

On Functions and Finance: Sovereign Debt Workouts and Equality in International Organizations Law

Jan Klabbers*

INTRODUCTION.....	241
I. THE PATCHWORK.....	243
II. THE BACKGROUND.....	246
III. THE ORGANIZATIONS.....	248
IV. THE FUNCTIONALISTS.....	253
CONCLUSION.....	260

INTRODUCTION

The innocent Martian landing on earth may be forgiven the somewhat bewildered look in her eyes when surveying the situation regarding regulation of international financial matters.¹ Contrary to what is the case with most recognized issue areas, international financial matters are not the province of a single, more or less universal international organization.² Where global health is served by the World Health Organization, and postal traffic is the province of the Universal Postal Union, there is no equivalent organization dealing with global finance.

Instead, there is a patchwork of entities, some formal, some less so,³ addressing various aspects of financial matters. The field is fragmented to a high degree, with some entities assuming some responsibility for financial policy at large (the G20 in particular), and some engaged in financial regulation (the Basel Committee, part of the Bank for International Settlements – itself a curious entity –; the International Organization of Securities Commissions, the Financial Stability Board).⁴ There are entities charged with oversight of

* Dr iur. (University of Amsterdam), LL.M. (University of Amsterdam), M.A. (University of Amsterdam), Academy Professor (Martti Ahtisaari Chair), University of Helsinki; Visiting Research Professor, Erasmus Law School, Rotterdam.

1. I borrow the Martian from THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

2. The only other major issue area to which this applies is the environment, which is likewise fragmented into a number of distinct regimes. One can only wonder whether it is a coincidence that both finance and the environment are regularly in crisis.

3. On the distinction, see Jan Klabbers, *Formal International Organizations*, in OXFORD HANDBOOK OF INTERNATIONAL ORGANIZATIONS (Jacob Katz Cogan et al., eds., forthcoming). See also Jan Klabbers, *Institutional Ambivalence by Design: Soft Organizations in International Law*, 70 NORDIC J. INT'L L. 403 (2001).

4. A useful overview of regulatory bodies and their work is HOWARD DAVIES & DAVID

financial dealings (such as the Financial Action Task Force.)⁵ Some international organizations of broad membership and jurisdiction claim a stake in financial matters, with both the United Nations General Assembly and the United Nations Conference on Trade and Development (UNCTAD) aspiring to play a role, as does the Human Rights Council. Then there are a lot of entities, both universal and regional, providing loans and financial support for investment and development purposes, ranging from the World Bank and International Monetary Fund (IMF) to regional organizations such as the Nordic Investment Bank, the Council of Europe Development Bank, the Inter-American Development Bank or the African Development Bank, and ranging from established players (such as the World Bank) to ambitious newcomers, such as the China-inspired Asian Infrastructure Investment Bank (AIIB). And with no claims to exhaustiveness, there are several existing entities working on debt relief, including the aforementioned General Assembly, UNCTAD and IMF, and less well-known entities such as the informally named Paris Club (largely inter-state) and London Club (involving the private sector). If the fragmentation of general international law was considered troublesome a decade ago,⁶ it pales in comparison with the fragmentation of international financial law, and if the latter has never seemed troublesome, it is most likely because the field has never been imagined as unitary, non-fragmented to begin with. If international trade law was ‘invented’ by the late John H. Jackson, as is sometimes suggested,⁷ financial law has thus far lacked a similar unifying voice.⁸

The focus of this paper will rest on the tensions within the legal functionalism approach dominating international organizations law, brought to light by looking at the financial sector in general and debt relief in particular. Two of these tensions will be central to this paper: the role of sovereign equality in functionalist theory, and the nature of functionalism as it transpires from examining the financial sector. While this may seem to constitute an esoteric and impractical theoretical exercise, it should be remembered that international organizations (including financial institutions) benefit tremendously from functionalism, as it is functionalism that justifies the existence of large bureaucracies with broad competencies, taxation privileges, and a sheltered existence due to immunity from suit and the near-impossibility

GREEN, GLOBAL FINANCIAL REGULATION: THE ESSENTIAL GUIDE (2008). On the more recently established Financial Stability Board, see Sara de Vido, *The Financial Stability Board and Other New Modes of Governance*, in THE LEGAL IMPLICATIONS OF GLOBAL FINANCIAL CRISES (Geneviève Bastid-Burdeau & Michael Waibel, eds., forthcoming).

5. Marie Wilke, *Emerging Informal Network Structures in Global Governance: Inside the Anti-Money Laundering Regime*, 77 NORDIC J. INT’L L. 509 (2008).

6. For a synthetic overview, effectively closing much of the debate, see MARTTI KOSKENNIEMI, FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW. REPORT OF THE STUDY GROUP OF THE INTERNATIONAL LAW COMMISSION (Erik Castrén Institute, 2007).

7. See David Kennedy, *The International Style in Postwar Law and Policy: John Jackson and the Field of International Economic Law*, 10 AM. U. L. REV. 671 (1995).

8. A recent attempt, eventually too engaged with secondary policy questions to succeed fully, is Chris Brummer, *How International Financial Law Works (and How It Doesn’t)*, 99 GEO. L. J. 257 (2011).

of being held to account by third parties.⁹ Hence, this is not merely ‘art for art’s sake’ – there actually is something at stake. A decline in the appeal and popularity of functionalism might entail that institutions lose their privileged status, hence it is of relevance to subject the workings of functionalism to closer scrutiny.

This paper is structured as follows. I will first sketch the patchwork of institutions addressing matters related to global finance and the resulting theoretical puzzles (I) and discuss some historical background relating to the emergence of international organizations (II). Subsequently, Section III will discuss some of the more prominent entities operating in debt relief, and will include a snapshot of the UNCTAD Roadmap and its follow-up. Section IV will discuss how the financial sector relates to functionalism, while Section V concludes.

One caveat is in order: I write this as an international lawyer with special interest in the law (and theory) of international organizations, rather than in financial law or sovereign debt relief. Consequently, this piece treats the international financial mechanisms and institutions as the empirical data that may or may not shine a light on the law of international organizations.

I. THE PATCHWORK

Even on closer scrutiny and from the perspective of the law of international organizations, the patchwork of formal and informal entities (Brummer speaks of a ‘dizzying array’)¹⁰ engaged with different aspects of international financial law shows some remarkable characteristics. First, with the exception of the (many) organizations active in investment and development, most would be considered as highly informal. The G20, the Basel Committee, the Financial Stability Board, the Paris Club; none of them fits the textbook description of international organization.¹¹ If entities such as the World Health Organization (WHO) or Universal Postal Union (UPU) represent a Weberian ideal type, many of the financial entities depart considerably from the ideal.¹² In fact, not a single organization matches the ideal type; the best heuristic device is that of a continuum with the ideal type at its end. And even those among the financial entities that do come relatively close (the IMF, the investment and development institutions) nonetheless still depart significantly from the dominant model, in the ways their decision-making structures are set up, and often also in terms of their accountability. For instance, many of them explicitly rule out the possibility that member states can be held liable for the

9. For a general overview, see Jan Klabbers, *The EJIL Foreword: The Transformation of International Organizations Law*, 26 EUR. J. INT’L L. 9 (2015).

10. Brummer, *supra* note 8, at 259.

11. There actually is no single generally accepted textbook definition, but most authorities agree that international organizations typically (though not invariably) consist of states, are typically (though not invariably) based on a treaty, and typically have at least one organ, preferably one with a will distinct from the will of the member states. For one authoritative discussion, see HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY* 36-47 (2011).

12. On ideal types and their use in social theory, see MAX WEBER, *ECONOMY AND SOCIETY*, VOLUME I 20-22 (1978, Guenther Roth & Claus Wittich eds.).

organization's activities,¹³ and many of them decide through what is referred to as weighted voting.

Second, many of the entities together providing global financial governance are special in the sense that they do not strive to be inclusive in terms of membership. The G20 is limited to, as the name suggests, 20 members; the Paris Club likewise counts twenty permanent creditor states; the Financial Stability Board, a creation of the G20, has 24 members,¹⁴ and the Basel Committee does not have many more – 28, as of March 2016. Yet, it is abundantly clear that these entities of limited membership exercise authority over the world at large and, what is more, exercising such global authority is often precisely the ambition. In so doing, these entities depart fundamentally from the classic international ordering mechanism of 'sovereign equality', still honored as the normative cornerstone of the United Nations but often considered of symbolic value rather than an accurate representation of the global distribution of power.¹⁵

Thus put, global financial regulation presents the law of international organizations with some fundamental theoretical puzzles. The dominant theory is the theory of functionalism, and while it will be further set out below it is perhaps useful to spell out its main elements already here.¹⁶ It is premised on the idea that states set up entities and give them a specific technical function (or small set of related of functions). The law is put in place to make sure that nothing impedes the performance of those functions, precisely because they are supposed to be technical, i.e. a-political, and thought to contribute to the greater good: one luminary could write, without irony, that organizations contribute to the 'salvation of mankind'.¹⁷ International organizations law facilitates the working of international organizations by means of, for instance, allowing for broad conceptualizations of the implied powers doctrine, by granting privileges and immunities from jurisdiction, and by making it next to impossible for third parties (i.e. those other than member states) to control the activities of international organizations.¹⁸

In particular, the disorganization of global financial regulation raises two fundamental questions for functionalism. First, there is the position of non-member states to consider: it is clear that many non-members are affected, and that therewith ideas about sovereign equality become problematic. Surely, a country such as Malawi is not on a par with the US or China, neither in the organizations it is a member of (such as the World Bank) nor in the setting where its policies are affected by entities it is not a member of, such as the G20 or the Basel Committee. Even within an informal entity such as the Paris Club

13. The point is highlighted in CHITTHARANJAN F. AMERASINGHE, *PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS* 426-428 (2005).

14. The G20 members plus Brazil, China, India and Spain.

15. For in-depth discussion, see GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES* (2004).

16. Much of what follows is derived from Klabbers, *supra* note 9.

17. NAGENDRA SINGH, *TERMINATION OF MEMBERSHIP OF INTERNATIONAL ORGANISATIONS* vii (1958).

18. See generally JAN KLABBERS, *AN INTRODUCTION TO INTERNATIONAL ORGANIZATIONS LAW* (2015).

there seems to be a discrepancy between creditor states and debtor states, symbolized in the circumstance that the debtor never meets with all permanent members at once but only deals directly with the Chairperson, who exercises a power delegated to him by the permanent members.¹⁹ And within the IMF the structural adjustment programs nominally insist on mutual consent, but somehow the borrowing state is hardly in a position not to. In short, to the extent that functionalism works on the presumption of the sovereign equality of states, the financial sector problematizes this fundamental notion.

Second, there is a challenge to the very heart of functionalism, and ironically it stems from the highly functional nature of the financial entities, whether formal or informal. While most organizations are either a mixture of managerialism and agora,²⁰ as it has been put, or are little else but ‘debating clubs’, uncharitably put,²¹ the financial entities are extremely function-oriented. They do not debate on general matters of social justice; instead, they invest and develop, they regulate, they manage. There is broad agreement on the outlines of policy; this stems directly from the organization’s function; and consequently, political debate (which inevitably takes place) tends to revolve around points of detail and individual loans, with only the occasional bigger issue flaring up precisely at the moment when the main function is questioned: think of the ‘greening’ or the ‘human rights mainstreaming’ of the financial institutions. Yet, ironically, instead of this resulting in financial entities being the poster children for functionalism, most observers suggest that these entities occupy a somewhat special place, at some removes from the ideal type.²²

These two questions will be central to the current article. They are not the only questions worth asking in relation to the global financial order (such as it is). It would be extremely interesting to zoom in on synergies and competition between entities, as symbolized by the recent creation of the AIIB, but this is not the time or the place. Neither is this the time or the place to focus on the re-invention of entities that for a while were (or seemed to be) marginalized: UNCTAD’s central role in financial matters these days departs from its constitutional mandate, but would constitute an intriguing example.²³ Finally, it would also be useful to pay closer attention to what it means for functionalism that some of the functions, as it turns out, are taken care of by entities that do not qualify as formal organizations. If formal organizations owe their existence to their capacity to perform specific functions, what happens if it is discovered

19. As mentioned by Armin von Bogdandy & Matthias Goldmann, *Sovereign Debt Restructurings as Exercises of International Public Authority: Towards a Decentralized Sovereign Insolvency Law*, in SOVEREIGN FINANCING AND INTERNATIONAL LAW 39 (Carlos Esposito, Yuefen Li & Juan Pablo Bohoslavsky eds., 2013).

20. Jan Klabbers, *Two Concepts of International Organization*, 2 INT’L ORG. L. REV. 277 (2005).

21. Symbolized in clever *trouvailles* about their acronyms, where UNCTAD stands for Under No Circumstances Take Any Decision, GATT was the General Agreement to Talk and Talk, and the OECD is known as Office for Excellent Cocktail parties and Dinners.

22. This is rarely made explicit, but oozes from the textbooks, precisely because of the different voting procedures and the sheltered legal position of member states referred to above.

23. See also Jan Klabbers, *Marginalized International Organizations: Three Hypotheses Concerning the ILO*, in CHINA AND ILO FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK (Ulla Liukkunen & Yifeng Chen, eds., 2014).

that those same functions can also, and perhaps better (i.e. more efficiently or more effectively) be performed by others?²⁴

II. THE BACKGROUND

When international organizations were first created and studied against a political background, they were generally heralded as marking an improvement in the lot of smaller and poorer states. These smaller powers used to be bossed around by the bigger powers, whether in the guise of a Concert, an Alliance (Holy or otherwise), or some kind of Balance of Powers, or under some form of colonial administration, even if only under the heading of a doctrine – such as the Monroe Doctrine. This changed, or so it seemed, with the emergence of international organizations: instead of being bullied by the bigger powers, now at least smaller and poorer states could act on the same footing with their bigger and more powerful neighbors. Typically, organizations worked on the principle of ‘one state, one vote’ in their plenary bodies, and while sometimes the use of majority voting meant that the individual smaller and poorer states could be outvoted, at least collectively they could take a stand.²⁵

This rosy picture was not inaccurate, in that organizations often indeed typically work on the basis of sovereign equality and thus ‘one state, one vote’, marking something of an improvement. Nonetheless, it was always somewhat deceptive. For one thing, the smaller and poorer states engaged in ‘lawfare’ *avant la lettre* in order to try and change the international legal order and the implications of the foundational notion of sovereignty, if only by proposing new rules or opposing existing ones.²⁶ No lesser authority than Paul S. Reinsch, one of the founding fathers of the law of international organizations, pointed out that the distinction between colonial domination and domination through an international organization was a distinction of degree at best, not a distinction of kind.²⁷ And somehow, it usually transpired that while the poorer and smaller states might have equal voting rights in the plenary bodies of international organizations, these were rarely the politically relevant bodies: the real power would reside elsewhere, in bodies and organs of limited composition where voting would not be equal.

The most visible manifestations hereof these days are the UN Security Council with its five veto-wielding permanent members and the weighted voting prevalent in the financial institutions, but the pattern as such is well-nigh universal. In the International Maritime Organization (IMO), e.g., the relevant organ for much of the important work is the Council, a body of limited composition – the IMO’s member states actively campaign for the right to sit

24. See also Jan Klabbers, *Contending Approaches to International Organizations: Between Functionalism and Constitutionalism*, in RESEARCH HANDBOOK ON THE LAW OF INTERNATIONAL ORGANIZATIONS (Jan Klabbers & Åsa Wallendahl, eds., 2011).

25. For an informed discussion in this vein, see BENGT BROMS, *THE DOCTRINE OF EQUALITY OF STATES AS APPLIED IN INTERNATIONAL ORGANIZATIONS* (1959).

26. See Arnulf Becker Lorca, *Sovereignty Beyond the West: The End of Classical International Law*, 13 JOURNAL OF THE HISTORY OF INTERNATIONAL LAW 7 (2011).

27. He did so for instance in his public speeches, trying to create enthusiasm for international organizations in his skeptical audiences. For further discussion, see Jan Klabbers, *The Emergence of Functionalism in International Institutional Law: Colonial Inspirations*, 25 EUR. J. INT’L L. 645 (2014).

on the Council for a limited period of time. Meanwhile in the World Trade Organization (WTO) decisions are either pre-cooked in informal meetings ('green room') or, when not pre-cooked, they are stalled indefinitely: witness the fate of the Doha Round.²⁸ Even within informal entities of large membership, the real action takes place 'en petit comité', as in the eighteen-member Technical Committee of the International Organization for Securities Commissions (IOSCO).²⁹ And many of the important topics have by now even been taken out of the reach of formal organizations and are decided upon in closed, self-appointed clubs such as the G20; in the Conferences or Meetings of the Parties set up under international environmental agreements, or in temporary and broad but ill-defined alliances such as the Contact Group on Piracy off the Somali Coast.

In short, the equality embedded in the formal decision-making processes of many international organizations has always been mostly of cosmetic or symbolic value. It suggests that all states are equal; that differences in political, military, economic or cultural power may matter in everyday life, but can be bracketed as the occasion arises. In so doing, the notion of sovereign equality is undergirded by a democratic theory of sorts. Arguably, it is a misguided, perhaps perverted, democracy theory that ignores whether the state concerned actually can be said to be representative of its citizens, but nonetheless, as noted, it was often considered a step forward in comparison to being bullied by the greater powers.

With this in mind, it should not come as a surprise that discussions about debt relief and sovereign default are usually taken in entities where, as a general rule, it remains unclear whether all members are equal, or whether some might be a bit more equal than others. Following the model of financial institutions generally, one would perhaps expect that mechanisms to facilitate debt relief too would work on the basis of financial clout, and indeed this seems by and large to be the case. Yet, things are not very open and transparent, and this may find its cause in the nature of the activity concerned, which remains something of a taboo from many directions.³⁰

For one thing, if state A's debts are being mitigated or even swept away in a highly public fashion, then many other states will come and present similar demands: why, after all, give preferential status to A, but not to B and C? This pattern was clearly visible after much of Iraq's debt was relieved,³¹ although there is less empirical support visible in other cases. Such distinctions breed discontent, and go against the general grain of international law. Even the granting of favorable treatment in trade relations has always been frowned

28. On patterns of inclusion and exclusion relating to the WTO and resulting from informal power exercises, see *EXPERT KNOWLEDGE IN GLOBAL TRADE* (Erin Hannah, et al., eds., 2016).

29. The point is made by Brummer, *supra* note 8, at 278. See on IOSCO generally also ANNE MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

30. Note also that debt relief is, in current proportions, a fairly novel phenomenon. Indicative is that until the 1980s, studies on financial law would rarely devote attention to debt relief or debt workouts. See, e.g., FREDERICK A. MANN, *THE LEGAL ASPECT OF MONEY* (1982) (discussing such things as the currency of repayment, the calculation of interest, et cetera, but not paying much attention to relief or workouts).

31. See the discussion in YVONNE WONG, *SOVEREIGN FINANCE AND THE POVERTY OF NATIONS: ODIOS DEBT IN INTERNATIONAL LAW* (2012).

upon: think of the ingenious phenomenon of the most-favored-nation principle, which has a history going back to the nineteenth century, i.e. long before the WTO or even its predecessor GATT was ever created. Hence, the states granting debt relief have something of an interest in trying to prevent things from becoming very public: providing relief is more suited for backroom negotiations than for the cameras of CNN and the publicity of twitter feeds, also with a view to keeping domestic audiences happy. And if this is the interest of the debt relievers, it is the interest of the debtor states as well: they must play along.

But there is a more interesting cultural phenomenon at work as well. Debt relief is often necessary not so much to service a particular loan, but rather to service the servicing of loans: over time, debts accumulate due to the imposition of interest. This entails that creditor states are, eventually, making money on other people's misery, and do so not just incidentally or for a particular project (this is what IMF and World Bank are for), but on a structural basis. This now sits uncomfortably with many ethical traditions, and may help explain why few are brazenly open about such issues.³²

There are other ethical considerations militating against openness as well, none more so perhaps than the awkward circumstance that often, governments are loaned money which enable them to conduct wars and oppress their populations. There are no doubt circumstances where it can be argued that this is the right thing to do (think of World War II lend-lease, e.g.), but also circumstances where this is less felicitous: it is generally acknowledged that Saddam Hussein's Iraq borrowed huge sums of money first to engage in war with Iran, later also in order to invade Kuwait. The former was considered geopolitically justifiable (the Iranian revolution of the late 1970s was widely seen as threatening, so anyone wishing to stop Iran was welcome), but few would have approved of the latter, and indeed it led to the curious spectacle of the West having to spend lots of money to repel an invasion which itself had been sponsored by lots of western money.

III. THE ORGANIZATIONS

If debt relief is not a very transparent affair, often taking place far removed from the spotlights, one of the more active entities engaged in it is known as the Paris Club, with the designation itself already signifying an absence of formal structures. Despite not being very well-known to the general public and not occupying a prominent place in the general literature on international organizations or international economic law,³³ the Paris Club is not particularly shy.³⁴ It was set up in 1956 as an informal meeting of

32. This may be a residue form of debates surrounding the emergence of capitalism, which was not so much considered virtuous in its own right at the time, but rather as a useful antidote against greater evils. For a wonderful discussion, see ALBERT O. HIRSCHMANN, *THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH* (2013 [1977]).

33. It is sometimes deemed worthy of a paragraph. See, e.g., BOB REINALDA, *ROUTLEDGE HISTORY OF INTERNATIONAL ORGANIZATIONS: FROM 1815 TO THE PRESENT DAY* 461 (2009); MATTHIAS HERDEGEN, *PRINCIPLES OF INTERNATIONAL ECONOMIC LAW* 465 (2013).

34. Much of the following was culled from its website: <http://www.clubdeparis.org/en/>.

Argentina's then creditor states, in Paris, in order to set up a deal. Since then, so its website proudly proclaims, the Paris Club has treated \$ 583 billion in debts, through 433 agreements involving some 90 debtor countries. The Paris Club treats mainly bilateral debts; it serves as a forum for bringing the indebted state together with its creditors.³⁵

The Paris Club counts 20 permanent members, all of them wealthy industrialized nations, and generally seen as Western (this includes Japan and Australia). Perhaps the most surprising member is Russia, which until not so long ago itself was often also listed as a debtor state. Russia actually joined in 1997 while also still a debtor state.

In addition, so called 'ad hoc participants' can participate in the work of the Paris Club. There are some 15 of those at present, including Brazil, Argentina and Turkey. Some nine international organizations (including IMF, World Bank, and OECD) are listed as observers, and non-member creditor countries too can participate in negotiations, providing the debtor state and permanent members agree. The Paris Club is served by a small secretariat, consisting of two handfuls of French Treasury officials, headed by a French official, and located within the French Treasury Department. Likewise, the chairman of the Paris Club is a senior French Treasury official.³⁶ This is, in a strong sense, a throwback to nineteenth century structures: the earlier international organizations tended to be located in the relevant ministry of the host state and staffed by employees of that host state's ministry.³⁷

Decision-making in the Paris Club has two important characteristics. First, it takes place by consensus: under 'The Six Principles' at the heart of the Club's operational model, 'decisions cannot be taken without a consensus among the participating creditor countries'. Second, while 'formally' (if the word is appropriate in the context of the Paris Club) merely an observer, the IMF plays an important role: the Paris Club borrows (no pun intended) conditionality standards set by the IMF, and demands that the creditor country has a current IMF arrangement of one form or another. Put differently, even though the Paris Club focuses on bilateral debts, the creditor needs the backing of the IMF in order to stand a chance with the Paris Club – and this adds a multilateral element.

Perhaps noteworthy is that for a long time, the Paris Club, while happy to discuss and restructure debts, was not at all keen on providing debt relief. This only started to happen in the 1990s, after the club adopted its so-called Naples terms in 1994, followed in 2003 by more extensive Evian terms. As Bohoslavsky and Goldmann suggest, this marks the transition from a purely contractual perspective on debts to something of a more public concern.³⁸

35. For a useful, if somewhat outdated, discussion, see Alexis Riefel, *The Paris Club, 1978-1983*, 23 COLUM. J. TRANSNAT'L L. 83 (1984).

36. Sometimes these go on to bigger things still: Michel Camdessus chaired the Paris Club from 1978 until 1984, and three years later became managing director of the IMF. See ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 625 (2002).

37. EDOUARD DESCAMPS, *LES OFFICES INTERNATIONAUX ET LEUR AVENIR* (1894).

38. Juan Pablo Bohoslavsky & Matthias Goldmann, *An Incremental Approach to Sovereign Debt Restructuring: Sovereign Debt Sustainability as a Principle of Public International Law*, in this issue.

The Paris Club is, like so many international organizations, an organization departing from the standard blueprint model. It has no constitutional instrument to speak of; it is unclear who can join, and how they can join; and it has no organs other than a small and outsourced secretariat. Neither does it produce law, strictly speaking: once the Club and the debtor country reach an agreement this is given the ostensibly non-binding form of ‘agreed minutes’,³⁹ the contents of which will be worked out in bilateral agreements between the debtor state and its individual creditors. And yet, despite all this informality, it would seem that the Paris Club is an international organization, at least for heuristic purposes, and can be analyzed in those terms. It has been in existence for sixty years, and clearly seems to fill a need. Still, there is a sense that it has outlived its utility: Gelpern suggests that the Paris Club no longer meets today’s needs, and its decline has become ‘impossible to ignore’.⁴⁰

If the Paris Club has largely operated in a self-imposed twilight zone, the IMF, by contrast, has been highly visible over the past seven decades. The IMF, as is well-known, was set up in 1944, together with the World Bank and the ill-fated International Trade Organization, in order to help structure the post-war economy.⁴¹ Its main brief was, and is, to deal with monetary imbalances. Equally well-known is that its decision-making structure does little to pay homage to the ‘one state, one vote’ idea: decision-making takes place by weighted voting,⁴² and the weight of votes of each member state is dependent on the amounts of money it has invested in the IMF. In short: the more you put in, the more power you can exercise. As many have suspected, over the years the IMF has proved to be highly sensitive to instructions and demands coming its way from the United States Treasury department. In particular during the Clinton administration, ‘it was often difficult . . . to tell where US policy ended and [IMF] management strategy began.’⁴³

Of the Bretton Woods institutions, it is the IMF that is most often associated with debt relief. It launched the so-called Highly Indebted Poor Countries (HIPC) in 1996, and proposed the creation of a Sovereign Debt Restructuring Mechanism in 2003. The former is often considered successful, at least in terms of output; the latter, however, was never accepted by the relevant states. Instead, the richer nations continue to rely on market-based mechanisms,⁴⁴ such as the Collective Action Clauses often included in

39. Incidentally, this label itself is no airtight indication of legal status. Other ‘agreed minutes’ clearly having legal force included the boundary treaty between Iraq and Kuwait, so flagrantly violated by Saddam Hussein in 1990. For further reflection, see JAN KLABBERS, *THE CONCEPT OF TREATY IN INTERNATIONAL LAW* (1996).

40. See Anna Gelpern, *Sovereign Debt. Now What?*, in this issue.

41. RICHARD N. GARDNER, *STERLING-DOLLAR DIPLOMACY IN CURRENT PERSPECTIVE: THE ORIGINS AND THE PROSPECTS OF OUR INTERNATIONAL ECONOMIC ORDER* (1980).

42. Tarullo speaks, less innocuously, of ‘the radically asymmetrical allocation of voting power’ with the IMF. See Daniel K. Tarullo, *The Role of the IMF in Sovereign Debt Restructuring*, 6 *CHI. J. INT’L L.* 287, 292 (2005).

43. RANDALL W. STONE, *CONTROLLING INSTITUTIONS: INTERNATIONAL ORGANIZATIONS AND THE GLOBAL ECONOMY* 212 (2011).

44. Relying on investment arbitration is likely to be fraught with problems: see Michael Waibel, *Opening Pandora’s Box: Sovereign Bonds in International Arbitration*, 101 *AM. J. INT’L L.* 711 (2007).

sovereign bonds. These allow a supermajority among creditors to bind a dissenting minority, and therewith are thought to facilitate debt relief workouts, as the minority cannot hold the majority captive.

Perhaps the main political imperatives regarding debt relief tend to come from the economic superpowers meeting once a year under the innocuous headings of first G7, then with Russia joining known as G8, and nowadays G20 (the latter also including some of the larger developing economies). During the 1980s and early 1990s, the (then) G7 did little to stimulate debt relief: the major economic powers were of the opinion that at best, debts should be restructured, but that once incurred, debts should be fully repaid.⁴⁵ That said, a first change came about in 1987, when the G7 agreed, in Venice, to let poor African states defer their payments, provided they accepted structural adjustment directives from the IMF.⁴⁶

As far as institutionalized manifestations of global governance go, the G7/G8/G20 (apologies for awkward labeling, in itself indicative of elusive institutionalization) must rank amongst the more opaque examples. It may be relatively clear who are members at present, but is unclear on what criteria members are selected, by whom they are selected, and how members can join or leave.⁴⁷ Decision-making, likewise, is lacking in transparency, and the legal status of their communiqués is less than certain. What is clear though is that the G7/G8/G20 plays an important role in global governance, exercising power both directly and indirectly, through the influence its members have on decision-making in IMF and World Bank.⁴⁸ This also extends to issues of debt relief, even in the absence of any formal safeguards.⁴⁹ It was, e.g., the G7 that spurred the creation of the Financial Stability Board, and the G7/G8/G20 was instrumental in providing the OECD with the impetus to start working on a global taxation regime in the form of the BEPS project.⁵⁰ While many proclaim the relevance of the Rule of Law, the economic superpowers tend to be keen on circumventing such philosophies in their own dealings, preferring the flexibility offered by the absence of formal procedure to the legitimacy associated with proper legal procedure.⁵¹

Perhaps the most prominent recent attempt to create something of a global debt relief mechanism has been located, not entirely according to

45. NGAIRE WOODS, *THE GLOBALIZERS: THE IMF, THE WORLD BANK, AND THEIR BORROWERS* 163 (2006).

46. Wong, *supra* note 31, at 51.

47. For an analysis in legal-institutional terms, see Peter Holcomb Henley & Niels Blokker, *The Group of 20: A Short Legal Anatomy from the Perspective of International Institutional Law*, 14 MEL. J. INT'L L. 550 (2013).

48. Christian Walter, *Debt Crisis*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW, VOL. II 1074 (Rüdiger Wolfrum ed., 2012).

49. Important enough to warrant the inclusion of a recent communiqué in a collection of international legal instruments. See INTERNATIONAL LAW DOCUMENTS (Jan Klabbbers, ed., forthcoming) (contains the text of the 2013 Brisbane G20 Communiqué).

50. BEPS stands for Base Erosion and Profit Shifting; the project aims to close some of the taxation loopholes that global companies make such gregariously use of. On tax law and international law generally, see REUVEN S. AVI-YONAH, *INTERNATIONAL TAX AS INTERNATIONAL LAW: AN ANALYSIS OF THE INTERNATIONAL TAX REGIME* (2007).

51. One example among many is LON L. FULLER, *THE MORALITY OF LAW* (1969).

expectation⁵², within UNCTAD. UNCTAD was set up in 1964 as an organ of the UN General Assembly. Influenced by the dependency economics of Raul Prebisch, André Gunder Frank and others, the global south envisaged UNCTAD to become a counterweight against western-dominated organizations such as the IMF and, at the time, GATT. UNCTAD was highly active for a while, developing amongst others a number of commodity agreements and a global instrument (albeit non-binding) to regulate the behavior of multinational companies⁵³, but threatened to slip into marginalization.

In recent years, however, UNCTAD seems to have re-invented itself as a venue for discussion and information-gathering concerning investment and, in the wake thereof, debt relief. The most prominent output thereof to date is the so-called Roadmap on sovereign debt workouts, published in April 2015.⁵⁴

Meanwhile, in December 2014, the UN General Assembly established an ad hoc committee on Sovereign Debt Restructuring Processes.⁵⁵ The ad hoc committee adopted a set of principles, partly overlapping with UNCTAD's roadmap on 24 July 2015, which came to be laid down in General Assembly Resolution 69/319. The principles taken together stand for what has been called an 'incremental approach', looking for the middle ground between market-based and statutory approaches.⁵⁶

Indeed, more generally, the principles look for the middle ground, aiming to find a balance between the position of creditors and debtors. Debtors have a right to restructure their sovereign debt, so principle 1 suggests, but only as a last resort, and only by preserving creditors' rights. Creditors should refrain from exercising undue influence, while debtors continue to enjoy immunity from both jurisdiction and execution. And even within groups of creditors, some balance is sought: majority restructuring must be respected by outvoted creditors, while at the same time states must be encouraged to insert collective actions in the bonds and other instruments they issue. In short, the Principles aim to find a middle ground between all actors and on well-nigh all relevant topics, oozing the spirit of compromise.

One of the more noteworthy elements of the Roadmap is that it also suggests, in very careful, guarded terms, the creation of a Debt Workout Institution. This would be expected to provide technical support to the debtor (but without becoming its advocate), facilitate talks and provide expertise, assist in establishment and implementation of debt workouts, mediate, and maintain a list of abusive creditors. In the long run, it is even envisaged to host a sovereign debt restructuring tribunal. The Debt Workout Institution could be

52. It may have been expected, as Paulus suggests, that someone would start working on responsible debt, taking also the creditors' responsibility into account. See Christoph G. Paulus, *Debts*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 48, at 1089. What was unexpected, however, is that this would take place within UNCTAD.

53. This was the Restrictive Business Practices Code. For discussions, see Stuart Benson, *The UN Code on Restrictive Business Practices: An International Antitrust Code is Born*, 30 AM. U. L. REV. 1031 (1981).

54. UNCTAD, *Sovereign Debt Workouts: Going Forward. Roadmap and Guide* (UNCTAD, 2015).

55. G. A. Res. 69/247 (Dec. 29, 2014).

56. G. A. Res. 69/319 (Sept. 29, 2015). See also Bohoslavsky & Goldmann, *supra* note 38.

established either as a full-fledged international organization, as an independent non-profit entity, or perhaps as a subsidiary body of the UN General Assembly.⁵⁷

IV. THE FUNCTIONALISTS

Ever since its inception a little over a century ago, the theory of functionalism as it relates to the law of international organizations⁵⁸ has dominated the way international organizations have been structured and perceived. In a nutshell, functionalism in international institutional law boils down to this. It is essentially a species of principal-agent theory, where the member states provide the organization with a specific function or set of related functions. Though structured as principal-agent theory, it comes with at least two twists. First, the principal is by definition a collective principal: it takes at least two states to create an international organization. Second, and more interestingly perhaps, the principal is represented within the agent and, at least nominally, remains in constant control. All organizations have a plenary organ composed of all member states which, in the final analysis, can tell the organization what to do and what not to do. While it is generally acknowledged that organizations can lead a life of their own (this is cast in legal terms as ‘legal personality’), nonetheless they are also thought to remain under control of their member states.⁵⁹

The very point of functionalism was to distill the work, structure and legal environment of any particular organization into simple terms, revolving around their assigned tasks. Thus, the function of the Universal Postal Union is to regulate postal relations, and the WHO somehow must regulate global public health. Conceptualized this way, those functions were considered to be merely ‘technical’ and a-political. The only political element involved was that functionalism promised that world peace and the ‘salvation of mankind’ would follow on the re-imagining of the world away from sovereignty and along lines of functional differentiation.⁶⁰ After all, the UPU would have no reason to go to war against the WHO, since both would be engaged in purely functional tasks. Organizations, in contrast to sovereign states with their petty jealousies, would stick to their tasks, and heaven would descend on earth.⁶¹

This was probably never very plausible to begin with, and it soon

57. UNCTAD, *supra* note 54, at 62-63.

58. It must be distinguished from its political science cousin, espoused by the likes of Mitrany and (as neo-functionalism) Haas, which instead of asking how organizations are structured, was always more interested in how cooperation begets further cooperation. David Mitrany, *The Prospect of Integration: Federal or Functional?*, 4 J. COMMON MARK. STUD 119 (1965); ERNST B. HAAS, *BEYOND THE NATION-STATE* (1964).

59. On the conceptually complicated relationship between organizations and their member states, see CATHERINE M. BRÖLMANN, *THE INSTITUTIONAL VEIL IN PUBLIC INTERNATIONAL LAW: INTERNATIONAL ORGANISATIONS AND THE LAW OF TREATIES* (2007).

60. See also David Kennedy, *The Move to Institutions*, 8 CARDOZO L. REV. 841 (1987) (describing how peace and institutionalization were thought to go hand in hand).

61. This spirit is highly visible, without the quasi-religious hyperbole, in the work of the main founding father, Wisconsin law and political scientists Paul Reinsch. See, e.g., PAUL S. REINISCH, *PUBLIC INTERNATIONAL UNIONS, THEIR WORK AND ORGANIZATION: A STUDY IN INTERNATIONAL ADMINISTRATIVE LAW* (1911). Also Klabbers, *supra* note 27.

transpired that there were two major issues. The first of these, largely unrealized at the time, was the very concept of international organization: did this encompass only those entities that could meaningfully be said to work for the global good, or would it cover pretty much every form of institutionalized cooperation between states? The literature, spearheaded by the classic study by Frank Sayre and possibly blinded by the light of its promise, quickly tended to the latter.⁶² The result hereof was however, that functionalism came to encompass not just institutions for the provision of public health or regulation of channels of communication, but also entities that were barely distinguishable from colonial enterprises, such as the river commissions of early twentieth century China, or international police forces protecting the interests of largely Western traders and investors in faraway places. In short, the link between organizations and the global public good (however elusive) was severed, and replaced by a link between organizations and someone's particular project, even if the latter often dressed up in universalist garb.

The second issue related to the putative a-political nature of international organizations. It soon turned out that even within international organizations, politics and the rivalries between states could not easily be dismissed. France made quite a *spiel* of enlisting the Permanent Court of International Justice in tightening the reins on the International Labor Organization (ILO) during the early 1920s,⁶³ and Great Britain did its best to expel Liberia from the League of Nations over concerns about Liberia's human rights record.⁶⁴ This may or may not have been ethically inspired (though one wonders about the hubris of the world's major colonial power berating others over their human rights record), but was difficult to reconcile with any functionalist consideration. If the League was created predominantly to achieve collective security, then surely how Liberia treated its citizens had little bearing on its potential contribution to the functioning of the League.

As a result, 'pure' functionalism probably never existed in real life, and would be most unlikely to arise at any rate, if only because what counts as 'functional' is bound by time and place and highly dependent on how issues are framed. Functions come and go; what once was 'functional' may no longer be quite as 'functional'. This forces organizations to adapt themselves and forces member states to redirect their creatures. Telling is the name change of the ITU: originally established as the International Telegraphic Union, it lost some of its appeal when the telegraph became obsolete, and was re-invented as International Telecommunications Union.⁶⁵

Moreover, there is a level of analysis problem involved in functionalism,

62. FRANCIS B. SAYRE, *EXPERIMENTS IN INTERNATIONAL ADMINISTRATION* (1919).

63. PCIJ, *Competence of the ILO to Examine Proposals for the Organisation and Development of Methods of Agricultural Production*; and PCIJ, *Competence of the ILO to Regulate the Conditions of Labour of Persons Employed in Agriculture*, advisory opinions nos. 2 and 3 (1923).

64. ALISON DUXBURY, *THE PARTICIPATION OF STATES IN INTERNATIONAL ORGANISATIONS: THE ROLE OF HUMAN RIGHTS AND DEMOCRACY* 107 (2011).

65. Another well-known example is how the Organization for European Economic Cooperation, set up to channel Marshall Aid, was transformed into the Organization for Economic Cooperation and Development. On the process, see Hugo J. Hahn, *Continuity in the Law of International Organization*, 13 *ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT* 167 (1964). On some level much the same applies to the moves from GATT to WTO, and from EEC via EC to EU.

rendering any identification of the precise function of any given organization highly unstable. The ILO is a prime example: its constitution suggests that its function was (and is) the provision of social justice insofar as it relates to labor. From a different perspective, however, its function was to prevent Western labor movements from succumbing to the charms of communism – it is no coincidence that it was set up shortly after the Russian revolution.⁶⁶ Both interpretations of the ILO's function are accurate enough, but the downside is that argument can tap into either interpretation, constantly opting for the one most conducive to the point under discussion. While this may have its advantages when it comes to papering over political disagreement, as an element of theory such instability lacks analytical rigor. In order for functionalism to be acceptable as theory, at least it should allow observers to identify the functions of any given organization with some cogency.

Given the fluidity of the idea of function, it is no surprise that generally, functionalism struggles with its scope of application. The functionalist ideal type is so much an ideal type, that it may legitimately be wondered whether any entity even comes close, and if that is the case, it raises serious questions about the capacity of the theory to explain things: if the theory has no matching entities in any empirically responsible manner, then what good is the theory? On such a note, it rapidly becomes ideology, and this may indeed apply to functionalism in the law of international organizations. After all, many organizations can only with difficulty be said to be 'functional', and this includes some of the more prominent ones. The EU is a case in point: it leads such a separate existence from its member states that it can hardly be considered merely to exercise a delegated function, as functionalism would entail.⁶⁷ The UN is less independent from its member states, but has so many functions that it is difficult to say which function it exercises: collective security? Global welfare mechanism? Other organizations, ranging from OPEC to the OIC and, in fact, all regional organizations, are interest clubs and upscale lobbyists, having long ago lost the connection to the public good that early functionalists deemed vital. And the WTO is, in effect, an organization without powers – a dispute settlement mechanism with a dysfunctional decision-making process attached.⁶⁸

If the scope of functionalism has come under fire, so too has its explanatory potential. It was long thought (without anyone bothering to spell it out)⁶⁹ that functional theory could comprehensively explain all facets of the law of international organizations, but this is no longer generally accepted. For one thing, and from a broad perspective, being a theory about the relations between

66. Indeed, Cox can plausibly suggest that the ILO's well-known tripartite structure (with national delegations consisting of representatives from government, labour, and the business community) illustrates corporatism writ large. See ROBERT W. COX, *PRODUCTION, POWER, AND WORLD ORDER: SOCIAL FORCES IN THE MAKING OF HISTORY* 101 (1987).

67. So already Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981).

68. Jan Klabbers, *Unity, Diversity, Accountability: The Ambivalent Concept of International Organization*, 14 MELB. J. INT'L L. 149 (2013).

69. Sometimes a 'tacit dimension' prevails, involving 'propositions and opinions shared by a group and so obvious to it that they are never fully or systematically articulated': see Hirschman, *supra* note 32, at 69.

the organization and its member states it has little to say about relations within the organization (for instance, between organs *inter se*), and equally little about relations between the organization and third parties.⁷⁰

But even on the relationship between the organization and its member states, functionalism cannot explain all, although it should be acknowledged that on some topics, reference to the functions of the organizations is heuristically valuable. Thus, the doctrine of implied powers, in its more expansive guises, is linked to the functioning of the organization.⁷¹ Likewise, functionalism helps explain why it is that organizations can enjoy privileges and immunities⁷², and helps explain the existence of rules on membership, both on admission and on suspension or even expulsion of members. But one thing issue it has always found problematic relates to decision-making.

The problem is this. If it is indeed the case that organizations are set up to perform certain functions, functions moreover which are generally considered a-political, then there is little functional reason to insist on stringent ‘quasi-democratic’ decision-making procedures, where each member state has a vote, and the consent of all is needed in order to adopt any proposal. In other words, functionalism goes hand in hand with what I have termed elsewhere a ‘managerial attitude’, a ‘just do it’ mentality. If it is indeed the case that postal regulation is a technical function that can only be exercised for the greater good of humanity, then why not leave it to the experts? If it is indeed the case that the provision of public health is a technical exercise, then surely there is no need for interference by sovereign states? In fact, such interference is, eventually, dysfunctional: democratic interventions can only jeopardize the smooth functioning of postal regulation (to stick to the example). Obviously, this presupposes that indeed postal regulation is something that can be left to the experts: it is premised on the thought that there is only one way to do things properly, and it is this way that the experts can agree on. In such a setting, no democratic decision-making is needed; it can only obfuscate things.⁷³

Put differently, there is an inherent tension in functionalism when it comes to decision-making. On the one hand, with organizations being agents of their collective principals, all principals want to retain their own share of control over the organization: this naturally results in a ‘one state, one vote’ model, and it is no coincidence that it is this model that has informed so many international organizations.

On the other hand, the functional nature of the tasks of the organization suggests that organizations are better off with decision-making procedures tailored to the task at hand. Whatever the merits of ‘one state, one vote’, it is not conducive to taking quick and nimble decisive action. Hence, as noted, quite a few organizations exist where the power to administer or to respond

70. Jan Klabbers, *Theorising International Organisations*, in OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW (Anne Orford & Florian Hoffmann, eds., 2016).

71. ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports 174 (1949); see also Klabbers, *supra* note 18, at 56 et seq.

72. PETER H. F. BEKKER, *THE LEGAL POSITION OF INTERGOVERNMENTAL ORGANIZATIONS: A FUNCTIONAL NECESSITY ANALYSIS OF THEIR LEGAL STATUS AND IMMUNITIES* (1994).

73. On the role of expert knowledge in general, see DAVID KENNEDY, *A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY* (2016).

quickly to current events is granted to an executive organ of (relatively) small composition or even to a secretariat, often accompanied by a plenary with a ‘one state, one vote’ approach. Surprisingly perhaps, neat procedures for arranging the relations between plenary and executive are by and large missing.⁷⁴

If this is the general pattern among international organizations, the financial institutions form the one major exception, where both in plenary and executive the voting is weighted. In the IMF, the plenary is the Board of Governors, where voting takes place in accordance with financial input. On this basis, in 2016 the US holds 16.8 percent of the votes. To put this in perspective, Uganda holds 0.1 percent, and a fairly wealthy Western state such as Finland still only 0.52 percent.⁷⁵ The Executive Board consists of 24 persons, most of them representing groups of states, and the managing director: the same voting percentages are carried over to the Executive Board, so at no point is the ‘one state, one vote’ idea given any credence. Much the same structure applies to the World Bank. With both financial institutions then, the orientation can be seen as highly functional. The point is to perform the task(s) assigned by the members in the constituent document, without getting derailed by political discussion or slow decision-making.

The same ‘just do it’ attitude is expressly reflected in the mandate of the World Bank, famously providing that decisions should be taken solely on the basis of economic considerations and the Bank shall not interfere in the political affair of any member states.⁷⁶ The message is clear: the Bank should stick to its main task, without being derailed or sidetracked by non-functional concerns. In this sense, it is difficult to think of an organization more closely aligned to functionalist theory than the World Bank: both its decision-making procedure and its explicit mandate tend to isolate the Bank from non-functional concerns.⁷⁷

Similar provisions, if sometimes less strongly formulated, can be found in the constituent documents of some of the smaller, regional financial institutions. The newly created Asian Infrastructure Investment Bank, e.g., repeats almost verbatim the formula of article 4(10) of the International Bank for Reconstruction and Development’s constituent document, and does so in article 31(2) of its Articles of Agreement.⁷⁸ The Nordic Investment Bank, by contrast, suggests much the same in fewer words when it is instructed to take its lending decisions ‘in accordance with sound banking principles and taking into account socio-economic considerations’.⁷⁹

74. Jan Klabbers, *Checks and Balances in the Law of International Organizations*, in *AUTONOMY IN THE LAW* (Mortimer Sellers, ed., 2007).

75. See <http://www.imf.org/external/np/sec/memdir/members.aspx>.

76. Article 4(10), Articles of Agreement IBRD. For a fine analysis, see Ronald Janse, (*Why Was the World Bank Supposed to Be a Nonpolitical Organization? An Interpretation of the Original Meaning and Rationale of Article 4(10) of the Articles of Agreement of the International Bank for Reconstruction and Development, 1941-1948*, 16 J. HIST. INT’L L. 113 (2014).

77. It has, accordingly, proven very difficult to insert other than purely functional concerns, as the entire discussion on the Bank and human rights suggests. For excellent discussion, see GALIT A. SARFATY, *VALUES IN TRANSLATION: HUMAN RIGHTS AND THE CULTURE OF THE WORLD BANK* (2012).

78. Articles of Agreement AIIB, article 31(2)

79. Agreement on the Nordic Investment Bank, article 1.

There are also exceptions though. Both the Council of Europe Development Bank and the European Bank for Reconstruction and Development (EBRD) have explicitly political mandates. The former was created with a view to help solve problems caused by large influxes of migrants and refugees.⁸⁰ The latter was set up to help eastern European economies transition and adopt the economic ways of the west. In the words of article 1 of the Agreement establishing the EBRD, the Bank shall in principle only sponsor projects in countries ‘committed to and applying the principles of multiparty democracy, pluralism and market economics’.

This suggests another element of wobbliness at the heart of functionalism. In general, it seems, all multilateral investment banks and development banks share, roughly, the same purpose: to make money available for projects in states that need such financial support. Yet, as the founding fathers of the Council of Europe Development Bank and the EBRD acutely realized, such a function says little about what the organization is actually expected to do. Again then, the identification of function, as mentioned above, is dependent on the level of analysis. On a high level of abstraction, all financial institutions have the function of sponsoring projects; on a different level, they may have the function of sponsoring some projects over others. This renders functionalism inherently unstable, as any ‘functionalist’ argument will first have to reveal which ‘function’ it relies on.⁸¹

Related to this is the realization that no project is politically innocent, and more importantly, ‘sound banking principles’ and the like are not politically innocent either. The very existence of conditionality suggests that the financial institutions have specific opinions on how best to structure the economy, and the very debate on conditionality suggests that not everyone agrees. The very creation of the AIIB, moreover, is generally seen as a bid for world power by China: it is thought of as a counterpart to the US dominated Bretton Woods institutions, at least by the US itself,⁸² therewith once again suggesting that the a-political nature so beloved by classical international institutional legal functionalism was never too plausible to begin with.⁸³

From a broader perspective, it would seem that global financial regulation (*vel non*) precisely manages to escape the strictures of functionalism, while

80. See Article 1 of its Articles of Agreement. Contrary to what one might expect, the Council of Europe Development Bank is not a recent creation, but was established in 1956, originally as the Council of Europe Social Development Fund.

81. It is possibly no coincidence that some have seen fit to include human rights in their discussions of the functions of otherwise fairly technical organizations. On these lines, the function of WIPO would be ‘to regulate intellectual property while taking human rights seriously’, rather than merely ‘to regulate intellectual property’. A brief example is Edward Kwakwa, *An International Organisation’s Point of View*, in ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS BY INTERNATIONAL ORGANISATIONS (Jan Wouters, et al., eds., 2010). The same thought prevails in the most recent report of the UN Special rapporteur on extreme poverty and human rights, Philip Alston, on the World Bank and human rights, UN Doc. A/70/274.

82. See, e.g., Joseph Stiglitz, ‘In Defence of the Asian Infrastructure Investment Bank’, available at <http://www.theguardian.com/business/2015/apr/14/in-defence-of-the-asian-infrastructure-investment-bank>.

83. Outside the ambit of law, some have presented radically different theories concerning the growth of international institutions. See, e.g., CRAIG N. MURPHY, INTERNATIONAL ORGANIZATION AND INDUSTRIAL CHANGE: GLOBAL GOVERNANCE SINCE 1850 (1994).

remaining faithful to the spirit of functionalism, or, more accurately, remaining faithful to functionalism in spirit. Financial institutions, formal and informal alike, are highly function-oriented, far more so than most others. In this sense, they keep the spirit of functionalism alive. Yet, simultaneously, they undermine what many thought was among the main hallmarks of functionalist theory: the idea of sovereign equality. Or, perhaps more accurately, they do not so much undermine as re-configure the idea of sovereign equality. If traditionally, in the famous words of Vattel, a ‘dwarf is as much a man as a giant’, and therefore ‘a small republic is no less a sovereign state than the most powerful kingdom’,⁸⁴ this concept of sovereign equality no longer applies in the law on debt relief. As noted earlier, much relevant decision-making takes place in entities of limited composition but unlimited reach, and where the organizations themselves boast broad membership, voting is inevitably tilted in the direction of the powerful. Practice, in other words, makes two moves. First, in formal organizations, it limits the accessibility of decision-making processes to the rich and powerful; second, outside formal settings, it steers relevant decision-making to fora of limited composition and uncertain legal status, but backed by enormous economic clout.

As far as functionalism goes, this cannot but draw attention to the need to re-visit some of its classic tenets, most prominently the idea of representation of the collective principal by means of the organization’s plenary organ. It is this element that provides international organizations with a gloss of input legitimacy. If Fritz Scharpf is correct in suggesting that organizations mostly depend on their output for their legitimacy (and that is *prima facie* a highly plausible thesis),⁸⁵ then such little input legitimacy as they can boast will stem from the inclusiveness of their decision-making procedures. Indeed, the very same point is reflected in the Basic Principles on Sovereign Debt Restructuring Processes adopted by the UN General Assembly in 2015: Principle 7 suggests, in so many words, that legitimacy demands that ‘institutions and operations’ respect ‘requirements of inclusiveness and the rule of law’.⁸⁶ Small wonder then that functionalism has always straddled two concepts of international organization: it needs some quasi-democratic pedigree, and simultaneously is in need of some practical effectiveness.

This helps explain, no doubt, why all attempts to institutionalize debt relief through some kind of international mechanism have thus far failed. The IMF’s proposal to create a Sovereign Debt Restructuring Mechanism never got very far, and it is noticeable (if not often noted) that one the elements of the UNCTAD Roadmap, the creation of a Debt Workout Institution,⁸⁷ has been overshadowed by the attention for substantive principles. This is not merely because of fears of expanding international bureaucracies, and not merely because, as has been suggested, the creation of a permanent institution would give the impression that debt relief is a normal, everyday occurrence, but also, and perhaps first and foremost, because (strange as it may sound), for any

84. EMER DE VATTEL, *THE LAW OF NATIONS* 75 (2008 [1758]).

85. FRITZ SCHARPF, *GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC?* (1999).

86. GA Res. 69/319, *supra* note 56, Principle 7.

87. UNCTAD, *supra* note 54, at 62-63.

institutional arrangement to be deemed acceptable it must cater both to democratic legitimation and to effectiveness. This is what the theory of functionalism suggests, however unwittingly perhaps, as anything else is domination.

The circumstance that in formal financial institutions weighted voting takes place and the adage of ‘one state, one vote’ has been all but lost finds, in turn, its justification in the practical concern that those who need to borrow have little to ask – ‘beggars can’t be choosers’, in colloquial terms. Hence, this departure from functionalist theory could be pushed through, although it is fair to suggest that the financial institutions are paying the price on a daily basis: no other organizations are so often the subject of calls for institutional reform.⁸⁸

The power distribution concerning debt relief, however, is different. Here there are no ‘beggars’, as the power of the indebted state can be considerable: a refusal to pay one’s debts can shake the entire financial system. Indeed, it is surely no coincidence that sovereign debt relief was rarely considered a political issue during the 1970s, when states were largely indebted to private banks. A refusal to pay would have risked the stability of the Western banking system. This was considered highly undesirable (and politically difficult, in that re-election in the midst of such a crisis would be next to impossible), the result being that lending became increasingly multilateralized and the work of governments, however reluctantly perhaps.⁸⁹ This, however, also implied that there was less of an incentive to tackle debts early on, and debts could thus be piling on.⁹⁰ Either way, the point to note is that being indebted also creates, curiously enough, something of a power base, if only because domestic parties need to be brought on board: as a result, the indebted can insist on formal equality, but their victory is Pyrrhic, and the indebted need to maintain a fine balance, as the 2015 Greek referendum seems to illustrate.

CONCLUSION

This paper has suggested that there are tensions inherent in the dominant functionalist theory of international institutional law, and those tensions have a bearing on the possible creation of international institutions or mechanisms mandated to address debt relief or debt workouts. Entities established or proposed to deal with debt relief tend to wish to evade the strictures of formal international organizations law, either by being set up as informal entities or by utilizing different decision-making rules, departing from the basic notion of sovereign equality. Yet, this basic notion of sovereign equality remains fundamental to international organizations: it is, in part, what their legitimacy depends on.⁹¹ The only way out, it seems, might be to depart from functionalism altogether, but if so, the financial institutions as currently

88. With the exception, no doubt, of the UN Security Council, for much the same reason.

89. Lee C. Buchheit, *The Role of the Official Sector in Sovereign Debt Workouts*, 6 CHI. J. INT’L L. 333 (2005).

90. See Wong, *supra* note 31, at 50-51.

91. The best analysis of legitimacy in the international realm remains Martti Koskenniemi, *Legitimacy, Rights and Ideology. Notes towards a Critique of the New Moral Internationalism*, 7 ASSOCIATIONS 349 (2003).

organized (including those devoted to debt relief) will have a hard time justifying their existence. In a putative constitutional global order – an alternative universe, to be sure⁹² – the weighted voting of the IMF or the exclusive nature of the G20 or the Paris Club, are difficult to envisage, let alone to justify, no matter how effective their work may be. Considerations of effectiveness should always be accompanied by the question ‘effective for whom?’, and if so, it will often transpire that effectiveness alone, while not irrelevant, cannot always help to justify an institution, mechanism or procedure. Something else is required: it is no coincidence that the *auctor intellectualis* of functionalism, Paul Reinsch, limited his analysis – somewhat unwittingly perhaps – to institutions serving the global public good.⁹³ While this notion, too, is obviously susceptible to manipulation and can be framed in different ways, at least reference to the public good makes clear that effectiveness alone will rarely be sufficient. Reinsch was wrong to insist that international organizations are a-political creatures; but he was right in suggesting that some kind of reference to the public good is required. It is this consideration which informs his functionalist legacy but has largely been overshadowed by the broadening of the scope of the concept of international organization occasioned by Sayre’s work.⁹⁴

This places the financial sector before something of a dilemma: under a constitutional theory, it cannot get away with purely market-based solutions. Hence, it benefits from functionalism, but can only do so meaningfully as long as it accepts some of the basic tenets thereof, including inclusiveness. Obviously, one might respond that theories are irrelevant for practical purposes, but this would be to miss the point that functionalist theory has been facilitating the operation of international institutions to a considerable extent, as it undergirds many of the legal rules and institutions that have created to the benefit of international organizations. Tilting functionalism towards managerialism then, a distinctively visible trend in the global financial sector, threatens to throw out the baby with the bathwater, and this, most would agree, is not a good idea.

92. JAN KLABBERS, ANNE PETERS & GEIR ULFSTEIN, *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* (2009) (sketching what a constitutional global order could possibly look like).

93. Reinsch, *supra* note 61. See also Klabbers, *supra* note 68.

94. Sayre, *supra* note 62. I sketch this process of overshadowing extensively in Klabbers, *supra* note 9.