Institute for International Law and Justice

IILJ International Legal Theory Colloquium Spring 2012
Convened by Professors Benedict Kingsbury and Joseph Weiler

Wednesdays 2pm-3:50pm on dates shown, unless otherwise noted

NYU Law School
Vanderbilt Hall 208, 40 Washington Square South
(unless otherwise noted)

SCHEDULE OF SESSIONS:

January 25 Harlan Grant Cohen, *University of Georgia*
"Finding International Law, Part II: Our Fragmenting Legal Community"

February 1 Anthea Roberts, *London School of Economics / Visiting Professor at Harvard University*
"Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System"

February 8 Odette Lienau, *Cornell University*
"Rethinking Sovereign Debt: The Politics of Reputation in the Twentieth Century"

February 29 Nico Krisch, *Hertie School of Governance (Berlin) / Visiting Professor at Harvard University*
"From Consent to Consultation: International Law in an Age of Global Public Goods"

March 21 Doreen Lustig, *New York University*
"The Business of International Law: International Legal Attitudes Toward the Business Enterprise, 1870-1954"

April 3 Jean d'Aspremont, *University of Amsterdam*
"Formalism and the Sources of International Law" (*excerpts*)

April 4 Martti Koskenniemi, *University of Helsinki / New York University / Visiting Professor at Columbia University*
"International Law and the Emergence of Mercantile Capitalism: Grotius to Smith"

April 17 Horatia Muir Watt, *Sciences Po*
"Global Governance and Private International Law"
[to be held, exceptionally, on a Tuesday at 4pm; FH 118]

April 18 Armin von Bogdandy & Matthias Goldmann, *Max Planck Institut, University of Heidelberg / New York University*
"Sovereign Debt Restructurings as Exercises of International Public Authority: Towards a Decentralized Sovereign Insolvency Law"

Sovereign Debt Restructurings as Exercises of International Public Authority: Towards a Decentralized Sovereign Insolvency Law

by Armin von Bogdandy* and Matthias Goldmann**

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A. Introduction

The search for common principles regulating sovereign debt crises is not only of high topicality because of the pressing difficulties of several Euro area member states during the past two years. Rather, excessive sovereign debt and defaults have been pestering governments, citizens, the financial sector as well as the real economy for centuries. Every step on the ladder of economic expansion bears the risk to reverberate in a sovereign debt crisis.[1] Thus, the first traceable public-sector default in history probably occurred in the fourth

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century BC, when attic city states reneged on loans from the Delian League.[2] The beginning of the industrial age in the 19th century saw a virtual explosion in the number of sovereign defaults caused by increasingly developed financial markets. Carmen Reinhardt and Kenneth Rogoff have counted 83 defaults on external debt alone.[3]

In spite of the widespread occurrence of sovereign default, an international bankruptcy court and an international treaty stipulating rules for sovereign defaults never saw the light of day.[4] Instead, sovereign borrowers and their lenders have taken recourse to unofficial, non-binding, discretionary arrangements. During the 19th century, the British Corporation of Foreign Bondholders facilitated negotiations about debt restructurings.[5] Broad discretion reined the negotiations, leading to widely differning solutions.[6] Not much has changed since then. Different as these restructurings are, one may question them in terms of effectiveness and fairness. As regards their effectiveness, the lack of compulsory restructurings has caused collective action problems among creditors. In terms of fairness, the *ad-hoc* solutions provided by the International Financial Institutions as well as the London and Paris Clubs might not always represent the best balance between the interests of lenders and borrowers, between private and public creditors, global north and south.[7] Since the 1970s, a considerable number of renowned authors has developed proposals for sovereign debt restructuring mechanisms,[8] geared toward addressing the collective action and fairness problems while

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[1] Sovereign debt is, however, only one aspect of financial crises. On the intricate realtionships between external and domestic, public and private borrowing, banking crises and debt crises see C. Reinhart & K. Rogoff, "From Financial Crash to Debt Crisis, 101 *American Economic Review* (2011) 1676-1706.

[2] J. Zettelmeyer & F. Sturzenegger, *Debt Defaults and Lessons from a Decade of Crisis* (MIT 2006), 3 (ch. 1, Historical Overview).

[3] C. Reinhart & K. Rogoff, *This Time is Different* (Princeton University Press, 2009), table at 91. Domestic default is more difficult to identify, see ibid., 111ff.

[4] On recent initiatives see K. Rogoff & J. Zettelmeyer, "Bankruptcy Procedures for Sovereigns: A History of Ideas, 1976-2001", IMF Staff Papers 49 (2002), 470.

[5] Zettelmeyer & Sturzenegger (note 2), 11f.

[6] K. Raffer, "Improving Debt Management on the Basis of UNCTAD's Principles", 2 *et seq.*; M. Waibel, ""Out of Thin Air? Tracing the Origins of the UNCTAD Principles in State Practice", 6 *et seq.* (papers presented at the Madrid Conference, 2 March 2012, on file with the authors).

[7] Rogoff & Zettelmeyer (note 4), at 472: The International Debt Commission proposed by developing states in 1979 would have provided fairer solutions for debtors than Paris Club restructurings.

[8] K. Raffer, "Applying Chapter 9 Insolvency to International Debts: An economically Efficient Solution with a Human Face", 18 *World Development* (1990) 301-11 (emphasizing the difference between Chapters 9 and 11 of the US Bankruptcy Code, the latter relating to companies which may be liquidated, the former to municipalities which may not); J. Sachs, "Do We Need an International Lender of Last Resort?", Graham Lecture at Princeton University, 20 April 1995, available at http://www.earth.columbia.edu/sitefiles/file/about/director/pubs/intllr.pdf. (private lending instead of IMF, iMF as arbiter); 2003 article in Cato: http://www.earth.columbia.edu/sitefiles/file/about/director/pubs/cato_sum03.pdf; Lee C. Buchheit & G. Mitu Gulati, Sovereign Bonds and the Collective Will, 53 EMORY L.J. (2003) 1317; A.O. Krueger, *A New Approach to Sovereign Debt Restructuring* (2002); C.G. Paulus, "A Statutory Procedure for Restructuring Debts of Sovereign States", 49 *Recht der Internationalen Wirtschaft* (2003), 401; for a complete overview cf. Rogoff & Zettelmeyer (note 4), at 500. By contrast, other writers called for an international procedure on philosophical,

avoiding moral hazard among debtor states.[9] With the rejection of Anne Krueger's proposal in 2003, these efforts experienced a painful setback.[10]

This is an experimental paper which claims that the existing informal arrangements for the restructuring of sovereign debt can and should be considered as exercises of international public authority. The concept of international public authority has been developed as a basis for the legal conceptualization of global governance mechanisms in order to make them more legitimate, fair, and effective. Accordingly, the qualifiaction of sovereign debt restructurings as exercises of international public authority entails important legal consequences: In the tradition of political thinking since the enlightenment, public authority is only legitimate if it is framed by public law in a way that one may presume its acceptability for all those concerned by such exercises of authority. Our claim thus leads to a reconsideration and doctrinal reconstruction of informal sovereign debt restructurings in light of basic principles of public law. They need to conform to a minimum of procedural and substantive standards. Legal thinking about sovereign debt restructurings should move from a private law to a public law paradigm,[11] It should evolve from a bilateral approach rooted in the idea of international law as a law of coordination to a multilateral approach that understands international law as public law aiming at balanced outcomes.[12] As this paper will show, one may argue that some of the principles desirable according to this approach do already apply *de lege lata*, while others need to be developed *de lege ferenda*. The UNCTAD Principles on Promoting Responsible Sovereign Lending and Borrowing[13] provide important guidance in both respects. The public law approach set out in this paper might add a fitting theoretical and doctrinal framework for the UNCTAD principles, linking this important instance of international norm entrepreneurship to developments in, and insights from, other fields of global governance.

This paper will unfold in four steps. First, we will expand on our concept for the justification of International Public Authority and apply it to existing arrangements for sovereign debt restructurings (B.). Second, the methodology used for construing a legal framework for

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ethical, and theological reasons. See M. Dabrowski, A. Fisch, K. Gabriel & C. Lienkamp, *Das Insolvenzrecht für Staaten* (2003).

[9] Rogoff & Zettelmeyer (note 7), at 494f.

[10] J.A. Kämmerer, "Der Staatsbankrott aus völkerrechtlicher Sicht", 65 *ZaöRV* (2005), 651, 669.

[11] Cf. in the context of investment law: S. Schill, "International Investment Law and Comparative Public Law", in S. Schill, International Investment Law and Comparative Public Law (2010) 3-37.

[12] On the different traditions see J.H.H. Weiler, "The Geology of International Law - Governance, Democracy and Legitimacy", 64 *ZaöRV* (2004) 547, 549.

[13] Consolidated version, 10 January 2011, http://www.unctad.info/upload/Debt%20Portal/Principles%20drafts/SLB_Principles_English_Doha_4-2012.pdf.

international public authority deserves some explanation (C.). Thirdly, we will provide a rough sketch of the legal consequences of the authoritative character of these restructuring arrangements. In order to increase their legitimacy, they need to respect a minimum of procedural and material standards (D.I.). Also, their authoritative character has consequences for proceedings before domestic and international courts and tribunals (D.II.). Eventually, the existence of authoritative and legitimate arrangements for debt restructurings necessitates responsible lending practices on the part of sovereign borrowers (E.).

B. Sovereign Debt Restructurings as Exercises of Public Authority

I. From Global Governance to International Public Authority

The claim that sovereign debt restructurings are exercises of international public authority is based on our previous proposals to conceptualize international institutions and their activites from a public law perspective.[14] This approach emerged from what we perceiced as the strengths and weaknesses of the concept of global governance from the perspective of legal scholarship.[15] Since the mid-1990s, the concept of global governance has become a ubiquitous analytical perspective in many disciplines for the descripition of worldwide political, economic, and social processes.[16] Four characteristic traits of this concept are of relevance for legal scholarship. First, the global governance concept recognizes the importance of states and international institutions, but also highlights the relevance of actors and instruments which are of a private or hybrid nature, as well as of individuals – governance is not only an affair of public actors. Second, global governance marks the emergence of an increased recourse to informality: many institutions, procedures and instruments escape the grasp of established legal concepts like binding international law. Third, thinking in terms of

[14] A. v. Bogdandy, P. Dann & M. Goldmann, "Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities", 9 *German Law Journal* (2008) 1375-1400, reprinted in A. v. Bogdandy *et al., The Exercise of Public Authority by International Institutions. Advancing International Institutional Law* (2010), 3-32. This section heavily quotes from that text.

[15] The origins of the term global governance can be traced back to J.N. Rosenau, "Governance, Order, and Change in World Politics", in J.N. Rosenau & E.-O. Czempiel (eds.), *Governance without Government* (1992) 1; J. Kooiman, *Findings, Recommendations and Speculations, in* J. Kooiman (ed.), *Modern Governance: New Government-Society Interactions* (1993) 249. The concept of "governance" was borrowed from economics. See O.E. Williamson, "The Economics of Governance: Framework and Implications", 140 *Zeitschrift für die gesamte Staatswissenschaft* (1984) 195.

[16] M. Hewson & T.J. Sinclair, "The Emergence of Global Governance Theory", in M. Hewson & T.J. Sinclair (eds.), *Global Governance Theory* (1999) 3; R. Mayntz, "Governance Theory als fortentwickelte Steuerungstheorie?", in G.F. Schuppert (ed.), *Governance-Forschung* (2006) 11.

global governance means shifting weight from actors to structures and procedures. Last but not least, as is obvious from the use of the term "global" rather than "international," global governance emphasizes the multi-level character of governance activities: it tends to overcome the division between international, supranational and national phenomena.

As this list of characteristic traits suggests, the concept of global governance has the merit of providing a forward-looking alternative to a so-called "realist," i.e. a state-centric and power oriented world view, and may open our eyes towards phenomena that this perspective, as well as classical accounts of international law, regularly underestimate. In this respect, sovereign debt restructuring mechanisms are a perfect example. First, they comprise a host of actors ranging from international organizations with legal capacity such as the IMF to "soft" institutions like the Paris Club and private or hybrid actors like the Institute of International Finance or ad hoc creditors committees. Second, debt restructurings as well as emergency lending largely dispense with binding international legal rules.[17] Third, in the absence of an international bankruptcy court, solutions are worked out in bilateral and multilateral negotiations which sometimes span over years. Eventually, sovereign debt restructurings involve actors on all levels, ranging from international institutions and governments to individual bondholders.

Thus, the concept of global governance facilitates a profound understanding of phenomena which all too easily escape the conceptual reservoir of classical international law. However, there is a price to be paid for these insights. Global governance is not a neutral, value-free terminology allowing for an impartial spectator's grasp of reality. Rather, it is by and large the offspring of so-called "liberal" conceptualizations of international relations. As such, it stands in the tradition of institutionalist ideas such as regime theory in providing an alternative to the "realist" world view.[18] The reverse side of its origin in this theoretical cradle is its impregnation with the normative difficulties typical of many liberal theories of international relations. Accordingly, global governance is by and large accepted and approved of as an

[17] While debt relief, bond exchanges and emergency loans at some point require binding legal agreements, the direct outcomes of restructuring negotiations lack this quality. Also, the most important instruments of the HIPC Initiative, the Country Assistance Strategy, the Poverty Reduction Strategy Paper, and the Decision and Completion Point documents are neither contracts, nor binding international legal instruments, see L.F. Guder, *The Administration of Debt Relief by the International Financial Institutions* (2009), 156-7. Further, Stand-by Arrangements and Letters of Intent, the principal instruments structuring the IMF's lending activities, are generally held to be non-binding, see A.F. Lowenfeld, *International Economic Law* (2nd edn., 2008), 616-7.

[18] M. Barnett & R. Duvall, "Power in Global Governance", in M. Barnett & R. Duvall (eds.), Power in Global Governance (2005), 1, 7; M. Zürn, "Institutionalisierte Ungleichheit in der Weltpolitik. Jenseits der Alternative 'Global Governance' versus 'American Empire,' " 48 *Politische Vierteljahresschrift* (2007) 680.

essentially technocratic process following a little questioned dogma of efficiency or functionality.[19]

It did not take long for these implications of the concept of global governance to be challenged.[20] Generally speaking, the critics point out that global governance involves risks to individual rights and collective self-determination, and that it may impede, rather than promote, global justice. With respect to individual rights, the striking absence of judicial review and procedural safeguards – even when international institutions have a deep impact upon individuals – meets with harsh critique. The listing of terrorist suspects by the UN Security Council provides the most dramatic example of governance that would hardly be permissible in democratic states.[21] From the viewpoint of collective self-determination, international institutions are operating in considerable distance from the communities concerned, often producing outcomes that deeply affect domestic democratic procedures, leaving domestic parliaments with almost no choice. Recently, the legitimacy of economic and fiscal adjustment programs negotiated as part of the Greek sovereign debt restructuring has become the subject of open public contestation. Moreover, an international institution might display features of a secretive bureaucracy or might operate more in the service of the interests of particular stakeholders or states than of global justice and public interests.[22] As a result, the perception of global governance in scholarship today ranges from endorsement to rejection.[23] The policies of several institutions of global governance are questioned and, often enough, perceived as more or less illegitimate.

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[19] See e.g. R. Latham, "Politics in a Floating World", in M. Hewson & T.J. Sinclair (eds.), *Global Governance Theory* (2000) 23; Martti Koskenniemi, "Global Governance and Public International Law", 37 *Kritische Justiz* (2004) 241. On the related liberal bias of international organizations see M. Barnett & M. Finnemore, "The Power of Liberal International Organizations", in M. Barnett & R. Duvall (eds.), *Power in Global Governance* (2005) 161, 163-169. However, various critical perspectives on global governance have emerged. See e.g. A.D. Ba & M.J. Hoffmann (eds.), *Contending Perspectives on Global Governance* (2005).

[20] It may suffice to cite only a few examples: A. Cohen, "Bureaucratic Internalization: Domestic Governmental Agencies and the Legitimization of International Law", 30 *Georgetown Journal of International Law* (2005) 1079; R.W. Grant & R.O. Keohane, "Accountability and Abuses of Power in World Politics", 99 *American Political Science Review* (2005) 29; R. Howse & K. Nicolaidis, "Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?", 16 *Governance* (2003) 73; A.-M. Slaughter, "The Accountability of Government Networks", 8 *Indiana Journal of Global Legal Studies* (2000-2001) 347; Weiler (note 12); M. Zürn, "Global Governance and Legitimacy Problems", 39 *Government and Opposition* (2004) 260. For a taxonomy of different approaches see A. v. Bogdandy, "Globalization and Europe: How to Square Democracy and Globalization", 15 *Eur. J. Int'l Law* (2004) 885.

[21] *See*, for many, C. Feinäugle, "The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?", 9 *German Law Journal* (2008) 1513-1539.

[22] I. Venzke, International Bureaucracies from a Political Science Perspective – Agency, Authority and International Institutional Law, 9 *German Law Journal* (2008) 1401-1428.

[23] For an overview, see Ba & Hoffmann (note 19).

What can the response be to such claims of illegitimacy from a public law perspective? The starting point of a public law perspective is to ask whether the respective activities amount to an exercise of unilateral authority affecting individuals or political communities. Public law, at least in a liberal and democratic tradition, has a dual function for the rational justification of such unilateral authority: first, no public authority may be exercised that is not based on public law (constitutive function); second, public authority is controlled and limited by the substantive and procedural standards provided by public law (limiting function).[24] The second function implies that concerns about the legitimacy of governance need to be translated into meaningful arguments about legality. The experience of liberal democracies teaches how important it is that legitimacy concerns can, in principle, be put forward as issues of legality. While debates about legitimacy might potentially end up in endless contestations, public law provides standards and procedures for effective decision-making and dispute resolution without denying the contingency of the issues under consideration. This ensures the effectiveness of the ensuing decisions, while leaving those who disagree at liberty to seek their revision, or even to suggest changes to the constitutional framework in which the decisions were taken.[25]

As this section should have revealed, the main thrust of our approach is comparable to that of the Global Administrative Law project and of approaches aiming at the constitutionalization of international law.[26] We agree with these approaches to shift the attention from states to citizens as the ultimate sources of legitimacy. And like them, we are convinced that any exercise of public authority on whatever level needs to be justifiable in light of basic principles of public law, at least for those who hold dear liberal and democratic traditions of

[24] This idea can be found in many variations the writings of the most eminent theorists in the enlightenment tradition. Some emphasize the limiting function of public law, e.g. J. Locke, *Two Treatises of Government* (1689), 2nd Tr., §§ 132 et seq., especially at §§ 135-6; J.-J. Rousseau, *Du contrat social* (1762), liv. I, ch. VI and VII (especially lines 305-310; 381-386); while others emphasize its constitutive function, e.g. I. Kant, *Die Metaphysik der Sitten, Rechtslehre* (1797), §§ 43-49. For modern applications see J. Habermas, *Faktizität und Geltung* (1992), 167 *et seq.* (Chapter 4, sec. I); J. Rawls, *A Theory of Justice* (rev. ed., 2000), 206 *et seq.* (§ 38); J. Raz, *The Authority of Law* (1979), 169 *et seq.*; J. Raz, *Ethics in the Public Domain* (1994), 339 *et seq.*. These ideas also pervade modern administrative law, see E. Schmidt-Aßmann, *Das Allgemeine Verwaltungsrecht als Ordnungsidee* (2nd ed. 2004) 16-18. In the context of public international law see e.g. B. Kingsbury, *International Law as Inter-Public Law* (http://www.law.nyu.edu/kingsburyb/fall06/globalization/papers/Kingsbury,NewJusGentiumandInter-PublicI1.pdf).

[25] Habermas (note 24), 53 *et seq.* (Chapter 1, III(2)).

[26] B. Kingsbury, N. Krisch & R. Stewart, "The Emergence of Global Administrative Law", 68 *Law and Contemporary Problems* (2005) 15-62; S. Cassese, "Lo spazio giuridico globale", 52 *Rivista trimestrale di diritto pubblico* (2002) 323-339; for the constitutionalist tradition see e.g. A. Peters, "Compensatory constitutionalism: The Function and Potential of Fundamental International Norms and Structures", 19 *Leiden Journal of International Law* (2006) 579-610; S. Kadelbach & T. Kleinlein, "International Law - a Constitution for Mankind? An Attempt at a Re-appraisal with an Analysis of Constitutional Principles", 50 *German Yearbook of International Law* (2007) 303-348.

thought. Certainly, the requirement of such a justification for authority has strong roots in the Western tradition of political theory.[27] However, Amartya Sen has recently shown in his "Idea of Justice" that the idea of rationally justified authority has played a remarkable role in Asian and also in Islamic political thought across centuries.[28]

II. The Concept of International Public Authority and its Justification

This basic idea about the need to justify public authority raises two questions: First, what is to be understood as international public authority? Second, how is it possible to justify such authority on a global scale?

As regards the first question, the public law approach to international law requires a workable concept of *international public authority*, which preserves the insights of the concept of global governance, while avoiding its flaws. The concept of global governance itself is insufficient for the public law approach, because it does not enable the identification of critical acts which constitute unilateral exercises of authority affecting individuals or political communities. It flattens the difference between public and private phenomena, as well as between formal and informal ones. Moreover, the understanding of global governance as a continuous structure or process, rather than a batch of acts of specific, identifiable actors causing specific, identifiable effects makes the distinction between authoritative and non-authoritative acts highly difficult, if not impossible. However, this distinction is essential for the deployment of the constitutive and limiting functions of public law. Only authoritative acts need to be framed by public law, and the standards to be applied depend on the effects of those acts on individual rights and the self-determination of political communities. We therefore suggest a new focus on the exercise of *international public authority* which might provide an understanding of global governance phenomena which is more compatible with the function of public law.

As regards the concept of *authority*, we share the view of the proponents of Global Administrative Law that it should include, but by no means be limited to, binding international legal agreements. Rather, global governance has brought about the emergence of a multiplicity of new forms of authority on the international plane with similar effects. Thus,

[27] Cf. A. v. Bogdandy & S. Dellavalle, "Universalism and Particularism as Paradigms of International Law", *International Law and Justice Working Paper* (2008), New York University.
[28] A. Sen, *The Idea of Justice* (2009), 327-335.

soft legal instruments and mechanisms, but also merely factual instruments like indicators might affect individuals or political communities to such an extent that they require commensurate means of justification.[29]

The *public* character of authoritative acts thus defined depends on their legal basis. Whenever the author of an authoritative act may claim to have acted on a legal basis entitling it to enact unilateral decisions which deeply affect individuals or communities, we consider the act as one of public authority.[30] The legal basis might be part of hard or soft, explicit or implicit law. It is an intricate theoretical question whether soft law should be considered as part of international law proper. This depends on the particular concept of law, which is, as all basic concepts, disputed.[31] We opt for a concept of law which includes soft law, since soft law may also help to restrain authority and thereby become a constituent part of the public law framework which legitimizes the exercise of public authority by international institutions.[32] Soft law is normative because it aims at the formation and stabilization of normative expectations.[33] It can be enforced through peer pressure, reputational sanctions, deprivation of benefits, and similar incentives.[34] Still, we maintain a clear distinction between binding and non-binding international law since the breach of binding legal rules entails specific consequences, such as the possibility to impose reprisals.[35]

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[29] The present framework could therefore be applied to the UNCTAD Principles themselves and the process of their creation, scrutinizing them for transparency, participation, and accountability.

[30] This distinguishes our approach from the ideas of Joseph Raz, for whom (legal) authority always claims to be *legitimate*, see Raz (note 24), 28ff. We follow Habermas (note 24), 43ff. (Chapter 1, III.(1), according to whom the legality of an authoritative act is a proxy for its legitimacy.

[31] Cf. only P. Weil, "Towards Relative Normativity in International Law?", 77 *American Journal of International Law* (1983) 413-42; and U. Fastenrath, "Relative Normativity in International Law", 4 *European Journal of International Law* (1993) 305-340; for an overview, see M. Goldmann, "We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law", *Leiden Journal of International Law* 25 (2012), 335-68.

[32] M. Goldmann, "Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority", 9 *German Law Journal* (2008) 1865-1908.

[33] Despite their otherwise incompatible approaches, Habermas (note 24), 48-49; and N. Luhmann, *Das Recht der Gesellschaft* (1992) 134, agree on this point. However, they disagree about the meaning of "normative expectations", see Habermas (note 24), 70. See also F. v. Hayek, *Law, Legislation and Liberty*, vol. 1: Rules and Order (1973), 101-2.

[34] Cf. A. Guzman, *How International Law Works* (2008) 71 *et seq.*; Shelton, *Commitment and Compliance. The Role of Non-binding Norms in the International Legal System* (2000, several contributions on the issue); J. Brunnée, "Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements", in R. Wolfrum & V. Röben (eds.), *Developments of International Law in Treaty Making* (2005) 101-126; H. Neuhold, H., "The Inadequacy of Law-Making by International Treaties: 'Soft Law' as an Alternative?", in: R. Wolfrum & V. Röben (eds.), *Developments of International Law in Treaty Making* (2005) 39-52; R. Howse & R. Teitel, "Beyond Compliance: Rethinking Why International Law Really Matters", 1 *Global Policy* (2010) 127-136 (emphasizing the significance of international law as a benchmark providing orientation – the same should be true for soft law).

[35] This should mitigate the concerns raised against this view by J. d'Aspremont, *Formalism and the Sources of International Law* (2011) 12; id., "The Politics of Deformalization in International Law", 3 *Goettingen Journal of International Law* (2011) 503-550, 507-8.

If the legal basis is part of *international* law, including international soft law, we consider the act to be an exercise of international public authority. Accordingly, international public authority is the law-based capacity of any formal or informal international institution to legally or factually determine other persons or entities.

One might get a better grasp of the concept of public authority and its legal framework by contrasting it with its antonyme, private authority. Private authority is an exercise of liberty. It may be based on the consent of the parties and does not require prior legal authorization by a political community. For example, private investors are free to extend credit to states or purchase sovereign bonds at market prices and as long as such transactions are not tied to conditionalities or other political concessions. However, this does not mean that "anything goes". Rather, states as well as international and regional organizations are called upon to set minimum rules for the market in order to protect public goods and interests. Also, private actors have duties to respect human rights, even if they might be based on soft law.[36]

As regards the second question about the possibility of justifying international public authority, there is no simple answer to this question, except that any justification needs to be based on open-textured standards. In a pluralistic world fraught with different national, regional, functional, religious and ideological actors and a corresponding multiplicity of identities and interests, legitimacy is a constantly evolving, essentially contested concept.[37] Whether a certain restructuring of sovereign debt is legitimate, resulting from fair negotiations or not, is likely to be deeply contested. The citizens of the defaulting state and foreign bondholders might radically disagree over this issue. The public law framework of international public authority needs to square the circle and set up legal requirements which can be expected to make international public authority acceptable to at least the most gravely affected communities and individuals to at least a satisfactory extent.

In this respect, we do not consider state consent as a necessary and sufficient legal requirement for the justification of international public authority any more. State consent might not include the consent of those affected by such authority.[38] Also, global governance

[36] Cf. the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights.
[37] Reference to the literature on Pluralism, e.g. Peters, Krisch, Besson.
[38] On the limits of consent cf. Weiler (note 12), at 557-8.

has broadened and increased the authority exercised by international institutions, sometimes as tools in the hands of powerful hegemons, sometimes as relatively independent agents of their member states.[39] This requires looking into new perspectives for the justification of international public authority. With a global parliamentary assembly remaining unfeasible for the forseeable future, contemporary approaches emphasize participation, deliberation, procedural fairness, transparency, respect for fundamental human rights, and accountability as additional ways of ensuring the legitimacy of public authority.[40]

These proposals find support in modern political theories such as those by Amartya Sen, John Rawls, and Jürgen Habermas.[41] Even if implemented, they might not necessarily elevate the legitimacy of international public authority to the level enjoyed by domestic public authority. But they would establish a new, additional strand of legitimacy for international public authority by giving citizens and political communities other than states a say in its exercise, whether directly, through domestic or supranational parliaments, or other institutions like non-governmental organizations, instead of being mediated by states only.[42] This might provide at least some protection against grave violations of fundamental rights and unfettered special interests. Alternatives to this sobering outlook seem to be scarce, especially if one considers that Habermas' plea for a refurbished General Assembly representing both states and citizens[43] probably overstretches the idea of representation and overlooks its pitfalls.[44]

III. Applying the Concept to Sovereign Debt Restructurings

[39] Venzke (note 22).
[40] From the rich literature see only Grant & Keohane (note 20); R.O. Keohane & A. Buchanan, "The Legitimacy of Global Governance Institutions", in R. Wolfrum & V. Röben (eds.), *The Legitimacy of International Law* (2008) 25-62; D. Dyzenhaus, "Accountability and the Concept of (Global) Administrative Law", *International Law and Justice Working Paper* (2008) No. 7; S. Cassese, "Administrative Law Without the State? The Challenge of Global Regulation", 37 *New York University Journal of International Law and Politics* (2005) 663-694. Article 11 TEU positivizes this appoarch, see J. Mendes, "Participation and the Role of Law after Lisbon: A Legal View on Article 11 TEU", 48 *Common Market Law Rev.* (2011) 1849-1878.
[41] J. Rawls, *Justice as Fairness* (2001); J. Habermas, "Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?" in J. Habermas, *Der gespaltene Westen* (2004) 113; Sen (note 28).
[42] This idea originates in the debate about the dual strands of legitimacy within the European Union. See J. Habermas, *Zur Verfassung Europas. Ein Essay* (2011), 68; In the context of global governance see Habermas, Konstitutionalisierung (note 41), 159; A. Peters, "Dual Democracy", in: J. Klabbers, A. Peters & G. Ulfstein (eds.), *The Constitutionalization of International Law* (2009) 263-341; S. Besson, "Institutionalising global *demoi*-cracy", in: L. Meyer (ed.), *Legitimacy, Justice and Public International Law* (2009) 58-91.
[43] J. Habermas, Zur Verfassung Europas, note 42, at 87.
[44] Cf. Sen (note 28), 87 *et seq.*; C. Möllers, "Expressive versus repräsentative Demokratie", in R. Kreide (ed.), *Transnationale Verrechtlichung. Festschrift Brunkhorst* (2008) 160-182.

The preceding theoretical considerations enable us to qualify the existing international arrangements for the restructuring of sovereign debt as exercises of international public authority. We confine the following analysis to the most important venues for debt restructurings, namely the IMF as well as the Paris and London Clubs. For the purposes of this paper, we use the term "restructurings" as comprising not only the acts by which the parties actually reschedule, restructure, or reduce the debt of the troubled state, but the entire bundle of measures comprised in a sovereign debt workout like conditionalities and adjustment measures.

There can be little doubt about the authoritative character of IMF lending in case of sovereign debt crises. Whatever the legal nature of the lending instruments may be,[45] the IMF's lending practices include conditionalities which bear important consequences for states and their citizens, especially since the introduction of performance targets.[46] Also, the adjustment programmes required by the IMF affect the ability of a state to service its external and domestic debt and thereby impact upon the interests of third party creditors. The IMF's activities qualify as international public authority because they have their legal basis in the Articles of Agreement of the IMF,[47] a binding international treaty enjoying nearly universal membership. It corresponds to the traditional way in which collective action by public actors is realized on the international plane.

The Paris Club, by contrast, lacks a basis in binding international law. Still, we contend that the Agreed Minutes, which conclude Paris Club negotiations about debt restructurings, constitute exercises of international public authority. First, they are to be considered as exercises of *authority* as they affect the state in default as well as its population by stipulating the details of the deal between the borrower and its lenders, including the question whether there will be relief and the conditions of any debt restructuring.[48] Moreover, the comparability of treatment clause requiring the state not to grant more favorable conditions to other creditors affects these very creditors as well as the ability of the state to further lighten its financial burden.[49] Second, the Agreed Minutes are exercises of *public* authority because they are based

[45] On this contentious issue see Lowenfeld (note 17), 616f.
[46] IMF Guidelines on Conditionalities, 25 September 2002, para. 13.
[47] Article V(3)(a), (b), and (c), Articles of Agreement.
[48] On the effects of debt restructurings on human capabilities as understood by Amartya Sen and Martha Nussbaum, see Dabrowski *et al.* (note 8), 35-48.
[49] http://www.clubdeparis.org/sections/composition/principes/comparabilite-traitement, see D. Josselin, "Regime interplay in Public-Private Governance: Taking Stock of the Relationship Between the Paris Club and Private Creditors Between 1982 and 2005", 15 *Global Governance* (2009) 521, 531.

on the normative framework of the Paris Club and the will of public actors, namely government officials acting under their domestic authorizations. Although of non-binding character, this framework comprises a set of procedural and material principles as well as fairly standardized terms for restructurings.[50] This framework is normative as it aims at the formation and stabilization of normative expectations. Moreover, it is endowed with the authority of the participating states and backed up with their economic power. Since the middle of the 1980s, the Paris Club has enjoyed almost a monopoly for negotiations involving bilateral debt.[51] The Paris Club and its legal framework might therefore well be considered to be the choice of many states for the exercise of collective action in matters of restructurings of bilateral debt. Thirdly, the Agreed Minutes are exercises of *international* public authority because this normativity is generated by the common will of states, more precisely government representatives of various states. It is interstate, hence international.[52]

Qualifying London Club restructurings as exercises of international public authority is a more difficult task. The London Club is the platform of commercial banks voluntarily convened in creditor committees on an ad-hoc basis.[53] At close inspection, the London Club might also be characterized as exercising *authority*: The effects of London Club restructuring agreements for debtor states are comparable to those of Paris Club Agreed Minutes. Also, for creditors, participation might not be so voluntary after all. In fact, without the London Club, creditors would be faced with a huge collective action problem leaving everybody worse off than if they participate in a common restructuring of a debtor to which they have a significant exposure.[54] Often only a small group of banks represents a much larger number of institutional creditors during negotiations.[55] While London Club agreements might therefore easily be qualified as authoritative for their parties, their *international* and *public* character is less obvious. No explicit hard or soft agreement authorizes the London Club to carry out its activities. Nevertheless, we consider implicit consent as sufficient for the establishment of a legal basis (hard or soft) for the exercise of international public authority. In this respect, we follow the general tendency in international law to recognize that implicit or even tacit

[50] http://www.clubdeparis.org/sections/composition/fonctionnement-du-club/reunions; http://www.clubdeparis.org/sections/composition/principes/cinq-grands-principes; http://www.clubdeparis.org/sections/types-traitement/reechelonnement/termes-de-traitements.
[51] L. Grard, "Le Club de Paris et les dettes publiques des Etats", in: D. Carreau & M.N. Shaw, *The External Debt* (1992), 197, at 228.
[52] J. Bentham, *Introduction to Principles of Morals and Legislation* (1789), Ch. XVII, § 2, para. XXV.
[53] On its functioning: Zettelmeyer & Sturzenegger (note 2), 12ff.
[54] See L. C. Buchheit & R. Reisner, "The Effect of the Sovereign Debt Restructuring Process on Inter-Creditor Relationships", *U. Ill. L. Rev.* (1988) 493, at 500, 514.
[55] K. Hudes, "Coordination of Paris and London Club Reschedulings", 17 *N.Y.U. J. Int'l L. & Pol.* (1984-1985) 553, 560.

consent may give rise to international obligations.[56] The IMF has repeatedly shown its implicit approval of the London Club's activities. In times of an international law of cooperation and international institutions, not only states, but also international organizations should be able to trigger and convey implicit agreement through their behavior. In this regard, one might regard it as an implicit expression of consent that the IMF has consistently supported London Club restructurings and compelled creditors and debtors to engage in them by its lending policies. Prior to 1989, debtors had to reach an agreement in principle with their creditors in order to qualify for funds under stand-by arrangements.[57] In 1989, the Fund launched its policy of lending into arrears in order to facilitate the restructurings of sovereign debt with private creditors and the corresponding adjustment programmes.[58] It now requires countries to engage in discussion about adjustment programmes with its *private* creditors in order to receive upfront public sector support.[59] The London Club in turn endorses IMF support by requiring borrowers to seek IMF assistance.[60] As a sign of their close cooperation, IMF staff has been regularly present at negotiations in the London Club.[61] In addition, not only the IMF, but also state practice implicitly approves of London Club negotiations as an indispensable mechanism for the restructuring of sovereign borrowers' commercial debt. For example, the exchange of syndicated loans into Brady Bonds was facilitated not only by the International Financial Institutions, but also by some governments of creditors.[62] Thus, it is not far-fetched to say that the London Club operates in debt crises at least with the implicit approval of the International Financial Institutions as well as of a considerable number of states. Its restructurings therefore have at least a non-binding legal basis, which justifies their characterization as exercises of international public authority.

In sum, all of the informal international restructuring mechanisms under consideration above qualify as exercises of international public authority. It does not take much phantasy to extend

[56] See S. Szurek, "Article 11, Convention of 1969", in O. Corten & P. Klein, *The Vienna Conventions on the Law of Treaties* (2011), 188, 197-8.
[57] S. Hagan, "Sovereign Debtors, Private Creditors, and the IMF", 8 *Law and Business Review of the Americas* (2002) 49, 51.
[58] On the effects of restrictive IMF policy on lending into arrears to private creditors see L. Simpson, "The Role of the IMF in Debt Restructurings: Lending Into Arrears, Moral Hazard and sustainability Concerns", UNCTAD G-24 Discussion Paper Series No. 40 (2006), 9 (claiming it had a pro-creditor basis).
[59] See "The Chairman's Summing Up—Fund Involvement in Debt Strategy", Executive Board Meeting 89/61, 23 May 1989; "The Acting Chairman's Summing Up on Fund Policy on Arrears to Private Creditors—Further Considerations", Executive Board Meeting 99/64, 14 June 1999; and "The Acting Chair's Summing Up—Fund Policy on Lending into Arrears to Private Creditors—Further Consideration of the Good Faith Criterion", Executive Board Meeting 02/92, 4 September 2002; cf. Hagan (note 57), 52-3.
[60] Josselin (note 49), 526.
[61] Zettelmeyer & Sturzenegger (note 2), 22.
[62] Lowenfeld (note 17), 686-7.

the same reasoning to further programmes aimed at debt sustainability such as HIPC and MDRI or the Vienna Initiative and also qualify them as exercises of international public authority. Remarkably, in *Abaclat v. Argentine*, the tribunal recognized the existence of an informal restructuring mechanism consisting of the mentioned venues.[63] It is not by accident that the previous sentence uses "mechanism" in the singular: The above considerations should not lead to the conclusion that each venue and each act should be examined in isolation. Rather, we hope that this text has demostrated so far that each debt crisis triggers a series of acts carried out by several actors in multiple venues. Sometimes only a holistic view on the entire process might allow the identification of those acts which need to be qualified as public authority. This is one important lesson learned from the research on global governance. For example, in the recent Greek crisis, the International Institute of Finance led the negotiations about the haircut to be suffered by creditors from the private sector on their behalf. The outcome of these negotiations is a non-binding agreement which does not refer to adjustment measures to be implemented by Greece. It might therefore appear to be voluntary. However, this outcome was reached shortly after the Greek government and the European Council had signalled agreement on the terms of a second bailout package, including austerity measures, but before that agreement was officially endorsed. Thus, the public sector endowed private creditors with the responsibility to make the second bailout package materialize.

C. Method: How the Law Governing International Public Authority Emerges

Qualifying international mechanisms for the restructuring of sovereign debt as exercises of public authority is not an end in itself. It makes it necessary to develop a thicker legal regime in order to ensure the legitimacy of the authoritative acts in question in accordance with the approach discussed above (B.II.). This raises difficult methodological questions. How could such a legal regime possibly come into existence in an effective and legitimate way? The following is only a brief summary of issues which have been set out elsewhere in necessary detail.[64]

[63] ICSID, *Abaclat v. Argentine Republic*, Case ARB/07/5, Decision on Jurisdiction and Admissibility, 14 November 2011, § 40.

[64] A. v. Bogdandy & M. Goldmann, "The Exercise of Public Authority through National Policy Assessment: The OECD's PISA Policy as a Paradigm for a New International Standard Instrument", 5 *International Organizations Law Review* (2008 (2009)) 241-298, at 270 et seq. This section quotes from that text.

For the foreseeable future, a new treaty regulating the legitimacy of sovereign debt restructurings is unlikely to come along, in spite of the urgency of the issue. But the advancement of public law does not hinge on legislation or treaty-making alone. Rather, the history of public law provides ample illustration for the emergence of legal concepts and principles by way of discursive interactions between practice and legal scholarship. Most continental legal orders saw a turn to the so-called "legal method" during the 19th century.[65] For example, in Italy and Germany, the legal method saw a steep rise in popularity because it allowed a reaction to perceived deficits in the legitimacy of the governments of the day, which were characterized by constitutional arrangements that fell short of parliamentary democracy and gave a strong role to governments controlled by monarchs. At the same time, the administrative apparatus had to master an ever increasing range of problems, which in turn caused the liberal bourgeois elite to demand respect for its liberty and property. In this situation, practice readily adopted the legal method.[66] It allowed the advancement of the legal order through the development of new concepts and principles. This is to be imagined as a dialectical process involving scholarship and practice, and including both deductive, principled reasoning guided by the idea of the *Rechtsstaat* as well as inductive analyses of existing legal rules and practice. [67] The resulting doctrinal concepts and principles had the advantage of being considered on the one hand as existing parts of the legal order which explain its deeper structure, and as legitimate because of their consistency with the overarching idea of the Rechtsstaat.[68] It was a win-win situation: the administration obtained effective instruments, the bourgeoisie some basic safeguards against arbitrary state action which are small measured by contemporary standards, but meant some progress in those days.

This sometimes rather intuitive process might have prompted pragmatic, efficient and somewhat legitimate solutions, but they were far from being uncontroversial. Thus, the legal

[65] A. v. Bogdandy, "The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges Facing Constitutional Scholarship in Europe", 7 *International Journal of Constitutional Law* (2009) 364-400. However, the legal method never thrived in England and France as much as elsewhere on the continent.
[66] On the parallel developments in Germany and Italy M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 2 (1992) 318-9; and P. Schiera & R. Gherardi, "Von der Verfassung zur Verwaltung: bürgerliche Staatswissenschaft in Deutschland und Italien nach der nationalen Einigung", in E.V. Heyen (ed.), *Wissenschaft und Recht der Verwaltung seit dem Ancien Régime* (1984), 129- 46, at 140-4.
[67] Stolleis, *supra* note 66, at 330-48; a good illustration for the "legal method" provides Laband's distinction of formal and material laws, see W. Pauly, *Der Methodenwandel im deutschen Spätkonstitutionalismus* (1993) 177-86.
[68] For an insightful analysis into the nature of doctrine ("Dogmatik") in continental legal orders see N. Luhmann, *Rechtssystem und Rechtsdogmatik* (1974) 9-23. On the impact of *Dogmatik* on courts and legislators: C. Möllers, "Methoden", in W. Hoffmann-Riem, E. Schmidt-Aßmann & A. Voßkuhle (eds), *Grundlagen des Verwaltungsrechts*, vol. 1 (2006) 121-75, at marginal notes 35-37; Schmidt-Aßmann, *Ordnungsidee* (note 24), , 4-6.

method soon came to be accused of providing mere apology to existing power structures.[69] Indeed, most of the advocates of the legal method in the 19th century had little interest in democratic reform.[70] However, our age is profoundly different from the 19th century. Scholarship is not expected to justify governmental power. There is thus no need to follow a Hegelian approach in order to disguise the contingency of doctrinal constructions. Instead, a modern version of doctrinal constructivism should face the political implications of legal concepts head-on in an open, deliberative exchange of ideas, which might lead to the consolidation of legal standards applicable to exercises of international public authority guided both by current practice and the normative ideas deployed above (B.II.).

We do not claim that this process of doctrinal constructivism is yet to begin with respect to sovereign debt restructurings. Rather, we try to demonstrate in the following that important legal concepts and principles ensuring the legitimacy of sovereign debt restructurings already exist *de lege lata* in the form of general principles of law, customary international law, or the institutional soft law governing the Paris Club and other venues.[71] Other elements might be desirable *de lege ferenda* and should be proposed to practitioners, interest groups, policy-makers, judges and academia. The UNCTAD Principles provide an important contribution with respect to both *de lege lata* and *de lege ferenda* aspects.[72] Domestic and international courts might play a crucial role in developing and enforcing such standards. For example, they might choose to give effect to restructurings only if they meet a minimum level of legitimacy. Domestic and international courts have already started in other fields to coordinate their efforts in order to agree on common principles. [73]

[69] W. Wilhelm, *Zur juristischen Methodenlehre im 19. Jahrhundert* (1958), 159; S. Mastellone, *Storia ideologica d'Europa da Stuart Mill a Lenin* (1982), 158. Well-known is the turn against the legal method by R. von Ihering, *Der Kampf ums Recht* (1872).
[70] S. Cassese, *Cultura e politica del diritto amministrativo* (1971), 17.
[71] On customary international law see M. Waibel, "Out of Thin Air? Tracing the Origins of the UNCTAD Principles in State Practice" (paper presented at the Madrid Conference, on file with the authors); on general principles of law see M. Goldmann, "Responsible Sovereign Lending and Borrowing: The View from Domestic Jurisdictions", Survey Written for UNCTAD (2012), http://www.unctad.info/upload/Debt%20Portal/RSLB_MGoldmann_02-2012.pdf.
[72] On the role of such codes of conduct: N. Roubini & B. Setser, "Improving the Sovereign Debt Restructuring Process: Problems in Restructuring, Proposed Solutions, and a Roadmap for Reform", conference paper (2003, on file with the authors), 14-5.
[73] Cf. E. Benvenisti, "Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts", 102 *American Journal of International Law* (2008) 241-274.

D. Consequences Deriving from the Qualification of Sovereign Debt Restructurings as International Public Authority

Ensuring the legitimacy of acts of international public authority in sovereign debt restructurings requires an elaborate legal framework comprising procedural and substantive standards (I.). Further, the authoritative character of international restructurings might cause legal repercussions for cases before domestic and international courts and tribunals (II.).

I. Enhancing the Legitimacy of Sovereign Debt Restructurings

1. Procedural Requirements

The following is only an illustrative list of procedural issues which have to be considered as existing or desirable elements of the legal regime of sovereign debt restructurings, provided that one follows the reasoning that sovereign debt restructurings have a public and authoritative character. The list is by no means intended to be enumerative.

As regards the relationships between borrowers and lenders, the public law approach requires both sides to participate in negotiations about debt restructurings on the request of a borrower who is unable (and not unwilling) to pay its debts.[74] Deductively, any discursive idea of the legitimacy of international debt restructurings requires such a duty. The participating states have decided over time to resolve sovereign debt crises in a public and authoritative manner through multilateral negotiations. In a public law context, the ability to act and to make decisions (i.e., a *competence*) indicates a responsibility to act, at least in situations where the common good is under great threat.[75] The participants in authoritative restructurings are not like private citizens which may choose to contract whenever they please, but like Members of Parliament, which have a responsibility to fulfil their duties, or even more like administrative agencies which need to deal with matters falling within their competence.

[74] On the criterion of the inability to pay cf. J.A. Kämmerer, "State Bankruptcy", in R. Wolfrum (ed*.), Max Planck Encyclopedia of Public International* Law (2009), marginal note 2.

[75] This thought might even become a doctrine of general international law as part of the responsibility to protect, see UN General Assembly, 2005 World Summit Outcome, UN Doc. A/RES/60/1, para. 26. It is to be stressed that this does not imply that in all cases a court may find a breach of an obligation in case of inaction. Rather, in such situations, the competent institutions hold discretion what to do.

Inductively, the duty to participate in negotiations about restructurings seems to exist at least *in nuce* in contemporary international law.[76] There is considerable agreement about this result, although different reasonings are possible. Some derive this duty from the *erga omnes* character of human rights obligations.[77] Others derive it from the obligation to strive for a peaceful settlement of disputes contained in the UN Charter.[78] Again other scholars argue that the practice of the Paris Club might have created customary law.[79] But these lines of argument might have difficulties in extending this duty over private creditors. By contrast, general principles of law in the meaning of Article 38(1)(c) of the Statute of the International Court of Justice are in principle of universal applicability. General principles of law may be derived from deductive reasoning as well as from municipal law inasfar as it is applicable to the international level.[80] One could imagine a duty to negotiate about debt restructurings as a specific concretization of the principle of good faith.[81] One might also find such a general principle of law reflected in the compulsory character of domestic insolvency proceedings.[82] Domestic agents do not have a choice as to whether to participate in insolvency proceedings, because those proceedings are authoritative. Once the authoritative character of current international debt restructurings is recognized, a duty to participate appears to follow from it by analogy. The inexistence of obligatory bankruptcy procedures for public entities with the exception of municipalities in the United States and some other countries[83] does not militate against this analogy. Rather, it seems to us to be grounded in the belief that essential public interests should not be left to the discretion of creditor committees. As has been emphasized above, on the international level, restructuring mechanisms with effects equivalent to that of domestic bankruptcy procedures do already exists, and so do creditor committees. The question is therefore not whether to have them or not, but how fair and efficient they might be. If domestic law considers a duty to participate as an essential aspect of fair bankruptcy proceedings, there are good reasons to recognize this idea as a general principle of law. It

[76] The PCIJ in *Société Commerciale de Belgique*, Series A/B No. 78 (1939), did not find customary law to exist. See also R. Dolzer, "Staatliche Zahlungsunfähigkeit: Zum Begriff und zu den Rechtsfolgen im Völkerrecht", in J. Jekewitz *et al.* (eds.), *Festschrift Partsch* (1989), 531-554, 536ff.
[77] Kämmerer (note 10), 657.
[78] M. Bothe & J. Brink, "Public Debt Restructuring – the Case for International Economic Co-operation", 29 *German Yearbook of International Law* (1986), at 107.
[79] Grard (note 51), at 228; A. Reinisch, "Debt Restructuring and State Responsibility", in D. Carreau & M.N. Shaw (eds.), *The External Debt* (1992) 537, at 547ff.; C. Tietje, *Die Argentinien-Krise aus rechtlicher Sicht: Staatsanleihen und Staateninsolvenz* (2005), 18 (claiming the existence of a customary principle of cooperative debt management).
[80] H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), 67 *et seq.*; R. Wolfrum, "Soucres of International Law", in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2011), marginal note 35.
[81] Slightly optimistic: Dolzer (note 76), 538-9; Tietje (note 79), 18.
[82] Goldmann (note 71), xxx.
[83] Cf. 11 U.S.C., Chapter IX; see below note 118 on other jurisdictions.

would be therefore desirable for domestic and international courts and tribunals, provided that they are called upon to apply general principles of law, to recognize this duty as having a *de lege lata* character. For this purpose, UNCTAD Principles 7, 9, and 15 on provide valuable guidance by stipulating that cases of financial necessity should be resolved by negotiated restructurings.

Another procedural requirement which one may derive from many theories concerned about procedural fairness is the idea of an inclusive decision-making process. All those affected by a restructuring should have the opportunity to influence authoritative decisions; either directly or indirectly through representatives, notice-and-comment procedures, or the like.[84] This requirement might challenge the practice of some existing restructuring mechanisms and call for improvements. First of all, the population of the debtor state is heavily affected by the restructurings, but often not well represented. In the Paris and London Clubs, it is solely represented by its government, some of which in the past have manifestly ignored their responsibility towards their people. Given the gravity of the decisions taken, in particular the restructurings, one might want to think about strategies improving ownership of the population concerned of the adjustment measures.[85] Of course, leadership and the ability to act quickly and efficiently are of great importance in such crises. But at the same time, the procedures should find the support and acceptance of the affected individuals. One way of doing so is by setting goals and letting the state in default choose the means. This is the intention behind the abolition of structural performance criteria in IMF lending conditionalities.[86] Another instrument might consist in broadening the participation in international negotiations by involving domestic stakeholders such as parliaments, union and industry representatives etc. Also, one might question the wisdom of separate negotiation rooms for the creditors and the defaulting state which only meets with the Chair.[87] These considerations might to some extent be derived from the general principle of good faith,[88] but should otherwise be understood as suggestions *de lege ferenda* in order to increase the legitimacy of sovereign debt restructurings, as well as their effectiveness. By requiring

[84] See above, B.II. On notice-and-comment procedures see R. Stewart, "US Administrative Law: A Model for Global Administrative Law?", 68 *Law and Contemporary Problems* (2005) 63-108.
[85] Since the end of the cold war, ownership has become a guiding principle for the international financial institutions. For an early manifestation see J.H. Johnson, "Borrower Ownership of Adjustment Programs and the Political Economy of Reform",World Bank Discussion Paper No. 199 (1992); on its meaning see P. Dann, *Entwicklungsverwaltungsrecht* (2011), 216-219.
[86] IMF, GRA Lending Toolkit and Conditionality: Reform Proposals (2009), http://www.imf.org/external/np/pp/eng/2009/031309a.pdf
[87] Cf. http://www.clubdeparis.org/sections/composition/fonctionnement-du-club/deroulement-d-session.
[88] K. Raffer, "Ein Insolvenzverfahren für Staaten – Gebot ökonomischer Ratio", in G. Kodek & A. Reinisch (eds.), *Staateninsolvenz* (2011) 33.

prompt, efficient, and fair rearrangements, UNCTAD Principle 15 provides argumentative support for such efforts. Domestic insolvency law, by contrast, seems of little help in this respect because it applies to private individuals and entities which cannot be equalled with states and their duties towards their population. In fact, insofar as public entities may be subject to insolvency proceedings, most domestic laws give greater leeway to public interests than is the standard in purely private proceedings.[89]

Like the relationship between creditors and the debtor state, intercreditor relationships need to be designed in a way which ensures the legitimacy of the negotiated agreement. In this respect, the consensus requirement for Paris Club restructurings might ensure that the taxpayers in creditor states which eventually need to bear the losses are not deprived of their influence.[90] But the involvement of domestic institutions in the proceedings might provide safeguards equivalent to unanimity or consensus. As far as only private actors are concerned like in the London Club, we do not see any obstacle to majority voting with numbers of votes proportionate to the sums owed like in domestic insolvency proceedings. One might, however, opt for minimum thresholds in order to safeguard the interests of small creditors.

Even more complicated is the relationship between different groups of creditors. The Paris Club's comparable treatment clause which prohibits the debtor from agreeing with other bilateral and private creditors on other than comparable terms seriously affects those creditors. It seems difficult to justify this clause with the intergovernmental nature of the Paris Club and the capacity of its members to to represent their population. First, not every private creditor might be represented by his or her government in the Paris Club. Second, Paris Club members negotiate not only about their citizens' financial interests, but primarily about their own interests. Therefore, some kind of coordination between the different fora, or at least a right of other creditors to be heard seems necessary in order to address tensions between private and public creditors as they have arisen in the past.[91] An interesting idea in this respect are the Principles proposed by the Council on Foreign Relations, which recommend coordination between private creditors steering committees and the Paris Club.[92] UNCTAD Principle 7 points in the same direction by requiring lenders "to behave in good faith and with cooperative spirit".

[89] Goldmann (note 71), xxx.
[90] Cf. the Paris Club Five Key Principles, http://www.clubdeparis.org/sections/composition/principes/cinq-grands-principes.
[91] Josselin (note 49).
[92] Cf. Hagan (note 57), at 66.

Transparency and disclosure are further important issues which discursive approaches to the legitimacy of international public authority require. Only if the parties of a restructuring know what is at stake they will be able to find a satisfactory solution. Transparency and information sharing is already required by defaulting states under existing IMF and Paris Club legal frameworks.[93] UNCTAD Principles 11 and 13 corroborate these rules.

A final procedural issue is whether the legitimacy of sovereign debt restructurings would be enhanced by the availability of a court or arbitration tribunal with the jurisdiction to resolve disputes arising from negotiated restructurings (as opposed to creditor holdout litigation, cf. infra). This would certainly strengthen the accountability of debt restructurings.[94] One might not have to design and set up new courts or tribunals for this purpose, but rely on existing domestic and international judicial institutions.

2. Substantive Requirements

Apart from procedural issues, the need to justify sovereign debt restructurings to those affected also has consequences for their substantive legal framework. In this respect, fundamental human rights play a decisive role. Their protection requires a viable state with effective institutions for the maintenance of at least a minimal standard of basic public services such as education, health, and security. Some scholars argue that this rule applies as a principle *de lege lata* by virtue of the erga omnes effect of human rights obligations.[95] Restructurings should not become the 21st century equivalent to the granting of concessions or transfer of property from debtor to creditor states in the 19th and 20th centuries.[96] Certainly, creditors also have important interests at stake, whether their claims meet the definition of property in human rights treaties or investment under BITs or not.[97] However, research has revealed that their long-term returns have often been positive even in case of

[93] IMF Articles of Agreement, Article IV; The Comparability of Treatment Clause is part of the Five Key Principles of the Paris Club (note 90).
[94] Cf. C. Paulus, "Ein Insolvenzrecht für Staaten", in M. Dabrowski, *Die Diskussion um ein Insolvenzrecht für Staaten* (2003) 231-259.
[95] T. Pfeiffer, "Zahlungskrisen ausländischer Staaten im deutschen und internationalen Rechtsverkehr", 102 *Zeitschrift für vergleichende Rechtswissenschaft* (2003) 141-194, 160-1.; Dolzer (note 76), 547.
[96] Zettelmeyer & Sturzenegger (note 2), 16;
[97] On possible ECtHR cases by hedge funds, see L. Thomas, "Hedge Funds May Sue greece if It Tries to Force Loss", New York Times, 18 January 2012, B1.

defaults and restructurings.[98] The relationship between human rights and soverign debt restructurings has not yet been fully explored in scholarship and practice. This opens a perspective for the future development of the UNCTAD Principles.

Many substantive principles, however, only have the status of desiderata. This concerns in particular the question of preferential status, which Anna Gelpern has termed the "seating chart" of international debt restructurings.[99] In this respect, it is not quite settled that the IMF and regional institutions should enjoy priority over other creditors, thereby depleting the value of their investment. Some argue that priority should be granted to more senior loans which involve lower funding costs for the affected state.[100] However, given that IMF lending might help bridge some time until a more sustainable solution is negotiated, there are good policy reasons for granting them preference.[101] Some even argue that customary law already recognizes the preferential position of the IMF.[102]

These few examples might illustrate that the recognition of existing mechanisms for debt restructurings as exercises of public authority requires a good deal of doctrinal constructivism in order to find equitable solutions to problems of sovereign debt which have been vexing this field for years.

II. Effects for Domestic and International Courts and Tribunals

Domestic litigation, and even more so, international arbitration by individual or groups of creditors may restrict the ability of states to negotiate restructurings.[103] Several strategies have been devised in order to curb such holdout litigation. Debevoise proposed considering

[98] Zettelmeyer & Sturzenegger (note 2), 26ff.
[99] A. Gelpern, "Building a Better Seating Chart for Sovereign Restructurings", 53 *Emory L. J.* (2004) 1119-1161.
[100] P. Bolton & D.A. Skeel, "Inside the Black Box: How Should a Sovereign Bankruptcy Framework be Structured?", 53 *Emory L. J.* (2004) 763-822.
[101] E.g. German Ministry for Economic Cooperation and Development, *Internationale Insolvenzregelungen für Entwicklungsländer*, Stellungnahme des Wissenschaftlichen Beirats beim BMZ (BMZ Spezial Nr. 014), Mai 2000, Bonn: BMZ (AG1-14/91); J. Zettelmeyer, "The Case for an Explicit Seniority Structure in Sovereign Debt", IMF Working Paper (2003).
[102] Reinisch (note 79), 552; C. Holmgren, *La renégociation multilatérale des dettes: le Club de Paris au regard du droit international* (1998), 159.
[103] On ICSID, see K.P. Gallagher, "The New Vulture Culture: Sovereign debt restructuring and trade and investment treaties", IDEA Working Paper 02/2011; M. Waibel, "Opening Pandora's Box: Sovereign Bonds in International Arbitration", 101 *American Journal of International Law* (2007) 711-759. A positive view takes K. Halverson Cross, "Arbitration as a Means of Resolving Sovereign Debt Disputes", 17 *The American Review of International Arbitration* (2006) 335-382.

sovereign debt contracts as exchange contracts according to Art. VIII(2)(b) of the IMF Articles of Agreements.[104] However, courts so far have not followed this view.[105] More successful have been attempts to invoke necessity as a defense against such claims. This story, which begins with the *Serbian Loans* case and presently continues with ICSID disputes is well known among lawyers and does not need to be reiterated here in full.[106]

However, necessity as a defense is unsatisfactory from a public policy perspective for several reasons. First, a defaulting state may not invoke necessity if it has contributed to the situation of necessity.[107] This requirement has limited the ability of defaulting states to invoke necessity, since a sovereign default is typically the result of multiple causes, including mistakes of the defaulting government.[108] Second, the legal consequences of invoking necessity do not correspond to the policy objectives of sovereign debt restructurings. Necessity only entitles a state to a stay of proceedings, which ceases as soon as the economic or financial situation improves. This does not necessarily coincide with the conclusion of a debt restructuring. Also, a state might have to pay damages to its creditors for the delay.[109] Third, the invocation of necessity is unrelated to the the procedural and substantive legitimacy of debt restructurings. While it might be a strong indication for a situation of necessity if other states enter into negotiations with the defaulting state, unilateral, unnegotiated default does not necessarily bar a state from establishing an emergency and invoking the defense of necessity.

After the failure of the IMF proposal for a Sovereign Debt Restructuring Mechanism, states massively increased the use of Collective Action Clauses in their debt instruments which had

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[104] W. Debevoise, "Exchange Controls and External Indebtedness: A Modest Proposal for a Deferral Mechanism Employing the Bretton Woods Concept", 7 *Houston Journal of International Law* (1984) 157-68; see Rogoff & Zettelmeyer (note 4), at 479f.

[105] Tietje (note 79), 10-11 (with references to the opinion of the German Federal Court of Justice, that exchange contracts do not include sovereign debt instruments).

[106] Kämmerer (note 10), 659; see also the PCIJ in the Socobel decision (note 76).

[107] Cf. Art. 25(2)(b) Articles on State Responsibility; ICJ, *Gabčíkovo-Nagymaros Project*, Judgment, ICJ Reports (1997) 7, 46.

[108] For a critique of the ICSID awards on necessity cf. S. Schill, "International investment Law and the Host State's Power to Handle Economic Crises", 24 *Journal of International Arbitration* (2007) 265-286; C. Binder, "Changed Circumstances in Investment Law: Interfaces between the Law of Treaties and the Law of State Responsibility with a Special Focus on the Argentine Crisis", in C. Binder *et al.* (eds.), *International Investment Law for the 21st Century* (2009), 608-630, 610 *et seq.*; M. Waibel, "Two Worlds of Necessity in ICSID Arbitration: *CMS* and *LG&E*", 20 *Leiden J. Int'l Law* (2007) 637-648.

[109] Kämmerer (note 74), marginal note 10; Waibel (note 108). On damages cf. Art. 27(b) Articles on State Responsibility.

hitherto been a common feature only in debt instruments governed by English law.[110] So far, Collective Action Clauses proved to be an effective means against holdout creditors. However, they have certain practical and normative drawbacks. Practically, they only apply to new debt, not to old debt with long maturities. Also, large vulture funds may be in a position to buy enough of one bond in order to obstruct restructurings. The majority required under Collective Action Clauses for the approval to a change in payment terms is the majority (usually 75% or 85%) of the holders of one particular bond, not of all outstanding government debt.[111] Theoretically, Collective Action Clauses might raise some of the legitimacy concerns set out in the preceding sections. They make the financial survival of a state dependent on the goodwill of its creditors, irrespective of the fate of the population of the defaulting state.[112]

These policy considerations lead us to suggest another solution. We argue that reasons of legitimacy and of positive law require the acknowledging that authoritative international sovereign debt restructurings lead to an automatic stay of international and domestic enforcement actions against sovereign creditors. Deductively, such a principle is, first, a corollary of the idea that sovereign debt restructurings need to protect essential human rights interests.[113] Only one single, centralized proceeding, or a number of closely coordinated proceedings, may enable a state to regain the capacity necessary for safeguarding essential human rights and avoid disastrous shocks to the domestic and global economy. Second, only one single or multiple coordinated proceedings may ensure that all creditors are treated equally and that any priorities are applied consistently. Third, it is appropriate to apply automatic stay by analogy to sovereign defaults, because the only fundamental normative difference between defaulting states and defaulting private entities is that the former cannot be liquidated. But this militates *a fortiori* in favor of the application of automatic stays of enforcement proceedings in sovereign default cases, because this defense facilitates the orderly resolution of a sovereign debt crisis while ensuring the maintenance of the essential

[110] For data on the use of CACs, see W.M.C. Weidemaier, "Reforming Sovereign Lending Practices: Modern Initiatives in Historical Context" (paper presented at the Madrid Conference, on file with the authors). On the political process leading to the rise in CACs see R. Quarles, "Herding Cats: Collective-Action Clauses in Sovereign Debt – The Genesis of the Project to Change Market Practice in 2001 Through 2003", *Law & Cont. Probl.* 73 (2010) 29-38.
[111] Gallagher (note 103), at 12; J.E. Fisch & C.M. Gentile, "Vultures or Vanguards?: The Role of Litigation in Sovereign Debt Resturcturing", 53 *Emory L.J.* (2004) 1043, 1094-5; C. Wheeler & A. Attaran, "Declawing the Vulture Funds: Rehabilitation of a Comity Defense in Sovereign Debt Litigation", 39 *Stanford J. Int'l L.* (2003) 253-284, 264-5.
[112] R.K. Rasmussen, "Integrating a Theory of the State into Sovereign Debt Restructuring", 53 Emory LJ (2004) 1159, 1163-4.
[113] Cf. above, C.II.

functions of a state. Thus, from a teleological point of view, the transfer of this principle of private insolvency law to sovereign defaults seems adequate.

Inductively, we argue that there is growing evidence that ongoing sovereign debt workout negotiations as well as the ensuing restructurings have *de lege lata* the effect of an automatic stay on court proceedings. A general principle of law to this effect seems to be emerging.[114] Bankruptcy filings of private entities trigger an automatic stay on enforcement actions in practically all domestic jurisdictions. .[115] Although domestic law might vary in some details from one legal order to the other, in particular as some jurisdictions require prior court approvals, on an abstract level there is a high degree of convergence: Authoritative, centralized insolvency proceedings bar individual enforcement against the creditor in default.[116] This principle is increasingly applied in public sector default cases.

First, domestic legislation provides for automatic stay (or some other form of stay) in case of defaulting public entities. Under Chapter 9 of title 11 of the US Code, automatic stay is applicable in bankruptcy procedures against municipalities.[117] Other states which have enacted bankruptcy legislation for subnational entities include Brazil, Bulgaria, Hungary, Romania, and South Africa. It routinely includes some form of stay on enforcement.[118] Even in the absence of formal bankruptcy proceedings, there is legislation recognizing that creditors may not obtain and enforce judgments for the full amount of their debt against insolvent sovereign debtors. After the Second World War, Germany passed legislation which anulled, with few exceptions, all domestic government debt of the Reich, thereby mooting ongoing and future enforcement action.[119] The 2010 United Kingdom Debt Relief (Developing Countries) Act reduces claims of private creditors against countries participating in the HIPC proportionate to the relief granted to them under the initiative. Although the legislation in

[114] In this sense already Dolzer (note 76) 546f.
[115] International Law Association, "State insolvency: options for the way forward", Report for the Hague Conference (2010), 23. Paulus (note 8), 404; Waibel (note 103), 750.
[116] Cf. only 11 U.S.C. § 362 and §§ 240 German Code of Civil Procedure; 89 German Insolvency Code. Differences are due to the fact that in Germany, stays require court approval, but the execution of judgments usually does not require adversatorial enforcement proceedings before courts. The general principle has been recognized by international tribunals, cf. ICSID, *Noble Ventures Inc. v. Romania*, case ARB/01/11, which emphasizes that restructurings under municipal law are not arbitrary measures under the fair and equitable treatment standard, cf. Waibel (note 103), 750. However, willful breaches and abuse could lead to a violation, cf. C. Schreuer, "Fair and Equitable Treatment in Arbitral Practice", 6 *Journal of World investment and Trade* (2005) 357 at 380.
[117] 11 U.S.C., §§ 901(a), 362.
[118] M. Waibel & L. Liu, "Subnational Insolvency: Cross-Country Experiences and Lessons", World Bank Policy Research Working Paper No. 4496 (2008), 26.
[119] § 1(1), Allgemeines Kriegsfolgengesetz, 5 November 1957, Bundesgesetzblatt III, No. 653-1.

Germany and the UK technically does not impose stays, it serves the identical purpose, namely ensuring the orderly resolution of debt crises through international negotiations while preserving the equality of creditors.

Second, state practice and some case law applies automatic stays in case of international debt restructurings, thereby recognizing the latter as authoritative and as fulfilling essentially the same function as domestic insolvency proceedings. Since the 1930s, bilateral lenders have routinely granted defaulting states a moratorium on their debt during international negotiations.[120] This might be a corollary of the duty to cooperate in sovereign debt restructurings.[121] The situation is less clear with respect to private creditors, which usually reserve the right to file suits and require states to waive their jurisdictional immunities. However, some precedents stir hopes that more and more courts might recognize automatic stay as a legal consequence of sovereign debt restructurings. In 1985, the Supreme Court of New York recognized this principle in a suit against Venezuela, basing it on the duty of the plaintiff to respect creditor solidarity.[122] The same logic can be found in the first decision in *Alied Bank Int. vs. Banco Credito Agricola de Cartago*. In 1984, the Court ruled against a holdout creditor since Costa Rica at the time seemed to be negotiating in good faith. When the restructuring later turned out to be more a unilateral suspension of payments, the first ruling was reversed.[123] A more recent example for this line of reasoning is the 2005 summary order rendered by the US Federal Court of Appeals for the Second District in *EM Ltd. v. Argentina* and *NML Capital v. Argentina*. Although this order formally lacks precedential value, it has been widely cited for the remarkable considerations of the judge, who decided that "the District Court acted well within its authority to vacate the remedies in order to avoid a substantial risk to the successful conclusion of the debt restructuring. That restructuring is obviously of critical importance to the economic health of a nation."[124] A similar decision was rendered in *Pravin Banker v. Banco Popular del Peru.*[125] At around the same time, the Italian Corte di Cassazione recognized that the need to safeguard essential public interests and human rights justified extending immunity over Argentina's emergency laws, even though it

[120] Zettelmeyer & Sturzenegger (note 2), 15.
[121] Cf. supra, D.I.1.
[122] Supreme Court of New York, *Crédit français S.A. v. Sociedad financiera de Comercio*, 490 N.Y.S.2d 670 (1985); Dolzer (note 76), 539.
[123] 757 F2d 516 (2nd Circuit 1985), see Rogoff & Zettelmeyer (note 4), 475.
[124] *EM Ltd. V. Argentina*; *NML Capital v. Argentina*, Summary Order, 13 May 2005, 05-1525-cv.
[125] Cf. U. Panizza, F. Sturzenegger & J. Zettelmeyer, "The Economics and Law of Sovereign Debt and Default", 47 *Journal of Economic Literature* (2009) 651-698, 659; Kämmerer (note 10) 664.

had waived its immunity for the bonds in dispute.[126] The 2011 judgment of the Court of Appeals for the 2nd Circuit in *CIV v. Argentina* seems to endorse the present line of reasoning, although more indirectly.[127] In this case, the Court upheld the attachments received by CIV on Argentina's reversionary interest in collateral pledged for Brady bonds (i.e. upon repayment of the bonds, Argentina would receive the pledged collateral, at which time CIV would be able to have it "confiscated"). These attachments were upheld *even though* the court recognized they might obstruct a new restructuring with third parties. However, the Court based its decision primarily on the argument that the attachments concerned only a relatively small sum (in case of the Argentinean default, USD 100m is indeed not a significant amount), while the volume of the planned restructuring and thus of the expected reversionary interest was much larger. The Court concluded that the attachment would not obstruct Argentina's finances. If one reverses this argument, attachments could principally be vacated in case they obstruct restructurings.[128]

Certainly, the mentioned cases represent only part of the entire picture. Judges at the US Federal Court for the Southern District of New York rendered dozens of judgments in favor of vulture funds attempting to reclaim the nominal amount of their debt against Argentina, and did not recognize automatic stay as a defense.[129] Other particularly infamous decisions are those of a Belgian court granting *Elliot Associates* enforcement of its US judgment in Belgium by allowing interception of Peru's interest payments to non-holdout creditors cleared by a Belgian company,[130] and the decision of the German Federal Constitutional Court in the Argentinean Bond case, which refused to give recognition to the defense of necessity in cases confronting states and private investors.[131] However, in a 1962 judgment concerning

[126] Corte di Cassazione, sez. Un., 27 May 2005, n. 11225, 88 Riv di dir int (2005) 856, http://www.ilsole24ore.com/art/SoleOnLine4/Speciali/2006/documenti_lunedi/02gennaio2006/sentenza_11225_2005.pdf?cmd%3Dart; see Waibel (note 103), 757.
[127] *Capital Ventures International v. Republic of Argentina*, 10-4520-cv *et al.*, 20 July 2011.
[128] See also 2nd Circuit in *CIV v. Argentina,* 05-2591-cv, 23 March 2006, margin note 43, regarding the risk that the order of attachment might create "confusion" among the creditors participating in the exchange offer (obiter dictum): "we can conceive, perhaps, of a situation in which an order of attachment might be against the public interest for some reason not addressed in the CPLR (statute)".
[129] E.g. *EM Ltd. v. Argentina*, 03 Civ. 2507 (TPG), opinion on motions for attachment and restraints, 7 April 2010; see also the impressive list of judgments against Argentina in a restraining order of 15 January 2010 in the case *Aurelius Capital Partners et al. v. Argentina*, No. 07 Civ. 2715 (TPG), totalling more than $500m. But see also in the same case as well as 11 other cases the order of 28 March 2012 lifting an earlier restraining order concerning funds of the Argentine central bank held at the Federal Reserve Bank of New York in order to enforce judgments of a total worth of over $2.2bn (http://www.businessweek.com/news/2012-03-28/u-dot-s-dot-judge-vacates-2-dot-2-dot-billion-order-in-argentine-bond-case).
[130] *Elliott Associates*, Brussels Court of Appeals, 8th Chamber, General Docket 2000/QR/92, 26 September 2000; for a meticulous critique see Buchheit/Pam, 53 Emory LJ (2004); further holdout litigation is listed in Panizza, Sturzenegger and Zettelmayer, 655-59.
[131] Cases 2 BvM 1-5/03, 1, 2/06, Decision of 8 May 2007, BVerfGE 118, 124.

Germany's post-war default on its domestic debt, the latter court recognized that sovereign defaults justified highly intrusive measures including the legislative cancellation of debt without compensation because of the high significance of the state for the economy in general and the ensuing impossibility to liquidate all of the state's assets.[132]

For the above reasons, it might be possible to identify a growing conviction across legal orders that, as a matter of a general principle of law, sovereign debt restructurings may not be jeopardized by holdout litigation and arbitration. By requiring prompt, fair and effective restructurings in case of financial necessity, UNCTAD Principles 7, 9 and 15 corroborate these efforts. As a general principle of law, automatic stay would have to be applied by international courts and tribunals, including ICSID arbitral tribunals.[133] For the latter, there are also good policy reasons to grant automatic stay. A powerful argument has been made that ICSID dispute settlement is conditional upon the protection of essential public interests.[134] Sovereign debt restructurings aim at preserving the financial survival and stability of states and should therefore be respected.[135] Additionally, restructurings of this kind could hardly be said to violate fair and equitable treatment or national treatment clauses contained in Bilateral Investment Treaties.

Domestic courts and tribunals would only be immediately bound by such a general principle of law if the legal order in which they operate gives direct effect to them.[136] Otherwise, only their state is obliged to respect this principle as a matter of international law. In order to avoid state responsibility arising from continuing holdout litigation, it would have to pass appropriate legislation. Beyond the scope of strict legal obligations, it should be borne in mind that the fairer and the more legitimate and effective international debt restructurings are, the more reason will domestic and international judges and arbitrators have to defer to them and put a stay on creditor suits and enforcement action.

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[132] Case 1 BvR 987/58, Judgment of 14 Novermber 1962, BVerfGE 15, 126, 140-144.
[133] Cf. Art. 38(1)(c), ICJ Statute.
[134] Schill (note 11); B. Kingsbury & S. Schill, "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law", *Institute of International Law and Justice Working Paper* No. 6 (2009).
[135] On the connection between sovereign debt and domestic stability see M. Goldmann "Sovereign Debt Crises as Threats to the Peace: Restructuring under Chapter VII of the UN Charter?", 4 *Goettingen Journal of International Law* (2012), forthcoming.
[136] An example would be Art. 25 of the German Basic Law. According to Wheeler & Attaran (note 111), 266 *et seq.*, comity as a doctrine of U.S. law might lend itself for such purposes.

E. Implications for Borrowing States and Lenders: Preventive Aspects

The principles and ideas outlined above do not amount to a carte blanche for defaulting states. Rather, an authoritative international debt restructuring mechanism needs to be protected against moral hazard, i.e. against the risk of abuse by states which are able, but genuinely unwilling to pay their debts in time and consider restructurings as preferable to austerity measures. Therefore, sufficient incentives are necessary in order to ensure sustainable debt practices.[137] It is quite obvious from this that the preventive aspects of the UNCTAD Principles constitute an extremely important building block in the construction of stable international restructuring mechanism and an international insolvency law. Some of the preventive duties listed in the Principles have already the status of general principles or customary law. Other principles are emerging.[138]

However, in light of the ongoing European debt crisis, a sober assessment of government incentives to engage in sustainable borrowing might come to the conclusion that strong international oversight mechanisms are necessary. Such mechanisms require principles of a global budgeting law as a basis of their assessment. Needless to emphasize, the UNCTAD Principles are an important contribution in this respect. If they succeed in increasing transparency, market discipline might effectively contribute to sustainable practices.

F. Conclusion

Conceptualizing sovereign debt restructurings as international public authority involves a daunting task for practice and legal scholarship. It helps uncovering the full extent of the implications of sovereign debt restructurings for all affected parties and underlines the need to bring these mechanisms out of the shadow of informality. Like all exercises of public authority, they must not escape the reach of the law. This insight calls for some good dose of doctrinal constuctivism in order to establish rules which protect the interests of all parties involved, including states, the citizens affected by adjustment measures, commercial and other private creditors, as well as international institutions. We hope that the public law

[137] Sovereign defaults are preceded by lending booms which lead to irresponsible behavior. See Zettelmeyer & Sturzenegger (note 2), at 6 *et seq*.
[138] Cf. J.P. Bohoslavsky, "Lending and Sovereign Insolvency: A New Criterion to Distribute Losses among Creditors", 2 *Goettingen Journal of International Law* (2010) 387-412; Goldmann (note 71), xxx.

approach advocated in this paper and its underlying principles might guide the development of such rules and principles and provide useful insights and arguments for the support of legal rules and principles which make international debt restructurings both fairer and more efficient. In that respect, the UNCTAD Principles are to be welcomed as an important step on the road towards a decentralized, yet increasingly full-grown international insolvency law for the regulation of international sovereign debt restructurings.