THE FINANCIAL OBLIGATION IN INTERNATIONAL LAW

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To the memory of Maria-Paulina Lindeborg (1924–2013)

Foreword

I commenced the practice of law in Washington DC on 29 August 1976. Just fifty-three days later, at a location on Capitol Hill only a few blocks from my office, the United States Congress enacted the Foreign Sovereign Immunities Act of 1976. As far as I can tell, there was no connection between these two events.

The FSIA, and similar legislation two years later in the United Kingdom, the State Immunities Act (1978), marked a dramatic shift in private creditor relations with sovereign debtors. Until the middle of the twentieth century, lenders to sovereign borrowers had few or no judicial remedies against defaulting sovereigns. A doctrine of "absolute" sovereign immunity prevented a sovereign from being sued in foreign courts without its consent. An aggrieved private creditor was left to importune its Foreign Office or State Department in an effort to bring diplomatic pressure on the wayward sovereign borrower.

In the less than 40 years since the doctrine of "restrictive" sovereign immunity was codified in the laws of most creditor countries (sovereigns lose their jurisdictional immunity when they engage in commercial activities abroad), thousands of judicial decisions and a vast amount of legal commentary have defined the rights and remedies of private lenders to payment-challenged sovereigns. What has been noticeably missing from this literature, however, has been a thorough analysis of the status under public international law of the financial obligations that sovereigns owe to each other, or to the multilateral bodies such as the Bretton Woods institutions that they have created. The book you are now holding fills that gap.

A deep fog has long obscured the question of what it means to say that a financial obligation is governed by public international law. Is that law, as some have argued, merely a reflection of the corresponding rules of private commercial law, like the shadows cast in Plato's cave? Is public international law as it relates to financial obligations merely an application by analogy of the doctrines of municipal law or, at best, comparative municipal law? Or is there an independent, sufficiently developed body of law—separate from the legal system of any individual state—by which financial obligations between and among the subjects of international law (states, their instumentalities, and international organizations) can be interpreted and, if necessary, adjudicated? Rutsel Martha makes a compelling case for the latter proposition.

But if we are to view public international law as adequate to this task, it must cover much the same ground as the commercial law of any domestic legal system. How and by whom are the obligations created? In what currency may they be discharged? Under what circumstances will the performance of otherwise valid and enforceable obligations be excused or deferred? In situations of financial distress, are any obligations to be given a legal or de facto seniority over any others? How, apart from full and timely payment, may such an obligation be extinguished or reduced?

These issues have a special poignancy today. Following the onset of the Eurozone debt crisis in early 2010, the policy of the official sector actors (principally the European Union and the International Monetary Fund) has been to lend the afflicted countries

all of the money needed to repay in full and on time their maturing private sector debts. In Greece (until 2012), Ireland, Portugal, and Cyprus, private creditors were paid in full through official sector bail-out loans. A similar policy is being applied in the Ukraine. The result? Sovereign liabilities measured in the hundreds of billions of euros have migrated out of the hands of private creditors and onto the balance sheets of sister states and multilateral financial institutions such as the IMF and the European Stability Mechanism. These liabilities are therefore no longer creatures of private law; they are now the subjects of public international law.

In the years that Dr Martha has labored over this extraordinarily thorough treatise, the sheer quantum of the subject matter of the book—financial obligations governed by public international law—has grown exponentially. The law and the politics of the twenty-first century will be profoundly affected by the issues discussed in this book.

Lee C. Buchheit

New York City
November 2014

Preface

It was famously held in *Russian Indemnities (Russia/Turkey)* (1912) that 'it is certain, indeed, that all liability, whatever its origin, is finally valued in money and transformed into obligation to pay; it all ends, or can end, in the last analysis, in a monetary debt'.[1] The veracity of this assertion is confirmed by the international experience since its pronouncement, which witnessed an explosive multiplication and diversification of financial transactions between international persons (States and international organizations) giving rise to a wide variation of contractual obligations as well as rulings of international courts and tribunals involving non-contractual financial claims in the context of law of international responsibility. Especially, the volume and diversity of the financing practices of the bilateral aid agencies and the (global and regional) multilateral financial institutions that have come to populate the international scene since the end of the Second World War made important contributions to what can safely be called public international financial law. Whereas the practices of these multilateral financial institutions and bilateral aid agencies are mainly important in the field of primary financial obligations, it is the jurisprudence of especially the investor-State arbitral tribunals that have contributed to the shaping of the secondary financial obligations resulting from responsibility for internationally wrongful acts. Moreover, the various sovereign debt crises and other stability scares that the world experienced during the twentieth century generated many thorny legal questions of international law, the answers to which have not always seemed obvious.

The recent Eurozone sovereign debt crises and the responses thereto further actualized the practical relevance of these questions. Europe had its own special brand of institutional arrangements that was tested in the extreme, and which brought to the fore the question of the substance and scope of the rules and principles that apply to financial obligations governed by public international law. In fact, the practical importance of this question is prompted by the choice of law and forum clause in the European Stability Mechanism's (ESM's) *General Terms for ESM Financial Assistance Facility Agreements*. Describing itself as an 'intergovernmental organisation under public international law, based in Luxembourg', the ESM prescribes that loan agreements with member States and any non-contractual obligations arising out of or in connection with such agreements 'shall be governed by and shall be construed in accordance with public international law, the sources of which shall be taken for these purposes to include: (a) the ESM Treaty and any other relevant treaty obligations that are binding reciprocally on the Parties; (b) the provisions of any international conventions and treaties (whether or not binding directly as such on the parties) generally recognised as having codified or ripened into binding rules of law applicable to states and to international financial institutions, as appropriate, including,

[1] *Affaire de l'indemnité russe (Russie, Turquie)*, 11 November 1912, XI UNRIAA, 421 at 440. English translation taken from the unofficial English translation, available at: <http://www.pca-cpa.org/upload/files/Russian%20Award%20edited%20_final_.pdf>

without limitation, the *Vienna Convention on the Law of Treaties Between States and International Organizations or between International Organizations* done at Vienna on 21 March 1986; and (c) applicable general principles of law'.[2] This provision is similar to Section 11.04(g), *Asian Development Bank's Ordinary Operations Loan Regulations* (2001), European Bank for Reconstruction and Development's 1994 *Standard Terms and Conditions for Public Sector Loans*, and the *General Conditions Applicable to the African Development Bank Loan Agreements and Guarantee Agreements (Sovereign Entities)*.

The legal opinion required under the ESM's *General Terms for ESM Financial Assistance Facility Agreements*' Clause 4.1.1 as a condition precedent for the entry into force of the ESM loan agreements, takes the matter further, by requiring counsel certification that the choice of public international law as the governing law for the loan agreement is a valid choice of law binding on the beneficiary Member State and its central bank of in accordance with law.[3] In discharging this responsibility such counsel will be faced with the reality that despite the assertion of *Russian Indemnities* slightly more than a century ago, no treatise currently exists on the topic of contractual and non-contractual financial obligations created and governed by public international law.

My aim in this book is to contribute towards filling this vacuum. It covers the financial transactions and financial claims between States, between international organizations, and between States/international organizations and private parties. Special attention is paid to the practices of public international finance (bilateral aid and multilateral lending), especially since the World War II courts and tribunals (ICJ, human rights courts, investor-State arbitrations, etc.)—including, of course, the *Loan Agreement Case* between Italy and Costa Rica,[4] which provide ample material confirming McNair's observation that 'there is more international law in existence than is generally believed; so much of it is not widely known and not readily available'.[5]

Dr Rutsel Silvestre J Martha

London
November 2014

[2] Clause 16.1, *ESM's General Terms for ESM Financial Assistance Facility Agreements* (ESM, 2012).

[3] *ESM's General Terms for ESM Financial Assistance Facility Agreements* (2012): *Schedule 2 Forms of Legal Opinions 2 Part I—Form of Legal Opinion for Beneficiary Member State.*

[4] *Loan Agreement Between Italy and Costa Rica*, 26 June 1998, XXV UNRIAA, 21.

[5] Foreword by Arnold Duncan McNair to H Lauterpacht, *Private Law Sources and Analogies of International Law* (1927; reprinted Archon Books, 1970) vi.

Acknowledgements

I was inspired to write this book while working as a lawyer in the Legal Department of the IMF in the 1980s. On several occasions I had discussions with colleagues and supervisors about the preferred methodology at that time, namely, to look for answers to complex financial issues in the legal systems of the major financial centres (New York, London), whereas my feeling was that answers could be obtained by closer study of the public international law sources. It has taken me all this time to put my ideas on paper and substantiate these with evidence from the international practice. Throughout that period my thoughts have benefitted not only from the expansion and diversification of the international practice but also from practical exposure to the issues in the various positions I have held, especially during my tenure as the General Counsel of a multilateral financial institution. Some of these ideas found their way into a handful of articles that I wrote in the intervening period: 'Preferred Creditor Status Under International Law: The Case of the International Monetary Fund', *International and Comparative Law Quarterly* (1990); 'Inability to Pay Under International Law and Under the Fund Agreement', *Netherlands International Law Review* (1994); 'International Organizations and the Global Financial Crisis: The Status of Their Assets in Insolvency and Forced Liquidation Proceedings', *International Organizations Law Review* (2009); 'The General Counsel as a Transactional Lawyer: Structuring the Commitments to Replenish the Resources of the International Fund for Agricultural Development', in Asif H. Qureshi and Xuan Gao (eds), *International Economic Organizations and Law—The Perspective and Role of the Legal Counsel* (Wolters Kluwer Law & Business, 2012); 'The Treatment of Monetary Problems by International Administrative Tribunals', in Olufemi Adekunle Elias (ed.), *The Development and Effectiveness of International Administrative Law* (Leiden: Brill, 2012); and 'International Organizations as Sovereign Bondholders—The Sovereign Debt Crisis Seen from a Different Angle', *Manchester Journal of International Economic Law* (2013). Although this book does not reproduce these publications, at various parts it draws significantly on the research and analysis contained therein.

In addition to thanking my former colleagues at the IMF for triggering my inspiration, I also wish to acknowledge my former colleagues in the Office of the General Counsel of the International Fund for Agricultural Development, as well as various other colleagues and friends for their valuable comments and advice on several chapters of this book. I am particularly indebted to Dr Pieter Bekker, Petra de Krijger, Diego Devos, Aroua Gaaya, Xuan Gao, Qingqing Ge, Lala Ireland, Xianting Jang, Ross Leckow, Dr Maurizio Ragazzi, and Itziar Garcia Villanueva. A special thanks goes to Dr Charles Proctor, who generously read an early version of the manuscript and provided very helpful comments. I am also grateful to Oxford University Press for publishing this work, particularly the reviewers and the following individuals: Merel Alstein, Emma Endean, Deepikaa Mercileen, and Fiona Barry.

All the views in this book are mine and do not necessarily represent the views of the institutions with which I have been associated or of the abovementioned individuals.

London
November 2014

Table of Cases

The table below contains chronological listings of the judgments and awards—of (1) the international arbitral tribunals; (2) the world courts and ajudicative bodies; (3) the international arbitral tribunals; (4) the regional courts (including the regional human rights courts); and (5) the domestic courts—that are mentioned in texts. Whereas the majority can be found at various websites,[1] where possible, the print source of the judgments and awards have been cited.

I. THE INTERNATIONAL ARBITRAL TRIBUNALS

[1] Websites: <http://www.un.org/law/riaa/>, <http://www.pca-cpa.org/>, <http://www.icj-cij.org/docket>, <http://www.world-bank.org/icsid>, <http://curia.europa.eu>, <http://hudoc.echr.coe.int/>, <http://www.worldcourts.com>, <http://www.corteidh.or.cr/>, <http://italaw.com>, <http://untreaty.un.org/unat/>, <www.ilo.org/tribunal>, <www.oas.org/tribadm/default_en.asp>.

II. THE WORLD COURTS

1. Permanent Court of International Justice

2. International Court of Justice

3. WTO Appellate Body

4. International Military Tribunal for the Far East