2 Conceptualising sovereign debt in international law

1 Introduction

This chapter clarifies key concepts and situates sovereign debt within the international legal framework. The debt crises of the 1980s and 1990s as well as the Euro Zone Debt Crisis (2009-2015) have shown that sovereign debt crises no longer are domestic problems for individual countries alone.[1] In fact, the Euro Zone Debt Crisis has demonstrated the potential cross-border effects of a debt crisis in an increasingly interconnected economic environment.[2] The frequency of debt crises raises fundamental theoretical questions: What is the nature of 'sovereign debt' in international law? Who is a 'sovereign' for the purposes of sovereign debt liability under international law? What is 'sovereign debt governance'?

This chapter attempts to answer the above questions. It uses the concept of 'sovereignty' to examine sovereign borrowing and lending and the capacity of sovereigns to engage in international financial transactions. Modern international law prescribes normative and operational contents of sovereignty in relation to states and inter-governmental organisations (IGOs). Indeed, apart from a state's financial undertakings, its human rights obligations could also constrain its sovereignty within the international system.[3]

1 D Cohen & C Valadier 'The sovereign debt crisis that was not' in CA Primo Braga & GA Vincelette (eds) *Sovereign debt and the financial crisis: Will this time be different?* (2011) 15-44. Thus, the claim that sovereigns do not go bankrupt because of unhindered access to tax revenues has been shown to be chimeric. See A Rieffel *Restructuring sovereign debt: The case for ad hoc machinery* (2003) 289.

2 The crisis had impacted developed economies, as Laryea observed: 'In contrast to previous sovereign debt crisis where the focus had been on emerging markets in Latin America and Asia, or on debt relief to low-income countries, the spotlight is now on highly indebted advanced economies. In varying degrees, the public debt burdens of countries such as Greece, Ireland, Italy, Portugal, Spain, the United Kingdom, the United States, and Japan weigh heavily on the markets and agenda of international policy makers.' See TW Laryea 'Introductory remarks' (2011) 104 *Proceedings of the Annual Meeting of American Society of International Law* 139.

3 D Cassel 'A framework of norms: International human rights law and sovereignty' (2001) 22 *Harvard International Review* 60-63; P Eleftheriadis 'Law and sovereignty'

This chapter and the next would argue that sovereignty is a 'conceptual bridge' connecting citizens as rights holders with the sovereign debt regime, especially as international tribunals have been exercising jurisdictions over claims arising from sovereign debt default and restructuring.

Proceeding from the above, the chapter is structured as follows: The next part examines the nature of sovereign debt with particular emphasis on the forms of financial undertakings often assumed by sovereigns under international law. It also addresses issues around who the 'sovereign' is for the purpose of sovereign debt liability. Part 3 draws the relationship between sovereign debt default and sovereign debt restructuring for the purpose of determining international responsibility. Part 4 conceptualises 'sovereign debt governance' using theories of global governance. Part 5 concludes the chapter.

2 Nature and forms of sovereign debt

Since the Middle Ages, borrowing and lending have remained key features of international economic relations.[4] The nature and forms of 'sovereign debt' reflect the historical evolution of international finance in general: bonds, bilateral loan, multilateral loans, export credit financing, resource-for-infrastructure loans, and so forth. Obviously, sovereign debt deals with financial undertakings of states. But what exactly is its legal character?

2.1 Defining sovereign debt

'Sovereign debt'[5] is sometimes called 'public debt', 'national debt', 'international loan', 'external debt' or 'foreign debt', although these terms do not necessarily mean the same thing.[6] Arruda defines 'external debt' simply as 'the sum total of a country's debts resulting from loans and financing contracted with persons resident abroad and guaranteed by its

(2010) 29 *Law and Philosophy* 535-569.

4 For a detail history of sovereign debt, see M Tomz *Reputation and international cooperation: Sovereign debt across three centuries* (2007); SD Krasner *Sovereignty: Organised hypocrisy* (1999); B Eduardo & U Panizza *Costs of sovereign default* (2008); RW Kolb 'Sovereign debt theory, defaults, and sanctions' in RW Kolb (ed) *Sovereign debt: From safety to default* (2011) 3-11.

5 This term is adopted as it is commonly used in the literature.

6 ILA *State insolvency: Options for the way forward* (2010) 9. See also M Bello & ES Deventer 'Reconceptualising sovereign debt in international law' (2022) 26 *Law, Democracy and Development* 250; A De Man & M Bello 'Prioritising socio-economic rights in sovereign debt governance: The obligations of private creditors' (2021) 46 *Journal of Juridical Science* 57.

government.'[7] According to the report of the UN Independent Expert on the Impacts of Foreign Debt on Human Rights, 'foreign (or external) debt is debt owed to non-residents and consists of public, publicly guaranteed, and private non-guaranteed long-term debt, short-term debt and use of IMF credit'.[8] Residence seems to be the main emphasis here. In the same vein, the United Nations (UN) Human Rights Council's (UNHRC) Guiding Principles on Foreign Debt and Human Rights 2012 (GPFDHR) uses the term 'foreign/external debt', and defines it as follows:

> [A]n obligation (including monetary obligation) created under a contractual agreement and owed by a state to a non-resident lender which may either be an international financial institution, a bilateral or multilateral lender, a private financial institution or a bondholder, or is subject to foreign law. It includes:
> (i) loans, that is, advances of funds to the debtor by the lender on the basis of an undertaking that the borrower will repay the funds at some future point (including deposits, bonds, debentures, commercial loans and buyer's credits); and
> (ii) suppliers' credits, that is, contracts whereby the supplier allows the customer to defer payment until sometime after the date on which the goods are delivered or the services are provided.[9]

While Arruda's definition is too narrow, that of the GPFDHR is too broad. Except for the fleeting reference in GPFDHR, all three definitions mentioned above ignore the core element of 'external debt' from a conflict of law perspective, that is, the potential application of different laws in the event of dispute resolution. The International Law Association (ILA) avoids this pitfall by describing 'external debt' from the perspective of the potential application of multiple systems of law in resolving disputes pertaining to such debt. According to ILA, 'external debt is expressed in some foreign currency, typically payable abroad, governed by some external law and subject to the jurisdiction of external courts'.[10] In other words, different systems of law are potentially applicable and these may include the domestic law of the sovereign debtor, law of the lender's country, law of the market, the law of a neutral country or even 'public international

7 Arruda also defines it as 'the foreign money loaned to the government or to companies over several years. It is money loaned with interest.' See M Arruda *External debt: Brazil and the international financial crisis* (2000) 6, 140.

8 UNHRC *Guiding Principles on Foreign Debt and Human Rights* (adopted 5 July 2012) (GPFDHR 2012) para 22.

9 GPFDHR (n 8) sec 1(4).

10 ILA (n 6) 9.

law (or its offshoots)'.[11] This is one of the fundamental features of sovereign debt. As observed by Wood, 'much of the complexity associated with international finance results from the fact that an international loan agreement or bond issue must inevitably involve the laws of more than one country'.[12] Of course, it may be argued that lender's residence by necessary implication entails potential application of different laws.

However, currency variation is also important. Indeed, Tennekoon views sovereign debt from a functional perspective as the 'provision of finance at a financial centre by foreign lenders to foreign borrowers largely in a currency which is not the currency of the financial centre'.[13] The predominant currencies are the USA's dollar, the UK's pound sterling and the European Union (EU)'s euro. Currency is significant in sovereign borrowing because of the concomitant foreign exchange risks and what is termed 'original sin' that followed the debt crises of the 1980s and 1990s.[14] Generally, a country's economic policies, both monetary and fiscal policies, tend to influence its borrowing in foreign currency.[15]

Sovereign debt includes debts owed to supranational entities, governments or their agencies, commercial banks and bondholders.[16] A sovereign's liabilities arising from trade debt, judgment debt or arbitral awards also qualify as sovereign debt.[17]

Importantly, all the above definitions deliberately exclude domestic financial undertakings by either central or sub-national governments and their respective agencies. This explains the use of the term 'foreign/external'.

11 P Wood *Law and practice of international finance* (1980) 1.

12 Wood (n 11) 3-4.

13 RV Tennekoon *The law and regulation of international finance* (1991) 2.

14 Cassard & Folkerts-Landau note that 'several developing countries have experienced the impact of adverse movements in foreign currencies and interest rates in the past 20 years. In the early 1980s, the debt-servicing burdens of countries in Southeast Asia, Latin America, and Africa were severely affected by the steep appreciation of the dollar, the worldwide increase in interest rates, and the sharp decline in commodity prices. The debt crisis resulted in output and employment losses, financial sector crises, and the exclusion of these countries from international financial markets, which was only regained in the early 1990s.' See M Cassard & DFI Folkerts-Landau 'Management of sovereign assets and liabilities' in M Cassard & DFI Folkerts-Landau (eds) *Sovereign assets and liabilities management* (2000) 8-10.

15 CB Rosenberg & M Tirpak *Determinants of foreign currency borrowing in the new member states of the EU* (2008) 7-9; S Furth 'What debt crisis? A default primer for governments' (2012) Heritage Foundation 2, http://report.heritage.org/bg2713 (accessed 2 January 2017).

16 ILA (n 6) 9.

17 As above.

However, domestic debt of national governments is also sovereign debt. These are public debts held mainly by domestic creditors and governed by domestic law. They also include bonds denominated in local currency held by non-residents and foreign currency denominated bonds issued on the local markets. Sovereign domestic debts have lately been on the rise.[18] The distinguishing features of sovereign's domestic debt are that it is usually denominated in local currency making it unsusceptible to foreign exchange risks and, more importantly, it is subject to the exclusive control of the domestic legal system.[19] Thus, domestic debt is not normally subject to the jurisdiction of foreign courts or international courts or tribunals. For this reason, it is outside the scope of this book. However, it is worth noting that domestic debt may be susceptible to adverse legislative measures, change of law or other actions of government that might affect creditors' interests and consequently disincentivise future external loans.[20] Domestic debt is relatively easier to handle through, for instance, 'printing' of more currency although the government may have to contend with inflation that could be a disincentive for external creditors.[21] Therefore, despite its advantages, domestic debt could expose the financial sector to enormous risks, thereby complicating debt management. It is part of overall 'public debt' obligations of a government and, if poorly managed, it could negatively affect a country's economic rating and growth.[22]

2.1.1 Sovereign debt as a contract

Not surprisingly, all the above definitions conceive sovereign debt as a contract. Respect for contracts is one of the bedrocks of international financial law.[23] The contractual element undoubtedly is one of the core features of sovereign debt. Indeed, terms such as 'sovereign debt restructuring', 'rescheduling' and 'default' necessarily imply that their base is contract. Perhaps, it might help to expound on the juridical character of a 'debt'.

The term 'debt' reflects the mutuality of minds inherent in the core philosophy of contract. It is a liability arising from loan contracts.

18 DA Grigorian 'Restructuring domestic sovereign debt: An analytical illustration' IMF Working Paper 23/24, 2023.

19 ILA (n 6) 9.

20 J Olivier 'Debt maturity and the international financial architecture' (2009) 99 *American Economic Review* 2138.

21 ILA (n 6) 3.

22 Standard & Poor's *Default, transition and recovery: 2014 annual sovereign default study and rating transactions* (2015) 26.

23 Rieffel (n 1) 45.

According to *Black's law dictionary*, a 'debt' is 'a liability on a claim … a specific sum of money due by agreement or otherwise … the aggregate of all existing claims against a person, entity or state'.[24] Invariably, a loan is a contract structured on asymmetrical performance, that is, one party lends and the other subsequently repays over a period of time.[25] In the words of Sommers and others, 'the lender performs his part of the bargain at the outset, while the performance of the debtor is stretched over a long period'.[26] This is the nature of asymmetric contracts in terms of expectations of, and performance by, the parties. There always is a maturity period.[27] It entitles creditors to receive interest payments before the maturity. Thereafter, the legal effect of performance or non-performance (as the case may be) sets in. Thus, time is of the essence. Aguir notes that 'payments are typically contingent only on time'.[28]

However, sovereign debt is a loan *sui generis* that, as the book will argue in chapter 4, exposes the limits of contract as a form of governance. First, it is different from private loans because of its multi-jurisdictional element as observed above.[29] The League of Nations' Committee on International Loan Contracts stressed that 'the essential criterion of what is an international loan is the fact of issue in a country or countries other than that of the borrower'.[30] It is worth stating that the Committee was specifically referring to a 'market loan' (bonds), which is different from intergovernmental, bilateral and multilateral loan contracts, that is, facility agreements between governments or between governments and international organisations.

Second, sovereign debt largely depends upon the goodwill and creditworthiness of the debtor. It is not a secured loan in the same way as

24 B Garner (ed) *Black's law dictionary* (1999) 410.

25 Buchheit, eg, notes that 'most lending arrangements involve starkly asymmetrical performance by the parties: The lender's obligations are heavily front-loaded (they lend the money) while most of the borrower's obligations are performed thereafter (they must pay the money back over time).' See L Buchheit 'Law, ethics, and international finance' (2007) 70 *Law and Contemporary Problems* 2.

26 D Sommer and others 'Conflict avoidance in international loans and monetary agreements' (1956) *Law and Contemporary Problems* 463.

27 IMF *Handbook on securities statistics* (2015) 9-10, https://www.bis.org/publ/othp23.pdf (accessed 20 April 2018).

28 M Aguir 'Sovereign debt: Empirical facts' (2015) 2-3, https://scholar.princeton.edu/sites/default/files/maguiar/files/lecture_1_empirics.pdf (accessed 13 January 2018).

29 Wood (n 11) 3-4.

30 League of Nations Report of the committee for the study of international loan contracts (1939) 6, http://biblio-archive.unog.ch/Dateien/CouncilMSD/C-145-M-93-1939-II-A_EN.pdf (accessed 11 June 2018).

a private loan that requires collateral security for creditors to fall back onto in the event of default.[31] The International Centre for the Settlement of Investment Disputes (ICSID) arbitration tribunal in the *Postova Banka* case pointedly notes that 'creditors have much more limited legal resources if a sovereign debtor fails to make a contracted payment'.[32] Resource-backed loans could be seen as exceptions in this regard, as commodities or resources are often used to secure repayment.

Third, unlike ordinary private loans, sovereign debt could have implications for a country's monetary policy.[33] Finally, it is also peculiar in terms of 'the inequality of status between the parties to the contract although this is not of the essence of the loan contract''[34] Perhaps one exception is inter-governmental, bilateral loans as international law presumes formal equality of status among states. Even here, it might be observed, there is inequality, at least in terms of financial capacity, structural economic power, and geopolitical status of the parties. Generally, loan tends to bring unequal powers or persons together.[35] As will be examined subsequently, the status and capacity of the parties under international law may even affect the validity of the loan agreement and could incentivise repudiation.

Barry has captured both the contractual element and parties' distinct status and capacity when he defines 'sovereign debt' as follows:

> Sovereign debt obtains when agents have lent resources to the national government of sovereign state and these agents have claims to repayment that have at least prima facie legal validity. The claim to repayment, in turn,

31 Borchard famously remarked that '[h]e who contracts with the sovereign or the state has nothing but the state's honour and credit as a sanction ... [T]he contract is ... a gambling contract, depending for its performance entirely on the good faith and capacity of the debtor to pay' quoted in DS Kamlani 'The four faces of power in sovereign debt restructuring: Explaining bargaining outcomes between debtor states and private creditors since 1870' PhD thesis, London School of Economics and Political Science, 2008 20-38.

32 *Poštová Banka AS & Istrokapital SE v The Hellenic Republic* (2011) ICSID Case No ARB/13/8 (*Poštová Banka* case) paras 318-324.

33 RM Nelson 'Sovereign debt in advanced economies: Overview and issues for US Congress' (2013) 2-3. Black notes that excessive and poorly managed sovereign debt could affect the entire economy through 'higher borrowing costs for households, banks and corporations; lower economic growth; financial repression; credit rating downgrades; weakening of banking systems.' See L Black 'The changing nature of sovereign debt' (2012), https://www.tiaa.org/public/pdf/tcam_the_changing_nature_of_sovereign_debt_0.pdf (accessed 23 August 2018).

34 M Schmitthoff 'The international government loan' (1937) 19 *Journal of Comparative Legislation and International Law* 180.

35 Kamlani (n 31) 43-48.

> depends on the existence of a debt contract involving the national government and the lender. On the borrower's side, sovereign debt contracts are entered into by national government (sovereign debtors). On the lender's side, they are entered into by national governments (official/bilateral creditors), International Financial Institutions such as the International Monetary Fund, World Bank or regional development banks (multilateral creditors), or commercial banks and bondholders (private).[36]

Therefore, while the position or status of the debtor remains constant (that is, sovereign borrower) there is variation in the class of creditors depending on the type and structure of the loan. This too is critical in the context of post-default measures, including resort to adjudication especially at arbitral institutions. It is also important in the debt relief context.

2.1.2 Classification of creditors

International creditors generally are divided into two classes: official and non-official creditors. It is important to examine these briefly to understand their policies or approaches to sovereign debt and the extent of the influence of each creditor.

Official creditors

These are either bilateral or multilateral lenders established by laws or multilateral agreements or arrangements. They are governed by their respective charters or articles of agreement and answerable directly or indirectly to a government or group of governments. Their loans are often called 'official loans'. The prominent multilateral creditors are the International Monetary Fund (IMF), the World Bank (WB) and regional development banks (RDBs) such as the African Development Bank (AfDB), the European Bank for Reconstruction and Development (EBRD), the Inter-American Development Bank (IDB) and the Asian Development Bank (ADB).[37] Although each has its distinct mandates and lending policies according to the enabling charter or articles of agreement, lending to sovereigns is one of their predominant businesses. They also provide development aid, as well as concessional and non-concessional loans (that is, in terms of the rates and maturity).[38] Importantly, IMF and

36 C Barry 'Sovereign debt, human rights and policy conditionality' in RE Goodin & JA Fishkin (eds) *Political theory without borders* (2015) 107.

37 E Borenstein and others (eds) *Living with death: How to limit the risks of sovereign finance* (2005) 105-107.

38 Borenstein and others (n 37) 106.

WB have what is called a 'preferred creditor' status because their loans are accorded priority over other loans.[39]

IMF provides temporary financing to its members facing balance of payment difficulties and occasionally lends to low-income countries for poverty reduction.[40] IMF lending normally involves policy prescriptions called 'conditionalities' to enable the borrower to resolve the balance of payment problem and repay the loan on time.[41] This is the core feature of IMF lending. In particular, the policy prescriptions concern borrower's structural and macro-economic fundamentals such as 'macro-economic stabilisation, monetary, fiscal and exchange rate policies, including the underlying institutional arrangements and closely related structural measures, and financial system issues related to the functioning of both domestic and international financial markets'.[42] Many have argued that this and other similar policy prescriptions tend to compromise sovereign autonomy of the borrower over its economy.[43]

Bilateral official lending occurs largely through national development or aid agencies and government-guaranteed loans through export credit agencies.[44] In most cases, these agencies operate in developing countries in need of finance for development purpose. The appellation 'creditor nations' is often used to describe developed countries that offer bilateral government-to-government loans or through government-backed agencies, and they renegotiate the terms of the loan, if the need arises, mainly through the Paris Club.[45] In essence, both multilateral and bilateral lenders have either direct or indirect governmental support.

Before the establishment of these multilateral lenders, direct government-to-government loan was the predominant official loan. Today China is the largest bilateral lender through its policy banks: China Development Bank (CDB) and the Export and Import Bank of China.[46]

39 JM Rutsel-Silvestre *The financial obligation in international law* (2015) 494.

40 B Emine *Sovereign default, private sector creditors and the international financial institutions* (2009) 6.

41 Emine (n 40) 6-7.

42 Emine (n 40) 7.

43 Krasner (n 4) 33, 127-130.

44 Emine (n 40) 7.

45 Krasner (n 4) 127-150.

46 S Horn and others 'China's overseas lending' Kiel Institute for the World Economy Working Paper (2019) 1, http://hdl.handle.net/10419/200198 (accessed 20 October 2023).

In the past, bilateral debt obligations may arise following defeat in a war, that is, as a war indemnity.[47] Non-payment by sovereign debtors could lead to wars or other forms of state intervention.[48] The latter included taking direct control of revenue sources of the sovereign borrower by the sovereign creditor.[49]

However, over the past few years there has been an upsurge of multilateral and bilateral lenders. For instance, China, Brazil, Russia, India and South Africa (BRICS) have formed the New Development Bank in 2014. China also led over 90 other countries to form another multilateral lender called Asian Infrastructure Investment and Development Bank (AIIDB).[50]

China's bilateral lending practices are fundamentally different from conventional bilateral loans. Apart from the infrastructural loans under the Belt and Road Initiative, China's policy banks also provide resource-backed loans especially to resource-rich African states. These loans are usually repaid either in kind (that is, through mineral resources) or from future incomes to be derived from such resources.[51]

Non-official creditors

Non-official creditors are otherwise called private lenders because they are mainly business-oriented private or institutional investors and commercial banks having little or no commercial connection with their home government, although the latter often offer them some form of 'protection' and, sometimes, provide funds in the form of bail-out in order to rescue systematically important creditors facing imminent collapse.

47 This technically negates the notion of *contract* as, often, the 'borrower' lacks the requisite will or power to express its consent. See G Mallard '"The gift" revisited: Marcel Mauss on war, debt, and the politics of reparations' (2011) 29 *Sociological Theory* 227.

48 WMC Weidemaier 'Contracting for state intervention: The origins of sovereign debt arbitration' (2010) 73 *Law and Contemporary Problems* 335.

49 Krasner (n 4) 38, 127-150.

50 China controls over 30% of shareholding and 26% of the voting rights while India and Russia are the second and third largest shareholders respectively. See BBC 'China-led AIIB Development Bank holds signing ceremony' *BBC* (2015), https://www.bbc.com/news/world-asia-33307314 (accessed 12 December 2017).

51 Horn and others (n 46) 1-5; D Mihalyi and others *Resource-backed loans: Pitfalls and potential* Resource Governance Institute 2020, https://resourcegovernance.org/sites/default/files/documents/resource-backed-loans-pitfalls-and-potential.pdf (accessed 20 October 2023).

Private lending to sovereigns may be divided into two classes: bond issue and direct term loan agreement with a bank or group of banks.[52] Because of the complex issues relating to sovereign bonds, especially in sovereign debt adjudication, a detailed overview of bonds is deferred to the next sub-section. Bonds are fixed-income securities by which a holder extends money to an entity for a defined period of time and at certain interest rates.[53] Bonds possess the following characteristics:

(a) It is a debt instrument in a bearer form which seeks to enable the holder to possess direct legal rights as against the issuer.
(b) It contains the promise of the issuer that a sum specified on the face of the bond (the principal amount) will be paid to the holder of the bond on a specified maturity date or at an earlier redemption date.
(c) It contains a promise that the issuer will pay interest on the principal to the bondholder.
(d) It is transferable on the secondary markets because 'title to the notes passes on delivery.[54]

In the context of sovereign debt, Waibel defines bonds as a 'country debt instrument acknowledging indebtedness and promising repayment of principal and interest on an earlier advance of money'.[55] With growing internationalisation of capital markets around the world, bondholders could come from virtually all parts of the world or from different countries. This naturally adds to the complexity of sovereign debt especially in the event of default. Nevertheless, capital markets have provided alternative borrowing outlets and sovereigns are taking advantage of this to raise capital.[56]

The other form of private lending to sovereigns is the international loan contract. This is a loan constituted by agreement between the sovereign borrower and the lending commercial bank or banks through syndication.[57] The latter normally occurs where the loan is so huge that a

52 Wood (n 11) 177, 233.

53 R Andritzky 'Government bonds and their investors: What are the facts, and do they matter?' IMF Working Paper WP/12/158 (2012) 2-5.

54 Tennekoon (n 13) 161-162.

55 M Waibel 'Opening Pandora's box: Sovereign bonds in international arbitration' (2007) 101 *American Journal of International Law* 719.

56 Tanaka notes that '[i]nternational bonds have rapidly replaced syndicated bank lending as the main source of finance for emerging market economies (EMEs). Eurobonds now account for close to 90% of new international debt issuance by EME sovereigns.' See M Tanaka 'Bank loans versus bond finance: Implications for sovereign debtors' (2006) 116 *The Economic Journal Conference Papers* C149-C171.

57 Rieffel (n 1) 188-219.

single bank cannot or, on account of the magnitude of the risk involved, does not wish to provide the entire sum, hence a group of banks would form a syndicate (with a lead manager and an agent bank) to provide the entire sum. In such a situation 'each bank commits to contribute a proportion of the loan under the terms of a single loan agreement between the lending syndicate and the borrower'.[58] Syndicated loans have also increased over the years.[59]

Apart from the official character of the loan and the creditors, there are other notable differences between these classes of creditors. The priority accorded to some multilateral creditors as 'preferred creditors' is one. Second, while private creditors are principally driven by profit, the objectives of the official creditors are often dictated by wider development, and sometimes political, considerations as may be provided by their constitutive documents.[60] With respect to multilateral creditors, for instance, Emine notes that their objectives include 'promoting development and social welfare' although this 'may lead them to lend more in support of development projects, to lend in riskier environments, and to lend more in hard times relative to private lenders'.[61] However, it should be noted that these same wider, development-driven objectives are influenced, both directly and indirectly, by structural economic powers and geopolitical considerations as evidenced, for instance, by the stark variation in the voting powers of IMF member states.[62] Third, non-official creditors have no IMF-type 'conditionalities' that are common features of modern official (especially multilateral) policy lending.

It is also worth pointing out that apart from their non-official status and common objective of profit making, non-official creditors have little in common. For instance, syndicated bank loans are different from bonds. Bondholders can sell the bonds on the secondary markets. This flexibility allows investors, including so-called 'vulture funds', to acquire sovereign bonds.[63] Vulture funds purchase debts at a discount, frustrate restructuring, and litigate to recover the full value of the debt plus interest.

58 Wood (n 11) 256.

59 D Gong and others 'A foreign currency effects in the syndicated loan markets of emerging economies' (2018) 52 *Journal of International Financial Markets, Institutions and Money* 211-212.

60 The Agreement Establishing the European Bank for Reconstruction and Development (AEEBRD) 1990 (as amended in 2013), eg, stipulates that members should 'be committed to the fundamental principles of multiparty democracy, rule of law, respect for human rights and market economies'. See AEEBRD (2013) art 1.

61 Emine (n 40) 109.

62 Articles of Agreement of the IMF art XII secs 1, 2, 3 & 5.

63 *Postova Banka* case (n 32) para 338.

In addition, bonds are transferable.[64] This means that 'a holder in due course acquires the property in the instrument and all rights under it free of any defects in title of a prior holder or defences available to the issuer against a prior holder'.[65] Bondholders are entitled to a return on their investments in the form of interest. However, the status of bondholders as 'investors' has generated controversy.[66]

State-owned banks and funds

State-owned banks and funds have become very active in sovereign financing. It is not difficult to classify government-owned banks as 'official creditors' as they usually are wholly owned by governments and often function in pursuance of their government's interests. Government-owned funds such as sovereign wealth funds (SWFs), however, may not fit into this traditional categorisation because they function, and are mainly structured, as fund managers and institutional investors with diverse investment portfolios (for instance, real estate, equities, government bonds and fixed-income assets, and so forth), strategies and risk appetite. They are government investment vehicles established to manage state-owned financial assets usually derived from trade surpluses and proceeds from development of natural resources and export of commodities.[67] SWFs serve different investment purposes: budget stabilisation, socio-economic development and saving and reserve objectives.[68] Their objectives usually determine their investment strategies. For instance, Saudi Arabia's Public Investment Fund has been described as a mix of venture capital, hedge fund and start-up fund.[69]

Many resource-rich countries have been investing in sovereign bonds through their sovereign funds. Although SWFs may not fit the characterisation of creditors as official or non-official creditors because of their peculiar purposes and commercial orientation, they usually serve

64 Tennekoon (n 13) 146.

65 Wood (n 11) 183. See also *McKenty v Van Horenback* (1911) 21 Mn R 360.

66 Eg, *Abaclat & Others v The Argentine Republic* (2011) IIC 804. See the dissenting opinion of Prof Georges Abi-Saab, para 269, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC5313_En&caseId=C95 (accessed 12 November 2017) (*Abaclat* dissenting opinion); *Postova Banka* case (n 32) paras 336-342.

67 E Klitzing and others 'Demystifying sovereign wealth funds' in US Das and others (eds) *Economics of sovereign wealth* (IMF 2010) 3-13, 4.

68 IMF 'Sovereign wealth funds: A work agenda' (29 February 2008) 5, https://www.imf.org/external/np/pp/eng/2008/022908.pdf (accessed 17 September 2023).

69 G Hay & K Kwok 'Saudi's $700 billion PIF is an odd sort of sovereign fund' *Reuters* 21 September 2023.

the interests of their governments. Indeed, the case of *Law Debenture Trust* has shown how government-owned funds can act as the *alter egos* of their states. It also exposes the inadequacy of the traditional categorisation under the dominant private law paradigm.

The English Court of Appeal found in that case that the sole subscriber to the bonds 'was, and (the evidence showed) was always intended to be, Russia'.[70] On the other hand, the UK Supreme Court, on appeal, held that 'the obligation in contract is not owed to the Russian Federation but to an English corporation which is administering a trust of which the Russian Federation is the current beneficiary'.[71] This seemingly opposing descriptions re-echoed the origin of the dispute. In this case, the Russian government, through its trustee, acted as a typical hold-out bondholder when Ukraine proposed to restructure all its debts in 2015. Russia, holding a US $3 billion Ukrainian bonds, argued that the bonds were in the form of official concessionary loans that entitle it to a preferential treatment. Ukraine, on the other hand, countered and argued that the bonds were commercial in nature and that, therefore, Russia, as a bondholder, deserved no preferential treatment.[72]

Faced with a difficult situation, IMF agreed to classify the bonds as 'official bilateral loan' because 'the $3 billion Eurobond comes from Russian sovereign wealth fund, so it is official'.[73] It seems, despite the challenges presented by this case, IMF was unwilling to depart from the traditional characterisation of creditors as either official or non-official.

Russia's trustee, therefore, initiated a claim for summary judgment before an English court seeking to recover the debt. It was clear that the trustee bondholder acted commercially in pursuance of an understanding between two sovereign states (Ukraine and Russia). It was used as an instrument to achieve a governmental purpose although, based on the terms of the bonds, Russia was not a primary party. The High Court entered summary judgment in favour of Russia. On appeal, the Court of Appeal held, in the context of economic duress, that '[i]t is inevitable that

70 See *Ukraine v Law Debenture Trust Corp Plc* (2018) para 200.

71 *Ukraine v Law Debenture Trust Corp Plc* (2023) UKSC 11 para 203, http://www.supremecourt.uk/cases/docs/uksc-2018-0191-0192-judgment.pdf (accessed 20 October 2023).

72 A Lerrick *A solution to the Ukraine-Russia bond standoff* (2015).

73 S Rao & C Pink 'London or Paris: Which is the club for Russia's Ukraine debt?' *Reuters* 26 March 2015.

the demands made by states, even in commercial contexts, will commonly if not invariably be influenced by their political interests'.[74]

Therefore, although not entirely non-official in sovereign financing, SWFs operate like private creditors with both direct and indirect governmental support. They possess a hybrid character. The case of *Trust Debenture* shows the inadequacy of the traditional division of sovereign debts into official and non-official. In the words of Gelpern, Russia cleverly configured the debt 'to be able to have it both ways: its private in form and official in substance [and therefore] they have the choice of being an official or a private creditor'.[75] This hybrid characterisation has been criticised because 'special treatment to "official" bondholders is at odds with the bond's anonymous nature, violates CACs and *pari passu* clauses, and results in collusion between vulture funds and official bondholders'.[76] Nevertheless, IMF's treatment of official bondholders as official creditors has additional implications for debt restructuring. For instance, official bondholders would be subjected to IMF and Paris Club restructuring principles.

Apart from the peculiarities of SWFs, the Chinese government's loans may also not neatly fit into the traditional categorisation of creditors as either official or non-official. This is because Chinese loans are not the typical bilateral concessionary loans. Chinese policy banks usually lend at commercial rates with shorter maturities and collateral clauses designed to secure repayment sometimes from the proceeds of commodity exports.[77]

From the above, it can be argued that the dominant contractual framework under the private law paradigm struggles to accommodate the evolving categories of creditors as well as the emerging trends in sovereign financing.

2.1.3 Sovereign debt as investment

It seems that a creditor, whether official or non-official (or even 'hybrid'), would consider lending as an investment. However, in sovereign debt adjudication before arbitral tribunals, this is not as straightforward as it seems, especially with respect to sovereign bonds. This is because only sovereign debt instruments that qualify as 'investment' under the

74 *Ukraine v Law Debenture Trust Corp Plc* (2023) para 150.

75 Quoted in Rao & Pink (n 73).

76 H Yu '"Official bondholder": A vulture culture in sovereign debt restructuring after vulture funds?' (2017) 16 *Washington University Global Studies Law Review* 535, 552.

77 Horn and others (n 46) 2-5.

Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) and relevant bilateral investment treaties (BITs) can clothe ICSID tribunals with the necessary jurisdiction to adjudicate.[78] In other words, a sovereign debt that is the subject of adjudication must not only provide a prior contractual cause of action, but must equally be capable of standing as a treaty obligation to enable invocation of ICSID jurisdiction in claims against the sovereign debtor.[79] In the *Postova Bank* case the ICSID tribunal held that 'loans and bonds are distinct financial products'.[80] Similarly, in his dissenting view in the *Abaclat* case, Prof Abi-Saab argues thus:

> Affirming the jurisdiction of ICSID Tribunals over such instruments, would extend it over a vast new field. It would cover virtually all capital market transactions, ranging from standardized financial instruments, such as shares and bonds to structured and derivative products, such as hedges and credit default swaps. It would thus open the way to converting them from specialized tribunals, dealing with disputes arising out of a special type of investment, into commercial tribunals of general jurisdiction, covering all manners of financial transactions, including the most speculative varieties, which have nothing to do, in fact are light years away from the economic investment for the encouragement of which the ICSID Convention was concluded.[81]

Prof Abi-Saab's position arose from his interpretation of article 25 of the ICSID Convention which confers jurisdiction on ICSID tribunals regarding 'legal dispute arising directly out of an investment'. However, the ICSID Convention does not define the term 'investment'. It is therefore debatable whether sovereign bonds qualify as 'investments'. Scholars are divided

78 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (adopted 18 March 1965) (ICSID Convention 1965) art 25.

79 *Abaclat & Others v The Argentine Republic* (2013) 52 ILM 667 (henceforth, reference will be made to the ICSID report), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC5313_En&caseId=C95 (accessed 12 November 2017) (*Abaclat* majority).

80 *Postova Banka* case (n 32) paras 337-338 where the tribunal distinguished the two concepts thus: 'The creditor in a loan is generally a bank or group of banks, normally identified in the pertinent agreement. Bonds are generally held by a large group of creditors, generally anonymous. Moreover, unlike creditors in a loan, the creditors of bonds may change several times in a matter of days or even hours, as bonds are traded. The tradability of loans or syndicated loans is generally limited, and precisely because loans are generally not tradable, they are not subject to the restrictions or regulations that apply to securities … [L]oans involve contractual privity between the lender and the debtor, while bonds do not involve contractual privity. The lender has a direct relationship with the debtor – in the case of public debt, the state – as party to the same contract – the loan agreement – while in the issuance of bonds the contractual relationship of the state is with the intermediaries.'

81 *Abaclat* dissenting opinion (n 66) paras 268-269.

on this issue. Some have argued that bonds are not typical investments, while others argued that sovereign bonds qualify as 'investments' because of their developmental objectives. The former, as upheld by Professor Abi Saab in *Abaclat*, maintain that treating sovereign bonds as 'investments' for the purpose of ICSID arbitration would encourage hold-out behaviour and vulture fund litigations, thereby undermining debt restructuring. The majority decision in *Abaclat*, however, treated bonds as 'investments' and held that 'relevant criteria should be where and/or for the benefit of whom the funds are ultimately used, and not the place where the funds were paid out or transferred'.[82]

This issue will be elaborated in chapter 5. For present purposes, it seems unarguable that, taken outside the investment arbitration controversy, 'sovereign bonds' are financial instruments meant, ideally, to serve as an investment for the purpose of economic development of the sovereign debtor and its citizens. They are sovereign debt, which is a financing tool that links current and future generations. This developmental perspective of sovereign debt aligns with the global imperatives for sustainable development.

2.2 Validity and legitimacy of sovereign debt

One of the recurring issues in sovereign debt governance has been the sovereignty-compromising effect of debt and the powerlessness of states to resist it.[83] From the above discussion, it is obvious that sovereign debt simply is a debt incurred by a sovereign. The powers, capacity and identity of the latter and its conceptual basis have generated debates

82 *Abaclat* majority (n 79) paras 346-374.

83 Citing instances of the 19th century bankruptcies in Greece, Ottoman Empire, Balkan states and Nicaragua, Krasner has argued that 'the autonomy of borrowing states was compromised in two ways. First, rulers in borrowing states signed contracts that included invitations giving lenders some control over domestic fiscal activities including the collection and allocation of tax revenues ... Secondly, if borrowers defaulted then rulers in creditor nations could intervene using coercion, or in some cases imposition to seize direct control of revenue sources including custom houses.' With respect to official creditors, he argues that 'the terms included in contractual arrangements between borrowing countries and IFIs have often involved detailed specifications of domestic economic behaviour. The IMF, the World Bank and other institutions, have not simply been concerned about getting repaid. One of their central missions has been the restructuring of domestic institutions and policies of borrowing states. In some instances, IFIs officials have occupied offices within the bureaucracies of states that have signed agreements. Some of the missions of IFIs are not so different from the bankers' committees that assumed control of state finances in the Balkan states in the 19th century or the customs receivership in Nicaragua.' See Krasner (n 4) 34 & 127-130. See also M Waibel *Sovereign defaults before international courts and tribunals* (2011) 44.

raising questions about the validity and legitimacy of certain sovereign debts.[84] Interestingly, the word 'sovereignty' has always been a trigger for controversy. Likewise, the term 'sovereign' in the context of sovereign debt is not easily amenable to a comprehensive definition.

In this connection, Lienau raises a fundamental question: 'Who, really, is the "sovereign" in sovereign debt?'[85] This is not only an abstract jurisprudential question, but an important question that is central to the sovereign debt regime because, first, the validity of sovereign debts as well as the legitimacy and moral orientation of governments of such debtors are issues that often feature in sovereign debt adjudication.[86] Second, determining the place of socio-economic rights in sovereign debt governance should logically start with an understanding of the relationship between the 'sovereign' and the rights holders. Third, discussions on sovereign debt tend to ignore the surrounding legitimacy concerns and, as observed by Lienau, this puts the sovereign debt regime in an 'uncomfortable situation of functioning without a clear theory of what it means by "sovereign"'.[87] The famous *Tinoco* case[88] confirms the conceptual difficulty of identifying the sovereign for the purpose of international responsibility. As the book will examine in chapter 5, this case raised both theoretical and practical questions about recognition of sovereign government and the validity of the financial undertakings of such government under international law. The *Law Debenture* case has also raised critical questions on the role of international law in determining the validity of sovereign debt under domestic law.[89]

Fourth, the 'shrinking' economic powers of states in the face of growing internationalisation of institutions and complex regional integration, to some extent, has blurred the traditional relationship between the state and its citizens. The firm control of the Greek financial system by the Euro Group (that is, the European Commission and the European Central

84 O Lienau 'Who is the "sovereign" in sovereign debt? Reinterpreting a rule-of-law framework from the early twentieth century' (2008) 33 *Yale Journal of International Law* 63 (Lienau 2008); O Lienau 'The challenge of legitimacy in sovereign debt restructuring' (2016) 57 *Harvard International Law Journal* 151 (Lienau 2016); K Raffer 'Odious, illegitimate, illegal, or legal debts: What difference does it make for international chapter 9 debt arbitration?' (2007) 70 *Law and Contemporary Problems* 221-247; LC Buchheit and others 'The dilemma of odious debts' (2007) 56 *Duke Law Journal* 1237-1245.

85 Lienau 2008 (n 84) 64.

86 Lienau 2016 (n 84) 151; Raffer (n 84) 221-247.

87 Lienau 2008 (n 84) 64.

88 *Tinoco Arbitration Case (Britain v Costa Rica)* (1924) 18 *AJIL*147 150-151 (*Tinoco* case).

89 *Ukraine v Law Debenture Trust Corp Plc* (2023) paras 157-280.

Bank) and IMF following the debt default of 2015 even with overwhelming citizens' opposition to such control by way of constitutional referendum, are illustrative of the complex dynamism of this new relationship in the context of sovereign debt governance.[90]

Finally, the question is important because of the controversy over the so-called 'odious debt' (that is, illegitimate, illegal, non-consensual, war or morally-reprehensible debts mostly incurred by despotic regimes) that was re-ignited following Iraq's debt incurred during Sadam Hussein's era, or even the debate about the validity of apartheid-era debt on post-apartheid South Africa.[91] A similar controversy arose with respect to the juridical status of the Democratic Republic of the Congo (DRC) for the purposes of sovereign debt liabilities.[92] One must remember that although both 'people' and 'government' are constitutive elements of the juridical state under international law,[93] the two could have distinct (even competing) interests depending on the nature and orientation of the government. It is also possible to have creditors using the concept of sovereignty to their advantage. For instance, in *Ukraine v Law Debenture Trust Corp Plc*[94] the trial court held that 'a state's capacity to borrow rests in its sovereignty'. In this case, Russia was the sole subscriber of Ukraine's bonds, but Ukraine challenged the validity of the bonds on the grounds, among others, of

90 ME Salomon & R Howse 'Odious debt, adverse creditors, and the democratic ideal' London School of Economics and Political Science (2018) 2-27, http://ssrn.com/abstract=3291009 (accessed 20 June 2019).

91 J Hanlon '"Illegitimate" loans: Lenders, not borrowers, are responsible' (2006) 27 *Third World Quarterly* 211-226; R Howse *The concept of odious debt in public international law* (2007) 1-20; DC Gray 'Devilry, complicity, and greed: Transitional justice and odious debt' (2007) 70 *Law and Contemporary Problems* 137-164.

92 This arose when vulture funds sued the DRC over sovereign debt in the UK and US courts to seize assets belonging to a state-owned company. In *FG Hemisphere v DRC* (2012) the Privy Council held that the government's mining company was not responsible for the government's debt. See R Neate 'Privy Council blocks "vulture fund" from collecting $100m DRC debt' *The Guardian* (2012), www.google.con.ng/amp/s/amp.theguardian.com (accessed 13 July 2018). In the US, the following suits were also filed and similar issues including sovereign immunity were raised: *Af-Cap Inc v Republic of Congo* (2004) 383 f 3d 361 (5th Circuit); *FG Hemisphere Associates v Republique du Congo* (2006) 455 f 3d 575 (5th Circuit); and *Kessington International Ltd v Republic of Congo & Others* (2007) EWCA Civ 1128 (Court of Appeal).

93 Art 1 of the Convention on Rights and Duties of States (CRDS) (adopted 26 December 1933) which stipulates that a state should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) the capacity to enter into relations with other states.

94 *Ukraine v Law Debenture Trust Corp Plc* (2018) Court of Appeal para 200, https://www.judiciary.uk/wp-content/uploads/2018/09/law-debenture-v-ukraine-final-judgment14-sept-18.pdf (accessed 28 March 2020).

duress arising from the unlawful use of force, economic pressure and unlawful trade measures imposed on Ukraine by Russia.

For these reasons, understanding and locating the 'sovereign' is important for our conception of sovereign debt governance.

2.2.1 Concept of sovereignty

'Sovereignty' and all that it entails are vested in the 'sovereign'. However, defining and identifying the 'sovereign' is a theoretically-charged endeavour.[95] According to Rodrigues, since Bodin, scholars have always 'felt that a human being must always be at the disposal or is necessarily a part of something sovereign: the King, the Nation, the People, the State, the Race, the Proletaria'.[96] Scholars have developed several theories to explain and rationalise the concept of sovereignty.[97] Others advocated its total abandonment in legal theory.[98] For instance, Henkin once remarked that the concept should be relegated to 'the shelf of history as a relic of an earlier era'.[99] It, therefore, is not surprising that the concept has earned several appellations: a 'curse and source of conceptual confusion',[100] a concept of 'nuisance value',[101] a 'discredited old idea',[102] 'an annoying

95 EN Kurtulus *State sovereignty: Concept, phenomenon and ramifications* (2005) 67.

96 JA Rodrigues 'International law and sovereignty: Remarks on the persistence of an idea' (1921-1969) 47 *Proceedings of the American Society of International Law* 18.

97 See generally M Loughlin 'The erosion of sovereignty' (2016) 45 *Netherlands Journal of Legal Philosophy* 57; Eleftheriadis (n 3) 535; P Eleftheriadis *Hart on sovereignty* Oxford University Legal Research Paper Series Paper 85 (2013) 2-14, http://ssrn.com/abstract=2321612 (accessed 12 June 2018); CE Merriam *History of the theory of sovereignty since Rousseau* (2000); N MacCormick 'Beyond the sovereign state' (1993) 56 *Modern Law Review* 1-18; B Kingsbury 'Sovereignty and inequality' (1998) 9 *European Journal of International Law* 599-625; SD Krasner 'Rethinking the sovereign state model' (2001) 27 *Review of International Studies* 17-42; D Sarooshi 'The essentially contested nature of the concept of sovereignty: Implications for the exercise by international organisations of delegated powers of government' (2004) 25 *Michigan Journal of International Law* 1107; JJ Turner *Sovereignty: Moral and historical perspectives* (2014) 101-114.

98 Eleftheriadis (n 3) 535-537.

99 L Henkin *International law: Politics and values* (1995) 9-10.

100 B Elshtain 'Sovereign god, sovereign state, sovereign self' (1991) 66 *Notre Dame Law Review* 1356.

101 Rodrigues (n 96) 18.

102 Eleftheriadis argues that '[w]hen taken seriously, sovereignty cannot be successfully adjusted and refined to fit our times. Philosophically speaking, sovereignty is and has always been incompatible with the rule of law.' See Eleftheriadis (n 3) 538-539.

anachronism',[103] an 'organised hypocrisy',[104] and so forth. However, it is an important concept that is at the heart of modern international law and probably is here to stay.[105] The debate has mostly been about its actual character and *locus*, not its value or relevance.

For a start, there is no universally-accepted definition of 'sovereign' or 'sovereignty',[106] nor is there a trace of its exact origin.[107] Indeed, it is conceptualised from various perspectives.[108] The focus here is on juridical sovereignty, that is, the legal capacity, status and formal standing of a sovereign in international economic relations and before tribunals.[109] Broadly, Kurtulus defines 'juridical sovereignty' as 'a condition in which an agent – a state or a similar entity – according to law is supreme within a certain territory and independent of agents outside of it'.[110] Werner adopts a similar approach, seeing a sovereign in the image of an individual with freedom to act and freedom from the actions of others.[111] It is in this sense the independence that, 'on the one hand, gives states a freedom to act and, on the other, protects the freedom of states against the actions of others'.[112] It is a 'claim to authority … institutionalised, defined and redefined within the framework of international law'.[113] Werner uses the concept in two interrelated ways: as a description of the international status of a political community as a sovereign, and 'to endow states with certain fundamental rights, powers and duties'.[114]

While adopting an international economic law (IEL) approach, Qureshi and Ziegler define it as 'juridical independence from the authority of other participants in international economic relations … and as constrained and augmented by the principle of equality as between

103 JA Rabkin *Law without nations? Why constitutional government requires sovereign states* (2005) 45.

104 Krasner (n 97) 18, 26

105 Kingsbury (n 97) 599 (calling it 'the normative foundation of international law').

106 Loughlin (n 97) 58-59.

107 For the pre-Bodin history of the concept, see D Grimm *Sovereignty: The origin and future of a political concept* (2015) 3-10.

108 JC Cohen 'Whose sovereignty? Empire versus international law' (2004) 18 *Ethics and International Affairs* 1 & 9; Cassel (n 3) 60-61.

109 CRDS 1933 art 1.

110 Kurtulus (n 95) 84.

111 WG Werner 'State sovereignty and international legal discourse' in IF Dekker & WG Werner (eds) *Governance and international legal theory* (2004) 125-126.

112 Werner (n 111) 126.

113 As above.

114 Werner (n 111) 155.

states'.[115] In particular, they define economic sovereignty as 'the totality of the economic powers of a state, as well as its equal status in international economic relations'.[116]

These definitions are by no means adequate. In particular, they failed to disaggregate the constitutive elements of the juridical sovereign and proceeded upon the assumption or premise that 'the state' is simply the sovereign despite the contentious debate about this matter.[117] Therefore, a further contextualisation is important. At least we now know that 'the state' is a possible 'contender' or 'candidate' (for lack of a better term) for the position of the sovereign.

However, to identify other possible contenders and properly situate socio-economic rights of citizens within the sovereign debt scheme, one must approach the notion of sovereignty from two perspectives, namely, internal and external.[118] These perspectives are not mutually exclusive; they are mutually reinforcing, indicating incidents and manifestations of sovereign powers within and outside a country.[119] In other words, there is no controversy regarding the unitary nature of internal and external sovereignty because 'possession of one form is considered to imply, by definition, possession of the other'.[120] Rodriguez points out that 'sovereignty is one … No state can be sovereign externally and not be sovereign internally.'[121] In essence, possession of external sovereignty presupposes the possession of internal sovereignty, but the reverse is not necessarily the case.[122]

The internal and external aspects are only indicative of the extent of territorial limitations of operation as well as the legal field or environment

115 AH Qureshi & AR Zeigler *International economic law* (2011) 49.

116 Qureshi & Zeigler (n 115) 48-49.

117 Sarooshi (n 97) 1109-1111; Loughlin (n 97) 59.

118 There are various categorisations of sovereignty in the literature. See, eg, Rodrigues (n 95) 19; Kurtulus (n 95) 81; Krasner (n 97) 21; Sarooshi (n 97) 1108-1109.

119 By this approach, we avoid 'dichotomous questions' as to whether sovereignty is juridical or factual, qualitative or quantitative, divisible or indivisible, etc. Indeed, the various classifications serve different theoretical, contextual purposes. See Kurtulus (n 95) 62-63.

120 Kurtulus (n 95) 62.

121 Rodrigues (n 96) 19-20.

122 This falls under the doctrine of recognition of state and government that could have legal implications for lenders regarding which 'regime is entitled to borrow under the loan agreement … whether the borrower can be sued in the courts of a country that does not recognise it … and whether the acts of the borrowing state or its judiciary can be given effect to by non-recognising countries'. See Woods (n 11) 114.

in which the sovereign functions and manifests its sovereignty. This is important because it would help one to determine the status of the rights holders and their relationship with the duty bearers on both domestic and international planes. Although external and internal sovereignty are intricately connected, for analytical purposes, it is important to examine them separately.

The external sovereign

A 'sovereign' in the external sense is relatively straightforward: A juridical state is widely considered the 'sovereign' in international law, although this is increasingly being questioned in light of the growing influence, powers and rights of IGOs and the explosive growth of NSAs.[123] Nevertheless, 'the state', regardless of its constituents, forms, population, moral orientation and constitutional structure, is treated as the sovereign just like individuals and other legal persons in the domestic system. Indeed, it is not uncommon to compare a sovereign state with an individual under domestic law.[124]

Narrowed down to international financial law, external sovereignty is a juridical state's international economic status and its capacity to engage in international financial transactions and to operate externally.[125] A sovereign in the external sense possesses certain legal features, namely, sovereign equality,[126] sovereign immunity,[127] independence and

123 AR Taylor 'A modest proposal: Statehood and sovereignty in a global age' (1997) 18 *University of Pennsylvania Journal of International Economic Law* 750. Krasner observes that compromise of traditional external sovereignty occurs through 'convention, contracting, coercion and imposition' and 'examples of transgressions of autonomy include bondholders' committees that regulated financial activities in some Balkan states and elsewhere in the nineteenth century, International Monetary Fund (IMF) conditionality'. See Krasner (n 97) 18.

124 Grotious personified the state and held that 'like persons, sovereign states were not only free agents, but also bound by their agreement, *pacta sunt servanda*', quoted in MW Janis 'Sovereignty and international law: Hobbes and Grotius' in J Macdonald (ed) *Essays in honour of Wang Tieya* (1993) 398-399.

125 Qureshi & Ziegler (n 115) 64.

126 Kingsbury (n 97) 603-605.

127 Rule of *par in parem non habet imperium* ('one equal entity does not have sovereign authority over another such entity'): See *Compania Naveira Vascongada v SS Cristina* (1938) AC 485; *Trendtex Trading Corp Ltd v Central Bank of Nigeria* (1977) 1 QB 529; *Kuwait Airways Corp v Iraqi Airways Co* (2001) 3 WLR 117; *I Congresso del Partido* (1983) 1 AC 244; sec 3 of UK's *State Immunity Act* 1978 (which exempts 'commercial transactions' of sovereigns from immunity and defines 'commercial transactions' to include 'any loan or other transaction for the provisions of finance and any guarantee or indemnity in respect of such transaction or any other financial obligation'). See also

non-interference.[128]

In the *Nicaragua* case the International Court of Justice (ICJ) re-affirms that 'the principle of non-intervention involves the right of every sovereign state to conduct its affairs without outside interference'.[129] This is a solid customary international norm.[130] In addition, the UN Charter affirms the 'sovereign equality' of states.[131] This implies equality and equal treatment of all sovereigns under international law.[132] In other words, 'equality' here means, among others, that all 'sovereigns' have the same capacity to acquire rights, assume obligations and bring or respond to claims within the framework of international conflict-resolution mechanisms.[133] This extends to human rights issues. The doctrine of sovereign equality also is 'an articulation of the basic human rights of individuals whatever their origins [because] the state is not a mere artificial construct; it comprises in the end an aggregate of individuals'.[134]

Notwithstanding the elements of sovereign equality, independence, and non-interference, today the new vision of external sovereignty is that of cooperation and interdependence among nations, and between states and NSAs, especially in the areas of investment and finance.[135] In fact,

International Law Commission (ILC) *UN materials on jurisdictional immunities of states and their property* (1982) annex paras 33, 35 & 84; USA's *Foreign Sovereign Immunities Act* 1976.

128 UN Charter (signed 26 June 1945 and entered into force October 1945), art 2(1); *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v United States of America*) 1986 ICJ Reports 186 (*Nicaragua* case).

129 *Nicaragua* case (n 128) 197.

130 *Customs regime between Germany and Austria* (Advisory Opinion) (1931) PCIJ Reports Series 57; *Aaland Island* case (1920) Report of International Commission of Jurists League of Nations Official Journal Special Supplement 3; *Wimbledon* case (1923) PCIJ Series A 25; *DRC v Belgium* (2002) ICJ Reports; *Island of Palmas* case *(Netherlands v United States)* (1928) 2 Reports of International Arbitral Awards 829.

131 Arts 2(1) & (7) of UN Charter 1945 provide that '[n]othing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter'.

132 Qureshi & Zeigler (n 115) 64.

133 International Law Commission (ILC) Draft Declaration on the Rights and Duties of States art 13; CRDS (1933) art 1; *Charter of the Organization of American States* arts 10-23; *SS Lotus* case (*France v Turkey*) (1927) PCIJ 10, 18; *Island of Palmas* case 829; *Corfu Channel* case *(UK of Great Britain and Northern Ireland v Albania)* (Assessment of Legality of Compensation) (1949) ICJ Report 244; *Legality of the Use or Threat of Nuclear Weapons* (Advisory Opinion) (1996) ICJ Reports 225.

134 Qureshi & Zeigler (n 115) 71-72.

135 W Mattli 'Sovereignty bargains in regional integration' (2000) 2 *International Studies Review* 149-180.

today, more than ever before, states are driven into partnerships largely for investments, economic development and cooperation, especially through BITs.[136] Their sovereign status empowers them to do so. Their external sovereignty conditions their participation in the international community's economic and financial spheres of activities. Their financial commitments are part of these activities. This is, however, not a priceless sovereign act. Some even consider it as a dispersal rather than a confirmation of sovereign powers as NSAs have forced themselves into the international economic space. In the words of Taylor, '[m]onetary and other policy decisions which affect a country's economic wellbeing are no longer the sole province of the sovereign, but are increasingly affected by the direct and indirect demands of external actors'.[137] In addition, part of this new vision of external sovereignty is 'responsible sovereignty', which espouses the responsibility of states to protect their citizens, promote their welfare and adhere to minimum international norms, including those emanating from the UN and its agencies.[138]

Finally, the important point with respect to sovereign debt adjudication is that the state as sovereign is subject to the rules of international law. The state has the capacity to sue and be brought before an international tribunal over actionable claims. It has the capacity to change its internal conditions through its external actions. In particular, its investment treaty and financial obligations are products of the exercise of external sovereignty.[139]

However, as far as exercising external sovereignty is concerned, states no longer are the exclusive players with responsibilities under international law. The flexibility of the concept of sovereignty enables a 'transfer' of certain elements of external sovereignty to IGOs. Some scholars have extended this to NSAs, including non-governmental organisations (NGOs), commercial and investment banks, portfolio managers and foreign investment companies.[140] This form of 'transfer' is what Taylor calls the 'exercise elements of sovereignty' that does not affect the status

136 UNCTAD 'Recent trends in international investments agreements and investor-state dispute settlement' (2015), http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf (accessed 21 December 2017).

137 Taylor (n 123) 749.

138 J Falk 'Sovereignty and human dignity: The search for reconciliation' in H Steiner & P Alston (eds) *International human rights in context: Law, politics, morals* (2000) 582.

139 T Gazzini 'States and foreign investment: A law of treaties perspective' in S Lalani & RP Lazo (eds) *The role of the state in investor-state arbitration* (2014) 23.

140 Taylor (n 123) 768.

of the sovereign as a state, nor confer statehood on NSAs.[141] However, it enables NSAs to have both rights and responsibilities under international law. This, as it will be argued in the subsequent chapters, extends to socio-economic rights responsibilities for private international creditors.

The internal sovereign

It is appropriate to examine the relatively more tendentious aspect of sovereignty to, at least, identify and situate the status of citizens within the discourse. The internal perspective, unlike the external one, is replete with jurisprudential controversies, largely because of the criticality of individual rights and liberties and the imperative to recognise citizens' status and to protect them. In addition, locating the *sovereign* has implications for the governance structure and the economic and political stability of a state. From the internal perspective, sovereignty could be described as the supreme authority vested in an institution, a person, or a body (sovereign) covering the powers to make, change, enforce and alter pre-existing laws in a state and to govern generally within its territorial compass.[142] It deals with the freedom and autonomy of an entity to organise itself within its territory.

Relying on the Charter for Economic Rights and Duties of States (CERDS) and the Declaration of International Law Concerning Friendly Relations and Cooperation among States in accordance with the United Nations Charter,[143] Qureshi and Ziegler consider the following as the major incidents of internal economic sovereignty of a state: permanent sovereignty over its natural resources; sovereignty over its non-natural resources, including financial services and human resources; economic self-determination and governance; and non-interference in its economic affairs.[144] It is from these 'resources' that repayment of debts can be made. As will be argued later, this implies that debt repayment resources are subject to the principle of sovereignty because it is about *ownership*.

Internal sovereignty is increasingly being impacted by norms emanating from international economic organisations such as IMF and

141 Taylor (n 123) 800-809; A Cooley & H Spruyt *Contracting states: Sovereign transfers in international relations* (2009) 19.

142 EA Martin *Oxford dictionary of law* (2003) 469.

143 Declaration of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the United Nations Charter (adopted 24 October 1970).

144 Qureshi & Ziegler (n 115) 56.

WB.[145] In this regard, it extends to monetary sovereignty by which a state can freely issue currency and determine its monetary and exchange rate policies.[146] However, none of these really tells one who the sovereign is within the state structure and its relationship with the citizens.

There are three dominant schools of thought on this issue: the 'rule of law', the popular and the statist schools. The latter is concerned with the original source of authority as well as the effective control of a state and its government without much consideration given to the legitimacy and moral orientation of such government.[147] The *Tinoco* case seems to favour this approach, although Lienau has argued that the award took an 'intermediate, rule of law' position by which a sovereign is 'constituted and constrained by law, rather than "above the law" as presented' by the statists.[148]

It is important to point out that the intellectual ingredients of the statists' conception of sovereignty could be traced to Bodin, Hobbes, Bentham, Grotious and others.[149] For example, Bodin postulated that in every political community there must be a determinate, indivisible sovereign authority whose powers are decisive and recognised as rightful or legitimate basis of authority in such community.[150] Whether in autocracy, monarchy, democracy or whatever form of government, sovereignty rests on the 'sovereign prince' with supreme power in the hierarchical organisation of political community.[151] Unlike the Aristotelian position, Bodin maintained that peoples, free or slaves, could be citizens because 'acceptance of a common sovereign is what defines citizens'.[152] He recognised that sovereignty could be limited by natural law.[153] Hobbes,

145 Qureshi & Ziegler (n 115) 63.

146 J Fink 'Concepts, hybridisation, principles, and the rule of law: New literature on international monetary and financial law' (2014) 12 *International Journal of Constitutional Law* 1054-1070.

147 Merriam (n 97) 44.

148 Lienau 2008 (n 84) 78.

149 Bentham famously remarked that 'by a sovereign I mean any person or assemblage of persons to whose will a whole political community are (no matter on what account) supposed to be in a disposition to pay obedience', quoted in MDA Freeman *Lloyd's introduction to jurisprudence* (2001) 227.

150 S Beaulac *Power of language in the making of international law: The word 'sovereignty' in Bodin and Vattel and the myth of Westphalia* (2004) 1-125.

151 Beaulac (n 150) 107-115.

152 Rabkin (n 103) 56.

153 MP Ferreira-Snyman 'The evolution of state sovereignty: A historical overview' (2006) *Fundamina* 6.

however, claimed that a sovereign is illimitable whatsoever.[154] He located sovereignty in the Leviathan (the state) and argued that a 'commonwealth without sovereign power is like a word without substance'.[155] Accordingly, the sovereign represents the citizens and his actions represent their will; opposing or questioning him amounts to a contradiction. Hobbes reasoned thus:

> He that doth anything by authority from another doth therein no injury to him by whose authority he acteth; but by this institution of a commonwealth every particular man is the author of all the sovereign doth; and, consequently, he that complaineth of injury from his sovereign complaineth of that whereof he himself is the author, and therefore ought not to accuse any man but himself.[156]

This means that there is unity between the sovereign and the citizens. For the statists, ultimate authority must rest somewhere.

Following the same line of reasoning, Austin conceives the sovereign as a political superior without limitations, commanding and entitled to obedience from all subjects.[157] Interestingly, Austin located sovereignty ultimately in the people.

In summary, the statists' conception fits into the positivists' theoretical premise.[158] Sovereignty has no moral undertones in positivist international law.[159] It is strictly about *de facto* control of the state and of persons within the state as recognised by other states. The propriety or moral content of the process of assuming such control is immaterial. By extension, the legality, legitimacy or moral propriety of the constitutional order and its internal structures or processes are equally immaterial in constituting and determining the internal sovereign and its powers as well as its contractual obligations, and capacity for external relations and commitments.

International creditors would obviously favour the statists' conception of the sovereign because it ensures sovereign continuity, repayment

154 P Zagorin *Hobbes and the law of nature* (2009) 66-67.

155 Janis (n 124) 393-394.

156 Zagorin (n 154) 68.

157 Freeman (n 153) 242-254.

158 P Payandeh 'The concept of international law in the jurisprudence of HLA Hart' (2010) 21 *European Journal of International Law* 967; HJ Morgenthau 'Positivism, functionalism, and international law' (1940) *American Journal of International Law* 260, 275.

159 I Brownlie *Principles of public international law* (1990) 288.

predictability and relative certainty in their relationship with the state regardless of who the sovereign is.[160] This understanding might give creditors a 'conceptual monopoly' in the sovereign debt scheme.[161] It is noteworthy that except for a few (for instance, Austin) the statists do not locate sovereignty in the people. This is curious because, logically, without the people, sovereignty (and the sovereign) would be meaningless, perhaps inconceivable.

Unlike the statists, the popular school adopts a pragmatic approach and insists that sovereignty goes beyond the factual situations of effective control of government and powers over the people. It simply is about the will or consent of the people, 'a "sovereign people", whose consent provides legitimacy to government and authority for its decisions'.[162] This is grounded in the social contract theory as espoused by Rousseau.[163] It is a value-oriented, people-centric conception and, I will subsequently argue, it tends to accommodate human rights, public policy, and democratic concerns. It is also more in agreement with external sovereignty, as examined above.

Locke, Habermas and Waldron seem to favour popular sovereignty.[164] According to Habermas, '[t]he source of all legitimacy lies in the democratic law-making process, and this in turn calls on the principle of popular sovereignty'.[165] This principle 'requires that the people should have whatever constitution, whatever form of government they want'.[166] Indeed, there is contemporary evidence supporting this popular conception: Instances of street protests toppling democratically-elected governments in Europe and the Middle East between 2010 and 2015 are clear examples.[167] Therefore, the people are conceived as the sovereigns according to this approach. In the words of Merriam, 'it is difficult to see how a government can exist without the people as its basis'.[168] The jurisprudence of the historical and sociological schools provides the

160 N Tideman & S Lockwood 'The legitimate repudiation of a nation's debts' (1993) 19 *Eastern Economic Journal* 251.

161 Lienau 2008 (n 84) 103, 108.

162 Lienau 2008 (n 84) 76.

163 Merriam (n 97) 24-26; Rabkin (n 103) 66-69.

164 Elifthariadis 2010 (n 3) 537, 562; J Locke *Two treatises of government* (1823) paras 149-150.

165 Quoted in Eleftheriadis 2010 (n 3) 537.

166 Eleftheriadis 2010 (n 3) 537.

167 See, eg, 'Albanian protesters block roads' *Reuters* 2018, www.reuters.com (accessed 16 July 2018); 'Arab uprisings' *BBC* 2018, www.bbc.com (accessed 16 July 2018).

168 Merriam (n 97) 50-51.

theoretical ingredients for this view. As Savigny argued, 'the state originally, and according to nature, arises in a people, through a people, and for a people'.[169] This is even more relevant in the context of sovereign debt as the people literally pay for such debt as taxpayers.[170] They bear the brunt of any non-fulfilment of human rights commitments in the event of a sovereign debt crisis. Therefore, their consent is important for both the legitimacy of the state and the legitimacy of sovereign debts incurred by the state. The consent of the people is reflected in their acceptance of a constitutional order. It is this order that guarantees their rights as citizens.

However, the people are not the sovereigns in traditional international law as they cannot conduct international transactions or even borrow in their capacity as such on behalf of or in the name of their state.[171] A valid question might also be asked: Who are the people?[172] In the context of this work, the beneficiaries (or the presumed beneficiaries) of sovereign loan contracts are the people or the citizens. Viewed from a sustainable development perspective, loans are contracted, and debts are forgiven primarily for development purposes.

Theoretically, there is no conflict between the people and the state's external sovereignty. Indeed, both the statists who recognise the state as the sovereign and the populists clearly align with the external aspect of sovereignty as examined above. This is because the people theoretically constitute the state, and they empower their government to function externally on their behalf and in their interests. This approach is reflected in many democratic constitutions around the world. The US Constitution, for example, recognises 'We the people' as the basis of constitutional authority.[173] The same obtains under, for example, the Indian, South African and Nigerian Constitutions.[174]

It must be admitted that this by no means is the universal position. However, a fictional 'social contract' (the constitution) provides the basis for agency between the state and its citizens in the realm of international

169 Merriam (n 97) 51.

170 Arruda (n 7) 8-9.

171 *Vienna Convention on the Law of Treaties* (adopted 23 May 1969) (VCLT 1969) arts 6 & 26.

172 Loughlin (n 97) 59.

173 Preamble to the US Constitution. See also *Alden v Maine* (1999) 527 US 706, 714; *United States v Curtiss-Wright Export Corp* (1936) 299 US 304, 316-317; *School Exchange v McFadden* (1812) 11 US 116.

174 Constitution of the Republic of India 1948 (as amended) Preamble; Constitution of the Republic of South Africa, 1996, Preamble; Constitution of the Federal Republic of Nigeria 1999, Preamble & sec 14(2)(a).

relations, including loan contracts with other states or legal actors.[175] It is this fictional arrangement that enables the state to contract legitimately on behalf of its citizens and to assume financial obligations. In most cases, it equally is the basis for the domestic protection of human rights.

This conception of the sovereign may not be favoured by international creditors as it creates a cloud of uncertainty in the event of transition of government or succession of state.[176] As noted earlier, creditors prefer sovereign continuity in order to guarantee the repayment of loans or fulfilment of other financial commitments, regardless of the legal basis, legitimacy or moral orientation of the government. In addition, this conception is equally problematic as it can disincentivise repayment or future loan contracts and create a chaotic market for sovereign debt. Also, the extent to which this conception accommodates public policy, democratic and human rights concerns is unclear.

Finally, Lienau champions the 'rule of law' school in the context of sovereign debt.[177] While interpreting (or reinterpreting) the *Tinoco* case, Lienau advances a new 'rule of law' framework on sovereignty for the purpose of sovereign debt.[178] According to her, 'a sovereign government's international action is valid and binding on successor governments only if it has followed its own internal legal requirements for competence or ratification [because] an international contract signed in contravention of a government's own internal laws … [risks] repudiation by a subsequent regime'.[179] The UK Supreme Court seems to follow this reasoning in the *Ukraine v Law Debenture* case. Lienau appears to ignore the theoretical implication of this framework as it suggests that international law automatically enforces domestic law whatever the latter's content or basis.[180] This invariably requires a monist approach on the relationship

175 JR Oyola & M Sudreau 'Fiduciary relations' in C Esposito and others (eds) *Sovereign financing and international law: The UNCTAD principles on responsible sovereign lending and borrowing* (2013) 213-235; EJ Criddle & E Fox-Decent 'A fiduciary theory of *jus cogens*' (2009) 34 *Yale Journal of International Law* 331-249.

176 Eg, following a revolutionary change of government and the new government decides to disregard a prior loan agreement entered into by the previous one. See Wood (n 11) 14.

177 Lienau 2008 (n 84) 78.

178 As above.

179 As above.

180 Woods made the same point that 'where the loan is made to an instrumentality of an existing government such as a department, in principle one looks to the constitution of the state to determine whether for example, a loan entered into by the ministry of finance of the state is a commitment of the state or a commitment of separate state entity'. See Wood (n 11) 36.

between domestic law and international law.[181] In addition, it appears to assume a minimum regularity and governmental order in all states. Lienau argues that 'the sovereign is not absolute in the sense of being able to break its own laws and is, at least to some degree, *defined* by its law'.[182] She notes that an additional requirement identified in the *Tinoco* case is that 'a sovereign debt contract may not be internationally enforceable unless it intends to serve a legitimate governmental purpose'.[183]

This, however, raises questions as to the source of such legality and what exactly 'legitimate governmental purpose' entails. The latter is nebulous and can mean anything. It seems to contemplate a sovereign operating under 'international rule of law'.[184] This too is problematic, although it appears to have captured the attention of the framers of the UNHRC's GPFDHR.[185] It is submitted, therefore, that this approach fails to locate the sovereign and is not, *stricto sensu,* a 'conception' of sovereignty but a process of validating a sovereign's external relations and financial undertakings. It seems to neatly fit into the notion of external sovereignty.

Moreover, Lienau does not identify or locate the sovereign although she seems to suggest that the government, regardless of its character, shape or democratic credentials, is the sovereign so long as it is a government 'both constituted and constrained by law'.[186] Finally, the proposition can hardly stand in the absence of the other two conceptions. For, it seems inconceivable to determine compliance with 'internal laws' without recourse to the source, processes and legitimacy or authority of the institutions that actually produced such laws. Not surprisingly, Lienau admitted that this 'rule of law' framework is 'to a large degree an empty standard'.[187] It is even more difficult to convince scholars who believe that 'sovereignty is and has always been incompatible with the rule of law'.[188]

Nonetheless, the rule of law perspective offers a valuable analytical insight. It may be added that the internal laws enacted by legitimate constitutional authority, regardless of its democratic character or credentials, should be sufficient to determine the legality of a government's

181 M Shaw *International law* (2008) 131.

182 Lienau 2008 (n 84) 81, 108 (emphasis in original).

183 Lienau 2008 (n 84) 82 (noting Taft J's statement that the loan was for personal and not for legitimate government purposes).

184 Lienau 2008 (n 84) 81-83.

185 GPFDHR (2012) para 45.

186 Lienau 2008 (n 84) 78.

187 Lienau 2008 (n 84) 79 footnote 57.

188 Eleftheriadis 2010 (n 3) 539.

financial undertakings. In the *Law Debentures* case, for instance, Ukrainian (debtor) local law allegedly was not followed. The same case also shows that international norms determine the legality of a sovereign's external financial undertakings as the UK's Court of Appeal cited UN Charter as potential basis for invalidating bonds on ground of duress stating that 'the use of force by one state against another and also the threat of use of force by one state against another are in violation of a general norm of international law with the status of *ius cogens*'.[189] It seems, from this case, that both domestic law and international law are relevant in determining the validity of the external financial undertakings of a state.

The idea of sovereignty in international law also extends to the state's obligations towards its citizens because, as argued earlier, 'the government' and 'the state' are only conceivable with 'the people' in mind. International law has recognised this imperative especially in the area of human rights.[190]

It is clear from the above analysis that 'sovereign debt' is not a private debt. In this context, a debt incurred by state-owned private entities may not necessarily qualify as a sovereign debt unless it is backed by a sovereign guarantee. It would arguably qualify as a public debt insofar as citizens' interests are at stake. The government and the citizens constitute the state and, presumably, have a common stake in loans procured in the name of the juridical state. The government serves as an agent of the people.[191] In other words, it is presumed to transact in the name of its people. Whoever heads the government of a state in any particular time is not *the* sovereign, but only represents the citizens (the principal) as a core component of sovereignty. In other words, regardless of where sovereignty actually lies, it is difficult to divide the government and the citizens for the purpose of constituting the juridical state in international law.

Importantly, sovereignty, in both internal and external senses, conveys the inherent capacity and freedom of the state to act and transact with other international actors. For instance, a sovereign's act of joining an international organisation does not derogate from its juridical capacity as

189 *Ukraine v Law Debenture Trust Corp Plc* (2018) para 165.

190 Eg, under the UN Charter and International Bill of Rights and regional instruments. See, eg, UN Charter 1945 Preamble and arts 1(3), 55, 56, 63 & 77; Universal Declaration 1948 Preamble and arts 1, 2, 6, 8, 28 & 21; International Covenant on Civil and Political Rights (adopted 16 December 1966 and entered into force 23 March 1976) (ICCPR) Preamble; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966 and entered into force 3 January 1976) (ICESCR) Preamble. See also Criddle & Fox-Decent (n 175) 331.

191 Oyola & Sudreau (n 175) 213-235.

such. The state parties confer juridical capacity on such organisation. An illustrative example is the membership of IMF or even ICSID pursuant to the ICSID Convention. However, juridical sovereigns are not the exclusive players with powers and rights under international financial law; IGOs and NSAs equally have significant influence, rights and responsibilities under the law.[192] As sovereigns have the powers to engage in international financial transactions and to make claims or respond to claims under international law, so do IGOs and NSAs. Benvenisti notes that 'sovereignty is embedded in a broader, more encompassing global order that serves as a source not only of powers and rights, but also of obligations'.[193] In other words, with sovereign rights come sovereign responsibilities. This extends to the fulfilment of financial commitments by way of repaying debts to creditors.[194] The 'rule of law framework' amplifies this notion of sovereignty although, as shown above, it is not free from criticism.

In this context, therefore, the sovereign is the juridical borrower against whom performance is expected and, at the instance of creditors, is legally enforceable at recognised judicial fora. Conversely, it can make claims against creditors. Thus, debt qualifies as 'sovereign debt' where the borrower is a sovereign recognised under international law and is capable of exercising external sovereignty in the interests of the development and welfare of its people who, for this purpose, qualify as its principal.

3 Sovereign debt default and international responsibility

Having established the capacity of the borrowers and lenders in international financial law, it is now appropriate to turn to international responsibilities arising from sovereign debt crisis, particularly the events of default and restructuring. As observed at the beginning of this chapter, events in recent decades have shown that it is tenuous to claim that sovereigns do not go bankrupt.[195] Cases abound on this.[196] The impacts of sovereign insolvency can be devastating, especially for the citizens.[197]

192 Taylor, eg, sees sovereignty as a property, 'a combination of several powers, rights, and obligations, just as property ownership is a "bundle of sticks" that are divisible and transferable between original and subsequent owners'. See Taylor (n 123) 754.

193 B Benvenisti 'Sovereigns as trustees of humanity: On the accountability of states to foreign stakeholders' (2013) 107 *American Journal of international Law* 301.

194 Eleftheriadis 2010 (n 3) 536.

195 RP Buckley 'The bankruptcy of nations: An idea whose time has come' (2009) 43 *The International Lawyer* 1189-1216.

196 Cohen & Valadier (n 1) 3-8.

197 ILA (n 6) 6.

It starts with debt default, which often leads to restructuring.[198] Because of the technical confusion in this area, it is important to briefly contextualise sovereign debt default and sovereign debt restructuring in relation to a debtor's liability under international law.

3.1 Sovereign debt default and sovereign debt restructuring

In a strict sense, sovereign debt default occurs when a sovereign fails to make payment of either interests or the principal sums as they become due.[199] A default could be cured if the missed payment is subsequently effected, thereby averting potential crisis. However, default goes beyond missed payments. Indeed, it could broadly mean 'failure to perform a legal obligation specified in a contract or by law'.[200] Events of default are typically categorised into two forms: breach of the loan contract such as failure to pay sums when they become due or non-compliance with contractual undertaking or inaccuracy of warranty; and anticipatory events of default like insolvency.[201] Sovereign insolvency concerns the inability to repay debts as they fall due.[202] This usually leads to a sovereign debt crisis. A debt crisis occurs 'when a country's foreign exchange reserves are insufficient to meet its foreign exchange payment obligations over an extended period of time'.[203]

Importantly, an inability to pay or honour sovereign debt obligations invariably touches on the terms and credibility of loan contracts, or definitive bonds, as the case may be. There would be legal implications for such actions. Unlike the breach of a private loan contract that is remediable through domestic legal infrastructure, this raises a fundamental concern under international law because, in the words of Silard, a problem arises 'when a basic principle of international law that agreements should be observed comes into conflict with the sovereign debtor's inability to obtain the foreign exchange resources needed to meet the external debt service obligations of the economy subject to its control while simultaneously meeting its other governmental responsibilities'.[204]

198 C Trebesch and others *Sovereign debt restructurings 1950-2010: Literature survey, data, and stylized facts* (2012) 7-8; Tideman & Lockwood (n 160) 251-256.

199 Trebesch and others (n 198) 8.

200 PT Treadway *Investing in the age of sovereign defaults: How to preserve your wealth in the coming crisis* (2012) 2-3.

201 Wood (n 11) 64, 165.

202 ILA (n 6) 8.

203 MW Waibel 'Sovereign debt restructuring' (2003) *Seminar Internationales Wirtschaftsrecht* 6.

204 SA Silard 'International law and the conditions for order in international finance: Lessons of the debt crisis' (1989) 23 *The International Lawyer* 967.

It is worth pointing out that contrary to the argument that sovereign debt default is always a matter of choice,[205] the structure of the international economic system, to a large extent, dictates sovereign debtors' choices. Sovereigns usually default on their debts as a result of a combination of factors (both exogenous and endogenous) such as worsening terms of trade; poor macro-economic fundamentals; an increase in borrowing cost; the structure of a sovereign's debt portfolio; market perceptions; poor sovereign ratings; and systemic economic crisis.[206] It could also come as a 'knock-on contagion effect' from other countries, especially in a currency union.[207] It may be argued that these are all manifestations of the global economic structure.

A default could be partial (such as not servicing a part of the debt) which is different from a complete halt on all payments.[208] Debt default is different from outright repudiation that entails an official announcement of suspension of payments by the debtor. The sovereign debtor announcing repudiation usually feels justified on some grounds. Repudiation may involve political considerations or even issues of validity and legitimacy, as illustrated in the case of *Law Debenture*.

On the other hand, sovereign debt restructuring in most cases follows events of default. In simple terms, it is 'an exchange of outstanding sovereign debt instruments, such as loans or bonds, for new debt instruments or cash through a legal process'.[209] It has two key components: debt rescheduling, which means extension of maturity period or shifting contractual payments to the future; and debt reduction, which means a reduction in the nominal value of the old debt.[210] Thus, while default mostly is a unilateral action or inaction of the indebted sovereign, restructuring often involves negotiation between the debtor and its creditors following or in anticipation of default. Indeed, the emerging trend today, under the enhanced contractual governance framework, is for bonds to make provision for 'Aggregated CAC' and 'modified *pari-passu'* clauses *ex ante* to facilitate smooth debt restructuring.[211] This followed the adoption of standard aggregated collective action and *pari-passu*

205 Kolb (n 4) 3, 7.

206 US Das and others 'Restructuring sovereign debt: Lessons from recent history' (2012) 6, https://www.imf.org/external/np/seminars/eng/2012/fincrises/pdf/ch19.pdf (accessed 23 August 2018).

207 ILA (n 6) 4.

208 Trebesch and others (n 198) 8.

209 Trebesch and others (n 198) 7.

210 As above.

211 ILA (n 6) 37.

clauses by the International Capital Market Association (ICMA) and IMF.[212] The modified *pari-passu* clause excludes the obligations to make rateable payments, while the Aggregated CACs enables the adoption of different voting procedures during restructuring of bonds including by way of 'single-limb' voting (that is, single voting across different debt instruments), 'two-limb' voting (that is, requiring voting support for each series and across all series of bonds to be restructured) and 'series-by-series' (for each bond series) voting procedures.[213]

212 The new standard ICMA clauses vary depending on the governing law (ie English or New York). ICMA Model *Pari-Passu* Clause (English Law) provides: 'The Notes are the direct, unconditional and unsecured obligations of the Issuer and rank and will rank *pari passu*, without preference among themselves, with all other unsecured External Indebtedness of the Issuer, from time to time outstanding, provided, however, that the Issuer shall have no obligation to effect equal or rateable payment(s) at any time with respect to any such other External Indebtedness and, in particular, shall have no obligation to pay other External Indebtedness at the same time or as a condition of paying sums due on the Notes and vice versa.' For bonds governed by New York law the standard provision is as follows: 'The Bonds constitute and will constitute direct, general, unconditional and unsubordinated External Indebtedness of the Issuer for which the full faith and credit of the Issuer is pledged. The Bonds rank and will rank without any preference among themselves and equally with all other unsubordinated External Indebtedness of the Issuer. It is understood that this provision shall not be construed so as to require the Issuer to make payments under the Bonds rateably with payments being made under any other External Indebtedness.' The standard ICMA Aggregated CAC (Single Series – English Law) clause is as follows: 'Any modification of any provision, or any action in respect of, these Conditions or the Bond Documentation in respect of the Notes may be made or taken if approved by … a majority of at least 75% of the aggregate principal amount of outstanding Notes.' ICMA Aggregated CAC (multiple series – single limb voting) provides: '[a]ny modification to the terms and conditions of, or any action with respect to, two or more series of Debt Securities Capable of Aggregation may be made or taken if approved by a Multiple Series Single Limb Extraordinary Resolution (ie a resolution considered at separate meetings of the holders of each affected series of Debt Securities which is passed by a majority of at least 75 per cent of the aggregate principal amount of the outstanding debt securities of all affected series of Debt Securities (taken in aggregate)).' ICMA Aggregated CAC (multiple series – two limb voting) provides: '[a]ny modification to the terms and conditions of, or any action with respect to, two or more series of Debt Securities Capable of Aggregation may be made or taken if approved by a Multiple Series Two Limb Extraordinary Resolution (ie a resolution considered at separate meetings of the holders of each affected series of Debt Securities … which is passed by a majority of: (A) at least 662/3 per cent. of the aggregate principal amount of the outstanding debt securities of affected series of Debt Securities Capable of Aggregation (taken in aggregate); and (B) more than 50 per cent of the aggregate principal amount of the outstanding debt securities in each affected series of Debt Securities Capable of Aggregation (taken individually).' See in general ICMA Standard Aggregated Collective Action Clauses, Pari Passu and Creditor Engagement Provisions for the Terms and Conditions of Sovereign Notes governed by English Law and New York Law, http://www.icmagroup.org/assets/documents/Resources/ICMA-Standard-CACs-Pari-Pasu-and-Creditor-Engagement-Provisions (accessed 20 September 2023).

213 IMF 'Strengthening the contractual framework to address collective action problems in sovereign debt restructuring' (October 2014) 15-22.

The new clauses have been endorsed by IMF and G-20 and have featured in over 80 per cent of new sovereign bonds issues since 2014.[214] IMF actively promotes and monitors the inclusion of the new clauses. In 2019 it found that the 'inclusion of enhanced clauses has become the norm for international sovereign bond issuances'.[215] However, bonds governed by Japanese and Chinese laws have not followed this trend.[216] In addition, there are significant outstanding bonds without the 'enhanced clauses'. Despite the widespread adoption of these clauses, IMF has found that their inclusion in bond issuances had no impact on the market.[217]

The 'preferred creditor' status of multilateral creditors and the Paris Club's comparability of treatment of all creditors are critical principles in modern sovereign debt restructuring.[218] For the purpose of restructuring, creditors are organised and divided into three categories: The Paris Club (a group of creditor nations); the London Club (an *ad hoc* group of commercial banks); and *ad hoc* bondholder committees occasionally formed to pursue the interests of bondholders.[219]

3.2 Responsibilities arising from events of default

As observed earlier, sovereign loan contracts recognise sovereign debtors as subjects of international law. Therefore, non-performance or non-compliance with any international financial commitment would ordinarily trigger the sovereign's international responsibility.[220] However, this is not as straightforward as it may appear. For analytical purposes, it is important to understand what actually amounts to an 'international responsibility' and an 'international financial obligation' in the context of sovereign debt.

214 IMF 'Fourth progress report on inclusion of enhanced contractual provisions in international sovereign bond contracts' IMF Policy Papers 2019, https://www.imf.org/en/Publications/Policy-Papers/Issues/2019/03/21/Fourth-Progress-Report-on-Inclusion-of-Enhanced-Contractual-Provisions-in-International-46671 (accessed 14 September 2023).

215 IMF (n 213) 4.

216 IMF (n 213) 5.

217 IMF (n 213) 3-7.

218 Rutsel-Silvestre (n 39) 492.

219 ILA (n 6) 11.

220 M Waibel *Sovereign defaults before international courts and tribunals* (2011) 273-297.

3.2.1 Nature of international responsibility

Over the years, international law has come to recognise new subjects capable of exercising rights and responsibilities.[221] According to Amador, 'responsibility is a consequence of the breach or non-observance of an international obligation. Its imputability therefore necessarily depends upon who is or are the subject or subjects of that obligation.'[222] Historically, the principle developed largely from the desire of credit (and capital) exporting nations to protect their nationals and their investments, assets or properties.[223] In the past, this responsibility triggered state's obligation to make reparation only.[224] The wrongful act giving rise to a claim for reparation may be either '(a) acts which affect a state as such, ie, those which injure the interests or rights of the state as a legal entity; or (b) acts which produce damage to the person or property of its nationals'.[225]

Today, however, this principle, owing to a number of factors, has evolved into multiple rules for the protection of foreign investment with the possibility of making different claims beyond reparation and without necessarily involving the home country.[226] The concept of 'wrongful acts' has been extended to include 'the non-performance by the state – through the agency of any of its organs – of a contract entered into by the state with an alien, in which case the state is responsible for non-performance'.[227]

Furthermore, unlike in the past, there are additional bearers of responsibility under international law, such as IGOs and NSAs. However, the international responsibility of NSAs, especially multi-nationals and other business entities, is not that straightforward because of the state-centric, breach-based approach of the traditional principle.[228] Nevertheless,

221 ILC Report of the Special Rapporteur on international responsibility: State responsibility (1956), http://www.un.org/law/ilc/index.htm (accessed 20 January 2017).

222 ILC (n 221) paras 35-58.

223 RK Gardiner *International law* (2003) 436-467. Many have argued that 'dollar diplomacy' or imperialism was the main function of this principle and the aspect of law founded on it (international investment law). See M Sornarajah *The international law on foreign investment* (2007) 18 (noting that 'the roots of international law on foreign investment lie in the efforts to extend diplomatic protection to assets of the alien'.)

224 *Factory at Chorzow (Claim for Indemnity) (Germany v Poland)* (1928) PCIJ Series A No 17 29 (*Chorzow Factory* case).

225 ILC (n 221) para 41.

226 Sornarajah (n 223) 37-39.

227 ILC (n 221) para 43.

228 J D'aspremont and others 'Sharing responsibility between non-state actors and states in international law: Introduction' (2015) 62 *Netherlands International Law Review* 49-67.

there are now cases where shared responsibility and shared accountability could work.[229] In addition to responsibilities arising from wrongful acts, human rights obligations are no longer attributed to states only.[230] This underscores the distinction between responsibility and obligation,[231] which will be explored in the next chapter.

The traditional position has thus been transformed.[232] In other words, the principle of imputing wrongful acts to the state exclusively has now been modified in light of the reality of modern forms of international intercourse.[233] The idea that only sovereign states are 'law makers' or 'law breakers' is only a positivist cloak hiding the fact of co-existence of private and public powers, especially in the current international financial system.[234] Apart from being bearers of international obligations, NSAs have now become standard setters.[235] So have IGOs. They have rights, powers and authority and, therefore, can be held accountable for how they exercise their powers. The reality of international economic intercourse has placed them in a situation where accountability for their actions would be raised. This is more so with the emergence of principles for 'responsible' lending and borrowing.[236] This will be further examined under the sovereign debt governance regime in the next part.[237]

229 D'aspremont and others (n 228) 51.

230 Global Citizenship Commission 'Responsibility for human rights' in G Brown (ed) *The Universal Declaration of Human Rights in the 21st century: A living document in a changing world* (2016) 73-77.

231 Kelsen drew a distinction between responsibility and obligation in that 'legal responsibility for the delict is upon the person against whom the sanction is directed, whereas legal obligation is upon the one who by his own behaviour may commit or refrain from committing the delict, the actual or potential delinquent. Legal obligation and legal responsibility are two different concepts; but the subject of the obligation and the subject of the responsibility may – but not necessarily do – coincide.' See H Kelsen 'Collective and individual responsibility for acts of state in international law' (1948) *The Jewish Yearbook of International Law* 226.

232 CF Amerasinghe 'The essence of the structure of international responsibility' in M Ragazzi (ed) *International responsibility today: Essays in memory of Oscar Schachter* (2005) 2-6.

233 ILC (n 221) para 60.

234 Sornarajah (n 223) 39.

235 S Wheatle 'Democratic governance beyond the state: The legitimacy of non-state actors as standard setters' in A Peters and others (eds) *Non-state actors as standard setters* (2009) 215.

236 PRSLB 2012.

237 M Blagescu & L Robert 'Accountability of transnational actors: Is there scope for cross-sector principles?' in A Peters and others (eds) *Non-state actors as standard setters* (2009) 271; J Black 'Legitimacy, accountability and polycentric regulation: Dilemmas, trilemmas and organisational response' in A Peters and others (eds) *Non-state actors as standard setters* (2009) 242.

3.2.2 Sovereign debt default and international responsibility

Arising from the above discussion, for an event of sovereign debt default to trigger either a contractual or treaty cause of action,[238] such an event must qualify as a breach of international financial obligation.[239] An obligation under international law arises primarily from treaty, customary international law (CIL) and general principles of law.[240] Bilateral and multilateral loans as well as syndicated loan contracts and bonds issued by sovereigns reflect or are executed in the shadow of these normative bases. In addition to these bases of international obligations, however, sovereign financing is increasingly being shaped by 'soft laws' (that is, non-binding instruments).[241] The relevance of soft laws is doubtless as their consistent application (that is, compliance by actors) in sovereign debt schemes is such that several of them have either birthed or are in the process of birthing CIL-like practices or, at least, are paving the way for the emergence of these practices.[242] In other words, soft law instruments could equally shape the behaviours of creditors and debtors, thereby paving the way for the crystallisation of procedural and substantive principles on sovereign debt governance.[243]

238 J Crawford 'Treaty and contract in investment arbitration' (2008) 24 *Arbitration International* 351-356.

239 Rutsel-Silvestre (n 39) 492.

240 Statute of the International Court of Justice (adopted 24 October 1945) (ICJ Statute) art 38. It adds that as subsidiary means for the determination of rules of law reference shall be made to 'judicial decisions and the teachings of the most highly qualified publicists of the various nations'.

241 D Zaring 'Legal obligation in international law and international finance' (2015) 48 *Cornell International Law Journal* 177-178.

242 M Sudreau & JP Bohoslavsky 'Sovereign debt governance, legitimacy, and the sustainable development goals: Examining the principles on responsible sovereign lending and borrowing' (2015) 24 *Washington International Law Journal* 613-634; JP Bohoslavsky and others 'Emerging customary international law in sovereign debt governance?' (2014) 9 *Capital Markets Law Journal* 55; S Blankenburg & R Kozul-Wright 'Sovereign debt restructurings in the contemporary global economy: The UNCTAD approach' (2016) 41 *Yale Journal of International Law* 1-7.

243 The US Restatement (Third) of Foreign Relations Law provides that 'the law of international economic relations in its broadest sense includes all the international law and international agreements governing economic transactions that cross state boundaries or that otherwise have implication for more than one state, such as those involving the movement of … funds'. See American Law Institute US Restatement (Third) of Foreign Relations Law (1987) sec 102(2).

In essence, standards have evolved from both 'formal' and 'informal' international law to determine a sovereign debtor's liability following events of default.[244] The *Law Debenture* case, for instance, was triggered by Ukraine's default on 21 December 2015 when the principal and final instalment of interest fell due for payment.[245] The recovery claim by way of summary judgment arose from this default, and Ukraine disputed the claim on the ground, among others, that the debt was voidable on account of duress (unlawful threats and use of force by Russia). In the alternative, Ukraine argued that it was entitled to 'rely on public international law doctrine of countermeasures to decline to make payment'.[246] It was held that the defence of duress could avail a sovereign debtor under English law. However, while the Court of Appeal upheld the applicability of the defence of duress using the international law principle (Russia's threatened use of force), the Supreme Court held that there was 'no principled basis for treating international law as a guide to the illegitimacy of conduct under the English law of duress'.[247]

The Supreme Court also rejected the defence of countermeasures as a ground for debt default under English law, but agreed that such defence could be invoked in an 'inter-state dispute governed by international law'.[248] Presumably, the defence of countermeasures could apply to justify default on bilateral official debt where a creditor's conduct amounts to 'internationally wrongful act' under international law. Russia's initial characterisation of the bonds as 'official', therefore, could avail Ukraine this defence in an international tribunal.

The *Law Debenture* case illustrates that debt default may or may not violate international law depending on the nature, type and form of the debt. This rekindles the age-long debate about the 'proper law' for the governance of sovereign debt. Thus, the mixture of public-private elements is not a new phenomenon.

Liability for debt default is usually determined by the terms of loan agreement. However, it is not clear whether, having regard to the character

244 Zaring notes that 'six legal principles organize the way that global financial regulation works: (1) a national treatment principle; (2) a most favoured nation (MFN) principle; (3) a preference for rule-making over adjudication; (4) a subsidiarity principle of enforcement; (5) a peer review model of enforcement; and (6) a network model of institutionalization'. See Zaring (n 241) 685-687.

245 *Law Debenture* case (n 89) para 8.

246 *Law Debenture* case (n 89) para 10.

247 *Law Debenture* case (n 89) para 162.

248 *Law Debenture* case (n 89) para 207.

of the debtor, every debt default can trigger international responsibility of the debtor under international law. There are two schools of thought on this point that, for convenience, may be called 'the absolutists' and 'the realists'. The absolutists hold that any event that detracts from the fundamental principle of *pacta sunt servanda* amounts to a violation of international law by the debtor.[249] This will trigger international responsibility against the concerned sovereign debtor. In the words of Schier, 'the non-repayment of debt, as a non-performance of a duty created by a contract, constitutes an internationally wrongful act'.[250] This reflects the private law paradigm of sovereign debt governance, as will be elaborated below.

On the other hand, the realists hold that, short of outright repudiation, events of default would not trigger international responsibility.[251] This is the predominant view. According to O'Connor, CIL supports the position that sovereign debt default *simplicita* does not trigger international responsibility of the debtor arguing that '[n]on-payment in itself is no violation of international law'.[252] Waibel argues that the position that 'sovereign debt default, without more and independent of the debtor country's financial condition or aggravating circumstances in the debtor country's conduct, engenders international liability is deeply problematic … [because] rights to repayment of debt are not property rights: rather, they are contractual entitlements'.[253] Liability should be settled according to the terms of the contract. He advances a practical reason, which is even more forceful in the following words:

> Virtually all states, rich and poor, small and large, have defaulted on their debt at some stage in their economic development. Many states even defaulted repeatedly. A rule equating every sovereign default to an international wrong is neither consonant with the necessities of international life, nor does it appear to be in conformity with state practice.[254]

249 Winkler, eg, argued that the meaning of default is 'an utter and complete deception of a creditor by a debtor … Regardless of terms and definitions, the practice of disregard for creditors is held in abhorrence everywhere. Government default, irrespective of classifications and erudite definitions is ... a breach of its obligations under domestic and international, and always, moral law.' See M Winkler *Foreign bonds: An autopsy* (1933) 9.

250 H Schier *Towards a reorganisation system for sovereign debt: An international law perspective* (2014) 50.

251 Waibel (n 220) 281.

252 Quoted in Waibel (n 220) 280.

253 Waibel (n 220) 281.

254 Waibel (n 220) 282.

In the context of sovereign debt as an 'investment', the key consideration is whether a default constitutes a violation of the investment law standards of non-expropriation, most favoured nation (MFN), national treatment and fair and equitable treatment (FET).[255] These standards have featured prominently in recent sovereign debt adjudications. SDD and SDR have become subjects of adjudication in both domestic courts and international tribunals. This being the case, the realists' position seems more plausible as, first, it enables a judex to appraise all the circumstances leading to sovereign debt default in any given context. This is important because of the growing internationalisation of finance and the expanding roles of actors involved in the determination of ultimate liability.

Second, in practical terms, creditors rarely employ adjudication.[256] Indeed, as the next part will illustrate, the realists' position is in line with the current sovereign debt regime and has some support in both CIL and soft law instruments.[257] It also seems to accommodate the reality of the increasing influence of IGOs and NSAs as well as the impacts of their operations in sovereign debt governance. The downside, however, is that it reinforces the private law paradigm that, arguably, has struggled to adequately respond to the growing demands of hybrid creditors and the public-private elements inherent in sovereign financing.

In the next part an attempt will be made to advance a creditor accountability framework in the sovereign debt regime.

4 Conceptualising 'sovereign debt governance'

Until relatively recently, not much attention has been given to the concept of 'sovereign debt *governance*' in the literature.[258] Scholars tend to focus more on finding a sovereign debt workout framework that is fairly operational.[259] For this reason, an attempt will be made here to

255 Waibel (n 220) 273-297.

256 *Serbian Loan* cases (1929) PCIJ Series A No 20-21 142; *Fedax NV v Venezuela* (1998) 37 ILM 1378.

257 Eg, *SGS v Republic of Philippines* (2005) ICSID Reports 518 para 161; UNCTAD PRSLB 2012.

258 Waibel (n 220) 1-40; Schier (n 250) 48-50.

259 Both contractual and statutory proposals have been advanced. See, eg, IMF 'Proposals for a sovereign debt restructuring mechanism' (2003), http://www.imf.org/external/np/exr/facts/sdrm.htm (accessed 10 November 2016); AO Krueger & S Hagan 'Sovereign workouts: An IMF perspective' (2005) 6 *Chicago Journal of International Law* 203; SL Schwarcz 'Sovereign debt restructuring options: An analytical comparison' (2012) 2 *Harvard Business Law Review* 95; R Macmillan 'Towards a sovereign debt workout system' (1995-1996) 16 *Northwestern Journal of International Law and Business*

conceptualise 'sovereign debt governance' using insights from the theories of global governance and international justice. This is important because of the need to situate creditors' responsibilities to respect socio-economic rights within the context of sovereign debt regime.

4.1 Nature of 'sovereign debt governance'

Before defining 'sovereign debt governance', it is important to point out some preliminary points. First, it must be emphasised that, as creditors, international institutions, financiers and bondholders now have significant influence in shaping the international financial landscape. Indeed, it is now widely accepted that 'law making' and 'law breaking' in the international plane are no longer matters exclusive to sovereign states. The 'exercise elements' of external sovereignty, to borrow the words of Taylor, enable NSAs to partake in moulding international financial law.[260] Second, it is important to recall the argument advanced earlier on the citizens as beneficiaries (or presumed beneficiaries) of sovereign loans. This is important because sovereign debt governance ultimately affects the citizens, thereby raising issues of agency and fiduciary responsibilities.[261]

Third, owing to the absence of a multilateral statutory framework in this area, the 'governance' framework must necessarily rely on the disparate public-private mix, especially the secondary normative frameworks that continuously shape and define the international financial obligations undertaken by different actors.[262] In other words, conventional treaty and CIL do not adequately make provisions for the negotiation, contracting and restructuring of sovereign debt. However, they do not prevent actors from developing secondary norms to guide these processes. In fact, 'global law' abounds with these supplementary legal instruments outside the conventional or primary normative bases.[263] It may be argued that soft law is a child of necessity in sovereign debt regime as it fills the normative vacuum left by conventional law-making processes. While the contractual element inherent in sovereign debt supports the dominant

57; C Oechsli 'Procedural guidelines for renegotiating LDC debt: An analogy with chapter 11 of the US Bankruptcy Reform Act' (1981) 21 *Virginia Journal of International Law* 305-341.

260 Taylor (n 126) 757.

261 Oyola & Sudreau (n 175) 213-235.

262 Zaring (n 241) 687; UNTAD's PRSLB 2012.

263 LC Backer 'The structural characteristics of global law for the 21st century: Fracture, fluidity, permeability, and polycentricity' in S Musa & E Volder (eds) *Reflections on global law* (2014) 45-48.

private, contractual governance framework, soft law instruments have now recoloured this framework.

The final crucial point is that our conceptualisation of sovereign debt governance is built around the theories of global governance and the notion of international economic justice.[264] Marrying these with the conventional normative bases would help in appreciating the concept of sovereign debt governance within the context of international development trends.

4.1.1 Global law: Governance and justice

The inadequacies of the dominant private law paradigm require an innovative, contemporary theorising that reflects evolving patterns and dynamics in sovereign debt market. The disorganised but dynamic structure of the sovereign debt regime reflects the increasing globalisation of finance with its concomitants of intense competition and growing number of players exercising huge influence on the international financial stage. It is partly because of this that the notion of 'global law' emerged.[265] It is not the same as international law. However, it reflects the reality of emerging governance standards or frameworks designed to fill the gaps left by traditional international law. Hence it is fluid, polycentric, fractured and permeable.[266] Describing it as 'systematisation of anarchy', Backer uses the confusion (and sometimes chaos) that characterises the market as basis for his analysis.[267] He defines it as follows:

> [It is a] dynamic system in which order is dependent on the ability of actors to form and deploy a large number of governance structures simultaneously, where the state continues to assert a substantial power, but in which it can no longer claim pride of place. The foundational premise rests on acceptance of the existence … of a system of non-national, supranational or multi-national principles and rules applicable … to public and private actors, natural and juridical persons. Its constitution is 'form-recognising' – the elements of this form-recognition include self-constitution, institutional autonomy, regulatory authority, and dispute resolution mechanisms. Its normative element is

264 A Bogdandy & M Goldmann 'Sovereign debt restructuring as exercise of international public authority: Towards a decentralised sovereign insolvency law' in Esposito and others (n 175) 39-70.

265 P le Goff 'Global law: A legal phenomenon emerging from the process of globalisation' (2007) 14 *Indiana Journal of Global Legal Studies* 119.

266 Backer (n 263) 48.

267 As above.

> grounded in the customary expectations of the members of the organisation: citizens and residents in states; investors and customers in corporations.[268]

Perhaps 'systematisation of anarchy' best describes the ongoing effort to develop a sovereign debt restructuring framework within the contractual governance framework. Both states and NSAs are involved in this endeavour; hence the co-existence of formal (conventional international law-making processes controlled by states) and informal (soft laws developed by IGOs, NGOs and other NSAs) legal processes. It also reflects the constant contest between the Global North and the Global South in developing acceptable frameworks on sovereign debt restructuring and in advancing the objective of debt justice as a global development concern.

'Global law' gives legal expression to the evolving global governance regimes. Global governance itself reflects the yearnings for a more suitable analytical framework to address complex governance issues arising out of multiple governance spaces that have grown outside the traditional normative structures over the past few decades.

It is important to observe that the term 'governance' is an essentially-contested concept. The UN Commission on Global Governance defines it thus:

> Governance is the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest.[269]

According to this broad conception, governance is a process of managing collectivities to align or accommodate conflicting interests. Along similar lines, Ruggie remarks that '[g]overnance at whatever level of social organisation it occurs, refers to the system of authoritative norms, rules, institutions and practices by means of which any collectivity from the local to the global manages its common affairs'.[270]

268 Backer (n 263) 49.

269 Commission on Global Governance *Our global neighbourhood* (1995) 2.

270 JG Ruggie 'Global governance and "new governance theory": Lessons from business and human rights' (2014) 20 *Global Governance* 5.

These two definitions recognise some broad elements of governance in terms of varied constituencies, purposes and procedures. They are, however, descriptive, devoid of much analytical content.

From the mainstream governance scholarship, 'governance' can be located in three broad forms of coordination, namely, coordination through exchange characterised by formal rationality designed to ensure efficient allocation of resources (that is, anarchy of the markets); imperative coordination characterised by substantive rationality to achieve common organisational or societal goals (that is, hierarchy of organisation); and reflexive self-organisation characterised by 'substantive, continuing and reflexive procedures' (that is, the heterarchy of negotiated consent to resolve complex problems).[271] The latter form of coordination is what Jessop defines as 'governance'. Accordingly, 'governance' is a reflexive self-organisation involving 'continued negotiation of the relevant goals among the different actors involved and the cooperative mobilisation of different resources controlled by different actors to achieve interdependent goals'.[272] It generally occurs at three levels: informal, interpersonal relations; inter-organisational relations; and inter-systemic relations.[273]

The concept of 'governance' becomes significant today because of the inability of imperative coordination and 'market-mediated anarchy' to manage the complexities of modern economic, social and political phenomena consequent upon the transformative effects of globalisation. This complexity is rooted partly in the 'dialectic of de-territorialisation and re-territorialisation [and the fact that] complex systems generally operate in ways that engender opportunity for additional complexity'.[274]

Other familiar concepts have thus failed to provide a suitable theoretical framework to address the myriads of social, economic and political problems because of the epistemological and ontological complexities brought about by globalisation. While the self-correcting logic of the markets (that is, coordination through exchange) often requires non-market modes of coordination especially during crisis, the top-down, hierarchic, imperative coordination could not handle expansive organisational capacities; hence 'both market and imperative coordination[s] are prey to

271 R Jessop 'Governance, governance failure and meta-governance' (2002), https://ceses.cuni.cz/CESES-136-version1-3B_Governance_requisite_variety_Jessop_2002.pdf (accessed 20 June 2019).

272 Jessop (n 271) 1-3.

273 Jessop (n 271) 5-6.

274 Jessop (n 271) 7.

the problems of bounded rationality, opportunism and asset specificity'.[275] The self-correcting logic or 'invisible hand' of the markets has repeatedly failed to handle the externalities presented by complex interdependencies, which often leads to sub-optimal outcomes, especially market failures. Imperative, top-down coordination's excessive demand for centralised interaction of autonomous systems and bureaucratic rule following often leads to non-realisation of collective goals.[276] Hence, governance (reflexive self-organisation) offers 'a "third way" between the anarchy of the market and top-down planning [because] it is useful in cases of loose coupling or operational autonomy, complex reciprocal interdependence, complex spatio-temporal horizons, and shared interests or projects'.[277]

Jessop's conception reflects the increasing desire to frame governance discourse around the evolving global governance regimes. However, he seems to ignore the direct correlation between 'governance' and 'order'. Norm creation, application and enforcement are intrinsic to the idea of governance. They establish the legality and legitimacy of any structured order and define the specific roles of the actors driving it. Zumbansen observes that governance 'shares essential elements with ideas such as, for example, justice, sovereignty, or order'.[278] Not surprisingly, contemporary legal theorists generally view 'governance' as a framework for normative ordering, reflecting the concept's intradisciplinary value and the diversity of actors involved in 'governance'.[279] Zumbansen, for instance, pointedly observes thus:

> In law … references to governance point to the transformational character of existing institutional frameworks of order. For public lawyers, governance has been giving expression to a fundamental shift in the organisation and implementing of public service delivery as well as rule-making. Governance, in this context, carries the burden of being the comprehensive construction site for an encompassing reconsideration of the particularly 'public' nature of legislation, administration and adjudication. Meanwhile, in private law, governance appears to be an attractive concept to illustrate the larger, systematic dimensions of otherwise 'private' conduct. Governance studies in the contexts, for example, of contract and corporate law are thus concerned

275 Jessop (n 271) 8.

276 Jessop (n 271) 6-9.

277 Jessop (n 271) 8.

278 P Zumbansen 'The conundrum of order: The concept of governance from an interdisciplinary perspective' Osgoodhall Comparative Research in Law and Political Economy Research Paper 37 2010 9.

279 Zumbansen (n 278) 5-12.

> with the critical analysis of the otherwise unquestioned assumptions that lead to the classification of an activity as either private or public.[280]

One must admit that 'global governance' itself is a fuzzy term. However, in this context, it is about bringing order and regularity to a fragmented regime through a combination of formal and informal processes by both states and NSAs.[281] It is a complex hybridity of private and public elements and actors. According to Wheatley, 'global governance includes both traditional forms of inter-state law making and new forms of international governance by non-state actors'.[282] He notes thus:

> The defining features of an international governance regime are the capacity of non-state actors to consider and formulate responses to social, economic and political problems, to establish relatively precise standards (the doctrine of the rule of law), and the capacity, sometimes delegated to, or assumed by third parties, to interpret and apply those standards in relation to the activities of states, individuals and organisations.[283]

This perspective aligns with the inherent hybridity of public-private elements in sovereign debt contracting and restructuring. It does not disregard the incongruity of resolving sovereign debt problems using a purely private governance arrangement. Global governance regimes are shaped by international administrative, constitutional and institutional laws.[284] Dynamic regimes under international finance fit into this characterisation.[285] The key justification for global governance is to effectively deal with collective action problem (that is, lack of coordination of or among different actors).[286] This also is a key problem for some creditors in the sovereign debt regime. It is the main driver for IMF's enhanced contractual framework.

280 Zumbansen (n 278) 10.

281 Commission on Global Governance (n 269) 2.

282 Wheatley (n 235) 218, 220. Goldmann notes that it consists of 'a complex agglomerate of public and private, formal and informal, actors, processes, and instruments'. See M Goldman 'Public and private authority in a global setting: The example of sovereign debt restructuring' (2018) 25 *Indiana Journal of Global Legal Studies* 331-332.

283 Wheatley (n 235) 222.

284 A Bogdandy and others 'From public international to international public law: Translating world public opinion into international public authority' (2017) *European Journal of International Law* 119-121.

285 E Avgouleas *Governance of global financial markets: The law, the economics, the politics* (2012) 221, 158-159

286 Wheatley (n 235) 223.

Global governance also recognises that both authoritative and non-authoritative acts can affect individuals and their rights.[287] It is, however, not value neutral.[288] In addition, there is the overarching objective of fair, balanced treatment in contracting, negotiation or renegotiation of sovereign debt and in resolution of disputes or disagreements arising from the parties' conducts. This raises issues of distributive justice; hence, it might be called the 'justice' of sovereign debt governance.[289] From a broader perspective, however, the justice of sovereign debt is development. It is important to avoid the seemingly endless debate about the idea of 'justice'[290] here. Nevertheless, sovereign debt crises over the years have raised concerns regarding the utility of debt in attaining international justice through an even, sustainable development. Many of the heavily-indebted countries have not yet seen the promise of development partly because of the governance imbalance in the sovereign debt regime. It has been argued that 'the requirement of international justice is that peoples have sufficient resources as a group not to be subject to collective domination by agents such as states, multinational corporations or international organisations'.[291] In other words, the focus is on the people or citizens and their welfare or entitlements rather than on their state.[292]

This conception of justice is tied to the unity of the people with the juridical sovereign as examined above.[293] It also neatly fits into the objectives of both human rights and free market economy that sustains the markets for sovereign debts.[294] The reality of multiplicity of interests in the sovereign debt regime means that there is a real likelihood of competing

287 A Bogdandi & M Goldmann 'Sovereign debt restructuring as exercise of international public authority: Towards a decentralised sovereign insolvency law' in Esposito and others (n 175) 46.

288 Bogdandi & Goldmann (n 287) 43.

289 O Suttle 'Debt, default, and two liberal theories of justice' (2016) 17 *German Law Journal* 799-834.

290 See, eg, R Dworkin 'What is equality? Part 2: Equality of resources' (1981) 10 *Philosophy and Public Affairs* 283; T Nagel 'The problem of global justice' (2005) 33 *Philosophy and Public Affairs* 113; CE Pavel 'International justice' in MT Gibbons (ed) *The encyclopedia of political thought* (2015) 1.

291 TC Alexander 'Globalising sovereignty? Pettit's neo-republicanism, international law and international institutions' (2015) 74 *Cambridge Law Journal* 576.

292 Pavel notes that one of the two strategies for international justice is to focus on what states owe to their citizens and this 'theory is typically derived from a set of moral ideals that reflect the universal moral equality of individuals and their rights and entitlements'. See Pavel (n 293) 1.

293 Nagel (n 290) 114-117; R Queiroz 'Cosmopolitanism, sovereignty and global justice' in PA Diogo and others (eds) *Sovereign justice: Global justice in a world of nations* (2010) 161.

294 E Petersmann 'Theories of justice, human rights, and the constitution of international markets' (2003) 37 *Loyola of Los Angeles Law Review* 407.

demands against the debtor, thereby raising the imperative for balancing, rebalancing, sorting and prioritisation of interests.[295] This is a matter embedded in the philosophies and ideas of justice.

Finally, 'justice' in international law could be achieved through 'rule following' and 'international agreement'.[296] While the latter accommodates the traditional way of sovereign debt contracting, the former accommodates the evolving soft law approach with regard to both contracting, restructuring, and dispute settlement.

The key objective of sovereign debt governance as conceptualised here is to bring order, regularity and fairness to the sovereign debt regime. This is part of the justice of sovereign debt governance. The efforts, especially of the United Nations General Assembly (UNGA) and IMF, to find a workable framework that fairly address the concerns of creditors, debtors and other stakeholders in sovereign debt restructuring were largely informed by this objective. The increasing resort to investment arbitration, especially by non-official creditors, is also partly informed by their quest for 'justice'. Indeed, as will be elaborated in the next chapter, the idea of socio-economic rights itself is built around the objectives of fairness and welfare, which are key elements of justice as conceptualised above.

4.1.2 Approaches to sovereign debt governance

Partly because of the various interests involved in sovereign debt contracting and restructuring, it probably seems natural to expect controversies with diverse (perhaps conflicting) approaches to sovereign debt governance. For decades, the governance of sovereign debt has remained a critical issue in international development and financial and monetary laws.[297] Despite having rules, principles and regulations governing international financial relations among states, institutions and other actors, international financial law arguably has failed in the area of sovereign debt for its almost exclusive focus on private interests using the contractual governance framework.[298] Because of the economic elements inherent in this law, the idea of sovereign debt governance rekindles the debate about the actual utility of regulating markets.[299] It also raises concerns about social

295 Suttle (n 289) 799-834.

296 Nagel (n 290) 114-117.

297 Qureshi & Ziegler (n 115) 140-147.

298 RM Lastra 'Global financial architecture and human rights' in JP Bohoslavsky & JL Cernic (eds) *Making sovereign financing and human rights work* (2014) 132.

299 U Panizza and others 'The economics and law of sovereign debt and default' (2009) 47 *Journal of Economic Literature* 651-698; A Somma 'Biopolitics of transnational private

justice in a predominantly market-driven, globalised economic system. This, as noted earlier, reflects the variegated, often conflicting, interests involved.[300] It also demonstrates the paradigmatic competition alluded to in the previous chapter.

There are two opposing approaches to sovereign debt governance: the private law and the public law approaches.[301] The former is a child of liberalism, which emphasises individualism as foundation for all social and political institutions.[302] According to this approach, every debt is seen as a property, a contractual right. In its philosophical origin, property precedes any political community and, therefore, the community's laws, rules and regulations must necessarily recognise the liberty of the creditor over such right (debt).[303] In this sense, sovereign debt governance is contract-based governance, that is, it is the parties' agreed private-governance and, therefore, its 'justice' is to be located exclusively within the contractual instruments that structure, define and govern such relationship from the beginning to the end. This means that creditors and debtors simply are market participants and, naturally, it is assumed, the market would adjust itself without the need for outside interference.[304] As market participants, parties must discipline themselves to respect the 'rule of law' function of the market as mutually agreed in their contract.[305] Thus, this approach emphasises parties' justice or 'market justice'. It equates 'justice' with 'contract'.[306] A classic example of how this approach influences the shape of sovereign debt governance is the waiver of immunity by sovereign debtors in sovereign borrowing, enabling creditors to enforce debt

law – Sovereign debt crises, market order and human rights' (2012) 13 *German Law Journal* 1571-1578.

300 Bogdandy & Goldmann (n 287) 39; JP Bohoslavsky & M Goldmann 'An incremental approach to sovereign debt restructuring: Sovereign debt sustainability' (2016) 41 *Yale Journal of International Law* 13-42.

301 M Goldman 'Public and private authority in a global setting: The example of sovereign debt restructuring' (2018) 25 *Indiana Journal of Global Legal Studies* 331-363; I Bantekas & R Vivien 'Odious debt as a claim under international law: Lessons from the Greek Debt Truth Committee' (2016) 22 *European Law Journal* 540; M Rosenfeld 'Contract and justice: The relation between classical contract law and social contract theory' (1985) 70 *Iowa Law Review* 776-784.

302 Rosenfeld (n 301) 787.

303 Goldmann (n 301) 331-363.

304 FA Hayek *Law, legislation and liberty* (1982) 36-37, 128-129.

305 Rosenfeld (n 301) 776-784.

306 Rosenfeld (n 301) 771.

contracts largely through domestic (that is, private law) courts.[307] Hobbes and Lock are believed to be the philosophical progenitors of this view.[308]

This approach, however, has been criticised for, first, its failure to accommodate the reality of global governance and the imperative for sovereign debt justice within a complex, multi-layered global setting.[309] Second, flowing from the first flaw, this approach ignores the inherent hybridity of private and public elements and actors in sovereign debt contracting and restructuring.[310] Indeed, the complex reality of sovereign debt governance over the years has exposed the artificiality (some would say falsity) of the public-private dichotomy in international law.[311] For instance, the powers being exercised by states as well as the public roles increasingly being played by IGOs and private creditors alike in the sovereign debt regime illustrate that a private law paradigm may not suitably and effectively address all issues and grievances arising from the interaction between or among these players. Indeed, thanks to the ingenuity of bondholders and other private creditors, adjudicating sovereign debt claims now extends beyond the province of domestic courts as investment and other international tribunals are increasingly assuming jurisdiction over such claims.

Third, this approach places too much emphasis on procedural, contractual justice while ignoring the dynamic, substantive issues (for instance, duress or other forms of unconscionable influences arising from the exercise of structural economic powers by countries), which often impair, hinder or frustrate the 'justice of contract'.[312] Once again, the case of *Law Debenture* illustrates this point. In this case, Russia's geopolitical and economic influences were exercised through sovereign debt. The private law approach, therefore, faces challenges of relevance and legitimacy today.[313]

307 The UN Convention seeking to limit state immunity in commercial transactions including sovereign loans is yet to take effect. It is unlikely to see the light of the day because of its sovereignty-constraining effects. See UN 2004 The Convention on Jurisdictional Immunities of States and their Property (adopted 2 December 2004).

308 Suttle (n 289) 799-834; Rosenfeld (n 301) 776-784.

309 Goldmann (n 301) 335; Bogdandy and others (n 284) 119-121; Bogdandy & Goldmann (n 287) 39; Bohoslavsky & Goldmann (n 300) 18.

310 Goldmann (n 301) 336-340; Rosenfeld (n 301) 769.

311 PF Kjaer 'From the private to the public to the private? Historicizing the evolution of public and private authority' (2018) 25 *Indiana Journal of Global Legal Studies* 13-34; Bogdandi and others (n 284) 124.

312 Rosenfeld (n 301) 776-784.

313 Bogdandy and others argue that 'there are good reasons to doubt that rules established between private actors can live on their own, whether factually or normatively speaking'. See Bogdandy and others (n 284) 119-121.

The public law approach to sovereign debt governance, theoretically, is republican in origin as it limits private rights in order to protect wider public interests.[314] There are different perspectives here. For instance, while describing the current regime of sovereign debt as a fragmented patchwork of national and international laws, formal and informal rules and actors, Tan conceives sovereign debt governance as 'a set of disciplinary discourses', regulatory conversations and communicative interactions that is part of governance through development.[315] The current regime, according to Tan, skewed this development perspective by building private law narratives that conditioned behavioural expectations of key actors of the regime.[316] Using the socio-legal and critical legal methodological traditions, Tan rejects the private law approach that influenced the current regime with a governance architecture predominantly based on the fundamental principles of sanctity of contract (in domestic laws) and *pacta sunt servanda* (in international law).[317] It is not development-oriented. This is because these principles effectively shut out the citizens from any sovereign debt governance.[318] It is only by deconstructing these narratives that the citizens can be placed within the development objective of sovereign debt, especially with the global acceptance of international financial stability as a public good.[319] According to this perspective, debt relief is a matter of right.[320]

However, despite the deconstruction of the embedded narratives within the existing sovereign debt regime, this critical development perspective is devoid of functionality as it does not actually define the governance structure of the regime. In addition, Tan does not link the ideal of justice to sovereign debt governance. In other words, how does this 'set of disciplinary discourses' connect with the justice of sovereign debt governance?

314 Bogdandy and others argue that private law allows 'actors to act solely in pursuit of their self-interest, whereas public law requires a higher standard, often coined as the pursuit of a common interest'. Bogdandy and others (n 284) 118, 135.

315 C Tan 'Reframing the debate: The HIPC framework and new normative values in the governance of Third World debt' (2014) 10 *International Journal of Law in Context* 254, 268.

316 Tan (n 315) 254, 268.

317 Tan (n 315) 254-257.

318 As above.

319 Tan (n 315) 307-324.

320 Tan (n 315) 308.

The most influential public law perspective on sovereign debt governance is the 'international public authority' (IPA) perspective.[321] IPA is defined as 'the law-based capacity of any international institution to legally or factually limit or otherwise affect other persons' or entities' use of their liberty'.[322] It is, thus, a consequentialist tool that extends the meaning of 'publicness' by focusing on the consequences of a particular decision or action of an actor or institution on the citizens. Bogdandi and Goldmann use this tool to de-emphasise the informality and discretionary character of the sovereign debt regime, while at the same time emphasising issues of institutional legitimacy arising from the impacts of the actions or inactions of decision-making institutions, especially on citizens, regardless of such institutions' constitutive basis.[323] In other words, the impacts of these institutions' decisions on the 'public' determine the extent of their international authority and, consequently, responsibility. This means that all parties or bodies involved in sovereign debt restructuring (including IMF, Paris Club, London Club, and *ad hoc* bondholder committees) have IPA because their actions could have direct impacts on citizens of either debtor or creditor nations. The constitutive instruments of these bodies serve the democratic legitimating function of constraining their respective actions. These, of course, include soft law instruments.[324]

Goldmann and Steininger adopt the same IPA perspective.[325] Using public law's constraining function, they show how the interactions between public and private actors within the market place can influence sovereign debt governance.[326] Sovereign debt operates within a globalised market setting in which institutions (for instance, IMF and Paris Club) engage in decision-making processes that could have a strain on human rights and democratic principles, thereby raising fundamental legitimacy concerns.[327] Since financial markets are constituted by law, they argue, it makes sense to have a system of judicial review to ensure certainty and predictability because 'legal uncertainty may not only generate transaction costs, but pull the plug entirely'.[328] In light of the increasing push for

321 Bogdandy and others (n 284) 132.

322 Bogdandy & Goldmann (n 287) 47.

323 Bogdandy & Goldmann (n 287) 39.

324 Bohoslavsky & Goldmann (n 300) 13-42.

325 M Goldmann & S Steininger 'A discourse theoretical approach to sovereign debt restructuring: Towards a democratic financial order' (2018) 17 *German Law Journal* 709-734.

326 Goldmann & Steininger (n 325) 720.

327 Goldmann & Steininger (n 325) 724.

328 Goldmann & Steininger argue thus: 'Essential hybridity highlights the fact that private financial transactions have an immediate impact upon the public interest because they

legitimacy of the SDR regime and the difficulty of identifying the 'public' within globalised markets, they proposed the involvement of domestic courts, soft law and transnational cleavages (that is, along the entrenched division between neoliberalism and interventionism) to advocate a SDR framework that allows for more accountability and citizen participation within the context of the European Union.[329]

This appears to be a plausible perspective. However, it lacks the necessary, practical details to engender a workable, effective sovereign debt governance. Therefore, in an attempt to further refine the IPA perspective, Goldmann argues that IPA recognises the hybridity of private and public elements and that the complex involvement of 'public and private actors, instruments, and rules in sovereign debt restructuring makes the public-private distinction inoperable'.[330] Accordingly, the gap between 'market justice' and 'social justice' in sovereign debt cannot be addressed by the market because 'the insistence on the private law character of sovereign debt instruments serves as a tool for entrenching a neoliberal agenda and for discarding important public interests'.[331] He argues that the notion of 'public authority' has to be broadened to include 'an act of authority whose actor reasonably claims to be mandated to act on behalf of a community of which the observer is a member, or a member of such member'.[332]

However, although a plausible and innovative perspective, IPA is grounded in the positivist's vision of international law that perpetuates the public-private divide. Furthermore, this perspective appears to have fully endorsed the 'justice of contract' paradigm, thereby tilting towards the private law approach. It also fails to define sovereign debt governance. Not surprisingly, the perspective does not situate citizens within the pre-SDR phase of the sovereign debt regime, and this might affect the legitimacy of the proposed incremental SDR regime built around it.[333] Indeed, it ignores the idea of justice in the sovereign debt regime as part of the legitimacy issues. It also does not recognise the emerging trend of moving away

increase or decrease the quantity of money in the market and, with it, the indebtedness of public or private actors … Without that underlying framework, private law serves the self-interest of strategic market actors, not the public interest. Although this might advance commutative and restorative justice, it is inapt to bring about distributive justice. This requires solidarity, for which an actual – or at least an identifiable – public is necessary.' See Goldmann & Steininger (n 325) 730-732.

329 Goldmann & Steininger (n 325) 737-746.

330 Goldmann (n 301) 343.

331 Goldmann (n 301) 347.

332 Goldmann (n 301) 348.

333 S Blankenburg & RK Kozul-Wright 'Preface' (2016) 41 *Yale Journal of International Law* 2.

from the traditional Western-dominated lending institutions in sovereign borrowing to embrace other emerging credit-exporting nations such as China, Russia and Middle Eastern countries that often resist or counter the Western positivists' vision of international law. These emerging creditors, especially Russia and China, tend to carefully design their credit instruments in a manner that renders the traditional framework redundant or at least inoperative.

Finally, Suttle advances a more citizen-focused, justice-based, public law perspective of sovereign debt governance.[334] Using the Eurozone debt crisis as an example, he wonders why citizens of the majority of creditor-nations wanted their governments to, on the one hand, sustain domestic welfare programmes during the crisis but, on the other, loathed their countries' bailout support to their crisis-ridden European counterparts.[335] By contrasting the Lockean liberal idea of justice with the Humean liberal idea, he conceives sovereign debt markets as 'the convergence of a plurality of diverse economic and legal institutions' that necessarily depends on international cooperation.[336] Based on what he calls 'equality in global commerce' (that is, international economic justice) as well as the principles of international cooperation, economic advantage and self-determination, he argues that sovereign debtors were normally led to rely on creditors or the debt markets and, because of this, the 'justice' of sovereign debt should impose a cooperative, shared obligation on both creditors and sovereign debtors.[337] Because of the novelty of this perspective, it might help to quote Suttle at full length here:

> [N]o institution, whether national or international, will be just if it undermines self-determination … Clearly, where a state's debts can be serviced only through politically constraining and economically debilitating taxation and austerity over decades, that state's self-determination is substantially impaired. Constraints on economic policies may preclude the state from realizing its domestic conception of economic justice, or from vindicating the basic rights of its citizens, for example, to health care … No institution that avoidably brings about such consequences can be regarded as just … It is not because I am poor, but because my debts undermine my self-determination, that I have a claim to default on them … The corollary is that, in many cases, those economically less advantaged may need to facilitate restructuring by those more advantaged: The poor may have to bail out the rich.[338]

334 Suttle (n 289) 799-834.

335 Suttle (n 289) 799-805.

336 Suttle (n 289) 817.

337 Suttle (n 289) 826-829.

338 Suttle (n 289) 825-829.

However, despite his proposition for an innovative, cooperative egalitarianism, Suttle does not define sovereign debt governance. In addition, his notion of 'justice' of sovereign debt is, to state it plainly, too abstract, perhaps completely removed from the functional reality of the behaviours of international financial actors.

From the above approaches to sovereign debt governance, it is clear that the age-long public-private divide in legal theory informs the exclusivity of the contractual governance framework despite the peculiar characteristics and complexity of norm creation, application and enforcement brought about by economic globalisation.[339] This divide is a fictional construction built by liberal theorists and has been shown to be chimeric.[340] The polarisation between public law and private law scholars is unsuitable to frame an evolving regime of global governance with a complex hybridity of norms and a public-private mix operating within multiple layers of governance (national and international). Global law is not characterised by this divide. Indeed, transnational legal theories have emerged to embrace the complexities and governance challenges brought about by economic globalisation.[341] It may be argued that any form of legal ordering that excludes a multiplicity of actors and hybridity of norms cannot adequately capture the key character of sovereign debt in terms of contracting, debt servicing, restructuring and enforcement.

Therefore, guided by the above definitional insights and their respective pitfalls, 'sovereign debt governance' could be broadly defined as a system of interaction among multiple state and non-state actors aimed, first, at bringing order, certainty and regularity to sovereign debt contracting and predictability in resolving any dispute arising from such loans or bonds and, second, addressing the concerns of all stakeholders to achieve the ideal of international economic justice and development based on equality and well-being of all peoples.

This definition admittedly is far from being comprehensive. However, it is at least sufficient for our analytical purpose here. First, it offers a broader, universal picture of the main players within the current,

339 CEJ Schwobel 'Whither the private in global governance?' (2012) 10 *International Journal of Constitutional Law* 1106-1133; compare Bogdandy and others (n 284) 115-145.

340 Kjaer (n 311) 16-17.

341 G Teubner 'Global Bukowina: Legal pluralism in the world society' (1996), https://ssrn.com/abstract=896478 (accessed 9 July 2019); P Zumbansen 'Transnational private regulatory governance: Ambiguities of public authority and private power' (2013) 76 *Law and Contemporary Problems* 117-138.

authority-deficient sovereign debt regime.[342] Unlike in trade and some areas of international law, there simply is no single, regulatory IGO in the sovereign debt regime.[343] IMF and WB are disqualified because they are interested parties (that is, creditors). However, despite this interest, IMF in particular has emerged as an 'indispensable manager' of this decentralised governance regime even without an explicit mandate in its constitutive instruments.[344] This reveals that the governance of this authority-deficient regime is in the form of interest-driven interaction between or among the players.[345] The interaction may be organised, structured or unstructured, especially because of the inherently decentralised character of the international financial system.[346]

In essence, the lack of a centralised international financial governance framework means that any meaningful conception should recognise the operational, legal and constitutive basis of all players and their individual roles in driving this decentralised, authority-deficient regime.[347] The first group of players, of course, is the group of sovereign debtors whose principal motives for borrowing, presumably, are to address a gaping budget deficit, build infrastructure and finance the well-being and development of their citizens as may be required by their respective constitutions or other laws or legal instruments.[348] Thus, the consent of the sovereign debtors

342 DK Tarullo 'Rules, discretion and authority in international financial reform' (2001) 4 *Journal of International Economic Law* 631.

343 Klabbers, eg, notes that the field 'is a patchwork of entities, some formal, some less so … it is fragmented to a high degree, with some entities assuming some responsibility for financial policy at large'. See J Klabbers 'On functions and finance: Sovereign debt workouts and equality in international organizations law' (2016) 41 *Yale Journal of International Law* 241-261.

344 RP Buckley 'The direct contribution of the international financial system to global poverty' in N Schefer (ed) *Poverty and the international economic legal system: Duties to the world's poor* (2013) 278-290.

345 Klabbers (n 343) 241-261.

346 Gelpern, eg, argues that up to 2000 the regime was stable, delivering 'a measure of relief for debtors and impressive returns for creditors with no treaty, no statute, and no court in charge. It was flexible enough to adapt to massive shifts in global politics and economics. It was also effective enough, and accepted generally enough – just enough – to pre-empt far-reaching alternatives that periodically sprouted up at the United Nations, at the IMF, and among civil society groups.' See A Gelpern 'Sovereign debt: Now what?' (2016) 41 *Yale Journal of International Law* 46-47.

347 Gelpern (n 346) 57-58. See also M Reigner 'Legal frameworks and general principles for indicators in sovereign debt restructuring' (2016) 41 *Yale Journal of International Law* 145-151.

348 According to Li & Panizza, countries borrow '(1) to finance investment in physical and human capital; (2) to smooth business cycles; (3) to effect inter-temporal distribution of wealth; and (4) to respond to exceptional events such as war, natural disasters, or financial crises'. See Y Li & U Panizza 'The economic rationale for the principles on

as states perhaps is the main foundation of the sovereign debt regime.[349] Without it there would be no sovereign debt governance, although its presence does not necessarily legitimise or validate the sovereign debt contract and its execution. The consent may be expressed in the contract documents, definitive bonds or treaty-like instruments depending on who the creditor is. Today, most sovereign debtors belong to the Group of 77 (G77) countries pushing for a pro-debtor statutory framework for the governance of sovereign debts.

The second group of players is the group of creditors that are largely united by their shared interest or common objective of maximising profit, although the bilateral and multilateral creditors often have a mixture of motives for lending beyond profit maximisation as they use sovereign financing to pursue additional geopolitical interests covering trade, development, defence and other policy and strategic objectives.[350] Not surprisingly, the most geopolitically influential creditors largely dictate the form and substance of this decentralised governance regime, often using principles rooted in international law. Although most sovereign debtors are members of the multilateral creditors, the group of creditor nations under the auspices of the Paris Club tends to have maximum control over the most influential multilateral creditors, that is, IMF and WB. This is because, strictly, sovereign equality in international financial institutions (IFIs) is drastically diluted by the weighted voting system and structural power in international economic relations.[351] The traditional creditor nations usually collaborate through 'exclusionary' (that is, non-universalist system of membership) informal bodies such as the Paris Club (now having 20 creditor nations as members), Group of 7, Group of 20, Financial Stability Board and Basel Committee on Banking Supervision, and so

promoting responsible sovereign lending and borrowing' in Esposito and others (n 175) 17-20.

349 O Lienau 'Legitimacy and impartiality as basic principles for sovereign debt restructuring' (2016) 41 *Yale Journal of International Law* 102.

350 Gelpern (n 346) 51-53.

351 The governance and shareholding structure arguably is skewed. The formula considers a member's weighted average of GDP, international reserve, openness, and economic variability. Eg, in 2016 the US had 16,8% of IMF shareholding while Uganda had 0,01. See art XII, secs 1-5; IMF 'Factsheet: IMF quota', www.imf.org/external/np/exr/facts/quota.htm (accessed 20 May 2018). Klabbers, eg, argues that 'the equality embedded in the formal decision-making processes of many international organizations has always been mostly of cosmetic or symbolic value … With this in mind, it should not come as a surprise that discussions about debt relief and sovereign default are usually taken in entities where, as a general rule, it remains unclear whether all members are equal, or whether some might be a bit more equal than others.' See Klabbers (n 343) 246-247.

forth.[352] Although non-universal in nature and often lacking constitutive instruments, in functional terms 'these entities exercise authority over the world at large'.[353]

It must be recognised that China and other emerging market economies have been changing the traditional developed-developing nations matrix in sovereign debt schemes. China has become the world's largest official lender, surpassing IMF and World Bank.[354] In 2018 China's loans to the rest of the world combined was estimated to be over $5 trillion, amounting to 6 per cent of global gross domestic product (GDP).[355]

There are supporting institutions that are pretty much 'universal', affiliated to neither the group of creditor nations nor the group of debtor nations, but they nonetheless shape and drive the evolving sovereign debt regime. Examples are UNGA and the United Nations Conference on Trade and Development (UNCTAD). These two institutions have become key advocates of the so-called 'incremental approach' embedded in the IPA approach to sovereign debt governance that recognises public policy and socio-economic rights concerns.[356]

Second, the above definition provides an analytical framework to examine the place of socio-economic rights holders and duty bearers under a rights-based approach to sovereign debt governance and, consequently, situate creditor accountability in respect of behaviours amounting to 'irresponsible lending'. It incorporates an important element that may provide more legitimacy to this decentralised governance regime, that is, through a stakeholder approach.[357] In particular, by considering the sovereign debtor as a stakeholder, it takes into account the unity between internal and external sovereignty as examined above so that, all things being equal, the citizens are seen as the ultimate beneficiaries of sovereign debt.[358] This is because the legitimacy of a sovereign debt framework depends upon its acceptability by citizens as critical stakeholders.[359]

352 Klabbers (n 343) 244.

353 As above.

354 Horn and others (n 46) 3.

355 Horn and others (n 46) 5.

356 Bohoslavsky & Goldmann (n 300) 13-42.

357 Lienau (n 349)101.

358 Gelpern, eg, considers the 'citizens, taxpayers, bank depositors and pensioners' as the 'ultimate stakeholders and therefore the regime ought to be accountable to these stakeholders'. See Gelpern (n 346) 45-46.

359 Lienau (n 349) 158; Tan (n 315) 254-257.

Without this, there would be no democratic legitimacy and this might affect the validity of a sovereign debt.[360]

By considering creditors as stakeholders, we embrace all classes of lenders regardless of their differential features or characters, policies and other peculiarities. The official/non-official dichotomy is unhelpful here. A creditor, whether official or non-official, plays a significant role in constituting the loan in the first place and would naturally have interests regarding how any dispute arising from the loan is resolved.

In this regard, courts and arbitral tribunals are also critical stakeholders as, over time, their decisions have shaped (and still continue to shape) the regime.[361] They embody the universal ideals of independence, impartiality and neutrality.[362] However, it should be admitted that the authority-deficit in international finance further raises legitimacy concerns on sovereign debt adjudication, especially regarding the lack of predictable, applicable shared norms and the potential inconsistency to which adjudicating sovereign debt claims by different courts might lead.[363]

NGOs and regional institutions and IGOs are also stakeholders having regard to the roles, especially of the latter, in continuously issuing standards on sovereign debt restructuring, and the former in their campaigns against creditors and submission of briefs in cases of investment arbitration. NGOs have been at the forefront of global movement for debt justice. They were instrumental to the multilateral debt relief initiatives of the past two decades.

Finally, this conception of sovereign debt governance aligns with the notions of global law and global governance as examined above. The key features are the hybridity of norms, mixed public-private elements, and multiplicity of interests. The multi-stakeholder interests challenge the traditional understanding. It goes beyond the debtor-creditor matrix. Bantekas notes the multiplicity of interests affected by sovereign debt thus:

> Sovereign debt is not simply a contractual assumption of debt by the state through a loan transaction but is largely conditioned by other extraneous factors. These include, among others: The many and varied purchasers of government bonds … *taxpayers that will be forced to forego some of their bank deposits or pay discriminatory taxes towards reviving the economy, or otherwise forfeit*

360 Lienau (n 349) 103.

361 Lienau (n 349) 107-108.

362 Lienau (n 349) 108-109.

363 Gelpern (n 346) 85.

> *property rights because of their latent inability to keep up with their personal debts … All of these would qualify as third parties to arbitral proceedings, at the very least*.[364]

It might be observed that the working definition does not emphasise on the principles and procedures involved in the initial steps of contracting sovereign debts. This is because contracting is one out of several phases of the regime, as we will now examine.

4.1.3 Sovereign debt regime

From the above, sovereign debt governance should be about ensuring order, certainty, regularity and justice for all the stakeholders. However, there still is no acceptable multilateral legal framework through which these objectives can be achieved. What obtains today, at best, is a sovereign debt regime. A regime is developed largely to address a particular set of issues. Krasner describes international regimes as 'sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations'.[365] Thus, regime formation is not exclusive to states.[366]

The sovereign debt regime is a hybrid of public and private elements aimed at addressing problems arising from sovereign borrowing and lending.[367] One of the key foundations of this regime is international law and its formal processes. Actors have always relied on the principles of international law, especially the core principle of *pacta sunt servanda,* to enter into loan contracts and seek enforcement of obligations arising from such contracts.[368] However, the regime has exposed the inadequacies of international law in dealing with the dynamics of sovereign debt. For instance, the non-responsiveness of formal law-making processes has led to the emergence of supplementary contractual frameworks issued by IGOs and NSAs for the restructuring of sovereign debts or, in some cases, debt reliefs. They seek to balance the interests of stakeholders.

In terms of the protection of broader interests of stakeholders, it may be argued that the regime is more favourable to creditors. Kamlani,

364 I Bantekas 'The emergence of an international law of sovereign debt and insolvency' (2014) 3 *International Human Rights Law Review* 161-163.

365 SD Krasner 'Structural causes and regime consequences: Regimes as intervening variables' (1982) 36 *International Organization* 186.

366 Kamlani (n 31) 43.

367 Kamlani (n 31) 44; Tan (n 315) 250-256.

368 E Petersmann 'International rule of law and constitutional justice in international investment law and arbitration' (2009) 16 *Indiana Journal of Global Legal Studies* 34.

for instance, pointedly observed that empirical evidence has shown that creditors dictate the normative substance of the restructuring regime.[369] It is instructive to quote him here:

> Sovereign debt management regimes are better characterized as imposed regimes, since their content is generally not a matter for negotiation between private creditors and sovereign states. In fact, it has customarily been the case that these regimes are established by creditor groups unilaterally … While sovereign debtors implicitly recognize their authority when engaging them in a restructuring negotiation, they have typically not been a party to the regime's establishment.[370]

This unbalanced power structure in constitution of debt restructuring regime will become handy in our discussion on creditor human rights responsibility in subsequent chapters. This, however, may not affect the validity of the resulting agreement because determining validity is a question of both law and facts. A sovereign debt will be deemed valid once the constituents of the agreement can be established. However, the objective of the loan is key to determining validity. For instance, a debt procured for the personal benefits of government officials rather than to further the interests of citizens may not be valid. In the *Tinoco* case it was held that for a debt to be enforced it must have been procured for 'governmental purpose'.[371] An illegitimate debt or debt imposing unconscionable conditions or violating treaty or CIL norms may be considered odious.[372]

As events of default continue unabated, stakeholders have been working hard to come up with a more balanced, fair and well-defined set of rules, principles and procedures for contracting, renegotiating and restructuring of sovereign debts.[373] However, the feasibility of this

369 Kamlani (n 31) 44.

370 Kamlani (n 31) 45; Tan (n 315) 254.

371 *Tinoco* case (n 88) 394.

372 This covers debts not in 'conformity with international law' under the Vienna Convention Succession of States in respect of State Property, Archives and Debts 1983 (arts 33-36). The Convention's *travaux préparatoires* show that at the time 'odious debt' was widely considered to cover debt incurred without popular consent and not beneficial to the people and the creditor was aware of this. See Bantekas & Vivien (n 301); I Bantekas 'Sovereign debt denunciation and unilateral insolvency under international law: When is it lawful?' (2023) 46 *Hastings International and Comparative Law Review* 132.

373 See, eg, the following instruments: UNGA Basic Principles on Sovereign Debt Restructuring Processes (adopted 10 September 2015) (UNGA BPSDRP); UNCTAD Sovereign Debt Workout: Going Forward, Roadmap and Guide (UNCTAD SDWG 2015); UNCTAD Principles on Responsible Sovereign Lending and Borrowing

framework achieving universal acceptance is open to question because maintaining the *status quo* favours the creditors and, not surprisingly, they tend to resist any universal statutory reform efforts. Universal acceptance is unlikely to emerge because the regime 'is fraught with bad incentives and destructive outcomes'.[374] Fortunately, universal consensus, as will be demonstrated in the next chapter, is something that socio-economic rights have generated and enjoyed for decades.

5 Conclusion

From the above discussions, the 'sovereign' is a unity between the citizens and their state for the purpose of valid external financial undertakings. International law sets the contours of sovereign debt relationships. State practices evolved to define the nature and structure of these relationships. However, these relationships are not essentially removed from the control of domestic private laws as virtually all non-official sovereign debt contracts and bonds have conflict of laws and jurisdictional clauses empowering domestic courts to determine issues of validity, interpretation, enforcement, and liability arising from the parties' conducts under such contracts. This means that, by nature, sovereign debts involve a complex hybridity of private and public elements. The positivists' dichotomy, arguably, is a false contraption developed to serve ideological, economic and geopolitical interests. Unfortunately, several principles, concepts, theories, ideas, practices and expectations have developed around this interest-based, false dichotomy. Key players in sovereign debt governance have succeeded in using this device to shut out a (perhaps *the*) critical stakeholder, namely, the citizen. The implication, it may be argued, is that the citizens are literally invisible, voiceless, helpless, and powerless in sovereign debt governance. This completely ignores the fact that sovereign financing, ideally, ought to be informed by the citizens' best interests otherwise its legitimacy could be questioned. It might be a consolation that these critical stakeholders have universally-recognised rights rooted in our common essential humanity. The question of how these rights align with the sovereign debt regime to create creditors' socio-economic rights responsibilities will be the theme of the next chapter.

(amended 10 January 2012) (UNCTAD PRSLB 2012); UNHRC Guiding Principles on Foreign Debt and Human Rights (adopted 5 July 2012) (UNHRC GPFDHR 2012).

374 A Gelpern 'Hard, soft, and embedded' in Esposito and others (n 175) 347.