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RESEARCH ARTICLE

The contractualization of fiscal and parliamentary sovereignty: Towards a private international finance architecture?

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Abstract

A state should be deemed to be enjoying fiscal sovereignty where it is effectively empowered, without pressure or coercion, to make all policy decisions required to run the state machinery and satisfy the fundamental needs of its people (at the very least), both individual and collective. A state's effective policy and decision-making power is effectively curtailed where: (1) it has been substituted in these functions by a third state or an organ of that state; (2) it is prevented from taking a particular action, such as unilateral default; (3) it is forced to violate fundamental domestic laws, including its constitution or the result of a referendum; or (4) external pressure is exerted against its government and institutions, with the aim of creating volatility and uncertainty concerning its finances so it succumbs to such pressure.

Keywords: International Monetary Fund (IMF); memoranda of understanding; parliament; self-determination; sovereign debt; sovereignty

I. Introduction

While the principal tenets of self-determination remain largely uncontested,[1] several underlying issues have been unresolved. Key among these is the degree to which states can unilaterally exempt themselves from international legal regimes that allegedly threaten – or indeed violate – elements of their self-determination and their parliamentary sovereignty. How far can mechanisms and processes that are otherwise lawful under international law erode these peremptory constitutional principles? In theory, such a conflict need not arise because state consent determines that a rule of international law, as expressed in a treaty or custom, may or may not override constitutional order. However, this explanation of the relationship between domestic and international law is far too simplistic to fully encompass the exact nature of the link between fiscal self-determination and the international financial architecture. The latter is made up from a variety of sources, few of which rest on treaties and custom. A big part of this legal regime is

[1]See recently also *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, ICJ Advisory Opinion [2019] ICJ Rep 2, where the ICJ confirmed that while self-determination is a fundamental human right, there is little support for its application to situations of secession (e.g. Catalunya, Kosovo), although a safety valve is possible where people are grossly oppressed.

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composed of 'rules' and practices found in standard contracts, banking practices, market practices, unilateral acts of states and soft law, much of which has transformed into trade usages.[2] The question that beckons is: Have states consented to be bound to all these 'rules' and practices and, if so, how has this been achieved and to what extent are they able to freely disengage themselves on the basis of standard mechanisms available to sovereigns, such as termination (of a treaty or contract) or unilateral repudiation (e.g. of an industry practice or trade usage)?

Of course, while fiscal self-determination may be prescribed expressly in peremptory terms in some national constitutions,[3] and even implied by reference to the right of political and economic sovereignty possessed by states,[4] the public-private nature of international finance ultimately entails that market rules enjoy equal force with (some) national constitutions. How is this legally possible? The answer to this question is complex, but it can be summarized as follows. The regulation of international finance is achieved through some degree of self-regulation,[5] as well as formal regulation by powerful industrial states, which in turn have conferred extensive powers to international financial institutions (IFIs), both public and private. As a result, the negative effects of a report of a private credit rating agency that downgrades the creditworthiness of state A, which in turn is forced out of private (lending) markets and suffers a currency devaluation, among others, is predicated on a sequence of otherwise lawful actions by states.[6] While such actions – whether unilateral (through legislation) or multilateral (e.g. through measures adopted by IFIs or informal entities such as the Paris Club[7]) – are not overtly directed at thwarting the fiscal self-determination of state A, this is what they *effectively* accomplish. Hence, in the absence of a generally agreed international rule prohibiting unilateral or collective acts producing financial (broadly understood) harm to a third state and prejudicing its fiscal self-determination, there is in theory no lawful impediment to such actions.

[2]By way of illustration, the insertion of English law clauses in sovereign debt instruments (including bonds, borrowing agreements and others) is now common practice. In fact, the financing document is now modelled around boilerplate, standardized instruments produced by the London Loan Market Association. See SL Schwarcz, 'Sovereign Debt Restructuring and English Governing Law' (2017) 12 *Brooklyn Journal of Corporate, Financial & Commercial Law* 1; equally, I Bantekas, 'The Globalisation of English Contract Law: Three Salient Illustrations' (2021) 137 *Law Quarterly Review* 130.

[3]For example, Arts 75–85 Argentine Constitution.

[4]Fiscal self-determination in the scholarly literature commonly refers to the regulatory right of states to impose and collect taxes, with 'arbitrariness' given a very narrow meaning even in investment arbitration. See A Lazem and I Bantekas, 'The Treatment of Tax as Expropriation in International Investor-State Arbitration' (2015) 30 *Arbitration International* 1. An eminent scholar has gone as far as argue that where tax competition among states is inherently harmful, it constitutes a form of domination, which in turn violates fiscal self-determination. See L van Apeldoorn, 'BEPS, Tax Sovereignty and Global Justice' (2018) 21 *Critical Review of International Social & Political Philosophy* 478.

[5]Self-regulation may be achieved in the absence of formal laws (so-called *lex mercatoria* and trade usages) as well as in the process of implementing hard law (e.g. implementation of anti-money laundering regulations by the banking sector). In every case, the chief aim of self-regulation is to replace the state in its public law-making function and pre-empt government action altogether. See V Haufler, *A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy* (Brookings Institute Press, Washington DC, 2001).

[6]See A Kruck, *Private Ratings, Public Regulation: Credit Rating Agencies and Global Financial Governance* (Palgrave, London, 2011) and for criticism, F Partnoy, 'What's (Still) Wrong with Credit Ratings' (2017) 32 *Washington Law Review* 1407.

[7]See M Megliani, 'Paris Club' (2015) *Max Planck Encyclopedia of Public International Law*, available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2176>.

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However, while these actions may be lawful, they are by no means legitimate. Two legitimacy-based approaches have been advanced in the literature, which have been adapted from the perspective of international law: sociological (or descriptive) and normative legitimacy.[8] The sociological approach is concerned chiefly with the perception of legitimacy ascribed to a particular institution, whereas the normative approach investigates whether such an institution deserves to be regarded as authoritative (or whether its authority is justified). It is evident that both approaches are predicated on external perceptions by relevant constituencies. An institution such as a national legislature or an IFI that makes a claim for normative legitimacy is effectively arguing for the 'right to rule', whereas a claim of sociological legitimacy is perceived as already having that right.[9] Normative legitimacy is prescriptive, whereas sociological legitimacy is agent-relative and subjective.[10] Legislative legitimacy is inextricably woven around the concept of authority, which ultimately dictates adherence, obedience or even disobedience. Normative legitimacy is clearly lacking in situations where the laws and practices of one state adversely impact a third state, especially where that third state has either not consented – or, worse still, where it is forced to succumb to the laws and practices of the first state. Of course, this is a short description of the microcosm of international finance because of the concentration of capital in private finance in the industrialized North. This private capital and the attendant mechanisms at its periphery (e.g. debt reduction, access to funding in private markets, financing of infrastructure development through public–private partnerships, credit rating assessments) effectively dictate borrower states' internal and external policies. This necessarily encompasses constitutional and human rights guarantees, including fiscal self-determination.

The key purpose of this article is to discover and highlight the linkages between international finance and fiscal self-determination, with a view to demonstrating the negative impact on parliamentary sovereignty. This article does not address how the various international finance processes and mechanisms can or should be reconciled with fiscal self-determination.[11] This is chiefly because there is no rule of international law that subjects fundamental human rights and key constitutional guarantees to other processes and mechanisms of a financial nature; otherwise, fundamental human rights would possess the same value as contractual obligations and could therefore be trumped by them.[12] Not surprisingly, IFIs and private financiers have advanced the argument that

[8]See, for example, C Thornhill and S Ashenden, 'Introduction: Legality and Legitimacy: Between Political Theory and Theoretical Sociology', in C Thornhill and S Ashenden (eds), *Legality and Legitimacy: Normative and Sociological Approaches* (Baden-Baden, Berlin, 2010) 7–12.

[9]D Bodansky, 'The Concept of Legitimacy in International Law', in R Wolfrum and V Roben (eds.), *Legitimacy in International Law* (Springer-Verlag, Berlin, 2008) 313; A Buchanan and RO Keohane, 'The Legitimacy of Global Governance Institutions', in LH Meyer (ed.), *Legitimacy, Justice and Public International Law* (Cambridge University Press, Cambridge, 2009) 29.

[10]Bodansky (n 9), 313.

[11]A modest attempt, which does not address constitutionalism, may be found in the essays contained in RP Buckley, E Avgouleas and DW Arner (eds), *Reconceptualising Global Finance and Its Regulation* (Cambridge University Press, Cambridge, 2016). See also See RM Lastra, 'Global Financial Architecture and Human Rights' in JP Bohoslavsky and J Letnar Černič (eds), *Making Sovereign Financing and Human Rights Work* (Hart, Oxford, 2016) 137; this chapter argues that the IMF could recommend human rights reforms.

[12]Industrialized creditor nations routinely object to any international or unilateral action promoting the notion of odious or illegal debt. But see the *Tinoco* arbitration [*Great Britain v Costa Rica*] (1923) 1 RIAA 371, where it is clearly stated that knowingly providing a loan to a government that will not be beneficial to its people constitutes a hostile act and merits no entitlement for repayment; see also Report of the UN

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where states enter into private contracts by which they bypass or violate their constitutional arrangements, performance is mandatory, even though in the vast majority of cases such contracts lack transparency or were signed in the absence of parliamentary approval.[13] Moreover, in most cases they were subjected to a governing law that does not render good faith an integral part of contracts, namely English law.[14]

The article is structured as follows: Part II discusses the linkages between self-determination and the global financial architecture, followed by an attempt in Part III to discover an appropriate test for ascertaining when fiscal sovereignty may be deemed to be violated. Part IV discusses the distinct role of conditionalities imposed upon borrowing states by intergovernmental IFIs and outlines possible effects on constitutional sovereignty arising from structural conditionalities, namely transfer of governmental powers, withdrawal of parliamentary sovereignty, assignment of sovereign powers upon third entities and conferral of effective decision-making.

II. Self-determination and the role of international finance in sovereign debt

Article 1(1) and (2) of the ICCPR and ICESCR expresses a fundamental rule of international law. This is true of both political and economic self-determination and cannot be trumped, save by a rule of higher or equal value, which at the time of writing does not exist. Financial self-determination thus requires that, irrespective of the fluidity and volatility of international markets, currency rates and the prices of commodities – all of which may lead a state to borrow or otherwise enter into debt – contracting into and servicing of the debt cannot be achieved by intentionally undermining constitutional order and fundamental human rights. This is not to say that states should not pay their debts, but that debt-creation and payment must be both lawful and legitimate. If that were not so – in which case debt servicing (as a corollary to the absolute sanctity of financial contracts) and self-determination would constitute rules of equal value – then by implication an indebted state would be obliged to mortgage or even surrender its natural resources to its lenders in order to repay or service any debt, even if it were unlawful or illegitimate.

Independent Expert on the Effects of Foreign Debt on Human Rights, UN Doc A/70/275 (4 August 2015), which points out that an 'absolutist view of the principle of *pacta sunt servanda* does not form part of positive law nor is it part of customary international law. Debt contracts exist in a broader legal and economic universe, in which human rights law, the agency relationship between states and their populations and economic constraints interact with the rights of creditors.'

[13]In *BCB Holdings Ltd and Belize Bank Ltd v Attorney-General of Belize*, [2013] CCJ 5 (AJ), a newly elected Belize government repudiated a tax concession granted to a group of companies by means of a settlement deed negotiated by its predecessor because it had not been approved by the Belize legislature, was confidential (hence non-transparent) and was manifestly contrary to the country's tax laws. The Caribbean Court of Justice argued that whether or not the concession violated public policy should be assessed by reference to 'the values, aspirations, mores, institutions and conception of cardinal principles of law of the people of Belize' as well as international public policy. The tax concession could only be considered illegal if it was found to breach 'fundamental principles of justice or the rule of law and represented an unacceptable violation of those principles'. It should be noted that BCB and the Bank of Belize bypassed the CCJ by seeking to enforce the award in New York and ultimately succeeded. *Government of Belize v Belize Social Development Ltd* [formerly BCB], US Ct Appeals judgment (13 May 2016*), cert den* US Supreme Court decision (12 January 2017).

[14]See H Kupelyants, *Sovereign Defaults before Domestic Courts* (Oxford University Press, Oxford, 2018) 111–40.

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This eventuality was categorically ruled out some time ago[15] because it would lead to an outright loss of sovereignty[16] or some form of (financial) occupation to the same effect.[17]

It is perhaps instructive at this point to set out the contours of sovereignty and its fiscal dimension. Scholars generally emphasize the existence of various strands of sovereignty. Krassner suggests the following: domestic; interdependence; international legal; and Westphalian sovereignty.[18] This categorization is shared by Jackson, who argues that it is possible for a state to enjoy some but not all of these variants. He goes on to distinguish between 'positive' sovereignty, in the sense of a state's capacity to dictate its own affairs (e.g. food security, job creation, maintenance of an appropriate defence mechanism) and 'negative' sovereignty, which entails freedom of external interference and recognition.[19] In this sense, sovereignty is no longer viewed as a set of immutable rights enjoyed in perpetuity by state entities and their leaders, but rather as recognition and conferral of obligations towards the international community and one's subjects. Krassner has taken this view further, arguing that sovereignty is challenged by human rights,[20] further reinforced by Reus-Smit in that where sovereignty is stronger, human rights weaken, and vice versa.[21] Overall, the forces of globalization have led to the erosion of both negative and positive sovereignty.[22] It was the humanitarian crises of the early 2000s that brought about the conceptualization of sovereignty as encompassing a certain degree of responsibility to both one's population and to the international community as a whole.[23] Deng, a former UN Secretary-General Special Representative on Internally Displaced Persons, emphasized that a state allowing its citizens to suffer 'cannot claim sovereignty in an effort to keep the outside world from stepping in'.[24] It is clear that respect for and fulfilment of fundamental human rights is an integral part of contemporary sovereignty, and this is further entrenched by reference to self-determination. States are therefore bound, at least at the internal/constitutional level, to observe fiscal self-determination that is consistent with fundamental constitutional and human rights, while at the international

[15]UNGA Res 1803 (XVII) (14 December 1962), entitled 'Permanent Sovereignty over Natural Resources'. Principle 1 stipulates that: 'The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the state concerned.' See N Schrijver, *Sovereignty Over Natural Resources: Balancing Rights and Duties* (Cambridge University Press, Cambridge, 2008) and M Bungenberg and S Hobe (eds), *Permanent Sovereignty Over Natural Resources* (Springer, Berlin, 2016).

[16]This is the rationale underlying the UN Guiding Principles on Foreign Debt and Human Rights, UN Doc A/HRC/20/23 (10 April 2011).

[17]Interestingly, such an outcome does not lead to a failed state. This is because, in the opinion of this author, a state is rendered failed by the corrupt or similar conduct of its government or exogenous conditions (e.g. war, famine) and not by contract or agreement, as would be the case with an agreement to retain an unsustainable or odious debt. See the Failed States Index (2016) as produced by the US Fund for Peace, available at: <http://fsi.fundforpeace.org>.

[18]SD Krassner, *Sovereignty: Organised Hypocrisy* (Princeton University Press, Princeton, NJ, 1999) 9.

[19]RH Jackson, *Quasi-States, Sovereignty, International Relations and the Third World* (Cambridge University Press, Cambridge, 1990) 1–12, 27–29.

[20]Krassner (n 18) 125–27.

[21]C Reus-Smit, 'Human Rights and the Social Construction of Sovereignty' (2001) 27 *Review of International Studies* 519; see also I Bantekas, 'The Linkages Between Business and Human Rights and Their Underlying Causes' (2021) 43 *Human Rights Quarterly* 118.

[22]Krassner (n 18) 1.

[23]AJ Bellamy, *Responsibility to Protect* (Polity Press, Cambridge, 2009) 21–22.

[24]FM Deng, S Kimaro, T Lyons, R Donald and IW Zartman, *Sovereignty as Responsibility: Conflict Management in Africa* (Brookings Institute Press, Washington, DC, 1996) 33.

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level there is an obligation not to interfere with the *legitimate* fiscal self-determination of other states and their peoples.[25]

Fiscal self-determination and unlawful debt creation

Fiscal sovereignty clearly dictates that states are free to choose when and how to finance themselves, and scholarship accepts that this is a complex phenomenon.[26] For the purposes of this article, it encompasses two distinct, yet ultimately interrelated, phenomena: the status of sovereign indebtedness; and access to sovereign funding, whether for indebted states or as a means of alternative finance. The legal literature generally focuses on the latter, assuming that if a state is in search of finance and liquidity, its debt is lawful and legitimate.[27]

The Greek post-2008 debt crisis is of this nature. The parliamentary committee set up by the Greek Government in 2015 to discover the truth about the country's debt ascertained that:

1. The key driver of the growth and accumulation of Greek sovereign debt was not 'excessive public spending', but rather the high real interest rates paid by Greece in the 1980s and 1990s.[28]
2. The factor triggering the Greek fiscal crisis, namely the massive difference between the deficit estimate of early 2009 (3.7 per cent of GDP) and the revised estimates of late 2009 and 2010 (12.7 per cent of GDP in October 2009, 13.6 per cent of GDP in April 2010 and 15.4 per cent of GDP in November 2010), was not the result of massive 'electoral cycle' overspending, but of statistically and legally problematic revisions of the way in which the costs of arrears in hospital spending, the losses of public enterprises and the liabilities stemming from derivative contracts were to be accounted.
3. The liquidity crisis triggered by deficit estimates revisions created the conditions under which the nationalization of the risks stemming from private cross-border borrowing (feeding the geometrical growth of Greek public debt since the Greek State became a Eurozone Member) and the reconfiguration of debt legal relationships (with sovereigns replacing private parties both as creditor and debtor) could be undertaken without any significant opposition.[29]

The Committee thus came to the logical conclusion that not only was Greece not over-indebted, but that the complete access of risk mitigation by German and French banks in

[25]UNGA Res 63/319 (29 September 2015), entitled 'Basic Principles on Debt Restructuring Processes', particularly Art 1; but see also UNGA Res 68/304 (17 September 2014), entitled 'Towards the Establishment of a Multilateral Framework for Sovereign Debt Restructuring Processes'; equally UNGA Res 67/198 (21 December 2012), 'External Debt Sustainability and Development', preamble.

[26]CD Zimmermann, *A Contemporary Concept of Monetary Sovereignty* (Oxford University Press, Oxford, 2013).

[27]See, for example, RM Lastra and Lee Buchheit (eds), *Sovereign Debt Management*, (Oxford University Press, Oxford, 2014); PS Kenadjan, K-A Bauer and A Cahn (eds), *Collective Action Clauses and the Restructuring of Sovereign Debt* (de Gruyter, Berlin, 2013); R Olivares-Caminal, *The Legal Aspects of Sovereign Debt Restructuring* (Sweet & Maxwell, London, 2009).

[28]The Committee issued its first preliminary report as Truth Committee on Public Debt, Preliminary Report (June 2015), available at: http://cadtm.org/IMG/pdf/Report.pdf. Its second report, released in September 2015, is available at: <http://cadtm.org/IMG/pdf/7AEBEF78-DE85-4AB3-98BE-495803F85BF6-Mnimonio_ENG.pdf>.

[29]See I Bantekas and R Vivien, 'The Odiousness of Greek Debt in Light of the Findings of the Greek Debt Truth Committee' (2016) 22 *European Law Journal* 539.

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purchasing full ownership of Greek private banks culminated in a private debt crisis that would otherwise have engulfed these two economies. Rather than allowing German and French banks to falter, Greece was effectively asked (but more correctly coerced) to nationalize the private debt of its banks (and in the process bail out French and German banks) and sink into financial chaos. The Committee had no problem characterizing Greece's post-2008 debt as odious, illegal and illegitimate.[30] Such a debt is emblematic of an external denial of fiscal self-determination, and this is not an isolated incident.

An argument may be made that the Government of Greece, as well as others in its position, made a calculated political decision, weighing all the possible financial and political consequences in agreeing to nationalize its indebted private banks. While such argumentation may explain the government's actions from a political perspective, it is of little legal significance. The proposition that debt is always payable is in stark conflict with the positive obligation of states to fulfil fundamental human rights if, by servicing their debt, they fail their people. In fact, human rights treaty bodies have made it clear that states cannot invoke their financial obligations to IFIs (and, by implication, private lenders) in order to avoid satisfying their human rights obligations.[31] Moreover, the *2014 Human Development Report* emphasises that 'access to certain basic elements of a dignified life ought to be de-linked from people's ability to pay'.[32] Moreover, given that states borrow for no other reason than for the benefit of their people, the economic self-determination of sovereign debt is of critical importance; debt that is contracted by the state but used (in the knowledge of the lender) for other private benefit cannot burden the people of that state. This naturally brings into question several principles of general international law. For one thing, despite some contention, no state is 'required to execute pecuniary obligations if this jeopardizes the functioning of its public services, disorganizes its administration' or has a detrimental effect on fundamental rights.[33] Recent awards by investment tribunals have confirmed this. In *LG & E*, an International Centre for the Settlement of Investment Disputes (ICSID) tribunal held that Argentina's crippling financial situation justified an invocation of a state of necessity. This was evidenced by an unemployment rate of 25 per cent; further, half the country's population lived below the poverty line, the healthcare system had effectively collapsed and per capita spending on social services had decreased by 74 per cent.[34] Indeed, the near-collapse of a domestic economy, in addition to

> the social hardships bringing down more than half of the population below the poverty line; the immediate threats to the health of young children, the sick and the most vulnerable members of the population … that all this taken together [qualifies] as a situation where the maintenance of public order and the promotion of essential security interest of Argentina as a state and as a country was vitally at stake.[35]

This is not merely an entitlement, but rather an obligation on the part of states; such human rights obligations therefore supersede conflicting pecuniary obligations. Such a

[30] Debt Committee First Preliminary Report (n 28), paras 8–22.

[31] *Federation of Employed Pensioners of Greece (IKA-ETAM) v Greece*, ECSR Merits (7 December 2012), paras 66–81; *Pensioners' Union of the Agricultural Bank of Greece (ATE) v Greece*, ECSR Merits (16 January 2012) para. 48; *Capital Bank AD v Bulgaria*, (2005) 44 EHRR 48, para 90.

[32] UNDP, *Human Development Report* (Oxford University Press, Oxford, 2014) 5.

[33] *Societé Commerciale de Belgique (SOCOBEL) v Greece*, (1939) PCIJ Rep, Series A/B, no. 78. This statement, which is attributed to the respondent's counsel, was accepted in full by counsel for Belgium.

[34] *LG & E Corp v. Argentina*, Award on Merits, ICSID Case No ARB/02/1 (3 October 2006) para. 234.

[35] *Continental Casualty Co v Argentina*, Award on Merits, ICSID Case No ARB/03/9 (15 September 2008) para. 180.

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conclusion is consistent with fiscal sovereignty (itself an emanation of economic self-determination) and the tools by which this is exercised.[36] Chief among these is the doctrine of executive necessity, which posits the idea that contracts and promises made by government are unenforceable in the public interest if they fetter the future competence and powers of the executive.[37] As a result, it is artificial and wholly illegitimate to construe loan agreements and debts outside the framework of international human rights.[38]

The second exception to general international law is that a succeeding government is not obliged to succeed to pecuniary obligations incurred by its predecessor when these provide no benefit to the people and are otherwise illegal.[39] The principle that governments succeed to all the obligations inherited by their predecessors was not meant to cover odious, illegitimate or illegal debt, or to serve as a pretext for the violation of human rights.[40]

As a result of the above considerations, states saddled with an odious, illegal or unsustainable debt continue to owe human rights obligations to their people. These obligations supersede other obligations under pertinent debt instruments.[41] States are entitled to employ a variety of mechanisms in order to abide by their human rights obligations. These include unilateral repudiation of debt arising from debt instruments, repudiation of awards in direct conflict with fundamental constitutional guarantees,[42] repudiation of unconscionable concession agreements and, finally, unilateral insolvency. Although there is significant practice – particularly in the late nineteenth and early twentieth centuries – of states becoming unilaterally insolvent,[43] and this is recognised by investment tribunals as a reality,[44] there is fierce resistance to its eventuality, at least as a matter of sovereign right.[45]

[36]In *Achmea BV v Slovak Republic*, PCA Arbitration Rules, Award on Jurisdiction (20 May 2014), para. 251, the tribunal held that it is not empowered to interfere in the democratic processes of a state, as is the case with its design of a public healthcare policy. It went on to emphasise that the design and implementation of such a policy 'is for the state alone to assess and the state must balance the different and sometimes competing interests, such as its duty to ensure appropriate healthcare to its population and its duty to honour its international investment protection commitments'.

[37]Watson's Bay and South Shore Ferry Co Ltd v Whitfield [1919] 27 CLR 268, 277; *Redericktiebolaget Amphitrite v King* [1921] 2 KB 500, 503.

[38]See CESCR, 'General Comment 2: International Technical Assistance Measures' UN Doc E/1990/23 (2 February 1990) para. 9, which emphasised that 'international measures to deal with the debt crisis should take full account of the need to protect economic, social and cultural rights'.

[39]TH Cheng, 'Renegotiating the Odious Debt Doctrine' (2007) 70 *Law and Contemporary Problems* 7.

[40]Among the many sources, Bedjaoui – who was the International Law Commission's (ILC) rapporteur on the Vienna Convention on the Succession of States in respect of State Property, Archives and Debts, so his opinion is decisive – notes that a debt is considered odious if the debtor state contracted it 'with an aim and for a purpose not in conformity with international law'. M Bedjaoui, 'Ninth Report on Succession of States in Respect of Matters other than Treaties', UN Doc. A/CN.4/301 (1977), reprinted in (1977) *Yearbook ILC* 70.

[41]Article 103 of the UN Charter may serve as additional justification for this argument, under the assumption that human rights are central to the aims of the Charter and the parties' obligations.

[42]*BCB Holdings Ltd and Belize Bank Ltd v Attorney-General of Belize* (n 13).

[43]M Waibel, *Sovereign Defaults Before International Courts and Tribunals* (Cambridge University Press, Cambridge, 2011) 3–19.

[44]In *Postova Banka AS and Istrokapital SE v Greece*, Award on Merits, ICSID Case No ARB/13/8 (9 April 2015) para 324, it was held that 'sovereign debt is an instrument of government monetary and economic policy and its impact at the local and international levels makes it an important tool for the handling of social and economic policies of a State. It cannot, thus, be equated to private indebtedness or corporate debt.'

[45]See V Paliouras, 'The Right to Restructure Sovereign Debt' (2017) 20 *Journal of International Economics* 115.

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Fiscal self-determination and the mechanics of sovereign lending

Fiscal sovereignty is based on the ability of a state to exact and utilize taxes, in addition to other forms of lending finance. In general, the sovereign power to tax is prescribed in so-called express exclusion (or carve-out) provisions in BITs (which defer instead to bilateral tax agreements), as well as customary international law – although the latter is arguably *lex generalis*. Recent treaty practice very much confirms respect for tax sovereignty in order to achieve an important public purpose. Article 6(5)(a) of Chapter 17 of the EU–Singapore Free Trade Agreement (FTA) states that nothing in the agreement 'shall prevent Singapore from adopting or maintain tax measures which are needed to protect Singapore's overriding public policy interests arising out of its specific constraints of space'. Moreover, a succession of investment courts have made it clear in cases alleging tax-related expropriation that if the economic benefit from the investment is reduced by taxation, in the absence of a specific commitment made by the host state to the investor, tax measures will not be expropriatory.[46] Tax sovereignty has also been reinforced by the notion that there is no duty on a state to adapt its tax regime in foreign investors' best interests.[47] Therefore, the calculation of taxes merely unfavourable to a foreign investor does not equate to expropriation.[48]

Sovereign financing is typically achieved through syndicated and bonded loans. In syndicated loans, a number of banks pool financial resources in favour of a single borrower state, not only in order to diversity the risk but also because a single bank may not have sufficient resources.[49] The lenders (or holders of the loan) may subsequently sell their portion of the loan to the secondary market, whether through novation or assignment. In novation, the initial financing contract is terminated and a new contract between the new novator and novatee state is established. Similar arrangements are made in the case of assignment. The exposure of banks involved in syndicated loans to severe non-performance necessitated a change in the financing of states. This came about through the process of bonded loans. There are two types of bond issuance, namely direct placement through an auction and indirect placement by means of an international issuance. It is in respect of the latter that investment banks play a key role because the loan possesses an international character and banks possess the attributes of foreign investors protected under BITs.[50]

When states are unable of raising finances through the private financial markets because of their excessive and non-performing debts, three multilateral forums exist for debt relief, namely the London Club, the Paris Club and the International Monetary Fund (IMF). The London Club is an informal group of private financial institutions that control sovereign debt, whereas the Paris Club is an informal grouping of states that control sovereign debt in either a bilateral or multilateral capacity. The Paris Club deals with the debt relief of middle-income and low-income countries, whereas the IMF has

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[46] *EnCana Corporation v Republic of Ecuador*, LCIA Case No UN3481, Award and Partial Dissent (3 February 2006) para 173.

[47] *El Paso Energy International Company v Argentine Republic*, Award on Merits, ICSID Case No ARB/03/15 (31 October 2011) para 295, quoting El Paso's Memorial at 362.

[48] Ibid.

[49] See A Mugasha, *The Law of Multi-Bank Financing* (Oxford University Press, Oxford, 2007) 88–91.

[50] See M Megliani, 'Private Loans to Sovereign Borrowers' in I Bantekas and C Lumina (eds), *Sovereign Debt and Human Rights* (Oxford University Press, Oxford, 2018) 69, 74–76; see also I Bantekas, 'The Emerging UN Business and Human Rights Treaty and Its Codification of International Norms' (2021) 12 *George Mason International Law Journal* 1.

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devised a program known as the Highly Indebted Poor Countries (HIPC) Initiative, later supplemented by the Multilateral Debt Relief Initiative (MDRI).[51] Debts that qualify for the stringent HIPC criteria are excluded from the ambit of the Paris Club. Debt relief under the Paris Club results in either debt reduction or debt rescheduling, whereas under the HIPC it results only in debt reduction for countries that have satisfied all requirements and completed it.

In order to be considered for HIPC Initiative assistance, a country must undergo three stages: pre-decision, decision and completion points. At the pre-decision stage, the IMF and the World Bank assess whether the country meets the poverty and indebtedness criteria required under the HIPC, namely that the applicant: (1) be International Development Association (IDA)-only and poverty reduction and growth facility (PRGF)-eligible; and (2) face an unsustainable debt burden that is beyond traditionally available debt-relief mechanisms. In order to meet the requirements of the decision point stage, the applicant country should have: (1) demonstrated a record of macroeconomic stability, exhibited through the implementation of an IMF program for three years; (2) paid any outstanding arrears to preferred creditors; (3) established a track record of reform and sound policies through IMF and IDA-supported programs; and (4) developed a poverty-reduction strategy paper (PRSP)[52] on the basis of broad public consultation.[53] Once a country has met or made sufficient progress in meeting these criteria, the Executive Boards of the IMF and IDA formally decide on its eligibility for debt relief and the international community subsequently commits itself to reducing debt to the agreed sustainability threshold. In order to receive the full and irrevocable reduction in debt available under the HIPC Initiative, however, the country must: (1) establish a further track record of good performance under IMF and IDA-supported programs; (2) implement satisfactorily key reforms agreed at the decision point; and (3) adopt and implement the PRSP for at least one year.[54] Once a country has met these criteria, it reaches its completion point. Debt relief under IMF initiatives has been supplied either by the Paris Club or through other forms of debt restructuring. Since the adoption of the PRGF, the Paris Club has offered better debt restructuring to HIPC-eligible countries than to non-HIPC countries. Participating creditor countries and the debtor country usually

[51]IMF Decision 13588-(05/99) MDRI-I Trust Fund (23 Nov 2005). The MDRI is an additional debt relief mechanism for countries that have completed the HIPC and allows for 100 per cent debt relief in respect of 'eligible debts' owed to the IMF, the IDA, and the African and American Development Banks.

[52]The PRSP requires the borrower state, in consultation with civil society, to sufficiently elaborate and explain its financial situation, the steps taken to improve it and the ways in which the loan or debt relief under the terms of the PRGF or HIPC would be utilised, as well as elaborate on the expected outcome. See F Stewart and M Wang, 'Poverty Reduction Strategy Papers within the Human Rights Perspective' in P Alston and M Robinson (eds) *Human Rights and Development: Towards Mutual Reinforcement* (Oxford University Press, Oxford, 2010) 447.

[53]The concept of 'local ownership' is prevalent in transitional justice, international development law and finance, UN peacekeeping missions and general human rights law. See generally A Friedman, 'Transitional Justice and Local Ownership: A Framework for the Protection of Human Rights' (2013) 46 *Akron Law Review* 727. Although this seems to be the case with debt relief schemes, as this article goes on to demonstrate, there is no effective 'local ownership' that would satisfy the rudimentary demands of self-determination. See also UNGA Res 62/186 (31 January 2008), which emphasizes the role of national ownership and sovereignty in the management of sovereign debt.

[54]See IMF, 'Debt Relief under the Highly Indebted Poor Countries Initiative', available at: <http://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/11/Debt-Relief-Under-the-Heavily-Indebted-Poor-Countries-Initiative>.

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sign an agreed minute at the end of a negotiation session. This is not a legally binding document, but merely a recommendation by the heads of delegations of participating creditor countries to their governments to sign a bilateral agreement implementing the debt treatment. When there are only a few creditors concerned, the Paris Club agreement is exchanged through mail between the chair of the Paris Club and the government of the debtor country, and is called terms of reference. In some cases, the multilateral debt agreement is implemented (in addition) through an MoU. Non-Paris Club creditors typically enter into bilateral agreements with debtor states, either under the HIPC or independently of it. Numerous bilateral agreements have been concluded in this manner, whether as treaties or MoUs.[55]

Although the Paris Club is formally distinct from the IMF, Paris Club members own the bulk of the special drawing rights in the IMF, and hence control this IFI. In practice, no debt relief is possible before the Paris Club if the applicant has not entered into an agreement with the IMF. As a result, the requirements of the IMF and the latter's seal of approval are necessary,[56] an eventuality that renders the two institutions inextricably linked.

During the process from pre-decision to completion point, the Paris Club and the IMF impose several conditionalities on applicant states. Although the subject matter of conditionalities is examined in more detail in a subsequent section of this article, suffice to state here that conditionalities imposed under the Paris Club and HIPC have been classified as structural or quantitative.[57] Structural conditionalities require the applicant state to undertake political, legislative and institutional reforms, whereas their quantitative counterpart demand the achievement of macroeconomic targets, such as the reduction of fiscal deficits and the accumulation of international reserves.

Despite the fact that, in theory, a cardinal principle for the design of the PRSP is 'local ownership', this is a fiction. It is equally fictitious to claim that debtor states *consent* to the conditionalities agreed with the IMF or the Paris Club. The international finance architecture is structured in such a way that developing states or states in distress are unable to make alternative choices. By way of illustration, over-indebted states are naturally excluded from private financial markets, or if they are not, the interest available to them is so high that it ultimately makes borrowing impossible. At the same time, their currency would have been devalued to such an extent that it is internationally undesirable, and in all probability they will suffer from a trade deficit or imbalance. In addition to being unable to meet their domestic fiscal needs, states distressed in this manner will be pressured by their creditors to repay their external debts. Ultimately, in the absence of liquidity and constant pressure, indebted states are forced to submit to the demands of their creditors in the form of conditionalities. Even though these are negotiated between debtors and creditors, there is little to no transparency involved and in practice the negotiating power of the debt is diminished significantly, if not outright extinguished. In

[55]See IMF, HIPC Initiative: [Report on the] Status of Non-Paris Club Official Bilateral Credit Participation (10 Oct 2007) 7–11. The IMF and the Paris Club have identified several legal impediments to debt relief agreements. Among these one may note: (1) impediments arising where central banks are the holders of the debt; (2) those cases where some creditors have argued that the mandate of specialized agencies holding guaranteed claims does not allow them to provide debt relief at HIPC Initiative terms; and (3) sale of HIPC claims to private investors, which increases the likelihood of litigation. Id, IMF HIPC Report, 12–13.

[56]N Villaroman, 'The Loss of Sovereignty: How International Debt Relief Mechanisms Undermine Economic Self-Determination' (2009) 2 *Journal of Politics and Law* 3, 5.

[57]Ibid 6.

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certain circumstances, states that defy debt relief proposals from the IMF or the Paris Club are coerced even further to succumb, as the case of Greece aptly illustrates, particularly with regard to the pressure exerted in the run up to the country's crucial July 2015 referendum, which is explored later in the article.

It is clear from this discussion that states are effectively (de facto) disposed of their sovereign decision-making power as well as their ability to make fiscal or other social policy, both of which constitute the essence of self-determination. The international finance architecture does not allow indebted states to opt out or to effectively declare and pursue unilateral insolvency, or indeed to design their own debt restructuring.[58] In the following section we will see how sovereignty is extinguished by contemporary conditionalities.

III. The test for sovereignty as a matter of law

The political/IR contours of sovereignty were set out in a previous section. For the purposes of obligations arising for states under international law, a legal test of sovereignty is of paramount importance for several reasons. First, where a state has been deprived of fiscal sovereignty, it would be the controlling entity that is liable for any fiscal or financial obligations entered on behalf of the deprived state – assuming that it is not under UN-sanctioned administration.[59] Second, any contracts, agreements or treaties entered into by the controlling entity that encompass self-interest, or that are detrimental to the interests (including human rights) of the deprived state, would be void, in accordance with general principles of contract and treaty law. In cases where national parliaments are bypassed by the controlling entity, no agency arrangements would be deemed to have been established, such that would equate the acts of the agent with those of the principal.[60] Third, any unilateral act, including promulgation of laws, adopted by the controlling entity on behalf of the deprived state would not bind the latter state, as they could not be attributed to it.

A similar test is that applied for determining the existence of belligerent occupation under international humanitarian law. An occupation exists if a territory is *effectively* occupied, irrespective of whether this is admitted or disguised by legal or other means by

[58] In the crucial vote on the 2015 UN General Assembly draft resolution on sovereign debt restructuring, Greece – a heavily indebted country – abstained. Such a political stance is inconceivable given that the substance of the resolution was of the utmost national importance for a heavily indebted country such as Greece (and the terms of the resolution were favourable). Greece ultimately succumbed to the EU Common Position on the UN Draft Resolution A/69/L.84, Doc 11705/15 (7 September 2015).

[59] See R Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford University Press, Oxford, 2008); SR Ratner, 'Foreign Occupation and International Territorial Administration: The Challenges of Convergence' (2005) 16 *European Journal of International Law* 695. The administration of territories by United Nations Interim Authorities, such as in the cases of East Timor, Cambodia and Kosovo, constitute a co-imperium to the extent that in neither of these territories did absolute sovereignty pass to the United Nations or its members. Some authors have gone so far as to claim a status of 'trustee occupant' in order to describe Israel's occupation of the West Bank following the 1967 Six-Day War. See A Gerson, 'Trustee Occupant: The Legal Status of Israel's Presence in the West Bank' (1973) 14 *Harvard International Law Journal* 1.

[60] See Art 2.2.5(1) UNIDROIT Principles of International Commercial Contracts (an agent exceeding his authority does not bind the principal) and Art 2.2.7(1), id (whereby in the event of a conflict of interest by the agent in their dealing with a third party, the ensuing agreement does not bind the principal).

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the occupier.[61] By analogy, a country is sovereign where it is *effectively empowered*, without pressure or coercion, to make all policy decisions required to run the state machinery and satisfy the fundamental needs of all its people (at the very least), both individual and collective. Where a state's effective[62] power to implement these two items is in any way curtailed or diminished by the actions of third parties (states) that state is no longer sovereign or legitimate.[63] Because states can generally ward off even the predatory acts of private actors, the latter cannot on their own diminish a state's sovereignty unless they pursue their claims through another state.

A state's effective policy-making and decision-making power is effectively curtailed (entailing a loss of sovereignty), in the opinion of this author, where (1) it has been substituted in these functions by a third state or an organ appointed by a third state or a group of states; (2) it is prevented from taking a particular action, such as unilateral default or designing its own debt-restructuring mechanism; (3) it is forced to violate fundamental domestic laws, including its constitution or the clear outcome of a referendum or; (4) external pressure is exerted against its government and institutions with the aim of creating extreme fiscal and financial volatility so that it succumbs to such pressure and the demands behind it.[64] Clearly, in all these circumstances, the fact that a state formally consents to the action stripping it of its effective policy-making and decision-making power is illegitimate and also illegal.[65]

Whereas the four strands in the test applied in the previous paragraph chiefly concern the relationship between the indebted state and other states (and perhaps other stakeholders), the link between sovereignty and self-determination also brings rights-holders into the equation. The indebted state must ensure that its people enjoy fundamental human and constitutional rights, including the collective right not to be deprived of natural resources and the right to development.[66] In equal manner, civil and political rights, as well as their socio-economic counterparts, entail an extra-territorial dimension from which these other states cannot escape.[67] A state that is unable to offer the full gamut

[61]See specifically *Loizidou v Turkey* (1997) 23 EHRR 513 and *Al-Skeini and Others v UK* (2011) 53 EHRR 18.

[62]I have used the word 'effective' several times in this article. Although there does exist a general (yet far from ambiguous) meaning in international law, namely that efficacy (actual observance) of law as distinguished from its validity (binding force), this is not useful. For the legal meaning, see H Taki, 'Effectiveness', *Max Planck Encyclopedia of International Law* (2013), available at: <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e698>. Its use here corresponds to the ordinary meaning of 'effective', as well as that provided by political scientists. Governance is considered to be effective where it manages to achieve policy goals. See A Underdal, 'The Concept of Regime Effectiveness' (1992) 27 *Cooperation and Conflict* 227.

[63]It is now beyond doubt that the effectiveness of a political order or governance dictates its legitimacy, to the extent that the two are inextricably linked. See M Levi and A Sacks, 'Legitimating Beliefs: Sources and Indicators' (2009) 3 *Regulation & Governance* 311.

[64]Points (1) and (3), and to some degree (2), are also common to the four indicators applied below in order to accurately quantify the circumstances under which a conditionality entails the loss of sovereignty and violates self-determination.

[65]UNGA Res 63/319 (29 September 2015) (n 16), Art 1.

[66]See generally principles 25–27 of the UN Guiding Principles on Foreign Debt and Human Rights, UN Doc A/HRC/20/23 (10 April 2011).

[67]See M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law Principles and Policy* (Oxford University Press, Oxford, 2013). Extraterritoriality does not just apply in respect of civil and political rights, but is also recognised in relation to socio-economic rights. See para 9 of the 2011 Maastricht Principles on Extraterritorial Obligations of States in the Area of ESC Rights.

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of rights to its people in a sustainable manner because of other obligations that are claimed by third states cannot be said to be sovereign.

The conclusion drawn from the aforementioned analysis boils down to this. Where a state is not sovereign, it is either a failed state or under effective occupation. A failed state may be sovereign (in the sense of empowerment) but suffer from weak institutions. This is not the case with the scenarios described above. Hence, a state not truly (fiscally or financially) sovereign as a result of the actions of third states or entities, while retaining its statehood, should be deemed as being under a *sui generis* occupation by these third states or the institutions controlled by them (such as IFIs).[68] This reality deserves to be more widely recognised and regulated by a fusion between the law of military occupation and the law of state responsibility, as well as a revised and much more human rights-compliant international law on the responsibility of international organizations.[69] Sadly, it is beyond the small and narrow scope of this article, which seeks merely to identify how and when sovereignty is lost in situations of indebtedness.[70]

IV. Conditionalities and sovereignty

Conditionalities are now an integral part of loan agreements granted or guaranteed by inter-governmental development banks, as well as all debt-relief mechanisms. Hence, their impact on fiscal self-determination is worthy of examination. This author takes the view that conditionalities can, in fact, be beneficial – especially for states with weak governance regimes.[71] To this end, conditionalities should aim at improving governance and minimizing the reach of the (corrupt or ineffective) state in the financial or other resources provided by creditors, while at the same time ensuring that conditionalities as a whole are not retrogressive and do not impede the fulfilment of fundamental human rights. Quite clearly, one of the advantages of conditionalities 'imposed' against the governments of authoritarian and fragile states is that it does not allow these to manage or possess disbursement powers in respect of public finances. On the contrary, any unchecked assistance or aid to such a government would violate self-determination and could lead to serious human rights violations.[72]

[68] I employ the term 'sui generis' here because belligerent occupation as such is inapplicable and hence its use in this context in the form of an analogy with the law of occupation.

[69] It is clear that if states are able to attribute otherwise personal action to intergovernmental organizations (IGOs) to escape their human rights obligations, then in equal manner the states affected by the measures adopted by such IGOs can claim that they were required by treaty to adhere to them. In both cases, there is an artificial absence of obligations and a corresponding absence of liability. Such a result is untenable and lacks legal foundation, and has rightly been condemned by international and domestic courts – despite claims to the contrary by collaborating states. This type of liability is recognised in Article 61 of the ILC Articles on the Responsibility of International Organisations: see I Bantekas, 'Exceptional Recognition of Governments and Political Entities in respect of Sovereign Loans: *The Greek Case*' (2013) 82 *Nordic Journal of International Law* 317.

[70] Readers are directed to E Benvenisti, *The International Law of Occupation* (Oxford University Press, Oxford, 2013) for a general understanding of the rights and duties of the occupying power. But see also A Evans-Pritchard, 'Greece is Being Treated like a Hostile Occupied State', *Telegraph*, 13 July 2015.

[71] See L Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford University Press, Oxford, 2005); H Grabbe, *The EU's Transformative Power: Europeanization through Conditionality in Central and Eastern Europe* (Palgrave, London, 2005).

[72] This now constitutes standard practice in aid disbursement and, while it does violate sovereignty to some degree, it is viewed as beneficial to financial self-determination and capacity building. See I Bantekas,

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Given that, in all cases of debt relief, the key beneficiaries are the lenders – private as well as public, whether through neo-colonial involvement in the economies of indebted states,[73] the diversion of 'bail out' funds to their private banks[74] or even by making a direct profit[75] – it is a fallacy to assume that creditors have no financial interest (that is, interesting in making a profit) in debt relief. In fact, there could well be more financial incentives from debt relief than ordinary debt repayment. This is because states – even poor ones – can always generate money through taxes, transit fees, customs and other duties, and they can effectively mortgage their natural resources. Conditionalities, therefore, are not necessarily aimed at decreasing poverty or increasing growth and development, nor is the necessary human rights retrogression a mere side-effect.[76] If lenders have a direct interest in seeing the debt repaid, avoiding unilateral default and/or exploiting in an advantageous manner the natural resources of the indebted state, it is in their interest to impose such conditions that help them achieve their aims.

In all cases of indebted nations, many structural conditionalities led to: (1) the appointment of a supervisory authority, which was effectively endowed with power to ratify all or crucial laws in defiance of constitutional democracy; (2) effective withdrawal of parliamentary sovereignty because the authority over certain matters had become a matter of contract; (3) powers vested in the people and exercised by the government being assigned to or conferred upon third parties by virtue of contract (public utilities becoming the subject of compulsory privatization); or (4) conferral of effective policy-making to a third entity (typically an IFI or the political organ of an intergovernmental organization, such as the Eurogroup)[77] because the debtor is assessed periodically and has become

'Effective Management of International Aid Through Inter-governmental Trust Funds' (2021) *Loyola Chicago International Law Review* forthcoming; equally, see I Bantekas, 'The Emergence of Intergovernmental Trusts in International Law' (2011) 81 *British Yearbook of International Law* 224.

[73]The Greek Fund for Privatisations of State Assets (TAIPED) took paid advice from a German consultancy firm, itself a subsidiary of the consultancy firm, which advised privatization and the sale of airports (at relatively low prices) to FRAPORT. FRAPORT is a subsidiary of Lufthansa. This involved a clear conflict of interest at all levels for the non-state actor and clear knowledge of the circumstances.

[74]The Greek Debt Truth Committee demonstrated, for example, that only about 8 per cent of all loan agreements from the IMF/EU/ECB to Greece since 2010 were earmarked for expenses other than debt repayment. See (n 28). As a result, Greece would have been better off had it not received 'bail-out' funds, as these generated further repayment of capital and interest at a time when the original debt had already been deemed unsustainable and the economy was stagnant.

[75]In the post-2010 'bail out' of Greece, given that the lending countries and institutions had triple-A credit rating, they turned the 'bail out' into a successful business venture. This was achieved because they were able to attract loans with low interest and then lend to Greece with a much higher interest. The ECB purchased Greek sovereign bonds from secondary markets at half their nominal value, but later demanded an extortionate rate of interest from Greece while all the time claiming to have bought Greek sovereign bonds in order to contribute to the Greek economy and bailout. See Greek Debt Truth Preliminary Report (n 28) 59.

[76]By way of illustration, the Greek Debt Truth Committee, in its preliminary report (n 28) 34–35, demonstrated that real wage losses as a result of the fiscal austerity were 17.2 per cent. By using the methodology developed in a report for the ILO, the report estimated that the effects 'of a 1 per cent fall in the wage share leads to a fall in GDP by 0.92 per cent. Using this finding, we estimate the loss in tax revenues, and the rise in interest payments and public debt as a consequence of the fall in the wage share in Greece. Our estimates show that the fall in the wage share has led to a 7.80 per cent increase in the public debt-to-GDP ratio. The fall in wages alone explains more than a quarter (27 per cent) of the rise in the public debt-to-GDP in this period.'

[77]The Eurogroup is an informal mechanism at ministerial level that discusses the shared responsibilities of EU member states related to the Eurozone. See <http://www.consilium.europa.eu/en/council-eu/eurogroup>.

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wholly dependent on the lenders' conditions, and is unable to refuse or resist the conditionalities 'suggested'.

In equal manner, even if no structural conditionalities were imposed (which is virtually impossible), their macroeconomic dimension can, in and of themselves, strip a state of its sovereignty. Where a state is forced to make policy based solely and exclusively on fiscal considerations, the welfare of its people is rendered meaningless and the state in question merely serves a function akin to an accountant or a tax collector. Where a state is forced to undergo strict fiscal consolidation, as was the case with Greece, several things occur that are directly or indirectly related to self-determination. The Greek Debt Truth Committee demonstrated that:

> Without austerity the Greek economy would only have stagnated rather than lose 25 per cent of its GDP. Consequently, in the absence of austerity, the 2014 debt to GDP ratio would actually be 8.1 percentage points lower. Furthermore, had only tax increases been implemented, without spending cuts, the 2014 estimated debt-to-GDP ratio would be 37.1 percentage points below its actual level. The implementation of fiscal and wage austerity in Greece, which already lacks structural competitiveness, produced prolonged recession and unemployment with adverse feedback effects on the financial fragility of the government … The austerity policies had a dramatic effect on investment: the volume of gross capital formation fell by 65 per cent in 2014 compared to 2008 and labour productivity by 7 per cent. The latter is the result of a decrease in capacity utilisation rate which is reflected in the growth of the fixed capital-to-GDP ratio, from 3.6 in 2007 to 4.9 in 2013 and 4.8 in 2014. In the manufacturing sector, the capacity utilisation rate decreased from 73.5 per cent in 2006-2010 to 65 per cent in 2013 and 67.7 per cent in 2014.[78]

Although several examples of structural conditionalities may be cited that entail an effective loss of sovereignty, this section of the article will base its conclusions on the case of Greece, which constitutes a paradigm in this respect for all four points raised above.[79] We shall devote a brief section to each of these.

Transfer of governmental powers

There are several examples of countries being effectively administered by foreign powers – especially in the event of default, as was the case with Egypt and Morocco, which were incorporated in existing empires. In the case of modern post-2010 Greece, since entering into its 'bail-out' agreements in 2010, a supervisory authority known as the 'troika' and composed of the European Union (Commission), the European Central Bank (ECB), the IMF (and subsequently re-baptised 'institutions'[80] in 2015) and later the European

[78]Greek Debt Committee Preliminary Report (n 28) 34.

[79]Heavily indebted states in Africa or South America are not parties to 'strong' regional integration mechanisms, such as the European Union, and hence the withdrawal of sovereignty paradigm discussed in this article concerns their relationship with the IMF (chiefly), regional international development banks and perhaps other World Bank institutions, such as the Multilateral Investment Guarantee Agency (MIGA). But see, MB Olmos *Giupponi, Rethinking Free Trade, Economic Integration and Human Rights in the Americas* (Hart, Oxford, 2017).

[80]The difference is that, under the troika regime, mere employees of the ECB, EC and IMF were responsible for suggesting conditionalities and conversing with the Greek government (including the Prime Minister),

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Stability Mechanism (ESM) was imposed by Greece's multilateral creditors.[81] The role of the troika was to supervise the implementation of the agreements between Greece and its creditors, which also meant that all related laws and policy actions required prior approval by the troika. In the event that a law or policy did not meet with the troika's approval, the next tranche of funds would be in jeopardy. Given that the bulk of the conditionalities were contained MoUs, the aim of which was to render any issues arising therefrom inadmissible from local or international courts,[82] the authority of the troika was exceptionally broad, and in practice could sanction any policy or law – even if not directly related to the Greek debt-restructuring plan. Even if successive Greek governments were somehow inclined to adopt a more humane policy for the under-privileged or increase public spending in order to boost the economy, the troika would effectively reject any such proposals. In this manner, the IMF, ECB and EU informal institutions, such as the EuroGroup, replaced the authority of the Greek government to adopt policy and laws in a sovereign manner, even though the latter was found not to be accountable under EU law.[83] In fact, no entity in the family of lenders, including facilitating institutions, such as the EC Commission, retained any kind of liability in its contractual or extra-contractual dealings with borrower states.[84]

The same is also true regarding the recent Puerto-Rican debt crisis. Following its indebtedness, the US Congress feared that the billions of dollars invested in sovereign bonds by US mutual funds, chiefly paid for by small bondholders, would never be repaid. As a result, the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) was adopted in 2016, setting up a fiscal control board with authority to oversee Puerto Rico's finances. It was empowered to approve the Governor's budget plan or, if not satisfied, 'draft, adopt and enforce' a plan of its own. It was given authority to 'enforce balanced budgets and government reform if Puerto Rico [did] not do so independently'. Furthermore, the law prohibited the

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while under the 'institutions' regime, the three creditors converse with the Greek government through ministers. See I Bantekas, 'The Legal Personality of World Bank Funds Under International Law' (2020) 56 *Tulsa Law Review* 101.

[81]Bilateral creditors in the troika are represented and coordinated by the EC Commission – on the basis of an inter-creditor agreement concluded among themselves on 8 May 2010 – whereas the IMF represents itself. The text of the consolidated version of the inter-creditor agreement is available at: <http://www.irishstatutebook.ie/eli/2010/act/7/schedule/1/enacted/en/html>.

[82]It was only in *Eugenia Florescu and Others v Casa Judeţeană de Pensii Sibiu and Others*, Case C-258/14, Judgment of the Court (Grand Chamber) of 13 June 2017, EU:C:2017:448, para 36 that the CJEU came to the conclusion that MoUs concluded under EU financial assistance mechanisms and balance-of-payment processes qualified as EU acts under Art 267(1)(b) TFEU, and hence were susceptible to interpretation by the Court.

[83]In Joined Cases C-105-109/15 *P, Konstantinos Mallis and Others v European Commission and European Central Bank*, EU:C:2016:702, the CJEU found that the Eurogroup is an informal grouping of the Euro Area finance ministers and as a result its acts could not be attributed to the Commission or the ECB. But see Joined Cases C-8-10/15P, *Ledra Advertising Ltd and Others v European Commission and European Central Bank*, EU:C:2016:701, where the CJEU held that where the EC Commission is involved in the signing of a MoU within the framework of the European Stability Mechanism, it is acting within the sphere of EU law. Therefore, it is bound to refrain from MoUs that are inconsistent with EU law, including the EU Charter of Fundamental Rights.

[84]See Case T-531/14, *Leïmonia Sotiropoulou and Others v Council of the EU*, EU:T:2017:297, which entrenched the non-contractual liability of the EC Council concerning decisions adopted within the framework of Articles 126 and 136 TFEU (Excessive Deficit Procedure).

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Government of Puerto Rico from 'exercising any control, supervision, oversight or review over the federal control board'.[85]

Withdrawal of parliamentary sovereignty

As to point (2), namely effective withdrawal of parliamentary sovereignty, all the agreements essentially required the debtor state to circumvent its constitution and violate its international human rights treaty obligations.[86] By way of illustration, in order to secure implementation of these conditionalities it was necessary to bypass constitutional requirements. According to Article 36(2) of the Greek Constitution, international agreements must be ratified by an implementing law adopted by the plenary of parliament. International agreements require a qualified majority of three-fifths of the deputies in accordance with Article 28(2) of the Constitution.[87] The Loan Agreement of 8 May 2010 (as amended by a subsequent agreement of 12 December 2012), however, was not even distributed to parliament, nor was it publicly discussed, including the severe austerity measures contained therein. In fact, in a document entitled 'Statement on the Support to Greece by Euro Area Member States' of 11 April 2010,[88] it was announced that the Euro Area member states, together with the ECB and the IMF, were prepared to provide a loan to Greece and that the terms of the loan had 'already been agreed'. This demonstrates that none of the parties involved had any intention of respecting the procedures of the Greek Constitution or of complying with even elementary requirements of transparency.[89]

Moreover, Article 1(4) of Law 3845/2010 granted the Finance Minister authority to negotiate and sign the texts of all pertinent loan and financing agreements (including treaties, contracts and MoUs). Although it was required under the Constitution that all such agreements be subject to parliamentary ratification, this never happened. Five days after its adoption, Article 1(9) of Law 3847/2010 modified Article 1(4) of Law 3845 by stipulating that the term 'ratification' [by parliament] is replaced by 'discussion and information'. Moreover, all pertinent agreements (irrespective of their legal nature) were declared as producing legal effect upon their signature by the Finance Minister.[90] Hence,

[85]The Financial Oversight and Management Board established by section 201(b)(1)(N) of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) 2016, was obliged to 'respect the relative lawful priorities or lawful liens, as may be applicable, in the constitution, other laws, or agreements of a covered territory or covered territorial instrumentality, in effect prior to the date of enactment of this Act'. Much of this is a direct reference to the contractual rights of foreign bondholders.

[86]Article 5(1)(e) of the (Consolidated) Inter-creditor Agreement (12 December 2012) (n 81), stipulates the following condition for the disbursement of funds by the EFSF: 'The entry into and performance by it of, and the transactions contemplated by, this Agreement (including the Facility Specific Terms or any Pre-Funding Agreement) and the MoU (and the transactions contemplated therein) does not and will not (i) violate any applicable law, regulation or ruling of any competent authority or any agreement, contract or treaty binding on it or any of its agencies.'

[87]See Judgment No 668/2012 (20 February 2012), para 29, decided by the Plenary of the Greek Conseil d'Etat (ΣτΕ), the majority of whose members agreed with such an interpretation of Art 28(2). See I Bantekas, 'The Contractualisation of Public International Law and Its Impact on the Rule of Law' (2021) 21 *International Journal of Law in Context* 1.

[88]Law no 3845/2010, Annex II.

[89]See principles 28–32 of the UN Guiding Principles (n 16), which render transparency a cardinal principle.

[90]It was only in 2018 that the CJEU in *Florescu* (n 82), para 41 accepted – albeit with no elaboration on their legal nature – that MoUs entered into by EU institutions in implementation of EU law were in fact

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Articles 28 and 36 of the Constitution were effectively abolished by a mere legislative amendment. Furthermore, Law 3845 included two of the three MoU as mere annexes, relegating them to the status of 'programme plan'.[91]

Assignment of sovereign rights to third entities

As concerns point (3), namely assignment of sovereign rights to third entities, a few examples will be highlighted. Oosterlink highlights the past practice of guaranteeing reimbursement through the imposition of controls on government spending. She goes on to say that:

> In many countries, such as Egypt, Greece or the Ottoman Empire, the debt was at some point administered by institutions representing the interests of foreign bondholders. The United States also prompted several countries such as Santo Domingo, Haiti, Honduras and Nicaragua to pledge their custom revenues to repay their external debt and this under U.S. supervised receiverships.'[92]

With respect to post-2010 Greece, under section 2.5.5.1 of the MoU appended to the 2010 EFSF Framework Agreement 2010 and the 2012 Master Financial Assistance Agreement with Greece,[93] the EFSF bailout was channelled through an escrow account. This account was controlled by an external commissioner of the troika and the majority of the funds have not gone through the government's budget, as is required under Greek law or out of respect for the borrower's fiscal sovereignty.[94]

Moreover, Greece's debtors established a Fund for Privatisations (TAIPED)[95] to implement the conditionality of privatisations. Previously in this article, reference was made to the privatization of Greek airports, the vast majority of which were already profitable. TAIPED decided to sell them to the German company FRAPORT, in which the German state possesses shares, Germany being the largest creditor of Greece and a key player in the Eurogroup, the ECB and to a lesser degree the IMF. Although little information is available regarding the stakeholders (and their connections) in the process of the privatisations, evidence demonstrates that FRAPORT did not possess the necessary capital to purchase the airports and the Greek government has been forced to act as a guarantor of the purchase![96] This is typical of privatisations at the urging of lenders and

'mandatory'. See M Markakis, 'Bailouts, the Legal Status of Memoranda of Understanding, and the Scope of Application of the EU Charter: *Florescu*' (2018) 55 *Common Market Law Review* 643.

[91]See Greek Debt Committee Preliminary Report (n 28) 48–49.

[92]K Oosterlinck, 'The Historical Context of Sovereign Debt' in Bantekas and Lumina (n 50) 13, 15ff. See also ES Rosenberg, *Financial Missionaries to the World: The Politics and Culture of Dollar Diplomacy, 1900–1930* (Duke University Press, Durham, NC, 2003).

[93]Agreement between EFSF, Greece, the Greek Financial Stability Fund and the Bank of Greece, as amended by the Amendment Agreement of 12 December 2012. See I Bantekas, 'Multilateral Development Banks as Agents of Contract' (2021) 4 *Asian Infrastructure Investment Bank Yearbook of International Law* forthcoming.

[94]Debt Committee Preliminary Report (n 28) 54.

[95]TAIPED was set up by Law 3986/2011. See I Sagounidou-Daskalaki, TAIPED: An Instrument for the 'Sell-Off' of Public Property and for the Abolition of National Sovereignty of Greece [in Greek] (Nomiki Vivliothiki, Athens, 2014).

[96]See M Dionellis, C Tzanavara, 'German Investors of the Air' *Efimerida Syntakton*, 8 February 2017, available at: <http://www.efsyn.gr/arthro/germanoi-ependytes-toy-aera> (in Greek). The same company was found to have corrupted Philippine officials under similar circumstances. See *Fraport v Philippines*, Award on Merits, ICSID Cases No ARB/03/25 and ARB/11/12 (10 December 2014).

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IFIs engaged in debt-reduction programs, whereby profitable public enterprises (all set up through taxpayers' money) are effectively transferred to private enterprises with little or no money, thus depriving the local population of resources and access to public goods.[97]

Conferral of effective decision-making to a third entity

In point (1), it was established that lenders may appoint an agent that is endowed with broad supervision powers that are tantamount to governmental powers. However, even where such an agent has not been appointed the same result can be achieved through other structures or mechanisms. Given that the disbursement of funds to indebted nations is periodical (or in tranches) and over significant periods of time, and the same is true of all forms of debt relief and repayment schedules, it is evident that in time the indebted state will become politically and financially dependent on the terms of its particular debt relief.[98] As a result, throughout this period the lenders can demand new and even harsher measures from the indebted state, which the latter cannot easily refuse – especially if the next tranche of funds is linked to the state's performance in international markets or the immediate payment of pensions or other liabilities.[99]

Given that the indebted state is rendered incapable of accessing private financial markets during the extended period of debt relief – and hence will lack liquidity in hard currencies – even if its political elite were willing to disengage the country from its debt relief program and refuse to accept the additional conditions demanded by its creditors, it would be unprepared to face the dire consequences in the short term. Moreover, its creditors would ensure that additional pressure is exerted on the government and the people with a view to abandoning the idea of a return to full sovereignty. In the particular circumstances of Greece, creditors make new demands or expand on existing ones days or weeks before the next tranche is due and this leads to new rounds of negotiations.

V. Conclusion

Just like other rights and freedoms upon which sovereign debt has a significant impact without much visibility, the linkages between debt and self-determination are manifold and interwoven. The larger picture may not always be evident to the general public. A country's debt will inevitably be linked to other actions demanded or imposed by the global system of international finance, such as unrestricted trade liberalization or reliance

[97]See M Raco, *State-Led Privatisation and the Demise of the Democratic State* (Routledge, London, 2016); equally, I Bantekas, 'The Contractual and Transnational Nature of Sovereign Donor-Trustee International Aid Contributions' (2021) 49 *Syracuse Journal of International Law and Commerce* forthcoming.

[98]See, for example, Article 4(9) of the (Consolidated) Inter-creditor Agreement 2012 (n 81), which reads, 'After serving an Acceptance Notice in respect of an installment and receiving the beneficiary member state's written acknowledgement of the terms set out therein, subject to any conditions applicable to the provision of Financial Assistance under the relevant Facility as set out in the applicable Facility Specific Terms, EFSF shall issue to the beneficiary member state a Confirmation Notice setting out the financial terms applicable to each installment or Tranche, as the case may be. In the case of an installment made up of a series of Tranches, a separate Confirmation Notice shall be issued for each Tranche. By acknowledging the terms of an Acceptance Notice, the beneficiary member state shall be deemed to have accepted in advance the terms of the Financial Assistance set out in each Confirmation Notice.'

[99]See, for example, E Maurice, 'Creditors Put More Pressure on Greece' *EU Observer*, 27 January 2017, available at: <https://euobserver.com/economic/136694>.

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on mechanisms, such as NEPAD, that may exacerbate poverty and inequality rather than combat it.[100]

We make use of the word 'effective' in order to test whether a particular action, contractual clause or other measures produces an outcome that is otherwise offensive to self-determination. This is not always easy because economic self-determination is sparse in the human rights literature. In this article, we have put forward the proposition that a state is sovereign where it is effectively empowered, without pressure or coercion, to make all policy decisions required to run the state machinery and satisfy the fundamental needs of all its people (at the very least), both individual and collective. A state's effective policy and decision-making power is effectively curtailed where: (1) it has been substituted in these functions by a third state or an organ of that state; (2) it is prevented from taking a particular action, such as unilateral default; (3) it is forced to violate fundamental domestic laws, including its constitution or the result of a referendum; or (4) external pressure is exerted against its government and institutions with the aim of creating volatility and uncertainty concerning its finances so it succumbs to such pressure.

In all cases of indebted nations, many structural conditionalities led to: (1) the appointment of a supervisory authority, which was effectively endowed with power to ratify all or crucial laws in defiance of constitutional democracy; (2) effective withdrawal of parliamentary sovereignty because the authority over certain matters had become a matter of contract; (3) powers vested in the people and exercised by the government being assigned to third parties by virtue of contract (public utilities becoming the subject of compulsory privatization); or (4) conferral of effective policy-making to a third entity (typically an IFI or the political organ of an intergovernmental organization, such as the Eurogroup) because the debtor is assessed periodically and has become wholly dependent on the lenders' conditions, and is therefore unable to refuse or resist the conditionalities 'suggested'.

The penultimate goal associated with the above considerations is to entrench the notion that states effectively denied their sovereign right to decide their fiscal affairs in accordance with their constitutions bear no liability to creditors for any debts created in their name. Legitimacy, and not strict legality, is key to this process. If this notion were to be entrenched into law, or even emerging norms, then it is certain that lending, debt-creating and debt-collection practices would become far more responsible and human rights-oriented, and far less intrusive to constitutionally sanctioned fiscal sovereignty.

[100]See A Nicolaides and CM van der Bank, 'Globalisation, NEPAD, Fundamental Human Rights, South African and Continental Development' (2013) 1 *International Journal of Development and Economic Sustainability* 54, who claim that economic globalization has resulted in a race to the bottom in South Africa and that NEPAD is questionable from a human rights perspective; see I Bantekas, 'The Human Rights and Development Dimension of Foreign Investment Laws: From Investment Laws with Human Rights to Development-Oriented Investment Laws' (2020) 31 *Florida Journal of International Law* 339.

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