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PROPOSED NYS LEGISLATION: HISTORY LESSONS FROM ARGENTINA'S HOLD-OUT SAGA AND THE IMF'S 2001 SDRM PROPOSAL

In recent years, the New York State Legislature has considered several proposed bills which, if enacted, would significantly affect the restructuring of Emerging Markets sovereign debt governed by New York law, and as a result, would potentially have an adverse effect on the trading markets for such debt, as well as on the cost to borrowers of raising capital. The ostensible purpose of these proposals is to address imperfections perceived largely by several nonprofit advocacy organizations and academics in the sovereign debt restructuring process (and notably not so perceived by debtor countries themselves or their creditors).

While these bills were not formally voted upon or enacted to date, due in part to active opposition by a consortium of private sector trade groups, accompanied by quiet opposition from some individual firms in the financial and investment communities, the substance of these misguided proposals has recently been re-introduced into the NYS assembly as the so-called Sovereign Debt Stability Act (NYS Assembly bill A2970A and Senate bill S5542A).

Although the likelihood of the future enactment of these proposals remains unclear, it is worth noting that the reaction of some market participants and commentators to this proposed legislative action is that simply the repeated consideration of these and similar proposals by the NYS legislature (not to mention their actual enactment) unfortunately has had the unintended effect of creating such a degree of legal uncertainty that the governing law of EM sovereign debt instruments going forward should be changed from NY law (formerly the gold standard of governing law in the US for sophisticated financial transactions) to that of another, less uncertain jurisdiction.

There is a long tradition of the sovereign debt markets evolving through the efforts of market participants to respond to changing circumstances and perceptions of the market's needs. While this evolution may have been encouraged from time to time by representatives of the official sector, it has not to date been imposed on the markets for good reason. Over time, history has shown that market participants (debtors and creditors alike) are fully capable of judging how best to address market challenges, and then working together to implement those changes needed to make the market work more effectively,

without creating unintended consequences, such as market disruptions or increased borrowing costs for EM issuers.

Some Background.

The EM debt trading markets, and the underlying area of Emerging Markets finance that they support, have developed considerably (though not always in a linear direction) since the onset of the Latin American debt crisis in 1982. The evolution of the sovereign bond restructuring process, and concerns about its imperfections, are longstanding, and the market, acting in large part through its various trade associations, has developed mechanisms to address these concerns (many of which were raised in the context of over a decade of the Argentine saga), at times with encouragement from the official sector. These concerns generally centered around the relative responsibilities, as between the private and official sectors, for contributing to the resolution of sovereign debt crises in the Emerging Markets and were for many years articulated in what became known as the 'burden-sharing' debate.

The Brady Bond Transactions of the Early 1990's. Taking a step back, EM sovereign debt during the 1980's was mostly in the form of commercial bank loans, the payment terms of which could not easily be amended. Largely for this reason, the many Brady bond transactions in the early 1990's (for the so-called Lesser Developed Countries, including Mexico, Venezuela, Brazil, Argentina, Peru, Ecuador and the Philippines), generally credited with ending what was then known as the LDC Debt Crisis, were structured and then implemented by the debtor countries and their bank advisory committees, with support from the US Treasury, IMF, the World Bank and other members of the official sector, to take advantage of exit mechanisms contained in the loan agreements of the major debtor countries that permitted loan principal to be exchanged for more marketable instruments. Historically, bonds issued under NY (or other US) law (as opposed to those issued under English law) had generally required that a bond's payment rights could not be compromised except with the consent of "all bondholders affected thereby", and that convention was carried over into the Brady bonds (as well as in many later bond issues as the Brady countries eventually returned to the voluntary markets during the 1990's).

As the result of a great deal of work and creativity on the part of the debtor countries and their bank advisory committees (and implemented by their lawyers), and with support from the official sector, the various Brady bond transactions during the 1990's successfully accomplished their goal of taking the concentration of EM credit risk within the banking system, reducing and collateralizing it, and them distributing the remaining credit risk more widely throughout the financial system. The result of this process was the creation of a new class of EM creditors, the EM investor buyside, as an additional source of capital for the EM countries. Not all the implications of this diversification of EM credit risk from loans to bonds were immediately obvious, however, and despite the gradual maturing and mainstreaming of the EM asset class, occasional financial crises continued to occur (notably Russia in 1998, Ecuador in 1999 and Argentina in 2001).

Ecuador (1999), Argentina (2001) and the Burden-Sharing Debate. In part because they were collateralized (for the most part), and represented the result of heavily-negotiated concessions on the part of bank creditors that had in many cases substantially reduced outstanding debt levels (and also had been issued in conjunction with an 'exit undertaking' by the debtor country to the effect that would not be subject to future restructure), Brady bonds were justifiably considered at the outset to have substantially less credit risk than the commercial bank loans that they had replaced, so it came as a considerable disappointment to the markets when in August 1999 Ecuador announced that it would be deferring interest payments on, and proposing a restructuring of, its US$ 6 billion face amount of Brady bonds that had been issued just five years previously (giving Ecuador debt relief of about 45%). Coming shortly after requests by the official sector that Pakistan (and later Romania) restructure their Eurobonds as a condition to official sector debt rescheduling (until this time, Eurobonds had generally been excluding from sovereign debt restructurings), the Ecuador announcement effectively initiated a debate between the official sector and private sector bondholders regarding their relative sharing of the burdens of resolving sovereign debt crises.

In this debate, the official sector took the position that it could not 'bail out' private sector bondholders with public money and that such bailouts would create the 'moral hazard' that bondholders would invest imprudently in the

Emerging Markets in reliance on the prospect of future bailouts. Private sector advocates countered that, while burden-sharing by the private sector was acceptable in principle, forced rescheduling of bonds would simply drive investors away from the Emerging Markets and effectively deprive countries of much-needed access to the global bond markets, one of the most stable sources of capital available to them, leaving those countries even more dependent, perhaps permanently so, upon official sector support. At the time, EMTA issued a position paper that, while recognizing the legitimacy of private sector burden-sharing as a goal, concluded that the official sector should focus more of its attention on preventing sovereign debt crises and on encouraging market-oriented approaches to resolving them; it wasn't prudent or appropriate for the official sector to put at risk a decade of progress that had been made in resolving sovereign debt crises in what by then had become known as the Emerging Markets, by forcing restructurings and imposing burden-sharing on the private markets.

Though bordering on acrimony at times, this debate was characterized by an extensive series of public and private meetings, consultations and formal and informal exchanges of views among official and private sector representatives regarding how best to resolve EM debt crises. Some progress was made over the next year or two as the market was able to successfully negotiate restructurings of previously rescheduled Russian debt, as well as the Ecuador bonds which had triggered the burden-sharing debate (an EMTA buyside director was heard to remark that, while the result wasn't too bad, "the process stunk"), but the debate continued, as an impending default by Argentina (later described as a "slow-moving trainwreck") increasingly hung over the market during the course of 2001. Notably, the continuing dialogue between the official and private sectors, as well as among private sector market participants, revealed a considerable divergence in the views of market participants, particularly in reference to the tactics of 'hold-out' creditors and the means of dealing with them in the context of restructuring negotiations.

Seemingly, the final straw in the burden-sharing debate came from Argentina, whose financial condition deteriorated sharply in late 2001, leading to erratic FX markets, and finally its declaration just before Christmas of a moratorium on its bond payments.

The IMF's SDRM Proposal in Late 2001 Leads to 'Marketable Bonds' in 2003. Almost contemporaneously with Argentina's moratorium, the IMF's First Deputy Managing Director Anne Krueger proposed that sovereign financial crises be subject to a Sovereign Debt Restructuring Mechanism (SDRM), essentially a mandated bankruptcy mechanism to be administered by the IMF. This proposal was widely criticized by the private sector, and underwent a series of modifications before active efforts to develop and implement it were finally abandoned in April 2003.

The main private sector criticisms of the SDRM were that:

(1) The SDRM appeared to be based on the assumption that existing mechanisms for resolving such crises did not work (or did not work well enough) because sovereign debt restructurings were too prone to delay and disruption by hold-out creditors, while the prevailing (though by no means unanimous) sentiment among private sector commentators was that the perceived threat of such delay and disruption had been greatly exaggerated;
(2) The SDRM would severely compromise the legitimate right of creditors to enforce their contractual claims and thereby would upset what was perceived by many as a delicate balance between the rights of sovereign debtors and their creditors (normal mechanisms found in and legitimizing established bankruptcy regimes (such as forced sales of non-strategic assets, changes in management or business and comprehensive treatment of all classes of claimants)) were lacking (in part simply because they cannot be enforced against a sovereign);
(3) As putative administrator of the proposed SDRM, the IMF's status as an official sector creditor owned and controlled by debtor and creditor countries would inevitably create conflicts of interest antithetical to the legitimacy and fairness of a bankruptcy regime; and
(4) The proposed bankruptcy mechanism did not address the real problem underlying sovereign debt crises, which was the failure of some sovereign debtors to develop the systems (and discipline), and to pursue the policies, that could provide greater protection against severe economic and financial difficulties that led to such crises.

In short, the IMF's SDRM proposal to create a bankruptcy mechanism for Emerging Markets sovereign bonds was generally perceived as a serious step in the wrong direction, while the better direction would be toward a more market-oriented approach that could be applied more voluntarily on a case-by-case basis.

What the SDRM proposal most succeeded at was to galvanize the private sector into an almost unprecedented degree of agreement and collaboration. By early February 2002, the major private sector trade organizations had formally written to the IMF's Managing Director a joint letter criticizing the proposal for these and other reasons, and shortly thereafter, John Taylor, Under Secretary of the US Treasury for International Affairs, without specifically commenting on the SDRM proposal itself, encouraged the private sector to develop its own market-based alternative of bond contract provisions. Despite Taylor's initiative, the SDRM proposal was not immediately withdrawn, and it soon became clear that the official sector was directly or indirectly pursuing a two-track approach that involved simultaneously pressing ahead with the SDRM proposal and also promoting the more voluntary development and adoption of bond contract clauses along the lines proposed by Taylor. Faced with this choice of alternatives, the Taylor proposal received qualified support from the private sector, and a group of trade associations began the process of preparing a formal response.

By June 2002, the trade association group had reconciled divergent positions of various sellside and buyside groups, and had written to the G10 finance ministers articulating a set of general principles for private sector involvement in resolving financial crises in the Emerging Markets. Among other things, the letter emphasized that any such involvement must be market-oriented so as to ensure the best chance of maintaining market access and restoring private sector capital flows. Following on from this letter of principles, the trade association group continued their collaboration by working together to develop a private sector consensus regarding specific, marketable bond contract language that balanced the Taylor proposal with the legitimate concerns of investors that bonds be made more creditworthy at the same time that they be made easier to restructure.

Despite this private sector consensus in favor of a market-oriented approach, many in the G10 preferred the SDRM, and as a result the official sector continued to pursue the two-track approach through the Summer and Fall of 2002. By January 2003, barely a year after the SDRM proposal had been made, the group of

trade associations released its Marketable Bond Package, which included specific language for bonds under both NY and English law, as well as a Code of Conduct for resolving financial crises in the Emerging Markets and a form of Documentation Chart for use in summarizing and publicizing the terms of specific EM bond issues.

Within several months, Mexico surprised the markets in March 2003 by becoming the first EM country to propose the inclusion of collective action clauses (CAC's) in its bond documentation in the context of a specific bond issuance. Mexico's initiative was strongly supported by the US Treasury, while some investors noted that it fell short of the full degree of creditor protections that had been recommended by the trade association group. Not wanting to interfere with a pending market transaction of such magnitude, EMTA declined to comment on Mexico's CAC bonds, other than to say that this aspect of bond documentation and crisis resolution had now moved "out of the hands of government policymakers, and trade associations, where it never belonged, and into the marketplace, where it properly does".

Within a year or so after Mexico's pioneering bond issue was successfully completed, nearly 30 other EM sovereigns (including Uruguay, Brazil, South Africa, Korea, and the Ukraine) brought to market their own bonds with CAC's under NY or English law, aggregating over US$47 billion face amount, for the most part following the example of Mexico's clauses (with some variations in the super-majority voting percentages), permitting the amendment of payment and other key terms with the consent of a super-majority of bondholders. As a result, little further was heard of the IMF's SDRM proposal, which was quietly withdrawn by the IMF and G7 later in the Spring of 2003.

The IMF's SDRM proposal and the EM industry's collaborative effort to oppose it by instead influencing the official sector toward a more market-oriented approach toward involving the private sector in the resolution of financial crises in the Emerging Markets was a long, drawn-out affair, marked by intensive cooperation among a broad spectrum of trade associations against a backdrop of considerable industry concern that Argentina's economic crisis and default were not being adequately addressed. Although the rest of the market decoupled from Argentina soon after its default, there was much at stake for Argentina and its bondholders, and the memory of Ecuador was fresh in the collective mind of EM investors. Many EM investors were clearly uncomfortable with the general lack of credit protections built into bond documentation and official sector policies, and

unhappily surprised by the way they were treated by Ecuador and later Argentina, and by the apparent indifference of the IMF and other official sector bodies and the lack of remedies they had in response.

Although the Taylor proposal itself, and the trade association reactions to it, took much of the wind out of the SDRM's sails, what ultimately seemed to tip the balance against the SDRM and in favor of marketable CAC bonds was that major debtor countries were strongly, but quietly, against the SDRM proposal, out of a concern that it would drive up borrowing costs and limit the control that they had over their own debt strategies. Mexico's adoption of CAC's largely settled the matter, although variations in the voting levels included by different countries in their own CAC bonds illustrated the ability of the markets to continue balancing the interests of debtors and investors, as well as some unresolved tension between the somewhat conflicting goals of standardizing bond documentation and the traditional case-by-case approach toward resolving financial crises in the Emerging Markets that dated back to the early 1980's.

EMTA's efforts to forge a consensus between the EM sellside and buyside were important in catalyzing the collaborative (and highly effective) industry and market response to the controversial SDRM proposal. Although CAC's were not a perfect solution to the problem of how to resolve financial crises in the Emerging Markets, they did help preserve a more market-oriented, case-by-case approach to future crises than would otherwise have been the case under an SDRM. At least for the time being, the Argentina default notwithstanding, the policy debate about this aspect of resolving EM sovereign debt crises, and the resulting distractions, seemed at last for the most part to have ended. Most importantly, the markets moved on, as marketable CAC bonds became the market norm.

2004-2016: Burden-Sharing as Seen Through the Argentine Prism. At a time when many Emerging Market countries were truly emerging, the Argentina default continued to have market and policy implications throughout the decade of the 2000's, long after the market's broader implementation of CAC's had taken the wind out of the SDRM's sails.

While all of these CAC bond issues included provisions to permit payment and other key terms to be changed by super-majority action (thus responding to what had been perceived as a potential hold-out or 'rogue' creditor problem), with the exception of two bond issues (one by Hungary, and the other by Latvia), they failed to address concerns (expressed by Mr Taylor in his original 2002 proposal, and also expressed by many investors frustrated by Argentina's restructuring

process) that EM sovereign bonds lacked adequate mechanisms to facilitate the constructive engagement of sovereign debtors and their bondholders in times of financial distress. To some, the lack of such engagement mechanisms (which would include the formation and recognition of negotiating committees and reimbursement of their reasonable legal and financial advisory expenses) seemed a remaining 'hole' in the existing architecture for resolving financial crises in the Emerging Markets that permitted 'rogue' debtors to avoid negotiating their way out of default.

Argentina's relationship with its bondholders remained polarized throughout 2004, and the burden-sharing issue was increasingly seen through an Argentine prism. IIF pushed hard for a set of Principles that would articulate guidelines for the conduct of debtors, creditors and the official sector in the context of EM sovereign crises. Over the Summer of 2004, EMTA worked intensively with a group of five other major financial associations (SIA, TBMA, ISMA, IPMA and EMCA) in an effort to improve the IIF draft Principles. The effort was only partly successful, as IIF ultimately broke off the collaboration after refusing a final set of comments that others in the group felt was necessary to ensure that the Principles would be supported by a sufficiently broad spectrum of the marketplace (and particularly, investors) to validate them and make them successful.

While the IIF Principles appropriately emphasized that sovereign debt restructurings should be voluntary and as market-oriented as possible, they failed to provide useful guidance on two areas that many investors considered important to the integrity of the restructuring process, constructive engagement with creditors and the aggressive use of exit consents. The final version of the Principles was silent on the issue of exit consents (rather than, as was suggested, discouraging their aggressive use), and did not support the inclusion of engagement provisions as a part of CAC's (which would have included the recommendation that debtor countries reimburse creditor committee expenses). By not dealing with these two issues adequately, the IIF Principles did not add much, if anything, to the then-existing framework for resolving crises, and as a result, investors did not support them, and despite considerable pressure from IIF, EMTA declined to take a formal position on them (IIF was reminded that EMTA could recognize market consensus, but could not manufacture it). Ultimately, IIF's goal was to submit their Principles to the G-20 countries at their Fall 2004

Summit; the G-20 issued a statement welcoming the Principles, but stopped short of endorsing them.

Argentina's long-awaited exchange offer to restructure its bonds was finally launched in January 2005, and following several delays due to pending litigation that threatened to attach tendered bonds, the exchange offer was completed in early June, restructuring about 76% of Argentina's US$ 80 billion in outstanding bonds, which had been in default since the moratorium declared in December 2001 (increased to about 93% by a later exchange offer in 2010). Legal actions by non-tendering bondholders against Argentina to enforce their judgment claims continued, however, though without a great deal of success (but see below).

Little can be said about Argentina's economic difficulties, default and restructurings (2005 and 2010) that all market participants would agree with, other than that the whole situation was deeply unfortunate and that it highlighted a lack of consensus about country debt restructurings. Many investors, for example, sharply criticized Argentina's restructuring tactics, which involved what can fairly be described as a "take-it-or-leave-it" offer, at a time when many believed (particularly with the benefit of hindsight) that Argentina could have offered its bondholders more generous restructuring terms. Other investors (some pointing to the subsequent performance of Argentina's innovative GDP instruments and other assets offered in the restructurings) criticized the so-called 'hold-out' investors for not participating and, in effect, for not simply 'moving on'. Similarly, the resulting legal actions against Argentina have been criticized by some (as disruptive, unsuccessful and, in effect shortsighted), and applauded by others (for innovation in defending the interests of creditor rights and pressuring Argentina to reopen its 2005 offer). A clear example of the differing opinions that together make markets.

One lesson can perhaps be drawn from the continuing difficulties surrounding Argentina's relationship with its bond creditors during this time. Because creditor reactions to a sovereign debtor's credit problems leading up to a proposed debt restructuring are strongly influenced by how effectively the debtor engages with its creditors, process does matter, though how much it matters may very depending on prevailing economic and market circumstances. Clearly, one way to make the restructuring process more 'orderly' (to the extent that is necessary or desirable) is to find mechanisms that encourage such engagement to be as constructive as possible. Because country debt restructurings are best approached on a case-by-case basis, their modalities and outcomes may not be

subject to standardization. This almost inherent lack of uniformity is almost inevitable and may result in a somewhat ad hoc process that has sometimes seemed unpredictable and therefore disorderly. The stating point in determining how to make the restructuring process more 'orderly' is in recognizing that even countries in financial crisis nevertheless retain considerable power (they are sovereign, after all) to determine how the crisis will be resolved.

Because of the limited remedies available to creditors, and the tendency of courts to proceed cautiously, even legal actions that may be brought by some creditors against the debtor country may be likely to prove more of a nuisance than a serious disruption. Whether or not a country's policies and actions can effectively prevent an economic crisis, the timing and manner of a restructuring are in many respects within the debtor country's control. While a debtor country may not under the prevailing architecture, be able to control creditor reactions to its financial crisis and restructuring proposals, such reactions can generally be anticipated and influenced by the debtor country's actions and communications. This influence on creditor reactions is in part exerted through the debtor country's engagement with its creditors. If there has been a 'hole' in the financial architecture, it has been that how (or in some cases, whether) a debtor country chose to engage with its creditors was too uncertain, and that uncertainty had the potential for resulting in an unconstructive engagement or, even worse, a perceived lack of it at all, as was often the case in Argentina.

Notwithstanding its relative success in restructuring its outstanding bond indebtedness by means of the 2005 and 2010 exchange offers, Argentina's saga continued, as aggressive legal action by its few remaining hold-out creditors dragged its way for several more years through the US federal court system (resulting in the hold-outs more or less successfully using an obscure contractual provision (known as the pari passu clause) to prevent Argentina from making payments to the restructured creditors). With its legal options finally foreclosed in 2014, the newly-elected Macri administration finally settled with the hold-outs in 2016, effectively ending a legal stand-off that had lasted for well over a decade. Suddenly, Argentina became a new darling of the capital markets (with Argentina, such resurgences have tended to be temporary), and within weeks issued US$ 15.6 billion in new bonds to finance the settlement.

Against the backdrop of historically low interest rates in the developed markets that drove flows of capital into EM in search of higher yields (as well as reducing the carrying costs for the hold-outs), the saga of Argentina's battle with its hold-

outs provided ample fodder for academics, analysts, policymakers and advocacy organizations to bemoan the fact that, regardless of the legal merits or lack of engagement, the tactics and ultimate success of the hold-out strategy had prevented Argentina (and increasingly the restructured creditors) from obtaining the full benefit of the restructurings. This provoked not only seemingly endless discussion and debate, but also renewed calls for reform of the financial architecture for resolving sovereign defaults which CAC's had (arguably) only partially addressed. For years, there had been rising tensions between the rights of individual bondholders and the interests of the wider bondholder community. What had begun in 2001 as a dispute between Argentina and its bondholders characterized largely by claims that the other side was not negotiating in good faith, by 2013 or so had morphed into a split in the bondholder community between those who had held out through the two restructurings (arguing in part that bondholders were railroaded and not treated fairly, and that they were defending creditor rights) and those holding restructure bonds (who believed that they constituted a sufficiently large percentage of the overall bondholder group (well over 90%)) and should not be held up by the hold-outs).

Following this lengthy litigation against Argentina by the hold-outs, coupled with several other sovereign debt restructurings that did not proceed as smoothly as many would have wished (creditors and debtors alike), most notably Greece (2012), the International Capital Market Association (ICMA) in 2014 developed and published model enhanced collective action clauses (later revised in mid-2015). These enhanced CAC's were designed at the invitation of the US Treasury specifically to address the problem of hold-out bondholders, and have been widely embraced by the markets (as have modified pari passu clauses). The subsequent experience of several successful restructurings (Ecuador and Argentina (each in 2020)) appear to confirm that, going forward, sovereign debtors will have more freedom to propose restructuring terms when they are assured of the required super-majority, while forcing them to continue negotiating with bondholders when they are not.

At this point, only a very small percentage of EM sovereign bonds in the global markets do not contain CAC's of some variety, and the enhanced CAC's are expected to become part of the new legal standard for the existing financial architecture, making restructurings more efficient and fair, for the benefit of sovereign debtors and their bondholders alike.

Accordingly, the record seems pretty clear that, dating back to the initial Brady bond negotiations (if not before), the private sector has shown itself to be reasonably flexible and adept at responding constructively to various challenges that have arisen over the years, both in creating greater flexibility in the financial architecture, and in resolving specific sovereign debt crises in the Emerging Markets, albeit at times with some encouragement (though notably without compulsion) from the official sector.

Enter the NYS Legislature. Despite this relatively long history of the steady progress that the private sector has made in developing market-oriented approaches to addressing various problems that have surfaced in the context of sovereign debt crises, the NYS Legislature has in recent years considered several legislative proposals, apparently introduced (and two of which were recently re-introduced) on the questionable theory that the market's approaches have not gone far enough.

The first bill, initially introduced in 2021, would permit sovereign debtors to opt-in to a comprehensive regulatory scheme for all of their debt governed by NY law, retroactively imposing a collective action mechanism, whether or not such debt as issued contained its own collective action clauses. As originally proposed, this regulatory scheme would be subject to a supervisory authority designated by NYS's Senate Finance Committee, though this authority was later withdrawn and replaced by an independent monitor to be appointed by the NYS Governor. While this bill would provide for restructuring proposals submitted by the debtor country, it expressly denies creditors the right to submit their own proposals, thus undermining any pretense of collaborative engagement between the debtor country and its creditor base.

The second bill (recently re-introduced with the first bill under the name 'the Sovereign Debt Stability Act') would limit recoveries on sovereign debt claims by private sector creditors to the same amount that the US government would be entitled to receive as an official sector creditor were such claims subject to an official sector rescheduling, thus imposing a burden-sharing regime on private sector creditors holding debt governed by NY law, a complex undertaking under the best of circumstances, and here imposed without benefit of the expert analysis provided under the current framework by international organizations such as the IMF and the Paris Club.

A third bill (which has not (at least yet) been re-introduced) would target so-called 'vulture' creditors, by making it more difficult for purchasers of sovereign debt in the secondary debt market to bring legal actions to enforce their debt claims.

While these bills have not to date been formally voted upon or enacted by the NYS legislature, there is no assurance that they will not be seriously considered in the current legislative session.

Prior iterations of these legislative proposals have been extensively reviewed by sophisticated market commentators and strongly opposed by a consortium of financial trade associations (including the American Council of Life Insurers (ACLI), the Investment Company Institute (ICI), the International Capital Market Association (ICMA), the Institute of International Finance (IIF) and the Life Insurance Council of New York (LICONY)), and heavily criticized by the Bretton Woods Committee (BWC). More recently, the current bills under consideration have also been strongly opposed by the same group (now joined by SIFMA and the Partnership for New York City). Many of these criticisms repeat concerns that were widely expressed by various private sector market participants and their representative bodies in reaction to the SDRM proposal several decades ago, and ultimately accepted by the official sector, thus resulting in the withdrawal of the SDRM proposal and the adoption of the process of encouraging and facilitating the evolution of more market-oriented mechanisms, as has occurred.

Like the SDRM, rather than a market-oriented approach, the proposed legislation would impose a new quasi-bankruptcy regime on the sovereign debt markets that, under certain circumstances, would severely limit existing creditor rights (on a retroactive basis), without the benefit of traditional creditor protections, and with the likely potential of discouraging future credit flows to sovereign borrowers and raising their borrowing costs (as well as the borrowing costs of non-sovereign issuers). Notably, the proposal would not apply comprehensively to all classes of a debtor's outstanding debts but only to the private sector debt governed by NY law, excluding official sector credits as well as private sector debt with other governing law, thus constituting a piecemeal approach to addressing a sovereign debtor's credit problems that might unfairly prejudice the affected private sector creditors.

In addition, despite the notable progress that has been made over the past two decades in developing and employing market-oriented mechanisms (like the enhanced CAC's which have been shown to be effective in facilitating EM sovereign debt restructurings), the quasi-bankruptcy regime contained in the

proposed NYS legislation would be inconsistent (and in some cases, incompatible) with the current framework and procedures for resolving sovereign debt crises (such as the IMF's Debt Sustainability Analysis), which have been developed over many years by the official sector (including the IMF, the World Bank, the Paris Club and the G20), often in consultation with various private sector representative bodies.

Perhaps most importantly, as was noted both by the Bretton Woods Committee and by the broad consortium of private sector trade groups referred to above, sovereign debt and the resolution of sovereign debt crises in the Emerging Markets involve many different international constituencies (including creditor and debtor countries) and present complex cross-border issues that are more appropriately discussed and addressed within forums more global than the NYS legislature, such as the G-20 Global Sovereign Debt Roundtable, and the Bretton Woods Committee) where all of the relevant voices can be heard. For years, it has been customary for significant developments involving the resolution of sovereign debt crises, including proposals for improvements in the relevant financial architecture (such as the SDRM), to be subject to extensive formal and informal consultations with a wide variety of market participants in various forums. This type of consultative process, which has led to broad consensus in the adoption and evolution of market-oriented reforms over many years, and can ease acceptance and help anticipate unintended consequences as well as pricing and trading implications, has not been present in the context of the development of the proposed legislation.

Finally, unintended consequences cannot always be anticipated, but one in this context that has already arisen is the concern expressed by some market participants and commentators that the repeated consideration of this proposal by the NYS legislature calls into question the reliability of New York law as the governing law for sovereign bond and other global debt issues. Historically, NY law has been considered the gold standard in the US for international financial transactions, generally, and credible sources indicate that a majority of the face amount of EM bonds and other debt currently outstanding in the global marketplace is governed by NY law (the other leading governing law internationally being English, or UK, law). Factors that have long contributed to this sense that NY law is a gold standard in this area include the substance of NY's commercial law and the competence of NY's judicial system and the consistency of the legal precedents established over many years, as well as the considerable

depth of the resources and acknowledged expertise of the NY bar (and the NY financial community that relies upon it), especially in the area of international finance. Shaking the confidence of the markets in the viability or reliability of NY law could itself lead to unpredictable consequences that could be damaging to the debt marketplace, as well as to New York generally.

In summary, the proposed NYS legislation is poorly thought out and would be an unnecessary intrusion on a market that is operating with reasonable efficiency for the benefit of investors and debtors alike, and has shown itself consistently able to develop and adopt adequate reforms, when need be, through a largely informal process that has involved extensive consultation and collaboration among investors, financial intermediaries, debtor countries and global regulatory authorities. While perhaps not perfect in all respects, the result has been a consensus-driven and market-oriented approach toward resolving sovereign crises, which has proven adequate to the task of keeping capital flowing into the Emerging Markets. A far less preferable alternative wouid be to impose a legislative solution, untested or guided by consultations with market participants, global policymakers or regulatory authorities or debtor countries, on a market that is not clearly in need of it, with the likely unintended, and unfortunate, consequence of raising borrowing costs and restricting capital flows to debtor countries, while at the same time creating a wholly ill-advised disruption to the New York judicial and legal apparatus.

Lastly, legislators should be guided by the maxim applicable to medical doctors: First, do no harm. In addition to being a misguided effort to fix a problem that has already been addressed through a time-tested process of consultation and consensus-building, the proposals under consideration in the NYS legislature, if enacted, would replace the current market-oriented process of resolving sovereign debt crises in the Emerging Markets with an unworkable approach that would hurt the interests of the debtor countries that it is intended to benefit.