

Mauro Megliani

Sovereign Debt

Genesis - Restructuring - Litigation

 Springer

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*'Nations are wading deeper and deeper
into an ocean of boundless debt'*

Edmund Burke

*'Aequum autem est id ipsum,
quo lex corrigitur'*

Hugo Grotius

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Abbreviations

| | |
|------------------------|--|
| A 2d | Atlantic Reporter – Second Series |
| AC | The Law Reports – Appeal Cases |
| AD | Annual Digest and Reports of Public International Law Cases |
| AFDI | Annuaire français de droit international |
| AJCL | American Journal of Comparative Law |
| AJIL | American Journal of International Law |
| All ER | All England Law Reports |
| Am Econ Rev | The American Economic Review |
| Am Jur 2d | American Jurisprudence – Second Edition |
| Am U Int'l L Rev | American University International Law Review |
| Annuaire | Annuaire de l'Institut de droit international |
| Ann dir int | Annuario di diritto internazionale |
| Arb Int'l | Arbitration International |
| Asian J WTO | Asian Journal of WTO & International Health Law and Policy |
| ASIL Proc | Proceedings of the American Society of International Law |
| AYIL | African Yearbook of International Law |
| Banking L J | Banking Law Journal |
| BC Int'l & Comp L Rev | Boston College International and Comparative Law Review |
| BCLC | Butterworths Commercial Law Cases |
| B C Third World L J | Boston College Third World Law Journal |
| Berkley J Int'l Law | Berkeley Journal of International Law |
| Bibliotheca Visseriana | Bibliotheca Visseriana Dissertationum Ius Internationale Illustrantium |
| BJIBFL | Butterworths Journal of International Banking and Financial Law |
| Boston U L Rev | Boston University Law Review |
| Brooklyn J Int'l L | Brooklyn Journal of International Law |
| Bus Lawyer | The Business Lawyer |

| | |
|-----------------------------|--|
| Bus L Int'l | Business Law International |
| BYIL | The British Yearbook of International Law |
| Calif L Rev | California Law Review |
| Cam L J | The Cambridge Law Journal |
| Can Bus L J | Canadian Business Law Journal |
| Cap Mark L J | Capital Markets Law Journal |
| Case W Res J Int'l L | Case Western Reserve Journal of International Law |
| Cd, Cmd | Command Papers |
| CFR | Code of Federal Regulation |
| Ch, Ch D | The Law Reports – Chancery Division |
| Chi J Int'l L | Chicago Journal of International Law |
| C int | La Comunità internazionale |
| CLC | Commercial Law Cases |
| CMLR | Common Market Law Review |
| Collected Cours | Collected Cours of the Academy of European Law |
| Colo J Int'l Envl L & Pol'y | Colorado Journal of International Environmental Law and Policy |
| Colum Bus L Rev | Columbia Business Law Review |
| Colum J Trans L | Columbia Journal of Transnational Law |
| Colum L Rev | Columbia Law Review |
| Cornell Int'l L J | Cornell International Law Journal |
| Cornell L Q | Cornell Law Quarterly |
| Cornell L Rev | Cornell Law Review |
| Creighton L Rev | Creighton Law Review |
| CTS | Consolidated Treaty Series |
| Current Leg Probs | Current Legal Problems |
| CYIL | Canadian Yearbook of International Law |
| D | Digesta Iustinianii Augusti seu Pandectae |
| Dalhousie L J | The Dalhousie Law Journal |
| DCI | Diritto del commercio internazionale |
| Denv J Int'l L & Pol'y | Denver Journal of International Law and Policy |
| Duke L J | Duke Law Journal |
| EBLR | European Business Law Review |
| EBOLR | European Business Organization Law Review |
| Econ J | The Economic Journal |
| ECR | European Court Reports |
| EJIL | European Journal of International Law |
| ELR | European Law Review |
| Emory L J | Emory Law Journal |
| Encyclopedia | Max Planck Encyclopedia of Public International Law |
| Eq | The Law Reports – Equity |
| ER | English Reports |
| Eu Const L Rev | European Constitutional Law Review |
| Ex D | The Law Reports – Exchequer Division |

| | |
|-----------------------------|---|
| F 2d | Federal Reporter – Second Series |
| F 3d | Federal Reporter – Third Series |
| Fed | Federal Reporter |
| Fed Appx | Federal Appendix |
| Fin Hist Rev | Financial History Review |
| Fordham Int'l L J | Fordham International Law Journal |
| Fordham L Rev | Fordham Law Review |
| Foreign Aff | Foreign Affairs |
| Foreign Pol'y | Foreign Policy |
| Foreign Rel | Papers Relating to the Foreign Relations of the United States |
| Foro it | Il Foro italiano |
| F Supp | Federal Supplement |
| F Supp 2d | Federal Supplement – Second Series |
| FYIL | Finnish Yearbook of International Law |
| Ga J Int'l & Comp L | Georgia Journal of International and Comparative Law |
| Geo J Int'l L | Georgetown Journal of International Law |
| Geo Wash Int'l L Rev | George Washington International Law Review |
| Geo Wash J Int'l L & Econ | George Washington Journal of International Law and Economics |
| Geo Wash L Rev | George Washington Law Review |
| German L J | German Law Journal |
| GoJIL | Goettingen Journal of International Law |
| GU | Gazzetta ufficiale della Repubblica italiana |
| GYIL | German Yearbook of International Law |
| Harv Env'l L Rev | Harvard Environmental Law Review |
| Harv Hum Rts J | Harvard Human Rights Journal |
| Harv Int'l L J | Harvard International Law Journal |
| Harv L Rev | Harvard Law Review |
| Hastings Int'l & Comp L Rev | Hastings International and Comparative Law Review |
| Hofstra L Rev | Hofstra Law Review |
| Houston J Int'l L | Houston Journal of International Law |
| IBL | International Business Lawyer |
| ICJ Rep | International Court of Justice Reports |
| ICLQ | International and Comparative Law Quarterly |
| ICSID Rep | ICSID Reports |
| ICSID Rev | ICSID Review/Foreign Investment Law Journal |
| IFLR | International Financial Law Review |
| ILM | International Legal Materials |
| ILR | International Law Reports |
| Indian J Int'l L | Indian Journal of International Law |
| Int-Am L Rev | Inter-American Law Review |
| Int'l ALR | International Arbitration Law Review |

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|------------------------------|---|
| Int'l J Soc of Law | International Journal of the Sociology of the Law |
| Int'l Lawyer | The International Lawyer |
| Int'l Lit Pr | International Litigation Procedure |
| Int'l Org | International Organization |
| Int'l Org L Rev | International Organizations Law Reviews |
| Int'l St Persp | International Studies Perspectives |
| Iowa L Rev | Iowa Law Review |
| Iran–US CTR | Iran–United States Claims Tribunal Reports |
| IYIL | The Italian Yearbook of International Law |
| JBL | Journal of Business Law |
| J-Cl dr int | Juris-Classeur de droit international |
| JCMS | Journal of Common Market Studies |
| J Comp Bus & Cap Mark L | Journal of Comparative Business and Capital Market Law |
| J Comp Leg | Journal of Comparative Legislation and International Law |
| JDI | Journal de droit international |
| J Econ Hist | The Journal of Economic History |
| J Econ Liter | Journal of Economic Literature |
| JIBL | Journal of International Banking Law |
| JIBLR | Journal of International Banking Law and Regulation |
| JIEL | Journal of International Economic Law |
| J Int'l Arb | Journal of International Arbitration |
| J Int'l Money & Fin | Journal of International Money and Finance |
| J Legal St | The Journal of Legal Studies |
| Jour Off | Société des Nations Journal Officiel |
| J Pol Econ | Journal of Political Economy |
| Jurid Rev | Juridical Review |
| J WIT | The Journal of World Investment & Trade |
| JWT | Journal of World Trade |
| JWTL | Journal of World Trade Law |
| Kansas L Rev | Kansas Law Review |
| KB | Law Reports – King's Bench |
| L & Bus Rev Ams | Law and Business Review of the Americas |
| L & Contemp Probs | Law and Contemporary Problems |
| L & Pol Int'l Bus | Law and Policy in International Business |
| LJIL | Leiden Journal of International Law |
| Lloyd's Rep | Lloyd's Law Reports |
| LNTS | League of Nations Treaty Series |
| Loy LA Int'l & Comp L Rev | Loyola of Los Angeles International and Comparative Law Review |
| LPICT | The Law and Practice of International Courts and Tribunals |
| LQR | The Law Quarterly Review |
| Md J Int'l L & Trade | Maryland Journal of International Law and Trade |
| Michigan J Int'l L | Michigan Journal of International Law |

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|-----------------------------|--|
| Michigan L Rev | Michigan Law Review |
| NC J Int'l L & Com Reg | North Carolina Journal of International Law and Commercial Regulation |
| Ned TIR | Nederlands Tijdschrift voor International Recht |
| New Eng J Int'l & Comp L | New England Journal of International and Comparative Law |
| NILR | Netherlands International Law Review |
| Nord TIR | Nordisk Tidsskrift for International Ret |
| North Am Rev | North American Review |
| NW J Int'l L & Bus NY | Northwestern Journal of International Law and Business Reports of Cases Decided in the Court of Appeals of the State of New York |
| NYIL | Netherlands Yearbook of International Law |
| NYS | New York Supplement |
| NYS 2d | New York Supplement – Second Series |
| NYU J Int'l L & Pol | New York University Journal of International Law and Politics |
| NYU LQR | New York University Law Quarterly Review |
| NYU L Rev | New York University Law Review |
| NZLR | New Zealand Law Reports |
| OJ | Official Journal of the European Communities/European Union |
| OJLS | Oxford Journal of Legal Studies |
| Pasicrisie | Pasicrisie belge |
| PCIJ Series A | Permanent Court of International Justice, Collection of Judgments |
| PCIJ Series A/B | Permanent Court of International Justice, Judgments Orders and Advisory Opinions |
| PCIJ Series B | Permanent Court of International Justice, Collection of Advisory Opinions |
| PCIJ Series C | Permanent Court of International Justice, Pleadings, Oral Statements and Documents |
| Penn St Int'l L Rev | Pennsylvania State University International Law Review |
| Philippine L J | Philippine Law Journal |
| Pol Sc Q | Political Science Quarterly |
| QB, QBD | The Law Reports – Queen's Bench Division |
| Rass dir pub | Rassegna di diritto pubblico |
| RBDI | Revue belge de droit international |
| RDAI | Revue de droit des affaires internationales |
| RDI | Rivista di diritto internazionale |
| RDIPP | Rivista di diritto internazionale privato e processuale |
| Recueil des Cours | Recueil des Cours de l'Academie de Droit International de La Haye |
| Rev arb | Revue de l'arbitrage |
| Rev crit | Revue critique de droit international privé |

| | |
|----------------------------|---|
| Rev dr int | Revue de droit international et de législation comparée |
| Rev dr pub | Revue du droit public et des sciences politiques |
| Rev Econ St | Review of Economic Studies |
| Rev sc lég fin | Revue de science et de législation financières |
| RGDIP | Revue générale de droit international publique |
| RIAA | United Nations Reports of International Arbitral Awards |
| RIW | Recht der Internationalen Wirtschaft |
| RMCUE | Revue du marché commun et de l'Union européenne |
| RTDH | Revue trimestrielle des droits de l'homme |
| SAYIL | South African Yearbook of International Law |
| S Ct | Supreme Court Reporter |
| Sess Cases | Cases Decided in the Court of Session |
| Sirey | Recueil Sirey |
| Stan J Int'l L | Stanford Journal of International Law |
| Stan L R | Stanford Law Review |
| State Papers | British and Foreign State Papers |
| Statutes at Large | United States Statutes at Large |
| Temple L Rev | Temple Law Review |
| Texas Int'l L J | Texas International Law Journal |
| Third World Q | Third World Quarterly |
| TLR | The Times Law Reports |
| Trans Grot Soc'y | Transactions of the Grotius Society |
| Travaux | Travaux du Comité français de droit international privé |
| Tribunaux Arbitraux Mixtes | Recueil des décisions des Tribunaux arbitraux mixtes |
| Tulane L Rev | Tulane Law Review |
| UC Davis L Rev | University of California Davis Law Review |
| U Chi L Rev | University of Chicago Law Review |
| UCLA J Int'l L & For Aff | University of California Los Angeles Journal of International Law and Foreign Affairs |
| UCLA L Rev | University of California Los Angeles Law Review |
| U Ill L Rev | University of Illinois Law Review |
| UKTS | United Kingdom Treaty Series |
| U Pa J Int'l Bus L | University of Pennsylvania Journal of International Business Law |
| U Pa J Int'l Econ L | University of Pennsylvania Journal of International Economic Law |
| U Pa L Rev | University of Pennsylvania Law Review |
| UNTS | United Nations Treaty Series |
| US | United States Supreme Court Reports |
| USCA | United States Code Annotated |
| Va J Int'l L | Virginia Journal of International Law |
| Vand J Trans L | Vanderbilt Journal of Transnational Law |
| Vand L Rev | Vanderbilt Law Review |

| | |
|----------------|--|
| VRU | Verfassung und Recht in Übersee |
| Wis Int'l L J | Wisconsin International Law Journal |
| WLR | Weekly Law Reports |
| World Dev | World Development |
| WTA Mat | World Trade and Arbitration Materials |
| Yale J Int'l L | Yale Journal of International Law |
| Yale L J | Yale Law Journal |
| YIFEL | Yearbook of International Financial and Economic Law |
| YILC | Yearbook of the International Law Commission |

Part I
Sovereign Indebtedness

Chapter 1

Introduction

1.1 Sovereign Debt and Sustainability

The traditional channels through which a sovereign State raises financial resources are taxation, money printing, and borrowing. In theory, fiscal policy and monetary policy should operate in an anti-cyclical manner so as to generate budgetary surpluses in times of economic growth and create deficit spending in periods of recession; in practice, deficits normally surpass surpluses and recourse to borrowing becomes unavoidable.¹

State indebtedness may be internal or external. External debt is incurred when a government is not capable of raising at domestic level resources sufficient to meet its needs. In terms of economics, this distinction entails significant consequences as domestic debt leads to an internal redistribution of national wealth, while foreign debt implies the transfer of a portion of national wealth to foreign subjects.² A huge external debt generally poses serious problems in terms of sustainability.

Broadly speaking, for market access countries, a debt is considered sustainable as long as the debtor is able to continue servicing the debt without an unrealistically large future correction in the balance of income and expenditure. Sustainability is excluded when a debt restructuring is already needed (or expected to be needed), the borrower keeps on indefinitely accumulating debt faster than its capacity to

¹ In the long run, debt financing of a deficit may prove more inflationary than money financing as governments, being unable to finance deficits through taxation or borrowing beyond a certain ceiling, are obliged to print money. In fact, the longer a government decides to finance the deficit by having recourse to borrowing, the higher is the ultimate rate of inflation, as money financing must take into consideration the accumulation of the debt. See Dornbusch and Fischer (1994), pp. 583–584. This idea runs counter to the concept of Ricardian equivalence, as developed by Barro (1974); see Churchman (2001), pp. 36–37.

² Dornbusch and Fischer (1994), p. 589.

service these debts is growing, or the borrower lives beyond its means by accumulating debt in the knowledge that a reduction will be needed to service these debts.³

The global financial crisis with its enduring effects has exacerbated the problem of sustainability and posed the issue of restructuring.⁴

1.2 Sovereign Debt and International Financial Law

The notion of State debt generally includes debts owed, guaranteed, or secured by a sovereign State or an agency or instrumentality thereof⁵; these debts may originate from various obligations (e.g., contract and tort)⁶ and may be owed to domestic or foreign creditors.⁷ From an economic point of view, what comes into play is the criterion of the residence of the parties: when creditors are resident inside the borrowing State, the debt is an internal debt; when creditors are resident outside the borrowing State, the debt is an external debt.⁸ From a juridical point of view, this distinction is not satisfactory as the legal regime governing the debt is not necessarily related to the residence of the creditors.⁹ In terms of international law, under the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (1983), State debt means any financial obligation of a predecessor State arising in conformity with international law towards another State, an international organisation or any other subject of international law (Art 33).¹⁰

This definition, however, is not sufficiently exhaustive to cover all the facets of the phenomenon, such as loans contracted with private parties, loans contracted with international law subjects but not under international law norms, as well as all the loans contracted by international law subjects in conformity with international law but outside a State succession.¹¹ To fill this lacuna, it is necessary to have

³ See IMF (2002), p. 4. For low-income countries, the International Monetary Fund and the World Bank in 2005 introduced a Joint Debt Sustainability Framework, under which debt sustainability analyses are conducted regularly on the basis of an analysis of a country's projected debt burden over 20 years and its vulnerability to external and policy shocks, an assessment of the risk of debt distress in that period in the light of indicative debt burden thresholds, and recommendations for borrowing and lending aimed at limiting the risk of debt distress. When a debt burden indicator exceeds its indicative thresholds, a risk of experiencing a debt distress can be envisaged. See The Joint World Bank-IMF Debt Sustainability Analysis for Low-Income Countries, at <http://imf.org/external/np/exr/facts/jdsf.htm>.

⁴ See Kolb (2011) and Primo Braga and Vincelette (2011).

⁵ See Feliciano (1995), p. 25. A quasi-sovereign debt is a debt owed by a State-owned or State-controlled enterprise, Galvis and Saad (2004), p. 727.

⁶ See Paulus (2012), pp. 1082–1083.

⁷ See Folz (2000), p. 608.

⁸ See Gianviti (1989), p. 235.

⁹ See Carreau (1995), p. 5.

¹⁰ (Done 8 April 1983) (1983) 22 ILM 306; see Degan (1993).

¹¹ See Menon (1991), pp. 163–166. However, according to Stern (1996), p. 344, these rules should be applied to any creditor of the State.

recourse to foreign connecting factors, such as governing law, jurisdictional/arbitral clauses, and the currency in which the loan is denominated.¹² Foreign creditors usually coincide with other States and their agencies, multilateral institutions, and private persons (banks, bondholders, trade suppliers).¹³ Although the holder of the debt instrument may change, with the economic characterisation of the debt varying accordingly, the legal regime of the loan remains unaffected.¹⁴ This is true not only for foreign creditors holding domestic debt¹⁵ but also for private foreign creditors replacing public foreign creditors.¹⁶

Sovereign debt belongs to the domain of international financial law, i.e. the branch of international economic law regulating international financial relationships.¹⁷ The term “international financial law” was first coined with reference to the institute of State debt succession by the Russian émigré Sack, who argued that international financial law represented a *sui generis* institution, partaking of both financial law and public law and constituting a supra-national law (“*überstaatliches Recht*”).¹⁸ Although endorsed by Politis,¹⁹ this theory encountered fierce opposition from Feilchenfeld, in whose view international financial law could not constitute a legal system separate from international and national laws.²⁰ Sir John Fischer Williams empirically highlighted that “*le droit financier international nous invite à une conception du droit qui ne serait pas seulement ‘international’ dans le sens*

¹² This is the position expressed by the International Law Association at the Hague Conference 2010; see Waibel (2011), p. 13.

¹³ See O’Connell (1967), p. 369, Mac Lean (1989), pp. 43–55, and Pavlidis (2006), p. 36.

¹⁴ See Borchard (1951), pp. 76–77.

¹⁵ The most immediate reference is to US bonds issued domestically, but mainly held by foreign creditors, Li and Panizza (2013), p. 20.

¹⁶ This is the case of bilateral debt assigned to private parties; cf. *Donegal International v. Zambia* [2007] EWCH 197 (Comm Ct), [2007] 1 *Lloyd’s Rep* 397.

¹⁷ International financial law, currently widely referred to, until recently was not a much scholarly ploughed field: “To those having an interest in international law, the law of international finance and investment is (...) an exotic and esoteric field. Even among those who count themselves expert in international economic law, knowledge often stops short at the law of international trade”, Baxter (1980), p. 7. However, the argument that this legal branch is not yet fully developed (Delaume 1967, p. 124) seems no longer tenable.

¹⁸ “*Le principe de la succession des dettes publiques est donc un principe, non de droit international public réglant les rapports entre Etats, mais de droit financier et de droit public général*”, Sack (1927), pp. 87–88. Sack’s work did not exert much influence on public international law scholars until the 1990s, see Ludington and Gulati (2008), p. 627.

¹⁹ Politis in his *Préface* to the book by Sack (1927), p. VI, emphasised that this work had brought “*une remarquable contribution à l’étude de la nouvelle branche du droit des gens qui a été justement appelée le droit financier international*”.

²⁰ International financial law may indicate all legal rules concerning international financial relations, “but the term, if it is used in this sense, defines a body of rules bearing on a common subject-matter, and not a system of laws originating from a separate source. Admiralty law, property law, patent law, and commercial law are all special fields of law, but whatever rules they contain are created by the systems of municipal law or by international law; international financial law, as properly understood, is as much or as a little an independent kind of law as are admiralty law and other fields of law mentioned”, Feilchenfeld (1931), p. 595.

étymologique du mot, mais qui serait un seul droit s'appliquant à tous les sujets possibles de droit, Etats en même temps qu'individus".²¹ Along the same lines, Schwarzenberger held that international financial law (as with international economic law) included all the topics related to cases characterised by a predominantly financial element and a foreign or international element.²²

1.3 The Structure of the Work

The present work proposes to explore four types of indebtedness connected with sovereign financing: bilateral debt, multilateral debt, syndicated debt, and bonded debt.²³ These four types will be analysed with reference to three crucial aspects—genesis, restructuring, and litigation—so as to provide a thorough picture of the most salient facets of the phenomenon. Structurally, after an introductory part giving a historical outline of sovereign debt and sovereign crises, the work divides itself into three main parts: genesis, restructuring, and litigation. Each of these parts opens with a preliminary chapter setting out general problems that, on one hand, perform an introductory function and, on the other, cannot be strictly confined to a single type of debt. The four types of debt are analysed in the following order: bilateral, multilateral, syndicated, and bonded. The scheme replicates itself identically in the three parts. Although it displays a certain degree of rigidity, the structure of the work makes it possible to capture in a systematic manner a phenomenon characterised by huge complexity and unclear boundaries:

- Genesis—the introductory chapter analyses different topics: the capacity to borrow, the legal nature of loans, the right to development, the UNCTAD Principles, and the HRC Principles. The chapter on bilateral debt investigates the qualification of the act of borrowing, the governing law, and the constitutional norms relating to parliamentary prerogatives in relation to treaties and budget. The chapter on multilateral debt takes into account the purposes and facilities of the various lenders, with particular references to the policy of conditionality. The chapter on syndicated debt focuses on the syndication process, the regulatory profiles, and the quest for a governing law. The chapter on bonded debt explores a far more complicated matter, analysing the issuing process, the role of the trustee/fiscal agent, the regulatory requirements for securities, and the law governing the various aspects of the loan.
- Restructuring—the introductory chapter examines the default and its consequences, the restructuring methods, and the debt conversions. The chapter on bilateral debt is centred on the nature and mission of the Paris Club, the progressive institutionalisation of which has produced substantive and procedural rules. The chapter on syndicated debt is focused on the role played by the London Club,

²¹ See Fischer Williams (1930), p. 139.

²² See Schwarzenberger (1942), p. 24.

²³ Trade debts, because of their commercial aims, do not fall within the scope of the work.

on the terms of restructuring and on the Baker and Brady Plans. The chapter on bonded debt analyses the effects of collective action clauses on the restructuring process, puts emphasis on the absence of a negotiating forum, and describes the restructuring routes. In this context, a first asymmetry in the structure of work emerges as multilateral creditors normally follow a non-restructuring policy.

- Litigation—the asymmetry becomes even more evident in the third part. There is no litigation related to multilateral debt, and little related to bilateral debt. With reference to syndicated debt, the analysis focuses first on the conflict of laws rules concerning the identification of the forum and then on the case law fundamentally related to champerty and *pari passu*. In bonded debt, the issue of jurisdiction is not specifically examined as it is similar to that already treated with regard to syndicated debt, and the *pari passu* case law is analysed as a sequel to that in the previous chapter, while particular attention has been given to the role of the trustee, class action, and ICSID arbitration. To balance these lacunae, the third part is open by a long introductory chapter divided into two sections: the first discusses public international law procedural rules, such as State immunity and act of State, and the second discusses public international law substantive rules, ranging from necessity to odious debt. Notwithstanding these adjustments, the scheme in the third part replicates the one chosen for the first two, not so much for the sake of symmetry but rather to make it easier to trace each source of State indebtedness. The work closes with a final part on the future developments, describing the interwoven issues of a sovereign debt restructuring mechanism, with the various proposals in this direction, and of a lender of last resort, including the European Stability Mechanism and the legal challenges to it.

The work betrays a fundamental imprint of international law. Nonetheless, the insufficiency of this discipline to cover the manifold facets of the phenomenon has led to the inclusion in the analysis of other sources, such as private international law, national laws, and financial practice; to provide a deeper understanding of the picture, references to international financial relations and international financial history have been occasionally made. Although it follows the scheme of a continental *tractatus*, combining primary and secondary sources, the work strikes a fair balance between doctrinal and jurisprudential references.

The separate analysis of the four types of debt under each profile is justified by the necessity to capture their distinguishing features. A public lender/private lender work would have been confusing, as bilateral loans and multilateral loans, on one side, and syndicated loans and bonded loans, on the other, present specific characters. A case study work, preceded by a long analysis of the principal legal issues, would have meant taking a path already trodden and would have encountered the objective difficulty of finding out all the relevant sources (loan contracts and restructuring agreements are not always available). A topic-based work would have been more suited to a multi-author work than to a single-author, treatise-like book. Although it has its imperfections, the chosen approach appears to be the best way to combine coherency, coverage of several different disciplines, and exhaustiveness.²⁴

²⁴ Developments are reported up to 31 December 2013.

References

- Barro RJ (1974) Are government bonds net wealth? *J Pol Econ* 82:1095–1117
- Baxter RR (1980) Introduction. In: Rendell RS (ed) *International financial law*. Euromoney, London, pp 7–10
- Borchard E (1951) *State insolvency and foreign bondholders. General principles*. Yale University Press, New Haven
- Carreau D (1995) Rapport du directeur d'études de la section de langue française. In: Carreau D, Shaw MN (sous dir de/eds) *The external debt (La dette extérieure)*. Martinus Nijhoff, Boston/Dordrecht/London, pp 3–24
- Churchman N (2001) *David Ricardo on public debt*. Palgrave, Basingstoke/New York
- Degan VD (1993) State succession especially in respect of state property and debts. *FYIL* 4:130–193
- Delorme G (1967) *Legal aspects of international lending and economic development financing*. Oceana, Dobbs Ferry
- Dornbusch R, Fischer S (1994) *Macroeconomics*, 6th edn. McGraw-Hill Inc, New York
- Feilchenfeld EH (1931) *Public debts and state succession*. Macmillan, New York
- Feliciano FP (1995) Report of the Director of studies of the English-speaking Section of the Centre. In: Carreau D, Shaw MN (sous dir de/eds) *The external debt (La dette extérieure)*. Martinus Nijhoff, Boston/Dordrecht/London, pp 25–32
- Fischer Williams (Sir) J (1930) *La convention pour l'assistance financière aux États victims d'agression*. *Recueil des Cours* 34:81–174
- Folz HE (2000) State debts. In: Bernhardt E (ed) *Encyclopedia*, vol IV. Elsevier, Amsterdam, p 608
- Galvis SJ, Saad AL (2004) Collective action clauses. Recent progress and challenges ahead. *Geo J Int'l L* 35:713–730
- Gianviti F (1989) The International Monetary Fund and external debt. *Recueil des Cours* 215:205–286
- IMF (2002) *Assessing sustainability*. IMF, Washington
- Kolb R (ed) (2011) *Sovereign debt: from safety to default*. Wiley, Hoboken
- Li Y, Panizza U (2013) The economic rationale for the principles on promoting responsible sovereign lending and financing. In: Esposito C, Li Y, Bohoslavsky JP (eds) *Sovereign financing and international law: the UNCTAD principles on responsible sovereign lending and borrowing*. OUP, Oxford
- Ludington S, Gulati M (2008) A convenient untruth: fact and fantasy in the doctrine of odious debts. *Va J Int'l L* 48:595–639
- Mac Lean RG (1989) Legal aspects of the external debt. *Recueil des Cours* 214:31–126
- Menon PK (1991) *The succession of states in respect to treaties, state property, archives, and debts*. Edwin Mellen Press, Lewiston/Lampeter
- O'Connell DP (1967) *State succession in municipal law and international law*, vol I, 2nd edn. CUP, Cambridge
- Paulus CG (2012) Debts. In: Wolfrum R (ed) *The Max Planck encyclopedia of public international law*, vol II. OUP, Oxford, p 1082
- Pavlidis G (2006) *La défaillance d'Etat*. Sakkoulas Publications, Athens/Thessaloniki
- Primo Braga CA, Vincelette GA (eds) (2001) *Sovereign debt and the financial crisis*. World Bank, Washington
- Sack AN (1927) *Les effets des transformations des États sur leurs dettes publiques*. Recueil Sirey, Paris
- Schwarzenberger G (1942) The development of international economic and financial law by the Permanent Court of Justice. *Jurid Rev* 54:21–40
- Stern B (1996) *La succession d'États*. *Recueil des Cours* 262:9–438
- Waibel M (2011) *Sovereign defaults before International Courts and Tribunals*. CUP, Cambridge

Chapter 2

A Historical Outline of Sovereign Indebtedness

2.1 Preliminary Remarks

From a historical perspective, States have systematically contracted loans to finance their policies. Since the modern age, State indebtedness has progressively lost its character of an occasional necessity of the sovereign to become an instrument of development for the national community as a whole.¹ In other words, sovereign indebtedness has been increasingly incurred to pursue political aims to the advantage, and in the interests of, the public.²

Sovereign borrowing has frequently been accompanied by sovereign default.³ In this regard, the Dutch philosopher Hugo Grotius explained that the failure to honour a debt owed by one monarch to another would lead to specific consequences: on one hand, it might provide a cause for a *justum bellum*; on the other, it would permit confiscatory measures in retaliation directed towards the subjects of the defaulting

¹ From eighteenth century onwards, some limitations on the power of the sovereign to contract loans began to emerge: Emmerich de Vattel, after drawing a distinction between personal debts and national debts, specified that a sovereign can validly contract debts as long as they are for the benefit of the country; in contrast, if it without necessity incurs debts so great as to bring his country to ruin, “*le souverain agirait manifestement sans droit; et ceux qui lui auraient prêté, auraient mal confié*”, de Vattel (1835), Liv. II, Chap. XIV, § 216.

² See Sack (1927), pp. 25–30. In this connection, the creation of a “National Debt” was the work of the Dutch, who brought the idea to England: “National Debts secured upon Parliamentary Funds of Interests, were things unknown in England before the last Revolution under the Prince of Orange”, Swift (1951), p. 68. See Dickson (1967), pp. 17–18.

³ One of the first instances of default can be traced back to the loan made by the Greek sanctuary of Delos in the fourth century BC to certain States of the Attic League: of the sums lent, only a small portion was subsequently reimbursed; see Andreades (1933), pp. 171–172. In the period from 1800 to 2009, the practice records at least 250 episodes of external defaults, Reinhart and Rogoff (2009), p. 34.