)

Officers of court  
Judicial council  
Judicial recommendations  
Voted on by judges  
Quorum  
  
Assembly - part xi ICC  
Vote of no confidence  
Quorum  
Funding

## Funding

See e.g. Part XII of the ICC; see also WTO DSB

- UN/imf/wb  
- filing fee  
-  standing fee: % for position / class w / counsel - monetize cost of distinguishing arguments to disincentivize delay and debate  
- state contributions

## Final clauses

See eg Final Clauses of ICSID/ICC