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Bailiffs for Gunboats: Ukraine v. Russia

I. Introduction

When the courts of a state are asked by a sovereign creditor to enforce a sovereign debt, the courts of that state may wish to seek the advice of its political departments in determining whether the enforcement presents a nonjusticiable political question.

The case of Ukraine v. Russia ("Ukraine-Russia"),[1] now pending a second argument in the Supreme Court of England, lies at the intersection of traditional public international law and private international law. Its unique aspect is that it addresses court enforcement of a debt that is intertwined with sovereign political relationships. More broadly, it reflects the great power that private enforcement of a commercial instrument may nowadays give to a creditor that has goals beyond repayment. In the special context of a sovereign creditor of a sovereign debtor, the case reveals the potential role of privately enforceable debt in achieving the creditor's political ends. The analysis I offer is powered by an insight from Professor Paulus in an article called "Power Game," in which he explains that all debt contracts give rise to power relationships.[2] One of his examples is from corporate law, "loan to own," a commercial maneuver that provides an analogy to Russia's behavior in Ukraine-Russia to the extent that enforcement of the monetary obligation has goals beyond mere repayment, including control of the debtor ("nonmonetary goals").[3]

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[1] *Ukraine v. The Law Debenture Trust Corporation P.L.C.* [2018] EWCA (Civ) 2026 (Eng.) [hereinafter *Ukraine*].

[2] *Christoph G. Paulus,* The Everlasting Power Game Between Creditors and Debtors in Credit Relationship*s* (May 30, 2020), in Copo/Munoz (eds.), El acreedor en el derecho concursal y preconcursal a la luz del Texto Refundido de la Ley Concursal, 2020, p. 39 et seq. He quotes John Adams, "There are two ways to conquer and enslave a nation. One is by the sword. The other is by debt." Id. at 44. He has discussed sovereign debt in a number of works, including *Christoph G. Paulus,* The Concept of 'Odious Debts': A Historical Survey, Duke Law School Legal Research Paper Series, Paper No. 179 (2007).

[3] See *Berman/Brighton,* Handbook on Second Lien Loans & Intercreditor Agreements s. 3.D, American Bankruptcy Institute (2009).

For many years, there has been a trend toward blurring the distinction between public and private international law.[4] As part of that development, we have seen a greater willingness to permit enforcement of sovereign debt using private law,[5] which provides enforcement through two pressure points: seizure of assets and the blocking of important transactions. Most focus has been on seizure, but private enforcement can have profound transactional effects as demonstrated in the American case in which Argentina's restructuring was blocked by private creditors.[6] Judgments likely to be recognized internationally can have those two effects all over the world.[7] These tools of private enforcement of debt may generate powerful pressures in the service of nonmonetary goals.

Thus it is now possible for a sovereign creditor with a goal of affecting the policies of a debtor sovereign state to use debt as a power tool for achievement of that goal over and above the repayment of the debt. The offer of a loan to a sovereign has been used throughout history as an inducement for the sovereign to accept some political result in exchange, but the use of a private form of debt that permits private-law enforcement for nonmonetary political purposes seems to be a new development. In a case where private debt enforcement is thus used by a sovereign creditor against a sovereign debtor, we may call it "political debt." Ukraine-Russia may reveal the emergence of private enforcement of political debt by a sovereign lender for what may be political reasons. China's Belt and Road Initiative may eventually turn out to be another. This brief paper asks whether political debt should be routinely enforceable against a sovereign debtor or should prompt judges to invite their country's political institutions to intervene.[8]

II. The Ukraine-Russia Case

Ukraine issued a note for repayment of a multi-billion dollar loan from Russia. The note was in standard commercial form suitable for trading and was listed on the Irish Exchange. Thus on its face it was a normal commercial debt and therefore subject to collection under modern rules denying sovereign immunity in suits on commercial obligations. Indeed, the note expressly called out the English courts for resolution of any disputes and the application of English law.

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[4] See *Gelpern,* Sovereign Debt: Now What?, 41 Yale J. Int'l L. Online 45, 47 (2016).

[5] *Panizza/Sturzenegger/Zettelmeyer,* The Economics and Law of Sovereign Debt and Default, 47 J. Econ. Lit. 651, 653 (2009); *Schumacher/Trebesch/Enderlein,* Sovereign defaults in court, European Central Bank Working Paper Series, European Central Bank (2018) [hereinafter Sovereign Defaults].

[6] *Republic of Argentina v. NML Capital, Ltd.,* 573 U.S. 134 (2014) [hereinafter *Argentina*]; *Gelpern, supra* note 4, at 69–73.

[7] *Cf. Westbrook,* Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court, 96 Texas L. Rev. 1473, 1479-82 (2018) (bankruptcy example). *Gelpern, supra* note 4, at 70–71.

[8] As discussed below, such an intervention would be a return, for political debt only, to the traditional role played by some foreign ministries in cases of enforcement of the obligations of sovereign states. *See infra* nn. 30–34 and accompanying text.

Russia sued for enforcement in London.[9] Now pending in the English Supreme Court is the decision of the Court of Appeal to recognize a case of defense of duress to enforcement of the note.[10] It held enforcement might be refused on alternative grounds:

1. a claim of duress may serve as a defense to enforcement or
2. may lead to suspension of enforcement.[11]

The arrangement between Russia and Ukraine was an unusual one. One thinks of sovereign loans being in one of two forms: bonds sold to various private parties or loans made by one sovereign to another.[12] The first sort is governed by the private law of some country and the parties often select a method of dispute resolution in the courts of some trusted jurisdiction. In recent years, private debt enforcement of sovereign debts have been increasingly common. In *Republic of Argentina v. Weltover, Inc.,* 504 U.S. 607 (1992), the United States Supreme Court held that the issuance of public bonds was a commercial activity permitting an enforcement action under the Foreign Sovern Immunities Act (FSIA).[13] Similar exceptions to sovereign immunity for public bonds held by private persons or institutions are found in other countries.[14]

Traditionally, we do not associate private-law enforcement with debts that are owed to sovereigns by sovereigns. We think of sovereign-to-sovereign loans as being administered in public institutions like the Paris Club and the IMF, with disputes resolved in arbitration or by the World Court. Any restructuring of debt would be a political negotiation.[15] But the Ukraine-Russia case addresses a sovereign-to-sovereign loan with the structure of a typical private loan. The creditor sovereign sought to use private-law civil enforcement against the debtor sovereign with politics near the center of the dispute.

In Ukraine-Russia, the debtor claimed that creation of the obligation represented by the note, and perhaps its enforcement as well,[16] should be subject to the defense of duress available in commercial transactions. That is, Ukraine asserted that a sovereign lender that chooses a commercial form of obligation in order to use private law mechanisms for enforcement should be subject to a defense of duress as would be any commercial lender. That claim was sustained in the Court of Appeal. The appeal of the decision was argued before the English Supreme Court almost

[9] The nominal plaintiff was a trust company that was named as such in the note issued by the Ukraine that was the subject of the case. *Ukraine* at para 3. I will refer to the Russian state as the plaintiff throughout.

[10] Most of the argument in the Ukrainian briefs in the Supreme Court supports a claim of incapacity and lack of authorization of the borrowing rather than a coercion defense. That position was rejected by the Court of Appeal.

[11] The issue was one of summary judgment as to the validity of various Ukrainian defenses, including duress, so the Ukrainian factual assertions were taken as proven at this stage of the proceeding.

[12] *Gelpern, supra* note 4, n. 197 at 83.

[13] *Republic of Argentina v. Weltover, Inc.,* 504 U.S. 607, 612–617 (1992) [hereinafter *Weltover*]; 28 U.S.C. § 1603(d), 28 U.S.C. § 1605(a)(2).

[14] See generally, Sovereign Defaults, *supra* note 5.

[15] See generally, *Gelpern, supra* note 4 (discussing the history of sovereign-to-sovereign loans and the operations of the Paris Club and the IMF).

[16] See text infra at nn. 24–25.

three years ago. Recently the Court has scheduled further argument for November 11, 2021.

The facts that Ukraine offered to prove in support of its duress defense were these[17]:

"Ukraine's case is that Russia applied massive, unlawful and illegitimate economic and political pressure to Ukraine in 2013 to deter the administration led by President Viktor Yanukovych from signing an Association Agreement with the European Union, which was to have been signed at the Vilnius Summit on 28 November 2013, and to accept Russian financial support instead. The Notes were to be the first tranche of that support."

[Thereafter] Russia invaded Crimea. In addition to the invasion, Ukraine's case is that Russia has also fueled and supported separatist elements in, interfered militarily in and succeeded in destabilizing and causing huge destruction across eastern Ukraine."

"… Ukraine alleges that the claim against it "forms part of a broader strategy of unlawful and illegitimate economic, political and military aggression by the Russian Federation against Ukraine and its people aimed at frustrating the will of the Ukrainian people to participate in the process of European integration."

The trial court held these facts would not support Ukraine's defense because the duress defense is not justiciable in a case involving sovereigns.[18] Thus it rejected the defense and granted summary judgment for enforcement. The Court of Appeal reversed and ordered a trial on the allegations of duress. It held that where a sovereign lender takes a commercial instrument to evidence its loan to another sovereign and designates an English court to enforce it under English law, the commercial defense of duress is available as it would be to a private debtor in the analogous circumstance and the English court chosen by the parties has the power to accept the defense if proven.[19]

The Court of Appeal offered an alternative holding as well: the sovereign seeking enforcement cannot both invoke the English courts and their enforcement mechanisms and claim nonjusticiability of the duress defense.[20] If the defense is not justiciable, then the suit should be suspended rather than proceed to resolution and enforcement. One way to summarize the decision in this regard is that a sovereign lender cannot "mix and match" by seeking private-law enforcement without private law defenses. It has to proceed under one set of rules or the other, public international law or private;[21] it cannot combine elements of football and golf and then tackle its opponent on the golf course.

To reveal all the underlying issues in this case, it is necessary to unpack Ukraine's claims to see what it was or may have been claiming by way of its defense. The defenses are potentially three in number. First, the allegations clearly include the asser-

[17] *Ukraine* at paras. 8-10.
[18] *Id*. at para. 17.
[19] *Id*. at para. 159.
[20] *Id*. at paras. 182–186.
[21] The court stated that Ukraine had agreed to either international arbitration of its defenses or their resolution in the World Court. It appeared the Russian state was not interested in either forum. *Id*. at para. 185.

tion that Russia's conduct, especially its alleged invasion of the Ukraine[22] and seizure of Crimea ("Russian misconduct"), constituted duress forcing acceptance of the loan and the note. To that extent, it is directly analogous to a private party's claim that a gun was held to its head or its arm was twisted to induce acceptance. The actual intervention in Eastern Ukraine and the seizure of Crimea took place after the execution of the note,[23] but Ukraine alleged prior threats and "illegitimate Russian economic warfare".[24]

The second potential defense is not clearly stated. It would be prevention or frustration of Ukraine's performance by Russian misconduct, much of which is alleged to have happened after the note was signed.[25] However, this possible defense is not found in the arguments discussed in the Court of Appeals opinion or in the Ukrainian briefs in the Supreme Court, even though it is clearly suggested by its offer of proof. Under traditional contract law, at least as we understand it in the United States, those allegations might well constitute a defense to enforcement of the note if proven to have occurred and to be causally related to the failure to pay.[26] The English law may be different or the facts might not support this second sort of defense.

Neither of these defenses is the central focus of this paper. Instead, my focus is upon Ukraine's assertion that enforcement of Ukraine's note was sought by Russia for political reasons, not merely for repayment of the contractual amounts owed. That entire case for the Ukraine is pregnant with that claim, but it is not present as a defense except in the form of "countermeasures."[27] Ukraine asserted that the reason for the loan of the money by Russia was to prevent a connection with the EU. The Russian response rests on the idea that countermeasures as a public international law doctrine have no place in an action to enforce a note in commercial form.

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[22] The invasion allegedly included some Russian troops on Ukrainian soil and closely related support of separatists in the eastern regions of Ukraine. *Welt,* Congressional Research Service, Ukraine: Background, Conflict With Russia, and U.S. Policy 15 (2021) [hereinafter Ukraine Background]. See also *Zaverukha,* The Conundrum of Public and Private Interests in Sovereign Debt: The Who, What, When, Where, And How of The Sovereign Loan from Russia to Ukraine, 22 Gonz. J. Int'l L. 85 (2019).

[23] The note was executed Christmas Eve, 2013. The invasion of Ukraine by Russia began two months later in February of 2014. Ukraine Background at 15. It is also alleged threats of such action were made before the note was executed. Ukraine's Written Case on Capacity, Authority, Countermeasures and Other Compelling Reasons for a Trial at para. 8, *The Law Debenture Trust Corporation P.L.C. v. Ukraine,* UKSC 2018/0191 (Eng.) [hereinafter Brief for Ukraine I]; Ukraine's Written Case on Duress, Foreign Act of State, Stay and Ratification at para. 21, *The Law Debenture Trust Corporation P.L.C. v. Ukraine,* UKSC 2018/0191 and UKSC 2018/0192 (Eng.) [hereinafter Brief for Ukraine II] (Briefs on file with author).

[24] Brief for Ukraine I at para. 2.

[25] "Yet by this claim Russia seeks to require Ukraine to repay vast amounts, which Russia has itself severely undermined Ukraine's ability to repay." *Id.* at para. 8.

[26] Prevention Generally, 13 Williston on Contracts § 39:3 (4th ed. 1993); Gelpern, *supra* note 4, n. 206 at 84. I use US law as exemplary for the purpose of analysis. I would not presume to state English law in this regard. It may be that these defenses are not available for some reason under English law, leaving Ukraine to argue "countermeasures," as it does in its brief. Brief for Ukraine I at paras. 99-106.

[27] This defense is based on public international precedents relating to breaches of treaties or other public international law. *Ukraine* at paras. 187-89; Brief for Ukraine I at paras. 99-106.

If such an allegation of a political goal were proved, I would regard the note as a "political debt," one for which enforcement is sought to influence the conduct or policies of the sovereign debtor. I want to discuss the possibility that in such a case it is legitimate for the court where enforcement is sought to seek advice from the political department of the state. In the United States that procedure would represent a limited return to the standard procedure in sovereign immunity cases before the adoption of the FSIA.

III. Analysis

This case provides yet another example of the prescience of Professor Paulus' work in revealing the fundamentals of commercial and business law through a historical perspective. In Power Game, he discusses the "weaponizing" of debt, which might be a fair description of the alleged Russian use of debt against the Ukraine.[28] He begins with the idea that every debt creates a power relationship. Understanding that relationship is central to understanding the evolution of debt. He contrasts the Middle Eastern notion of debt as a social phenomenon to be mitigated for social good with the Roman idea that the creditor is entitled to control the debtor even to the point of death.[29] Ukraine-Russia provides a useful lens for considering these power aspects of credit contracts.

Traditionally, courts around the world would not entertain a suit against a sovereign, a doctrine called sovereign immunity. The provisions of the FSIA provide a US example. Prior to its adoption, it was routine for sovereigns in a US court to seek a ruling from the State Department as to immunity.[30] Part of the reason was that sovereign immunity was viewed as creating political questions which the courts were not well-equipped to address and therefore would regard as nonjusticiable, as did the trial court in Ukraine-Russia.[31] However, over time the immunity was narrowed, primarily by exceptions for "commercial activities" or waiver of immunity in a contract. Typically, the court would receive guidance in the form of a "Tate letter," in which the executive branch would indicate whether it believed the court should accept the sovereign immunity defense in the case presented.[32] The adoption of the FSIA reflected a conviction that the political departments should not have such a substantial role in those decisions, but instead the courts should apply judicial

[28] *Paulus, supra* note 2, at 9.

[29] *Id.* at 2–5.

[30] H.R. Rep No. 94-1487, at *7 (1976); *Kahale/Vega,* Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States, 18 Colum. J. Transnat'l L. 211, 215-16 (1979) [hereinafter Immunity].

[31] This concern was more explicit in the "act of state" cases. *E.g., Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398 (1964). But it is illustrated by the provisions in the FSIA that permit a lawsuit against a sovereign on a fairly liberal basis but offer a narrower exception to immunity in enforcement against property in the United States precisely because enforcement against a sovereign by a third-party sovereign's courts may raise more political/diplomatic questions than the mere entry of judgment and liquidation of the debt. H.R. Rep No. 94-1487, at 26–31 (1976).

[32] H.R. Rep No. 94-1487, at *8 (1976); Immunity at 215-16.

standards for granting or refusing sovereign immunity.[33] The statute provided standards the courts could employ for that purpose, standards intended to eliminate the political element in those decisions.[34] This use of the statute evolved to permit the enforcement of ordinary debts like bonds.[35]

As mentioned above, the emergence of enforcement of commercial debt has potentially placed two powerful tools in the hands of lenders to sovereigns: seizure of property and interference with important transactions and relationships. Examples of the first include seizure of bank accounts, especially those used for commercial purposes, and attachment of commercial debts owed, directly or indirectly, to the debtor sovereign.[36] It is also possible to seize property.[37] These enforcement mechanisms could both deprive the debtor sovereign of assets and interfere seriously with its commercial relationships. Interference may also be more direct, as in the successful attempt by "vulture investors" in the United States to disrupt Argentina's restructuring of its global bond debt through an injunction enforcing a pari passu clause in the bond indenture. They were able to gain very favorable payment terms and a very high rate of return.[38] These results have upended and reshaped the "balance of power" (we may say, after Paulus) between sovereigns and their creditors.[39]

In this paper we consider if perhaps loans *by* sovereigns to other sovereigns should receive different treatment from that accorded to loans by private persons (bondholders) or institutions. The reason is that enforcement by sovereign creditors may constitute enforcement of political debt. An analogy may be found on the private side of debt enforcement in loan-to-own cases which present examples of situations where some courts have considered that enforcement of debt requires special treatment where creditors may have a goal beyond mere repayment; in those cases it is to force sale of a business to the creditors. In a similar way, the mechanisms of private debt enforcement can provide sovereign lenders with commercial threats that would pressure debtors to support the political objectives of those creditors. They may provide more pressure on the sovereign debtor than those available on a sovereign to sovereign basis if the sovereign creditor is hesitant to employ military action or finds the costs too great. The result could be to increase substantially the pressure

[33] The most relevant provisions for permitting seizure of property of a sovereign in the United States would be the commercial activity exception and the waiver of sovereign immunity. Generally, sovereign bonds are held to constitute commercial activity and certainly debts owed to a sovereign-owned entity for goods or services would be. *Weltover,* supra note 13.

[34] H.R. Rep No. 94-1487, at *7–8,*12,*14 (1976).

[35] Similar developments have taken place in Europe. See generally, Sovereign Defaults, *supra* note 5.

[36] These may include debts owed to corporations or other legal entities wholly owned by the debtor sovereign.

[37] See, e. g., *Crystallex International Corporation v. Venezuela,* 932 F.3d 126 (3d Cir. 2019) (attachment of shares owned by corporation that was in turn controlled by state).

[38] See *Wernau/Turner,* Argentina Debt Deal Poised to Deliver Big Payday to Holdouts, The Wall Street Journal (Feb. 29, 2016), https://www.wsj.com/articles/argentina-holdout-creditors-agree-to-4-65-billion-settlement-1456760652. (describing Argentina's plan to pay vulture creditors $ 4.65 billion, 75% of the total amount owed, but "several times more than they actually invested in the debt.").

[39] This phenomenon is general and spreading. Sovereign Defaults, *supra* note 5, at 2.

a sovereign lender could exert on a sovereign borrower to achieve the lender's political goals.

Ukraine's allegations in the Ukraine-Russia case suggest that Russia might have intended to use enforcement of its note as continuing leverage in an effort to discourage Ukraine from associating with the European Union and, perhaps, to redirect its political and economic focus to Russia. Whatever its political goals might have been, it might have been easier to enforce them by bailiff rather than by gunboat and it might have been more difficult for Ukraine to resist them if threatened with serious economic harm from enforcement of the debt by the English courts and, ultimately, the courts of the United States and other countries.

While the recent history of Russia and the Ukraine demonstrates that the traditional methods of pressure on neighbors are by no means obsolete,[40] their employment may be costly to the creditor sovereign in many different ways and risky as well.[41] It might be attractive to the aggressive sovereign to pressure a debtor sovereign by enforcement of the debt in an appropriate judicial system, replacing or supplementing the traditional gunboat with attachments and garnishments.

Suppose a sovereign demands the debtor align with the creditor in joining or rejecting a treaty on disarmament or human rights. It could buy large amounts of public debt from bondholders, perhaps at a discount if the debtor sovereign is experiencing some financial distress. It then could obtain a judgment in a court that enjoys a positive reputation around the world and could proceed in that country or through recognition elsewhere to attach moneys owed to the debtor by a large commercial enterprise. Badly needed funds could be diverted from the debtor at a moment of great need. On top of that, the enterprise might terminate the relationship going forward rather than be immersed in litigation. The price of avoiding these consequences might be acquiescence in the political demand. That demand might be made in a political negotiation of the traditional sort, but here it would be backed by a meaningful risk of commercial damage.

Note that that the sovereign debtor might have no commercial defense to the enforcement. We need not pause here to consider what facts might or might not constitute a defense under contract law, except to realize that analogous circumstances might not have arisen often enough under commercial instruments to provide precedent for a defense to a note apparently commercial on its face. English courts are often chosen in contracts precisely because of their commitment to enforce commercial obligations strictly. It is possible that was a factor in their inclusion in the note issued by Ukraine to Russia. In any case, the relatively narrow ground of defense permitted in Ukraine-Russia – a defense under traditional contract law – might not suffice to protect the sovereign debtor in many circumstances where enforcement of a debt is sought for political reasons.

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[40] See generally, *Pénet/Zendejas,* Sovereign Debt Diplomacies (2021).

[41] The Russian support of Ukrainian separatists was an up and down venture, with many casualties on all sides. See Ukraine Background, supra note 24, at 15 (describing the combat toll of the separatist conflict); See also *Besemeres,* A Difficult Neighbourhood: Essays on Russia and East-Central Europe since World War II 346-47 (2016) ("Destabilisation was relatively easy; pacifying and then holding new territories in the east would be more difficult").

In the caselaw in the United States governing loan to own, there are cases that take into account the motivation and alleged misconduct of the creditor in considering how strictly to enforce its commercial rights.[42] We might say (after Paulus) that misuse of the power arising from a transaction may be sufficiently serious and distinct as to be illegitimate and as a matter of "equity"[43] vitiate those rights. In an analogous way, we might consider whether factors beyond commercial defenses should be weighed in the enforcement of political debt. That is, it may be one thing to limit sovereign immunity in the context of repayment of debts to private creditors, but quite another to have third-country courts enforcing control of political decisions by another sovereign. In the terms used in the United States, might it be fair to say that political debt enforcement may not be "commercial" under the FSIA (and similar law in other jurisdictions) and therefore subject to a defense of sovereign immunity?[44]

Suppose in a US version of Ukraine-Russia, Ukraine could not show sufficient evidence of duress or frustration, but could show that Russia had offered to suspend enforcement of the $ 3 billion note as long as the Ukraine did not associate with the EU. Should the court decline enforcement on the ground that the question presented is political and therefore is nonjusticiable – that is, unenforceable in the face of sovereign immunity? If reliance is placed on waiver of immunity in the note, might the validity of that waiver itself be a political question where a political debt is alleged?[45]

Perhaps a court faced with allegations that the creditor seeks to enforce a debt for political reasons should seek political advice from the executive branch as American courts used to do in all sovereign immunity cases.[46] However, the existence and predominance of political motives is itself a political question, so a better rule might be that a court should seek such advice in any case in which the creditor is a sovereign

[42] See In re Free Lance-Star Publ'g Co., 512 B.R. 798, 807 (Bankr. E.D. Va. 2014) ("… the negative impact DSP's misconduct has had on the auction process has created the perfect storm, requiring curtailment of DSP's credit bid rights."). *Cf. DiNizo Jr.,* Cause for Credit Bidding: Utilizing Secured Debt to Obtain Property During a Bankruptcy Auction, 19 Hous. Bus. & Tax L.J. 84, 114 (2019) ("In re Fisker and In re Free Lance-Star expanded what constituted "for cause" under Section 363(k) by focusing on the secured creditor's conduct and motives when deciding to restrict credit bidding).

[43] The analogy is not perfect, but is suggestive. In the case of loan to own, it has been bankruptcy courts that have considered factors beyond the usual commercial debt liability and those courts traditionally have equity powers beyond other civil courts. See also *Westbrook,* Equity in Bankruptcy Courts: Public Priorities, 94 Am. Bankr. L.J. 203, 203 (2020) (discussing "the aspects of equity in bankruptcy that relate to societal interests ('public interests') in the confirmation of plans and other decisions made in Chapter 11 cases.")

[44] It might also be argued that the issues presented are "political questions" that are nonjusticiable. *Cf. International Ass'n of Machinists and Aerospace Workers v. OPEC,* 649 F.2d 1354 (9th Cir. 1981) (resolution of an antitrust action by a labor union against the Organization of Petroleum States for a gasoline boycott was a nonjusticiable political question).

[45] If a private creditor made a similar offer on the condition that it receive a telecommunications license from the state debtor, perhaps even a monopoly, should an American court enforce? I don't address that question, but it is interesting to consider that a court might want to know the views of the political departments in such a case.

[46] See *Born/Rutledge,* International Civil Litigation in United States Courts 217–218, 224–225, 226, 231 (6th ed. 2018) [hereinafter Casebook] (citing Tate Letter, *reprinted in* 425 U.S. 682, 711 (1976)). I do not attempt a full discussion of the effect of a waiver of immunity in this short paper but many of the same considerations apply.

state. In the United States, that would mean inviting the State Department to express the view of the government as to the existence of a political issue in the case and whether enforcement is consistent with United States foreign policy.[47]

I write not to conclude with the right answer to these questions but to identify them. The need to start thinking seriously about the political debt phenomenon may be enhanced if the suspicions of some about the Chinese Belt and Road Initiative are confirmed.[48] As a purely hypothetical example, if a Chinese institution were to sue a South Asian or African government on a note or bond in commercial form and seek to seize its assets in the United States, should an American court entertain a claim from the debtor sovereign that the Chinese government was acting to achieve some political goal and not merely to collect the debt? If so, might a US court decide that the political purpose made the enforcement noncommercial and thus nonjusticiable?

Or is that very question a political one, suggesting a need for State Department advice (a "Cleveland Letter"?) as to its political purpose vel non?

Perhaps a better rule would be that the plausible allegation of such a purpose should necessarily be referred to the political departments for advice. If the response is that a political question exists, then the Paris Club would put the loan on its agenda, which is arguably just where it should be. One might imagine that political concerns were a subtext of the opinion in Ukraine-Russia and that judges might conclude such questions would be better considered if they were explicit and legitimated. At a minimum, these issues require serious and timely discussion in the United States by the courts, by the State Department, and by Congress. They may commend themselves to our English friends as well.[49]

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[47] Prior to the FSIA, the courts appeared to accept these advices as binding. *Id*. at 217. Nonetheless, there was always some ambiguity as to the extent to which the courts took the executive's position as binding or merely strongly persuasive.

[48] See *Wolff,* Legal Responses to China's "Belt and Road" Initiative: Necessary, Possible or Pointless Exercise?, 29 Transnat'l L. Contemp. Probs. 249, 258 (2020); *Norton,* China's Belt and Road Initiative: Challenges for Arbitration in Asia, 13 U.Pa. Asian L. Rev. 79 (2018); *Carrai,* China's Malleable Sovereignty Along the Belt and Road Initiative: The Case of the 99-Year Chinese Lease *of Hambantota Port,* 51 N.Y.U. J. Int'l l & Pol. 1061, 1068 (2019) (citing *Khurana,* China's 'String of Pearls' in the Indian Ocean and Its Security Implications, 32 Strategic Analysis 1 (2008)). A recent empirical study of 100 loan contracts finds a number of clauses that may be troubling. *Gelpern/Horn/Morris/Parks/Trebesch,* How China Lends: A Rare Look into 100 Debt Contracts with Foreign Governments. Peterson Institute for International Economics, Kiel Institute for the World Economy, Center for Global Development, & AidData at William & Mary (2021), https://www.aiddata.org/publications/how-china-lends [hereinafter China Lends]. Among other unusual clauses the study notes: "[C]ancellation, acceleration, and stabilization clauses in Chinese contracts potentially allow the lenders to influence debtors' domestic and foreign policies." China Lends at 2. See also *Brahma Chellaney,* China's debt-trap diplomacy, The Hill (May 2, 2021), https://thehill.com/opinion/international/551337-chinas-debt-trap-diplomacy (expressing concern about the political aims of China's government).

[49] Once again, *Paulus* makes the larger point: "The most noble task of the law has always been, still is and will presumably be forever to protect the weak. Law will, at the same time, always be used by the insightful as a means to win the power game. Therefore, this very law has to react and to outbalance such unilateral power usurpation. When and if we are back at the stage where we had been in 450 BC it would merit this time to look at the much more human model of power distribution in the near east jurisdictions." *Paulus, supra* note 2 at n. 40. He applies this point especially in the case of sovereign debtors. *Id*.