The Principle of Good Faith in International Law

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Good faith is insufficient in bringing about a multilateral public order. An international community that applies the principle of good faith effectively does not exist. Arguably, rather than a robust juridical mechanism, good faith represents common sense in international law. However, an effective and functioning multilateral public order needs more than that. This becomes all the more palpable in respect of issues such as external sovereign debt, where public international law is inchoate.

1. Introduction

Good faith ensures a minimum standard of law in international relations. It is necessary as international law is inchoate. This article argues that the principle of good faith is an instrument to turn international law from a bilateral to multilateral dimension and to establish a multilateral public order. Yet, in that respect, the principle of good faith has not been successful to date.

In the second section, this article makes some conceptual clarifications with regard to good faith, after which a definition of good faith is made in the third section. Then in the fourth section, the notion of international community is discussed. Finally, the fifth section is based on a case study — external sovereign debt — to further explore the notion of good faith.

2. Conceptual Clarifications

Good faith facilitates an international community in which stakeholders feel that they operate on a "multilateral" level playing field, and not on a mere *ad hoc* bilateral one. This multilateral dimension is the ultimate guarantee for states to enter into transactions with other states. Indeed,

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"in the absence of any supranational authority, states have nothing to rely upon for the due fulfilment of international obligations but their trust in the good faith of the other parties".[1] Governments should be able to trust each other in order to enter into stable and peaceful relationships with each other.[2] Good faith is concerned with notions of trust and honesty in international relations.[3]

The principle of good faith fills certain gaps in international law. Being a primordial system of law,[4] international law may claim a degree of comprehensiveness, thanks to the principle of good faith. Indeed, positive international law enlists good faith: there is a reference to "general principles of law" in art 38 of the Statute of the International Court of Justice (ICJ),[5] which purportedly covers the principle of good faith. The ICJ refers to the principle of good faith.[6] Good faith is mentioned in the United Nations (UN) Charter,[7] the World Trade Organization (WTO) agreements,[8] the WTO dispute settlement decisions[9] and the UN "Declaration of the Principles of International Law on Amicable Relations and Cooperation among States."[10] Interestingly, none of these gives a

1 Talya Ucaryilmaz, "The Principle of Good Faith in Public International Law" (2020) 68(1) *Estudios de Deusto* 53.

2 Bernardo M Cremades, "Good Faith in International Arbitration" (2020) 27(4) *American University International Law Review* 768.

3 Andreas R Ziegler and Jorun Baumgartner, "Good Faith as a General Principle of (International) Law" in Andrew D Mitchell, M Sornarajah and Tania Voon (eds) *Good Faith and International Economic Law* (New York: Oxford University Press, 2015) p 11; Ucaryilmaz (n 1 above) pp 45–46,49,51.

4 Michael Byers, "Abuse of Rights: An Old Principle, A New Age" (2002) 47 *McGill Law Journal* 415: "International law is actually more like the civil law when it comes to rights, in that both systems tend to characterize some rights as general and primordial".

5 Available at https://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf (visited 01 February 2021).

6 *Certain Norwegian Loans* (*France v Norway*) (Jurisdiction) [1957] ICJ Rep 9, 53; *Gabčíkovo-Nagymaros Project* (*Hungary v Slovakia*) (*Merits*) [1997] ICJ Rep 7, 79: "The purpose of the Treaty, and the intentions of the Parties in concluding it, … should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized."

7 United Nations Charter, art 2: All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.

8 "Understanding on Rules and Procedures Governing Dispute Settlement of the World Trade Organization", art 3.10, available at https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#3 (visited 10 January 2021).

9 United States-Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by the United States) (WTO Doc. WT/DS58/AB/R (Appellate Body Report), 1998, para 158): "The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably".

10 The United Nations General Assembly, Declaration of the Principles of International Law on Amicable Relations and Cooperation among States (1970): "[e]very state has the duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law".

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definition of good faith. However, it may be argued that the lack of definition makes the principle of good faith even stronger and helps give the appearance of a multilateral public order. The ambiguity of the term increases the potential of international law establishing a multilateral public order.

That potential-increasing function is all the more crucial as international law has deficiencies with respect to law-making and law enforcement. There exists no world legislature which draws up international law; rather, there exist various treaties and customs which are binding upon various countries. Treaties and customs covering the entire international community, such as the Geneva Conventions on the Law of War,[11] are rare, and even when such comprehensive, albeit exceptional, legal regimes exist, their enforcement may be problematic. Indeed, the enforcement of the Geneva Conventions by an international court did not take place until the 1990s, when the International Criminal Court for the Former Yugoslavia was established.

There is no compulsory world court for the settlement of international disputes. Arguably, a mandatory court, if existed, would bring about an effective multilateral legal system. Granted, there has been a proliferation of international courts and tribunals. That proves the concern for the establishment of reliable, consistent and enforceable international legal regimes. However, there has been no integration among international courts and tribunals; and no hierarchy exists between them. The ICJ, the judicial organ of the UN, does not sit at the apex of a hierarchy of courts and does not direct international jurisprudence. The ICJ does not harmonise the jurisprudences of various international courts. Courts do not necessarily refer to each other. For instance the WTO panels barely refer to international investment tribunals awards. International courts and tribunals refer to one another's jurisprudence only on a voluntary basis, and not out of any concern for a consistent multilateral public order. This is the phenomenon of the fragmentation of international law.[12]

The fragmentation of international law is a source of ambiguity, which may be a source of concern. Arguably, that concern is handled though the principle of good faith. Good faith conveys the impression that whatever the deficiencies and insufficiencies of international law, the latter is

[11] Available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp?redirect=0 (visited 01 February 2021).

[12] United Nations, Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (A/CN.4/L.702, 18 July 2006), available at https://www.un.org/ga/search/view_doc.asp?symbol=A/CN.4/L.702 (visited 01 February 2021).

still capable of settling disputes among states and can still usher in stability international relations.

3. Definition of Good Faith

But, what exactly does good faith entail? First and foremost, good faith implies honouring engagements. That is to say, states shall not break promises that they have made through treaties and customs. Indeed, this is what the Vienna Convention on the Law of Treaties has openly admitted about good faith.[13] This is the most visible and concrete form of good faith.

Second, good faith implies stability.[14] The stability of the international system demands that states act consistently. Once a state has expressed its position, it should not change its position; or it should, at least, not be able to make a valid legal case for its new position. The legal realm should not allow for such change. This is a corollary of honesty and trust in international relations.

The consistency in state acts is, in technical terms, called the principle of estoppel.[15] "The principle helps to safeguard a state's legitimate reliance on the actions of other states, in the sense that faith and confidence are protected when they are placed reasonably on the actions of another."[16] The power of the principle of estoppel is such that a state may be deemed bound even by its unilateral declarations — unilateral declarations are regarded as having multilateral consequences. For instance if a state official — such as a Minister for Foreign Affairs – makes a unilateral declaration on a legal issue, the state may be deemed bound by that unilateral declaration.[17] States cannot arbitrarily change their position as

[13] "*Pacta sunt servanda*", Vienna Convention on the Law of Treaties: Every Treaty in force Is Binding upon the Parties to it and Must Be Performed by Them in Good Faith, art 26, available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (visited 02 February 2021).

[14] Ziegler and Baumgartner (n 3 above) p 9.

[15] IC MacGibbon, "Estoppel in International Law" (1958) 7(3) *The International and Comparative Law Quarterly* 468–469: "Underlying most formulations of the doctrine of estoppel in international law is the requirement that a state ought to be consistent in its attitude to a given factual or legal situation. Such a demand may be rooted in the continuing need for at least a modicum of stability and for some measure of predictability in the pattern of state conduct. It may be, and often is, grounded on considerations of good faith." Andrew D Mitchell, "Good Faith in WTO Dispute Settlement" (2006) 7 *Melbourne Journal of International Law* 348.

[16] Steven Reinhold, "Good Faith in International Law" (2013) 2(1) *UCL Journal of Law and Jurisprudence* 54.

[17] International Court of Justice, *Nuclear Tests* case (*Australia v France*) (*Merits*) [1974] ICJ Rep 253: "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith." "Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation. Thus interested states may take cognizance of unilateral declarations and place

indicated by their representatives once they have declared their position to the international community — that is a legally binding multilateral tie is established between the state making the declaration and a purported international community as a whole. This helps establish a multilateral public order.

Third, the principle of good faith contains the prohibition of abuse of rights by states. That is a state should invoke a treaty right or a customary right with due respect for the rights and interests of other states — this is a multilateral public dimension. The prohibition of abuse of rights implies the existence of an international community: a state cannot exercise its rights in a way which harms disproportionately the international community of states.[18] If there is a considerable imbalance between the benefit of the right-invoking state and disadvantages incurred by other states, the right of the state may, under international law, be circumscribed.

Fourth, the principle of good faith includes the notion of acquiescence. If a state does not object to the declarations or actions of another state, this may be deemed acquiescence on the part of the former. The latter has the right to interpret the passiveness of the former as an indication of consent. This is a corollary of common sense in international relations. The latter state may legitimately place its confidence in the passivity of the former state and build up further measures upon that. Acquiescence is necessary for international relations in that it brings efficiency to international transactions. States need not meticulously conclude a specific treaty for every action they take. States can legally and legitimately act on the basis of acquiescence of other states. This speeds up the establishment of a multilateral public order.

Actually, all the aforementioned properties of good faith — keeping engagements, consistency in international relations, prohibition on the abuse of rights and acquiescence — are based upon the principle of legitimate expectations.[19] States may legitimately expect other states to act in a certain way. The principle of legitimate expectations provides a strong guideline to states in terms of how to operate on the international stage. This principle enables an honest interaction between states; states can be (reasonably) confident of the honesty of other states. Treaties, customary

confidence in them, and are entitled to require that the obligation thus created be respected." (The International Court of Justice, in the *Nuclear Tests* case,, held that good faith is the governing principle of international law in terms of creation and performance of international obligations.)

[18] Byers (n 4 above) p 389: "One of several meanings of the term 'abuse of rights' provides that there is an abuse of right when the exploitation of an individual right injuriously affects the interests of the community."

[19] Ziegler and Baumgartner (n 3 above) p 12; Reinhold (n 16 above) p 63; Cremades (n 2 above) p 768.

international law, diplomacy, unilateral declarations, passiveness vis-à-vis acts of other states and informal understandings between states may lead to legitimate expectations. They all contain an element of good faith. For instance a state acting in good faith shall refrain from frustrating the object of a treaty to which it is signatory.[20] Signatory states can legitimately expect other signatory states to act in conformity with the treaty.

However, the principle of legitimate expectations in international law should not be confused with the duty of loyalty which is seen in national private laws — in particular, in civil law systems. The duty of loyalty connotes a stronger relationship between the contracting parties. It involves the "taking care of" the counterpart during the pre-contractual, contractual and post-contractual phases. Contracting parties should highlight to each other the risks involved in those phases and should protect each other from unsuitable contracts. Under the principle of good faith in national law, contracting parties exercise a special diligence in protecting each other from the risks of the contractual relationship. Yet, such diligence and such close relationship among states cannot be envisaged under public international law. There exists no such international community where states have a duty to care for each other.

4. International Community

A state should take care of itself in its relationships with other states. For instance a state should be vigilant in the formation of customary international law as a customary rule may surreptitiously amend a treaty to which that state is a party; an international practice may modify a written provision of a treaty.[21] In the process, no state is legally obliged to warn another state that a certain practice is amending a written treaty. Every state should fend for itself in keeping the written treaties to which it has signed up intact.

States are equally sovereign[22] and self-standing entities. They should be able to take care of their own affairs without the need for help or support from other states. This understanding of international law means that, in formal terms, there cannot be excessive imbalance between states' interests. The formal equal sovereignty is deemed to protect states from imbalance in their relations and vitiates the need for taking care of other states. This is in line with the common law understanding: each

[20] Vienna Convention on the Law of Treaties, art 18.

[21] *Air Transport* arbitral ruling (*France v United States of America*), 22 December 1963, paras 182, 249, 253.

[22] United Nations Charter, art 2(1), available at https://www.un.org/en/sections/un-charter/chapter-i/index.html (visited 02 February 2021).

party has his own capabilities and does not owe a fiduciary duty to the other unless they commit fraud or deceit.[23] There is a strong individualist streak to that understanding.

It is open to question whether such individualist understanding fits well with the notion of international community. Arguably, such international community still does not exist. Indeed, no binding international agreement has ever made a definition of international community.

It is granted the cognate doctrines of *erga omnes*[24] and *jus cogens*[25] implicate the notion of an international community. Both represent common concerns and values and highlight the duty of vigilance and the duty of care of the members of a purported international community in respect of matters such as the prohibition and prevention of genocide, the prohibition of racial discrimination and the prohibition of aggression in international relations. Yet, both doctrines involve only the ultimate values of humanity; legitimate expectations with regard to those values are exceptionally immense.

True, states' legitimate expectations of one other have increased due to the development of international law. The establishment of a permanent international criminal court in 1998,[26] the development of international human rights regimes, the establishment of the WTO in 1995, which covers almost all trade among states, and the proliferation of international courts and tribunals all increase legitimate expectations of states with regard to one other and point to the formation of a certain international community. All those developments increase the expectation of loyalty among states. In this context, good faith should have a place in international law.

Yet, that is not the whole picture. International courts and tribunals cannot establish binding precedents, which are essential to a multilateral public order. In essence, every dispute is regarded as a private bilateral matter between disputing parties. Third states are, in principle, deemed not to be influenced by the adjudication between the two disputing states. In other words, international adjudication is treated as if it does not have multilateral consequences. And, that does not bring about a real universal —

[23] Cremades (n 2 above) p 777.

[24] *Barcelona Traction* case (*Belgium v Spain*) (Second Phase) [1970] ICJ Rep 3, para 33.

[25] Vienna Convention on the Law of Treaties [Treaties conflicting with a peremptory norm of general international law ("jus cogens")], art 53: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

[26] Rome Statute of the International Criminal Court, available at https://www.icc-cpi.int/resourcelibrary/official-journal/rome-statute.aspx (visited 02 February 2021).

public — dimension. For instance that is obviously true of the ICJ — the "World Court". Although the ICJ's subsequent decisions refer to and are inspired by its previous decisions, such references take place on a discretionary basis. The ICJ is not legally obliged to do that.[27] That is merely the *de facto* practice of the ICJ, and one, arguably, cannot base an international legal community on voluntary references to past decisions.

Still, the ICJ has, to an extent, formed a certain jurisprudence and has become a popular venue for the settlement of international disputes. The ICJ has become relevant on the international scene, yet it suffers from three disadvantages. First of all, as mentioned above, its so-called jurisprudence still does not bind subsequent cases,[28] which suggests that every dispute involving every other state is *sui generis*. Rather than an understanding by the international community whereby states shall be treated similarly, every State is free to invoke its "unique" national sovereignty and hence its "unique" legal problem which requires a "unique" solution. However, the principle of good faith as applied to an international community requires the application of similar solutions to similar disputes — a corollary of stability, consistency and legitimate expectations in international relations.

Second, the ICJ cannot judge the excesses or abuses of power of the United Nations Security Council (UNSC). The Court defers to the UNSC's decisions and cannot check whether they comply with the principle of good faith. Being the utmost authority of the purported international community,[29] the UNSC cannot be held accountable and asked whether it has acted in good faith or not. The UNSC may abuse its rights.

For instance the ICJ does not judge whether the UNSC is acting in good faith when the UNSC is referring a certain incident to the International Criminal Court (ICC). When the UNSC referred the situation in Darfur — part of Sudan — to the ICC in 2005,[30] three permanent members of the UNSC (the United States of America, China and Russia) were not ICC members (and are still not). At the time, Sudan was not an ICC member either. Did the UNSC therefore not abuse its power — and therefore violate good faith — by engaging the ICC for a non-ICC member third country while three of its permanent members do not accept the jurisdiction of the ICC for themselves?[31]

[27] Statute of the International Court of Justice, art 59.

[28] *Ibid*.

[29] United Nations Charter, art 25: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

[30] United Nations Security Council Resolution no. 1593, available at https://digitallibrary.un.org/record/544817 (visited 21 January 2021).

[31] Darfur was referred to the International Criminal Court by the United Nations Security Council through a resolution (Resolution no. 1593) under Chapter VII of the United Nations Charter, as provided for by art 13(b) of the Rome Statute.

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Moreover, due to its composition, the UNSC is the subject of criticism. There are calls for the reform of the UNSC. At present, the existence of merely five veto-wielding permanent members in the UNSC is considered an anachronism and a legacy of the Second World War. Yet, to be able to amend the UN Charter, the approval of the five permanent member states is required.[32] Additionally, there is no consensus as to which countries should be new permanent members with veto power. States do not place confidence in other states. The concept of good faith, in this regard, does not exist in the "international community".

Third, the ICJ has never handed down a decision solely on the basis of the principle of good faith.[33] The principle of good faith merely bolsters a decision which has already been decided on the basis of a treaty and/or a customary rule. Good faith, rather, has an accessory role.

The WTO exemplifies the lack of international community, too. The WTO is not exactly a multilateral public mechanism. In fact, WTO procedures boil down to private bilateral dispute settlements between disputing states; the WTO's dispute settlement bodies merely supervise bilateral trade disputes between states and act as facilitators. Indeed, like ICJ rulings, the rulings of the WTO's dispute settlement bodies do not constitute binding precedent. Every WTO dispute is regarded as "unique", even though WTO panels and the WTO Appellate Body "voluntarily" refer to past decisions. Besides, in the event of non-compliance of a losing State with WTO panel and Appellate Body reports, the only thing the WTO can ask is to be informed about the unilateral sanctions of the winning State (the prevailing party) against the losing, non-compliant State. The WTO itself cannot directly impose sanctions on the non-compliant State but merely attaches its seal to unilateral sanctions of the prevailing State against the non-compliant State.

Hence the importance of the principle of good faith: this blatantly private and bilateral enforcement dimension of the WTO is injected with a dose of a multilateral and public dimension via the invocation of good faith in WTO dispute settlement. The WTO member governments are required not to frustrate the WTO dispute settlement mechanism;

[32] United Nations Charter, art 108: "Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, *including all the permanent members of the Security Council*." (Emphasis added).

[33] In 1988, in *Border and Transborder Armed Actions* between Nicaragua and Honduras, the ICJ elaborated that good faith, as a concept, "is not in itself a source of obligation". (*Border and Transborder Armed Actions (Nicaragua v Honduras)* (*Jurisdiction and Admissibility*) [1988] ICJ Rep 69, 105.)

Article 3.10 of the Understanding on Rules and Procedures Governing Dispute Settlement (DSU) of the WTO states:[34]

> It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute.

Yet, good faith does not have a robust influence on the substance of WTO dispute settlement decisions: there is no WTO panel or Appellate Body decision which has settled a dispute solely on the basis of the principle of good faith. Similar to its role in respect of ICJ decisions, good faith, at the most, fulfils an accessory function in support of the WTO's dispute settlement decisions. Indeed, WTO dispute settlement has more of a positivist dimension in that the panels and the Appellate Body decide on the basis of more than 60 agreements as covered by the WTO. Only if a WTO member state violates these agreements can the WTO's dispute settlement bodies deal with the dispute.

True, there are some provisions in the WTO agreements which directly refer to good faith.[35] But they do not allow for the settlement of a dispute purely on the basis of good faith.[36] The principle of good faith has never been a stand-alone legal basis for any decision of the WTO dispute settlement. However, an international community should arguably be able to rely on the principle of good faith on a stand-alone basis.

The lack of the international community can readily be discerned also in the fragmentary nature of the human rights protection the world over. While there exist regional human rights courts in Europe, the Americas and Africa, no such regional court exists in the most populated continent, namely Asia. Moreover, those purportedly universal human rights institutions — the United Nations' Human rights committees based in Geneva — do not issue binding decisions. Arguably, they prepare the groundwork for a future international human rights court which would enable individuals the world over to sue their governments. Yet, the prospects for the establishment of such a court seem pretty weak. States still do not place their faith in the establishment of a universal human rights court.

Actually, the lack of an international community and, as a corollary, the weakness of good faith in international law can be observed

[34] Available at https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#3 (visited 10 January 2021).

[35] For instance, art 4.3 of the Understanding on Rules and Procedures Governing Dispute Settlement refers to good faith in relation to consultation between disputing parties.

[36] Mitchell (n 15 above) p 371.

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also in the current status of the United Nations (UN) Convention on Jurisdictional Immunities of States and Their Property:[37] the Convention, though concluded in 2004, has not entered into effect. This proves that governments are reluctant to regulate their immunities in a binding international instrument. However, an international community requires the clarification of the legal accountability of states. Such clarification demands the procedural barrier to legal accountability — the sovereign immunity of the state — to be settled neatly. This is a corollary of the principle of good faith.

The principle of good faith has not found a robust place in the U.N. Convention on Contracts for the International Sale of Goods,[38] either. Granted, in its art 7(1), the Convention speaks of good faith:

> In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

Yet, good faith is to be sought in international trade rather than in the interpretation and the performance of the provisions of the Convention as such.[39]

A similar weak formulation of good faith exists in the UNIDROIT (International Institute for the Unification of Private Law) Principles of International Commercial Contracts:[40] Article 1.7. states:

> Each party must act in accordance with good faith and fair dealing in international trade. The parties may not exclude or limit this duty.

This formulation makes the impression that the principle of good faith is regarded as a somewhat ambiguous notion which may jeopardise the legal security inherent in literal interpretations of international commercial contracts. Yet, at the same time, it is admitted that a certain quotient of good faith is necessary in international trade.

Now, a look at a specific issue — external sovereign debt — may help further highlight the weakness of the concept of good faith in

[37] Available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en (visited 06 February 2021).

[38] Available at https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf (visited 06 February 2021).

[39] Cremades (n 2 above) p782: "The sale and purchase need not be governed by good faith, but rather the observance of good faith in international commerce must be ensured. The minutes of the deliberations on this delicate subject matter reflect the compromise between the representatives of countries that sought a general rule on good faith as applicable to contracts, and those that did not accept this position because it would introduce a factor of uncertainty, of undeniable risks in the judicial or arbitration proceeding."

[40] Available at https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016 (visited 06 February 2021).

international law. External sovereign debt, notwithstanding its prevalence, still has a bilateral private dimension and has not become a part of a multilateral public order.

5. External Sovereign Debt

There are limitations of a single case study. The latter may "not provide a sufficiently stringent test of a theory".[41] Yet, external sovereign debt is such a widespread and important phenomenon of international relations that the study of external sovereign debt can help us understand the current state of international law. The analysis of the principle of good faith in relation to external sovereign debt can give us indications as to whether international law is a multilateral public order or not.

(a) Definition

"External sovereign debt" is the money owed by a debtor government to foreign lenders. External sovereign debt may be also called external government debt, external public debt, external state debt, external national debt, international debt, the foreign debt of a government or borrowing by a nation. The debtor may be the government itself or governmental entities. The debt of the private sector may be guaranteed by the government. The creditor may be another government, an international organisation (eg the International Monetary Fund – IMF), a corporation (eg a commercial bank), a fund (eg pension fund, mutual fund) or a businessperson.

In the case of non-governmental creditors, the latter shall be resident in a foreign country[42] though it is possible that local persons and local corporations buy the foreign debt of their own government. Money borrowed by a government from foreign persons (natural persons or legal persons) in foreign currency under foreign law — for example, Argentina's dollar-denominated New York law bonds which are sold to U.S. residents — is a typical external sovereign debt. Thus, this article considers "external" financing and "external" investors. Only the monetary dimension of debt — the narrow dimension — shall be focused on in this article. Put another way, this article defines external sovereign debt merely as the obligation to pay a certain sum of money. The article does

[41] Roda Mushkat , "The Case for the Case Study Method in International Legal Research" (2017) 42(2) *Journal for Juridical Science* 151.

[42] Residence is determined by the centre of economic interest of the debtor and the creditor — not by their nationality.

not deal with the larger notion of debt which may eventually involve an act or responsibility other than or more than monetary obligation.

External sovereign debt is the debt owed to non-residents and which is repayable in *"foreign currency"*.[43] It is important to highlight this because at present the world over, some public debt held by non-residents is issued locally and denominated in the *local currency* of the debtor state and subject to the debtor state's local jurisdiction.[44] There are many foreign holders of domestic securities. For instance an international bank may buy the local currency debt of a country. Although domestically issued local-currency debt as held by non-residents can be considered as part of external sovereign debt, this article does not deal with that type of debt. This article's focus is on the *foreign currency debt* which is internationally issued (eg international bond issues) by the government and which is held by non-residents. Actually, it is the most common form of external sovereign debt and is more amenable to analysis under international law.

(b) Problem

External sovereign debt has been a lingering question of international relations. Actually, repaying or servicing a debt with newly issued debt is the cornerstone of the present international financial system.[45] Public international debt is perpetual;[46] it is here to stay. In technical terms, there is neither a limitation period nor a cut-off date where the addition of interest to the principal will stop. There is no treaty, custom or general principle of law that can halt external sovereign debt; it continues forever as long as there is no settlement between the debtor government and the creditor. There is no compulsory multilateral institution or public international judiciary to stop that. In essence, there exists a perpetual private bilateral dimension — as between the creditor and the debtor government — to the debt relationship.

That bilateral dimension is all the more interesting as governments regularly default on or restructure their external debt. The rise and fall of international lending and sovereign defaults have been a landmark of international relations and are a source of international tensions. That is external sovereign debt has multilateral consequences. There were debt

[43] William P Avery, "The Origins of Debt Accumulation among LDCs in the World Political Economy" (1990) 24(4) *The Journal of Developing Areas* 504.

[44] Yilmaz Akyuz, "The Asian Financial Crisis: Lessons Learned and Unlearned" (2017) 42 *Policy Brief* 3.

[45] Christopher G Locke and Fredoun Z Ahmadi-Esfahani, "The Origins of the International Debt Crisis" (1998) 40(2) *Comparative Studies in Society and History* 236.

[46] International Law Association, *Sovereign Bankruptcy Study Group*, Johannesburg, 7–11 August 2016, p 7.

servicing difficulties in the 1820s, the 1870s, the 1920s, the 1930s, the 1980s and there are some at present too.[47]

Be that as it may, external government debt has become a matter for international peace and security — the utmost concern of the UN which was established after World War II.[48] Yet, interestingly, the UN is weak in respect of the economic dimension of international peace and security. Article 2(4) — the provision on the prohibition of use of force — does not prohibit the economic use of force.[49] One cannot see a concept of prohibited "economic intervention into economic sovereignty of other nations" in the UN Charter. There is no concept of "monetary sovereignty" in the UN Charter. However, external sovereign debt could very well be an issue of economic use of force and a matter for the protection of national sovereignty. That is creditors may abuse their rights in respect of external sovereign debt — and this is a matter for good faith. Furthermore, default is regarded as an utmost sovereign act. "A defaulting sovereign can decide for itself which debts to pay in full, which to repay in part, which debts to not pay at all".[50] This is a matter for keeping engagements — hence the need for good faith on the part of the debtor state, too.

The weakness of the UN in respect of external sovereign debt may be due to the belief in the self-regulating capacity of external sovereign debt. Indeed, it is interesting to note that notwithstanding the existence of many external sovereign debt defaults and crises, the belief in the soundness of external sovereign debt has still not been undermined. There is a firm belief in international markets in the sustainability of external sovereign debt — the notion that the sovereign state will, supposedly, always find a way to repay its debts![51] Arguably, this assumption contains a strong belief in the existence of good faith of the debtor sovereign. Indeed, even those sovereigns who had defaulted in the past may, in the short run, return to international capital markets and sell new debt.

47 Shridath S Ramphal, "Sovereign Default: A Backward Glance" (1989) 11(2) *Third World Quarterly* 63; Edward Chancellor, *Reflections on the Sovereign Debt Crisis* (GMO White Paper, July 2010, p 2).

48 United Nations Charter, art 1(1).

49 Vaughan Lowe and Antonios Tzanakopoulos, "Economic Warfare" in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2013) para 29.

50 David Frum, "Why Mitch McConnell Wants States to Go Bankrupt" *The Atlantic* (25 April 2020), available at https://www.theatlantic.com/ideas/archive/2020/04/why-mitch-mcconnell-wants-states-go-bankrupt/610714/ (visited 24 April 2020).

51 Federico Lupo-Pasini, *The Logic of Financial Nationalism, The Challenges of Cooperation and the Role of International Law*(Cambridge, UK: Cambridge University Press, 2017) p 13: "For instance, banks invested heavily in sovereign debt of OECD countries due to the perceived lower risk associated with sovereign debt", p 38: "Sovereign debt has usually been considered a no-risk or low-risk financial instrument, because of the allegedly unlimited repayment capacity of states".

Arguably, the complexity of external sovereign debt and commensurate financial issues camouflage the real character of the legal situation of external sovereign debt.[52] The global sovereign debt regime is not clear. It is fragmented, and every debtor government is deemed a special or unique case. Most of the time, external sovereign debt negotiations and restructurings are not transparent. Most importantly, on a global scale, there exists neither a special sovereign debt organisation nor a self-standing international bureaucracy which deals with external sovereign debt relationships. This, in turn, increases the need for good faith in external sovereign debt. As positive international law is weak in respect of external sovereign debt, good faith is an ideal candidate to fill that gap.

By and large, governments are not transparent in their foreign relations. It is not always easy to understand and guess the future behaviour of governments. The latter may not behave the way we expect them to behave as uncertainty and deception reign in international politics. Domestic politics, lobbies and bureaucracies may try to influence the foreign policy of a national government in diverse ways, and because of internal contradictions, it may not be easy to talk to a foreign government. In that regard, external sovereign debt is a sure-fire way of "talking" to stranger governments:[53] foreign debt tames the debtor government. Arguably, external sovereign debt transforms the stranger government into a dependent, reliable and, finally, a familiar partner.

"The moment one starts framing things in terms of debt, people will inevitably start asking who really owes what to whom."[54] A certain bond forms between the creditor and the debtor. This is especially true of the relationship between financially powerful and financially weak countries. External sovereign debt disciplines debtor countries and gives creditor countries the right to talk to debtor countries. International debt gives an assurance that countries — creditors and debtors — will be talking to each other on a regular and predictable basis. In this context, rather than good faith as such, the sheer dependency that is created by the debt-based relationship to some extent feeds international peace and security.

Foreign debt leads the debtor state to behave in certain expected ways and, arguably, that ensures a form of international peace and security. Being indebted attaches a certain transparency to the indebted state.[55] That is a stranger government becomes more predictable due to its

[52] Saskia Sassen, "Predatory Formations Dressed in Wall Street Suits and Algorithmic Math" (2017) 22(1) *Science, Technology & Society* 1.

[53] See *in general* about the issue of talking to strangers, Malcolm Gladwell, *Talking to Strangers, What We Should Know about the People We Don't Know* (London, UK : Allen Lane, 2019).

[54] David Graeber, *Debt, The First 5,000 Years* (Brooklyn, New York: Melville House Publishing, 2011) p 8.

[55] Gladwell (n 53 above) p 177, 201, 212, 231, 232.

foreign debt. Compliance/non-compliance with debt relationship provides a measure of control and lessens the cost of foreign governments' need for checking actions. Thus, external sovereign debt oils the wheels of diplomacy and international politics.

Nevertheless, foreign debt does not always necessarily restrain debtor states, as can be inferred from sovereign defaults. From time to time, debtor governments have acted in surprising ways. One should accept that the search to restrain a stranger government has limits — one will never know the whole truth.[56] Therefore, good faith still has a role to play.

(c) The Lack of Good Faith under International Law

Notwithstanding the need for good faith, there are some peculiarities in external sovereign debt which prove that good faith under international law does not play any role in respect of external sovereign debt. *First*, external sovereign debt ultimately boils down to a private relationship between the debtor government and either the creditor government or the home government of private creditors. It is therefore a bilateral intergovernmental affair, and, manifestly, not a multilateral one.

Private creditors, when dealing with a debtor state, receive the support of their home state where, most of the time, the debt is issued. This is not a new phenomenon.[57] Notwithstanding the existence of an international sovereign debt market where innumerable private creditors apparently participate, home states are behind the scene ready to protect "their" private creditors against debtor states. U.S. activism in respect of external sovereign debt of various countries worldwide should be considered through that lens. That is when U.S. banks or other private lenders based in the United States are involved, the U.S. government acts. A typical example of this was seen during the Mexican (1980s) and Argentine (2001–2016) debt crises. In this context, the good faith of the debtor state is not so readily presupposed. There exists an implicit understanding that the debtor state may not pay its debts.

It is granted that private-sector capital flow to foreign countries is based upon contract — for example, bond contract.[58] A bond is "an official paper given by the government to show that you have lent them

[56] *Ibid*., p 261.

[57] Edwin M Borchard, William K Jackson and Ernst H Feilchenfeld, "International Loans and International Law" (1932) 26 *Proceedings of the American Society of International Law at its Annual Meeting*136: "International law enters the transaction mainly through the fact that a breach of the obligation occasionally induces the Foreign Office, especially in the event of repudiation, to take an interest in the problem and, depending upon the circumstances, to lend diplomatic support to its solution"; Éric Toussaint, *The Debt System* (Chicago: Haymarket Books. Kindle Edition, 2019), Kindle Locations 2222–2224.

[58] Mitu Gulati and George Triantis, "Contracts Without Law: Sovereign versus Corporate Debt" (2007) 75 *University of Cincinnati Law Review* 991.

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money that they will pay back to you at a particular interest rate".[59] Contract seems technical and apolitical and is designed to exclude interstate politics and bring in enforcement in court.[60] The contract commodifies and depoliticises external sovereign debt. Arguably, a harmonious market for external sovereign debt is created through contracts.

Nonetheless, private creditors may remain weak vis-à-vis the foreign debtor government, which may choose not to abide with the debt contract. Indeed, many unenforced sovereign debt contracts end up either in diplomacy between two governments — the debtor government and the home government of private creditors — or in a national court of the private creditor's home country.

Hence the activism of the U.S. government and of U.S. courts in respect of external sovereign debt. The engagement of national courts is all the more interesting as a strong voice in the legal doctrine has consistently stated that national private law (national civil law) shall not apply to foreign state loans and that foreign state loan disputes should not be adjudicated before national courts.[61] Actually, that voice was valid until the 1970s, when "restrictive foreign sovereign immunity" began to gradually emerge in various national laws and the legal doctrine. This has taken place, in particular, in the United States.[62]

The *second* peculiarity of external sovereign debt is that it is *ad hoc*: every debt transaction between the sovereign debtor and the creditor is deemed special and discrete. Debt creates a specific bond between the debtor government and the creditor. Debt relief is *ad hoc*, too; debt relief is given by creditor countries to debtor countries according to special political conjectures and on a discretionary basis. Only for debt relief to the poorest and most heavily indebted countries a formal international mechanism under the auspices of the IMF exists.[63] Therefore, only the latter has become part of the multilateral public order.

A typical demonstration of the *ad hoc* quality of external sovereign debt relationships was witnessed in a sovereign debt crisis which started in 2011 — the Greek sovereign debt crisis. After the large write-off of the Greek external sovereign debt in 2012, European officials openly stated

[59] *Cambridge Dictionary*, available at https://dictionary.cambridge.org/tr/s%C3%B6zl%C3%BCk/ingilizce/bond (visited 30 May 2020).

[60] Gulati and Triantis (n 58 above) 1002-3-4.

[61] Toussaint (n 57 above), Kindle Locations 2238, 2239, 2255, 2265.

[62] The Foreign Sovereign Immunities Act of 1976, The United States of America, Title 28, §§ 1330, 1332, 1391(f), 1441(d), and 1602–1611, United States Code, 90 Stat 2891, available at https://web.archive.org/web/20150627110441/http://usun.state.gov/documents/organization/218088.pdf and at https://uslaw.link/citation/stat/90/2891 (visited 06 February 2021).

[63] Debt Relief Under the Heavily Indebted Poor Countries (HIPC) Initiative, available at https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/11/Debt-Relief-Under-the-Heavily-Indebted-Poor-Countries-Initiative (visited 06 February 2021).

that Greece's debt problems were unique.[64] If every external sovereign debt relationship is unique, then one cannot expect a consistent and stable legal regime of external sovereign debt, which does not bode well for good faith.

International debt system can be defined as a network of autonomous *ad hoc* debt contracts. Arguably, that is a non-system; no multilateral public system for the resolution of external sovereign debt crises exists. Debt agreements are private in nature and are not placed within public international law. They are not subject to public international judicial settlement. As such, there is a *quasi*-lack of public international law of debt.

In contrast to those bilateral debt (credit) treaties between two governments and those between a debtor government and an official international organisation (eg the IMF and the World Bank), the debt relationship between a debtor government and its private creditors boils down to a private debt contract under a specific national law. Today, national governments the world over tap into international money markets through private debt contracts — for example, sovereign bonds — under a specific national law (eg New York law, English law). However, a debt contract under national law does not necessarily guarantee enforcement.[65]

Indeed, behind this private contract façade which implies a neutral, technical and self-regulating approach to external sovereign debt, there exist powerful intervention mechanisms from governments the world over. International money markets are not completely left alone. Rather, formal private debt instruments under the jurisdiction of a national law together with government interventions culminate in a *de facto* international debt regime.

The third peculiarity is that there is a lack of genuine international public policy on the part of the international community to deal with external sovereign debt. The weakness of international law is the primary symptom of this lack of international public policy. Rather than an international approach, the "national approach" to external sovereign debt is dominant: external sovereign debt is a sensitive issue for governments worldwide, and every government wishes to preserve as much margin of manoeuvre as possible in its external debt dealings. Indeed, the principle of good faith is applied to external sovereign debt only in the framework of national law and not international law as such. Good faith is merely regarded as an element of the enforcement of the sovereign bond before

[64] Landon Thomas Jr, "An Architect of a Deal Sees Greece as a Model" *The New York Times* (6 March 2012).

[65] Gulati and Triantis (n 58 above) p 977.

the national court under national law. This is *not* the good faith of international law.

The national dimension in respect of external sovereign debt is dominant. True, international rules cannot work without the constant cooperation and help of national legal systems.[66] Yet, as regards external sovereign debt, the preponderance of national law is great. This gives the impression of self-help. However, public international law aims at decreasing the self-help in interstate relations. Public international law aims to bring multilateralism, transparency and predictability to the current problems of the world, and, in this respect, the principle of good faith as applied in international law helps.

As regards external sovereign debt, there are the dominant national public policies of creditor and debtor countries, with the policy of the United States being the most important one as it is at the centre of capital flows worldwide. The U.S. bond market is huge. A cursory glance at its dominant role in determining interest rates in international borrowing is enough to prove the centrality of the United States in international financial affairs.

Interest rates have a direct correlation with the external sovereign debt problems of emerging markets. A change in the interest rates set by the central banks of major creditor powers, such as the United States, may trigger crises in indebted peripheral countries.[67] If interest rates increase, sovereign debt defaults increase too. For instance, in 1979, the interest rate for borrowing increased massively due to a unilateral decision by the U.S. Federal Reserve (FED).[68]

In the early 1980s, tighter U.S. fiscal policies continued to increase interest rates on government debt,[69] which ushered in a third-world debt crisis.[70] Likewise, in 1994, the FED increased interest rates, which caused funds to leave emerging markets and settle in safer assets.[71] This in turn triggered balance of payments problems in the developing world. In December 1994, Mexico ended up defaulting on its debt.

The *fourth* peculiarity of external sovereign debt is that it has an informal and a *de facto* dimension. Actually, law works best where it formalises

66 Antonio Cassese, *International Law* (New York: Oxford University Press, 2nd ed., 2005) p 9.
67 Toussaint (n 57 above), Kindle Locations 174–175.
68 Renaud Vivien and Cecile Lamarque, *Committee for te Abolition of Illegitimate Debt* (20 March 2013) p 4.
69 Graeber (n 54 above) p 2.
70 John Bellamy Foster, "The Age of Monopoly – Finance Capital" *montylyreview.org* (1 February 2010) p 3.
71 Lee Bucheit, *The Process of Sovereign Debt Restructuring* (Florence: Florence School of Banking and Finance, 24 April 2018), available at https://www.youtube.com/watch?v=v1nMSXu5a68 (visited 11 July 2020), Minutes – (6:00–6:35).

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peoples' behaviour.[72] Law is concerned with legal rights and duties. "Only if rights can be litigated and enforced is the law made formally binding."[73] However, it is very rare to launch formal public international law proceedings for external sovereign debt. Public international law litigation is marginal.

Arguably, creditor states and debtor states consent to this *de facto* and informal dimension of external sovereign debt. Both groups of states consent to the *status quo* of the external sovereign debt.[74] There is an element of self-interest for both groups in consenting to the current international debt regime[75] in that it is a coincidence of interests. In particular, only with the participation of great powers is an international regime deemed sufficiently inclusive. The existence of great powers legitimates an international process.[76] Indeed, great powers participate in the current *status quo* of external sovereign debt. This would appear to be an international political consensus in an area in which international law has a thin presence. The principle of good faith does not upgrade the status of international law in respect of external sovereign debt.

(d) International Law Initiatives

It is granted that there have been some attempts by international law to regulate external sovereign debt. For instance the UN General Assembly Resolution 69/319[77] issued its "Basic Principles on Sovereign Debt Restructuring Processes", which include debtor sovereigns' right to restructure their debts. The principles include the right of governments to determine their macroeconomic policies free of abusive measures — this is a manifestation of the principle of good faith. Granted, this Resolution has highlighted the need for the equitable treatment of sovereign debt restructurings, yet the Resolution's restructuring principles are non-binding and can be at most qualified as soft law — hortatory declarations.

Ideally, an international debt court would enforce sovereign debt restructuring, and the principle of good faith would find a better position

[72] Vaughan Lowe, *International Law: A Very Short Introduction* (New York: Oxford University Press, 2015) p 105.

[73] Federico Lupo-Pasini, *The Logic of Financial Nationalism, The Challenges of Cooperation and the Role of International Law* (Cambridge, UK: Cambridge University Press, 2017) p 266; Joel Trachtman, *The Economic Structure of International Law* (Cambridge, MA: Harvard University Press, 2008) pp 208–271.

[74] Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (New York: Oxford University Press, 2005) p 15.

[75] *Ibid.*, p 225.

[76] *Ibid.*, p 15.

[77] United Nations General Assembly Resolution, "Basic Principles on Sovereign Debt Restructuring Processes" (Resolution 69/319, 10 September 2015).

in the presence of such court. Yet, neither such a court nor any specific supranational legal authority exists to restructure and enforce external sovereign debt.[78] Granted, in 2014, the UN General Assembly called for the establishment of such an authority — a mechanism — through its Resolution entitled "Towards the Establishment of a Multilateral Legal Framework for Sovereign Debt Restructuring Processes".[79] However, the Resolution has not achieved its stated goal. There is still no self-standing and treaty-based sovereign debt restructuring organisation,[80] nor is there a universal convention or a mandatory mechanism for external government debt restructuring. The so-called "international community" still prefers *de facto*, informal and *ad hoc* external sovereign debt restructurings.

Two other international law attempts at external sovereign debt have been made: the United Nations Commission on Trade and Development (UNCTAD) issued the "Principles on Responsible Sovereign Lending and Borrowing" (2012), which was followed by the "Roadmap and Guide on Sovereign Debt Workouts" (2015). The latter highlighted the notion of sustainable debt.[81] The former, the UNCTAD Principles, are especially important in that they make it clear that responsibility for external state debt rests on both the creditor and the debtor state.[82] These principles aim primarily at preventing abuse of sovereign debt by creditors — this is a reflection of the principle of good faith.

The UNCTAD Principle 7 states that all "lenders should be willing to engage in good faith discussions with the debtor and other creditors to find a mutually satisfactory solution". This Principle attempts to integrate external sovereign debt into general international law and recommends negotiation as a method of dispute settlement.[83] This Principle invokes good faith to tackle the weakness of current international law on external sovereign debt.

Still, one of the weaknesses of formal public international law is the lack of a formal state bankruptcy procedure. While a formal state bankruptcy procedure would lead a debtor state to treat all its creditors in an

[78] Julian Schumacher, Christoph Trebesch and Henrik Enderlein, "Sovereign Defaults in Court" (Working Paper Series no 2135, European Central Bank, February 2018) p 4.

[79] United Nations General Assembly Resolution, "Towards the Establishment of a Multilateral Legal Framework for Sovereign Debt Restructuring Processes" (A/68/304, 9 September 2014).

[80] Christian Walter, "Debt Crisis" in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2014) para 50.

[81] Juan Pablo Bohoslavsky and Matthias Goldmann, "An Incremental Approach to Sovereign Debt Restructuring: Sovereign Debt Sustainability as a Principle of Public International Law" 41(2) *The Yale Journal of International Law* 23.

[82] Christoph G Paulus, "Debt Crisis" in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law, Oxford Public International Law* (Oxford University Press, September 2014) para 34.

[83] United Nations Charter, Ch VI, art 33/1.

equitable and similar manner, national sovereignty enables the debtor state to discriminate among its creditors. At present, a debtor state is free to order the payment of its debts, which defies bankruptcy procedures. There is no formal or legal relationship of seniority among debts owed by the state whether it is owed to the IMF, the World Bank, governments, banks, funds or private individuals.[84] As regards external government debt, "seniority is a discretionary decision and may not be legally enforceable".[85] If such a seniority exists, it is a *de facto* one and is one that may be abused by the sovereign debtor, which would be a violation of good faith.

In practice, while private creditors have primacy, governments prefer to give second place to debts owed to the IMF and the World Bank.[86] Government-to-government debts seem the most junior debts. That is governments prefer to settle their debts to other governments as a last resort.[87] In fact, government-to-government debts are the most politicised type of debt and are most prone to the vagaries of international politics and diplomacy.

There is no treaty determining the hierarchy of external government debts; the ranking and priority of these debts are the *de facto* and informal choices of governments. A government prioritises payment to private creditors because the great majority of the international debt market is constituted by private creditors. Governments do not wish for their debtor reputation to be tarnished in the eyes of private creditors. The higher rank given to official international financial organisations — for example, IMF and the World Bank — over creditor governments is simply a consequence of political expediency. International organisations are the primary port of call for governments in difficult times, and the debtor government feels responsible to repay them before it repays creditor governments. However, it is difficult to argue that it constitutes a custom or a general principle of law under art 38 of the ICJ. Arguably, this is just an informal practice of governments — a *de facto* matter — rather than a formal principle of law. Obviously, no sovereign state wishes to limit its margin of manoeuvrability in debt repayment under a formal and binding rule. This is a reflection of national sovereignty — the national approach to external sovereign debt. That national approach to external sovereign debt is true of the question of sovereign immunity too.

[84] Matthias Schlegl, "Which Are the Most Senior Creditors for Sovereign Debt?" *World Economic Forum* (13 August 2015), available at https://www.weforum.org/agenda/2015/08/which-are-the-most-senior-creditors-for-sovereign-debt/ (visited 16 May 2019) p 2.

[85] *Ibid*.

[86] *Ibid*., p 3.

[87] *Ibid*., p 5.

(e) Sovereign Immunity and Good Faith

The foreign sovereign's immunity in the courts of another sovereign is a legal construct. It is a privilege given to sovereign states for the sake of the orderly functioning of the international community. This ensures international peace, security and stability. However, arguably, if a state abuses this privilege; that is if a state lacks good faith, sovereign immunity may be revoked,[88] and national courts may check whether the foreign sovereign still merits immunity in the light of its conduct. Actually, this possibility is openly foreseen in the sovereign bonds where sovereigns waive their sovereign immunity. Though these waivers may be regarded as boilerplate clauses and thus may not be deemed to be applicable in practice, when the push comes to shove, a national court may apply the waiver in a case before it.

For instance during the Argentine sovereign debt crisis in 2001–2016, where the Argentine government defaulted on its external debt and engaged in a 15-year battle with those private creditors (holdout creditors) who did not accept the Argentine government's debt restructuring proposals and insisted rather on the full payment, U.S. courts did not hesitate in implementing the Argentine waiver of sovereign immunity as indicated in the Argentine sovereign bonds. The New York Courts made a series of decisions against Argentina and seized Argentine assets in the United States.[89] Only when the Argentine government decided to settle its debt dispute with holdout private creditors did the U.S. courts decide to lift the measures (injunctions) on Argentine assets and actions. Interestingly, the U.S. Court of Appeals justified the lifting of measures and sanctions on Argentine assets and financial actions through the principle of good faith under New York law — the law of the Argentine sovereign bonds. The Court of Appeals held that the lifting of injunctions would

[88] Mitu Gulati, "Foreign Sovereign Immunity: How Absolute Is It?" *Learn IOE* (5 December 2019), available at https://www.youtube.com/watch?v=kXuzk5KM_Hg (visited 12 May 2020).

[89] See Alexandra Stevenson, "How Argentina Settled a Billion-Dollar Debt Dispute with Hedge Funds" *The New York Times* (25 April 2016); Elisa Beneze, "Stopping the Circling Vultures: Restructuring a Solution to Sovereign Debt Profiteering" (2016) 49 *Vanderbilt Journal of Transnational Law* 251; Daniel Ozarow, *Argentina's Vulture Fund Odyssey: An End to Latin American Debt Dependence?* (Panoramas: University of Pittsburgh, 11 October 2016). PR Newswire, *Statement of Daniel A. Pollack, Court-Appointed Special Master*(6 April 2016), available at https://www.prnewswire.com/news-releases/statement-of-daniel-a-pollack-court-appointed-special-master-april-6–2016–300247449.html (visited 25 August 2019). See *NML Capital Ltd v Republic of Argentina*, no. 08-cv-6978 (SDNY) (7 December 2011); *NML Capital Ltd v Republic of Argentina*, 699 F.3d 246 (2d Cir, 2012); *NML Capital v Republic of Argentina*, 727 F.3d 230, 247 (2d Cir, 2013). Op. & Order at 25¸ *NML Capital Ltd v Republic of Argentina*, No. 14-cv-8601 (SDNY) (5 June 2015); eg, Injunction concerning Euroclear Bank, Art 2(f) of the injunction, S.A./N.V. FED.R.CIV.P.65(d)(2)(c).

be a suitable response to this new positive Argentine approach to the repayment of its debt:[90]

> Many agreements currently between Argentina and bondholders are contingent upon the vacatur of all Injunctions. Keeping the Injunctions in place thereby hinders the consummation of settlements. Having recognized "this matter will not be resolved without a successful settlement", . . . the District Court acted within its discretion to allow for settlement to continue. Keeping the Injunctions in place would also allow certain non-settling Plaintiffs to use the Injunctions "as a tool for leverage in negotiations". Now that Argentina has made important efforts, apparently in good faith, to resolve this long-term dispute, we agree that the district court did not abuse its discretion in concluding that the Injunctions have served their purpose; keeping the injunctions in place would now serve to further frustrate settlement attempts and perhaps close the door to ending this protracted and difficult history".

Importantly, the "good faith" that is mentioned in the aforementioned passage is strictly limited to U.S. law. The U.S. Court of Appeals does not talk about the principle of *good faith of international law* but the principle of good faith of U.S. law. This is the *good faith of national law*.

The Court of Appeals justifies the lifting of injunctions to enable Argentina to access international capital markets through New York. Thanks to this access, Argentina was able to re-borrow in the capital market and thus able to repay its holdout creditors with whom Buenos Aires achieved a settlement deal:

> Lifting the Injunctions would allow Argentina to pay exchange bondholders as well as to continue to resolve claims with FAA (Fiscal Agency Agreement) bondholders . . . The district court's consideration of the economic welfare of Argentina and its citizens was also proper. The district court found that keeping the injunctions in place would harm Argentina's ability to access global capital markets in order to raise capital to fund the payment of already agreed upon settlements. . . . such a raising of capital and the district court's finding that such market access is essential to the well-being of the nation as well as necessary to raise adequate funds to meet negotiated settlements was not in error. Nor was it improper for the district court to recognize this Circuit's judicial policy in favour of settlements.[91]

Thus, external sovereign debt is interpreted within the framework of the private contract under national law rather than under the legal

[90] *Aurelius Capital Master, Ltd., et al. v Republic of Argentina*, Case 16-628, Summary Order, United States Court of Appeals for the Second Circuit, Document 566-1, 15 April 2016, 1751273 (JA 583-4) 17–18.

[91] *Ibid.*, p 19.

categories of public international law. Thanks to restrictive sovereign immunity in national laws and the waiver of sovereign immunity in sovereign bonds, national courts settle external sovereign debt disputes under contractual terms and under national law. A "national approach" to external sovereign debt dominates. Rather than a genuine international public policy, national policies shape the external sovereign debt.

The prominence of national laws and national litigation in respect of external sovereign debt proves that the principle of good faith as contemplated under public international law has not filled the gap in public international law. National court protection takes place because sovereign bonds stipulate national laws and national courts — that is true of almost all sovereign bonds. In particular, this prevents the invocation of the principle of good faith *of international law* and favours the good faith *of national law*. In general, this prevents the development of international jurisprudence and international law in respect of external sovereign debt.

(f) The Belt and Road Initiative and External Sovereign Debt

The underdevelopment of international law and the dominance of national policy with regard to external sovereign debt are relevant to China's Belt and Road Initiative (BRI). It is China's national policy that will be the main determinant of this project. The BRI has led to a substantial build-up of external sovereign debt in countries participating in the BRI.[92] China, the creditor country, may give a partial debt relief or may lengthen the maturity of debts of the borrower countries that are in debt repayment difficulty.[93]

As stated above, the principle of good faith implies the prohibition of abuse of rights by the creditor state. There should be a certain balance between the rights and obligations of the parties to the debt relationship. If there is notable imbalance between the benefit of the right-invoking creditor state and disadvantages incurred by the debtor state, the right of the creditor state should, under the principle of good faith in international law, be circumscribed.

[92] Virginia Furness, "China's Belt and Road Initiative: Can Africa Escape a Debt Trap?" *Euromoney* (4 June 2020), available at https://www.euromoney.com/article/b1lwrkkwwpxs0x/chinas-belt-and-road-initiative-can-africa-escape-a-debt-trap (visited 08 April 2021); Faseeh Mangi,"Pakistan to Seek Debt Relief from China Belt and Road Loan" *Bloomberg* (9 February 2021), available at https://www.bloomberg.com/news/articles/2021-02-09/pakistan-to-seek-debt-relief-from-china-belt-and-road-loan (visited on 08 April 2021).

[93] Faseeh Mangi, "Belt and Road Initiative: Pakistan to Seek Debt Relief from China" *Business Standard* (10 February 2021), available at https://www.business-standard.com/article/international/belt-and-road-initiative-pakistan-to-seek-debt-relief-from-china-121021000054_1.html (visited 04 February 2021): "Last year, Beijing cancelled interest-free loans to 15 African countries due to mature by the end of 2020, and it has delayed other payments".

In particular, some argue that, through the BRI, China is executing a debt-trap policy,[94] although this view is not universally shared.[95] In the BRI, governments take loans from China for huge infrastructure projects, such as ports and railways, and some of these governments purportedly assume unsustainable debt obligations.[96] The terms of the loan conditions may not be favourable to borrower countries, for instance, if the interest rate of Chinese loans is higher than other sources, such as World Bank loans.[97] When the debtor governments participate in the BRI request debt relief, there is a possibility that China may appropriate those infrastructure projects in lieu of payment[98] — hence the need for good faith. Arguably, the exercise of good faith may be a check on the debt relationships within the BRI.

Since the international law is inchoate and weak in respect of external sovereign debt, the only plausible source of international law to check creditor state behaviour is the principle of good faith. The latter leads borrower states to legitimately expect creditor states to act in a certain way and creates an expectation of loyalty among states in the debt relationship. That is a creditor state shall not exercise its rights in a way which disproportionately harms the international community of states. This invokes a multilateral public dimension. Such expectations of loyalty are to be expected to exist with regard to debt relief and debt cancellation in the framework of the BRI, too. So far, China has renegotiated, restructured or cancelled the debt it has given to developing countries many times since 2000.[99] "China has in fact already altered terms on around $50 billion of debt."[100]

[94] Nicholas Smith, "China Is Exporting Its Unsustainable Growth Model through the Belt and Road Initiative" *Atlas Institute for International Affairs* (7 December 2020), available at https://www.internationalaffairshouse.org/china-is-exporting-its-unsustainable-growth-model-through-the-belt-and-road-initiative-bri/ (visited 03 April 2021); Nilanthi Samaranayake, "Chinese Belt and Road Investment Isn't All Bad—or Good" *Foreign Policy* (2 March 2021), available at https://foreignpolicy.com/2021/03/02/sri-lanka-china-bri-investment-debt-trap/ (visited 09 April 2021). Qi Liu, "China's One Belt One Road Initiative—A Debt Trap?", *Thesis*, University of Denver, 2020, p 68, available at https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=2787&context=etd (visited 08 April 2021).

[95] Furness (n 92 above); Nathaniel Taplin, "One Belt, One Road, and a Lot of Debt" *The Wall Street Journal* (2 May 2019), available at https://www.wsj.com/articles/one-belt-one-road-and-a-lot-of-debt-11556789446 (visited 08 April 2021); Samaranayake (n 94 above).

[96] Adhe Nuansa Wibisono, "China's 'Belt and Road Initiative' in Sri Lanka : Debt Diplomacy in Hambantota Port Investment" (2019) 2(2) *Jurnal Ilmu Hubungan Internasional* 224, 228, 229, 230.

[97] Cheang Ming, "China's Mammoth Belt and Road Initiative Could Increase Debt Risk for 8 Countries" *CNBC* (5 March 2018); Wibisono(n 96 above) p 232, 236.

[98] *China's Belt and Road Initiative: Why the Price Is Too High* (30 April 2019), available at https://knowledge.wharton.upenn.edu/article/chinas-belt-and-road-initiative-why-the-price-is-too-high/ (visited 09 April 2021); Wibisono (n 96 above) 229.

[99] Mangi (n 92 above). Lucas Niewenhuis, "The 'Debt-Trap Diplomacy' Debate: Are China's Loans Predatory?" *SupChina* (18 September 2019), available at https://signal.supchina.com/the-debt-trap-diplomacy-debate-are-chinas-loans-predatory/ (visited 04 April 2021).

[100] Furness (n 92 above).

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The debt relations in the BRI can be defined as a network of bilateral, autonomous and *ad hoc* debt contracts where China is the creditor vis-à-vis various countries. Arguably, debt agreements within the BRI are private in nature and are not placed within general public international law. In the BRI, debt relief will take place on a bilateral basis between China and individual debtor states. No purportedly multilateral and public mechanism will play a role in this regard. There is no compulsory multilateral institution or public international judiciary to intervene in BRI debt relationships. Besides, there is no specific Asia-Pacific organisation which deals with external sovereign debt relationships.

Debt relief is *ad hoc* and is given by creditor countries to debtor countries according to specific political circumstances and on a discretionary basis. Hence, when China evaluates each external sovereign debt case on its own merits, it deems every debtor government a unique case. Therefore, it is Chinese assessments that will be of ultimate legitimacy if China bases them on the principle of good faith.[101] Admittedly, the good faith *of international law* has still not filled the gaps of international law with respect to external sovereign debt. Yet, if borrower countries believe that in their debt relationship with China they are treated with good faith, then that would enable a multilateral platform of trust and honesty between China and the borrower countries within the BRI. On top of that, that would enable China to be a pioneer in the formation of an international law of external sovereign debt.

6. Conclusion

Good faith is insufficient in bringing about a multilateral public order. An international community that applies the principle of good faith effectively does not exist. Arguably, rather than a robust juridical mechanism, good faith represents common sense in international law. However, an effective and functioning multilateral public order needs more than that. This becomes all the more palpable in respect of issues such as external sovereign debt, where public international law is clearly inchoate.

Public international law is weak in respect of external sovereign debt, although the latter has been an important question of international relations. Public international law does not check governments in taking and repaying loans. There is no international framework of *de jure* and

[101] PORT STRATEGY, *BRI: Finance or Debt Trap?*, available at: https://www.portstrategy.com/news101/world/africa/bri-finance-or-debt-trap (visited 09April 2021): "China claims that in cases where its BRI partners face difficulties in servicing debts, China will properly address the issue through friendly consultation, and will never press partners for debt payment."

"formal" sanctions in the event of the non-repayment of external sovereign debt. External sovereign debt disputes are not adjudicated by a formal public international court, nor does the establishment of such court in the near future seem imminent.

External sovereign debt is left to the realm of national laws, national courts, international politics and diplomacy, and the self-styled "international community" seems content with this *status quo*. There is still no indication that there will be any major change with regard to the treatment of external sovereign debt any time soon. The good faith *of international law* has not filled the gap with respect to external sovereign debt under international law.