From Knowledge to Wisdom

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HUMAN RIGHTS AS A SUBJECT OF WORLD POLITICS

Aneta Stojanovska-Stefanova[*] *& Drasko Atanasoski*[**] *& Zoran Chachorovski*[***]

The aspiration towards protection of the human dignity of all human beings is central to the concept of human rights. This concept in its center positions man and common universal system of values dedicated to the sanctity of life and provides a framework for building human rights system protected by internationally accepted norms and standards. The existence of international norms, by itself, does not give an authority to the United Nations to explore how the countries implement them or not. Human rights treaties, together with the Universal Declaration, represent an authoritative exposition of the norms of the international human rights, standards of conduct towards which all countries should aim. These three documents, which collectively are called International Acts on Human Rights, represent a summarized presentation of the minimum social and political guarantees recognized by the international community as necessary for a decent life in the modern world.

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INTRODUCTION

Countries, as the main players on the international level, in mutual relations are often seen as sovereign, which means they are not vulnerable to any higher political authority. The duty which corresponds to the right of sovereignty is non-interventional, an obligation not to interfere in actions which essentially fall within the domestic jurisdiction of sovereign countries. Human rights, which usually imply the treatment of its own citizens by the country in its own territory, traditionally belong to the domain of domestic jurisdiction.

The general impression is that before the Second World War not much about human rights has been discussed. The political history of that period witnesses about countless violations of human rights and racial discrimination. Also in the modern world, unfortunately, millions of people are born and died without knowing that they have human rights, and therefore are not able to turn to their governments in order to fulfill their obligations. But, in the democratic world rightfully is concluded that imposed ignorance is also a violation of the human rights.

Hence, the effective protection and promotion of human rights has become a central pillar of the modern foreign policy of the countries.

The aspiration to protect the human dignity of all human beings is central to the concept of the human rights. This concept at the center leaves the man and the common universal system of values dedicated to the sanctity of life and provides a framework for building a human rights system protected by internationally accepted norms and standards.

Education on the other side, in the field of human rights, through the transfer of knowledge, raises awareness of the protection of human security and dignity around the world.

The frame of human rights, if we know it and appeal to it, is finally a guideline for tracing our future together. It represents critically important support system and a powerful tool for active action against the current social disintegration, poverty and intolerance that are spread around world.

I. HUMAN RIGHTS AS OBJECTS OF WORLD POLITICS

The existence of international norms, by itself, does not give authority to the United Nations to explore how the countries implement or not implement them.

The Acts for Human Rights, along with the Universal Declaration, represent an authoritative exhibiting of the norms of international human rights, standards of behavior in which all countries should strive for. These

three documents, which collectively are called International acts of human rights, represent the summarized exhibition of the minimum social and political guarantees recognized by the international community as necessary for a decent life in the modern world.[1] They are summarized in Table 1.

Table 1 Internationally Approved Human Rights.

The International Declaration of Human Rights recognizes the rights of:
• Equality of rights without discrimination(D1, D2, E2, E3, C2, C3[2])
• Life (D3, C6)
• Freedom and security of the individual (D3, C9)
• Protection from slavery (D4, C8)
• Protection from torture and cruel inhuman punishment (D5, C7)
• Human treatment by the law (D6, C16)
• Equal protection of the law (D7, C14, C26)
• Access to legal means during violation of the rights (D8, C2)
• Protection against arbitrary arrest and detention (D9, C9)
• Interrogation by an independent and impartial court (D10, C14)
• Presuming innocence (D11, C15)
• Protection against *ex post facto* laws (D11, C15)
• Protection of privacy, family and home (D12, C17)
• Freedom of movement and of residence (D13, C12)
• Seeking asylum from persecution (D14)
• Nationality (D15)
• Marriage and family creation (D16, E10, C23)
• Owning a property (D17)
• Freedom of thought, conscience and religion (D18, C18)
• Freedom of opinion, expression and the press (D19, C19)
• Freedom of assemblage and of association (D20, C21, C22)
• Political participation (D21, C25)
• Social security (D22, E9)
• Working under favorable conditions (D23, E6, E7)
• Free Unions (D23, E8, C22)
• Rest and recreation (D24. E7)
• Special protection for children (D25, E10, C24)
• Education (D 26, E13, E14)
• Participation in cultural life (D27, E15)
• Social and international order necessary for the accomplishing of rights (D28)
• Self-determination (E1, C1)
• Human treatment in detention or prison (C10)

[1] JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS 17 (MI-AN, Skopje 2004).

[2] Markings are: D = Universal Declaration of Human Rights, E = International Covenant on Economic, Social and Cultural Rights, C = International Covenant on Civil and Political Rights.

(Table 1 continued)

The International Declaration of Human Rights recognizes the rights of:
• Protection from debt prison (C11)
• Protection from arbitrary expulsion of foreigners (C13)
• Protection from advocacy of racial and religious hatred (C20)
• Protection of minority cultures (C27)

The comprehensiveness of the acts, means that the further significant progress in international action on behalf of the human rights will primarily lay in implementing (or monitoring the implementation) of these standards—an area in which the United Nations showed, and still shows much smaller success. They should be emphasized strict structural constraints imposed by the United Nations (UN). In fact, they are an intergovernmental organization established October 25, 1945 in San Francisco with the UN Charter, which represents an agreement between sovereign countries. Its members are sovereign countries. Delegates at the United Nations represent countries, and not the international community, let alone individuals whose rights are violated. As for other intergovernmental organizations, the UN has only those powers that the Countries—which also are the main damagers of the human rights—they grant them. Thus, perhaps more than the limits of the power to monitor the human rights, surprises the fact that the UN in general have received even this limited power.[3] Countries have a duty to respect, protect and fulfill human rights. In many cases, implementation means that the countries, its authorities should respect the accepted rights, for example to respect the right to privacy or freedom of expression. This particularly applies to civil and political rights, while to economic, social and cultural rights its implementation means a positive action by the countries in a way to fulfill them, regarding the need to fulfill or provide certain services like education and health and to provide certain minimum standards. In this context, it is especially important to take into consideration the capacity of a given country. The duty to protect requires the country to prevent violence and other human rights violations among the people on its territory. According to this, human rights also have a "horizontal dimension", which has become increasingly important in the era of globalization, raising the question of social responsibility of international corporations. Another trend of development is the growing emphasis on the prevention of the human rights abuse by structural measures, respectively through national institutions or by including the dimension of the human rights in the operations of peacekeeping.

[3] JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS 20 (MI-AN, Skopje 2004).

Prevention is also a priority and access of human security to human rights.[4]

However, generally accepted is the conclusion that non-governmental human rights organizations, played an important role in the enactment of international concern for human rights. Lobbying exactly the non-governmental sector in the world, helped the language of the human rights to join the United Nations Charter. Although civil society organizations do not have the right to register the violation of human rights and in that way to become the position of protector in every sense of the word, however, they have the choice of a significant place in the overall protection of rights.[5]

II. SOURCE OF HUMAN RIGHTS

Human nature which is the source of the human rights is based on the moral understanding of human possibilities. It indicates what human beings can become, not what they have been historically or "are yet" in some scientific definable sense. Human rights are based on the understanding of life as dignified and that "by nature" is convenient for human beings. If the rights provided along with the territory for human nature which stays behind them are implemented and put into effect, they should help in creating the imaginary personality type, the way a person would be worthy of such a life. The effective implementation of the human rights, on that way resembles a moral self-satisfed prophecy. Most synthetically said, the human rights are a set of principles and norms created upon the recognition of human dignity and differences that aim securing respect for that dignity in two dimensions —"man-man" and "man-society", and the goal is to develop them. They are universal, inalienable, indivisible and absolute, and their development is divided into generations of basic civil, political, economic, social, cultural and environmental rights.[6]

Unfortunately, there is no philosophical theory of human nature which is widely accepted. Although the consensus is not a measure of truth, without any consensus every special theory and every action that is based upon it, it is vulnerable to attacks. The problem becomes even more difficult when it would be seen that there are many theories of morality and theories

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[4] UNDERSTANDING THE HUMAN RIGHTS 34 (the Macedonian Information Center in Cooperation with the Directorate for Public Diplomacy, Ministry of Foreign Affairs of Macedonia, Printing House Europe 92, Kocani 2008).

[5] Ananiev Jovan, *The Civil Sector as an Initiator and Observer in the Protection of Human Rights*, MANUAL CIVIC PRACTICES 49 (Macedonian Center for International Cooperation, Printing House Grafohartija Skopje 2004).

[6] Ananiev Jovan, *The Civil Sector as an Initiator and Observer in the Protection of Human Rights*, MANUAL CIVIC PRACTICES 45 (Macedonian Center for International Cooperation, Printing House Grafohartija Skopje 2004).

of human nature behind them, are in denial to human rights.

For example, Marxism explains moral beliefs with class structure and struggle, which are determined by funds and method of production. Radical behaviorists see the human person as a result of submission. In both cases "human nature" is the result of historical processes that shape human beings according to socially prescribed patterns, and is not reflective of the inherent essence or potential. For followers of both theories, speaking on equal and inalienable rights for all people just because they are human beings is useless. Utilitarianism, that achieved its classic formulation in the works of Jeremy Bentham and John Stuart Mill in the first half of the nineteenth century, is also in the "hassle" of human rights. Utilitarianists believe that the moral quality of an act is a function of its good or bad consequences (usefulness). Good and bad, consequently, are a job of satisfaction and pain (which are usually understood in subtle and broad sense). The principle of utility, or what Bentham calls it, the principle of greatest happiness, requires from us to act, to make the maximum balance of pleasure over pain. The moral and political theories that highlight the differences between communities are also likely to be incompatible with the idea of human rights. Ancient Hellenes considered themselves to be inherently superior to the "barbarians" (non-Hellenes), who have not been followed with treatment like the Hellenes.[7]

But still, the same act has many different basis for justifying the human rights. Human rights were often considered as given by God. Alan Gewirth advocated that we have human rights to those things that are necessary to act as a moral force.[8] In my own work, I tried to give my views on human rights as a social and political guarantors necessary to protect the individuals from the usual threats to human dignity which represents the modern country and modern markets.[9]

III. HUMAN RIGHTS AND THE SOCIETY OF COUNTRIES

Once we have overcome or at least got rid of some of the more pressing philosophical questions, we can now look at the place of human rights in the theory of international relations. The country as a subject of international law in the broadest sense of the word is defined by its four fundamental features:

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[7] JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS 30 (MI-AN, Skopje 2004).
[8] ALAN GEWIRTH, HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATION (Chicago: University of Chicago Press 1984).
[9] JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE (Chapters1-3, Ithaca: Cornell University Press 1989).

- Population
- Territory
- Power and
- Sovereignty

The sum of all citizens who are living within a certain territory, separated from other territories, which are subordinate to the government and have an established relationship with the country through legal attachment—citizenship, is called population. The territory is an area separated from other territories with borders, where is living a certain population and over that population there is also a government. Country borders are endpoints to where the sovereignty of one country lies. Power within one country regulates the relations in the country and the character of its international positions. The highest authority, which does not recognize any other form of higher power, is sovereignty.[10]

The characteristics of the modern country, the way we know it today, was shaped by Peace of Westphalia,[11] under which the country constitute the three key features, territory, population and sovereignty, respectively absolute power to rule over them.[12]

The modern international system dates back, a little arbitrarily, in 1648, when the Peace of Westphalia ended the thirty years of war. But as we have seen, human rights are part of international relations scarcely the last fifty years. The absence of human rights in modern international relations, the first three centuries of their existence is due directly to an international order based on sovereign territorial countries.[13] To be sovereign means not to be subjected to any higher power. In early modern Europe, sovereignty was a personal attribute of the rulers. For example, Thomas Hobbes wrote about ‘‘princes and others with sovereign power’’. In other periods and places, such as in medieval Europe, no (earthly) power was considered as sovereign. In modern international relations, sovereignty is often seen as an attribute of territorial countries.[14] Sovereignty means supreme and independent authority over a territory and its population. This interpretation, which is part of a broader definition of what a country is, plays a huge role in every

[10] WILLIAMS, GOLDSTEIN & SCHFRITZ, CLASSIC READINGS OF INTERNATIONAL RELATIONS 82 (Belmond, California: Wadsworth Publishing Company).
[11] Peace of Westphalia, *Encyclopedia "Britannica"*, www.britannica.com.
[12] The Crisis of the Sovereign State and the "Privatization" of Defense and Foreign Affairs, Heritage Foundation, www.heritage.org.
[13] JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS 34 (MI-AN, Skopje 2004).
[14] Here it is emphasized the legal and political superiority of the state over other actors. In the modern world, usually it is understood that the internal sovereignty lies of the country which acts on behalf and in the interest of the people: "National sovereignty".

aspect of international relations and international law because it means that no one else, referring primarily to the other country, has the right to prescribe or implement laws the territory of a sovereign country. Thus, the right to use force in order to enforce the laws, lies only in the hands of the holder of power, whether it be the Government, the President or shared sovereignty between the two institutions. Therefore, once a country acquires sovereignty and therefore it is recognized by other countries, they recognize its authority over a territory and a population and give up the opportunity to interfere in the internal affairs of the country which have already been validate.

In the countries, sovereignty can generally be divided into:

- Internal and
- External.

Internal sovereignty is determined by the country's agency with the authority of exercising the power, while external sovereignty reflects the role of the country as an individual in the international community and refers to the country as the bearer of rights and obligations in relation to other countries in the international law.

Considering the importance of the term sovereignty is clear the importance and role of the decision whether a country will be internationally recognized or not, and the need for each territory and people who aspire to become a country to provide conditions for acquiring sovereignty.

A. Five Ways of Gaining Sovereignty

Sovereignty is acquired generally in five ways by which today's international law recognizes four types.

The firstway is through settlement of "no man's land" or land on which no one else had claimed the sovereignty, or if she was under someone's possession and the previous ruler gave up the rights to the land thus removing the obstacles a new or another country to realize its sovereignty over that territory.

The second way relates to the first and envisages acquisition of sovereignty by practicing it for a lengthy period on the territory without another country to challenge that right.

Secession is **the third way** through which can be gained sovereignty, but it must be conducted with the consent of the country to which the new breakaway territory previously belonged. So, on that way the transfer of rights is gotten from one another ruler, usually by agreement, and the modern trends and emergence of the idea of self-determination tell the new

sovereign to obtain the consent of the population on whose territory he requires sovereignty before he can accomplish the same. Such a case is the unification of East and West Germany, and so the four countries that had invaded her, the US, France, Britain and the Soviet Union agreed to the implementation of that process and have given up the right of sovereignty over its part of the German territory as well as people responded positively.

The fourth way, out of the five methods, today is not considered a legal way of gaining sovereignty because it is based on conquest which has been declared illegal by the United Nations and as such stays stated in its charter, which was signed and ratified by each of country members.

The fifth way and last type of passing the right for sovereignty over a particular territory is as far she is formed up as an additional part of an existing territory by way of natural growth as deposition of sediments or volcanic activity.

The choice of sovereignty as editorial principle is conditioned by the fact that the area of international relations is chaotic political arena without formal hierarchical power relations and revocation of act. But anarchy, the absence of hierarchical political governance, does not mean necessarily the rule of chaos, lack of order. Despite the international law, countries regulate their mutual interaction through institutionalized practices such as diplomacy, the balance of power and the recognition to spheres of influence. Although there is no international government, there is a social order which is managed by a set of rules. International relations are taking place within the anarchic society of the countries.[15] International society in the eighteenth, nineteenth and early twentieth centuries carefully respected the sovereign prerogative of each country to treat its own citizens as it deems it necessary. Today, there is already a highly developed system of International Human Rights. Countries have become louder in expressing and sometimes even act on their interests in relation to human rights. This certainly reflects an enhanced and transformed understanding of the place of the individual in international affairs.

IV. REALIZATION OF GOVERNMENT AND HUMAN RIGHTS

Human rights are only one part of the foreign policy. Theorists conclude that even well-meaning and well-considered policies on international human rights face enormous national and international barriers. In some circumstances, other political objectives can choose or justify cooperation with repressive regimes. But in practice, external constraints

[15] More at: HEDLEY BULL, THE ANARCHICAL SOCIETY (New York: Columbia University Press 1977).

and competing interests often served as an excuse for inaction, and not as a basis for reasonable political considerations. In political theory, there is no unanimity about the definition of the term politics.

Politics can broadly be defined as the achievement of certain ideas essential to a community. It is, above all, the essential idea for the common good, justice, and general utility. As an individual plan man tends more to perfect their moral qualities, such as the plan of living in a community, he tends to justice and the common good, i.e., towards the improvement of their community.[16]

> By definition, foreign politics should be a part, a substantial part, of the politics that any country or sovereign political entity implements. We name these politics as foreign politics, but other people call it: international politics, world politics, global politics, international relations, and comparative politics. [17]
>
> Among several approaches, even more so concepts in the study of foreign politics, geographic politics as already mentioned, is certainly unavoidable. It has a long history and has produced the riches of academic resources and conceptual reviews. Some authors associate the origin of the analysis of Aristotle's spatial factors that affect the political forms of ancient Greek cities. Actually, many social thinkers since ancient times to today, who think about politics, had and still have on their tables maps alongside their notebooks and pencils.[18]
>
> Until the 17th century, the responsibility for diplomacy amongst European countries has routinely been awarded various bureaucracies ("civil servants") on a geographic basis. Some of these functions have been responsible for certain homework (Hamilton and Langhorne, 1995, 72-73).[19]
>
> Machiavelli writes almost exclusively about the mechanics of power, the means of assistance that countries can become strong, the politics with which countries can become strong, the politics with which they can expand their power, and errors leading to their irreversible destruction. The political and military measures are practically the only objects of his interest, and almost completely separated them from the religious, moral, or social considerations, except as a means for achieving political goals. The purpose of politics is to preserve and increase the political power, the measure with which he appreciates is success in achieving this goal.[20]

We have already said that "every ruler should have good foundations, because if not, they will certainly fail." [21] International relations are organized around the legal fiction that countries have exclusive jurisdiction

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[16] ENCYCLOPEDIA OF POLITICAL CULTURE 873 (Modern administration, Belgrade 1993).
[17] MIRCEV DIMITAR,THE MACEDONIAN FOREIGN POLICY 1991-2006 9 (Skopje, Az-buki 2006).
[18] *Ibid*, at 11.
[19] GEOFF R.BERRIDGE, DIPLOMACY THEORY AND PRACTICE 5 (Faculty of Political Science, University of Zagreb 2004).
[20] MALESKI D., INTERNATIONAL POLITICS 332—333 (UniversitySt. Cyril and Methodius Skopje 2000).
[21] NICCOLO MACHIAVELLI, THE PRINCE 60 (Gjurgja Skopje 2009).

over its territory, its population and resources, and events that take place on it. The practice, as might be expected, is behind the idea, as is usually the case with political principles. However, the basic norms, rules, and practices of contemporary international relations are based on the country's sovereignty and formal equality of (sovereign) countries. Non-intervention is a duty with varies with the right to sovereignty. Other countries are obliged not to interfere in the international actions of a sovereign country. [22]

Hans Morgenthau, representative of rationalists in international politics, wrote that international politics and politics in general is a battle for power. Of course, if one starts from the idea that physical survival is of primary importance for every individual, then you should come to conclusion that power is of primary importance to countries as subjects of international law, because the national security is of primary importance. Through the prism of power, the country promotes her national interest, which then tries to accomplish within the world politics.

In the book, "About God's Country", Saint Augustine asserts that "human history is a sine wave of good and bad events, from devastating wars that are trying to provide short-term peace, whose ultimate meaning is not understandable to man, but determined by God."[23]

In contrast, representatives of the internationalist theory in international politics advocate for relations between countries governed by the norms and behavior that previously voluntarily agreed, and that would be applicable in war and peace.

The message of Immanuel Kant that "the country of peace must be established", and that it can be implemented through a "free federation" of countries close to the ideas of collective security and international organization, characterized by institutionalists of our time.[24]

The principle of setting international disputes by peaceful means obligates all countries and those that are members of the United Nations and those that are not, all international disputes to be resolved through peaceful measures and thus not threaten international peace and security.[25]

During the debate of the declaration of non-use of force in 1987, only the United States and Australia explicitly advocated for anticipatory self-defense; other countries were able to keep their positions by simply omitting any provision for self-defense, except the general formula that "Countries

[22] JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS 34 (MI-AN, Skopje 2004).
[23] D. MILLER, BLACKWELL ENCYCLOPEDIA OF POLITICAL THOUGHT 9 (Publishing House MI-AN 2002).
[24] MALESKI D., INTERNATIONAL POLITICS 37 (University St. Cyril and Methodius Skopje 2000).
[25] SIMIK MIROSLAV, MODERN INTERNATIONAL RELATIONS AND WAR 80 (Military Publishing and News Center 1988).

have the natural right to the individual and collective self-defense if an armed attack, as provided in the UN Charter."[26]

Swiss jurist, Emmerich de Vatel, one of the first intellectual forerunners of modern internationalism in the work "Law of Nations", said "Justice is the foundation of every society and it is very important to find a suitable application in relations between nations than in relationships between individuals."[27]

According to the theorist Carl Schmitt again, the essence of political action lies in distinguishing friend-enemy. That kind of differentiation according to Schmidt gives political sense to human activities and motives. The totality of the policy contained in every area of human activity (religion, economy, morality, etc.) is subject to such a distinction, i.e. the division of friends and enemies. Every religious, moral, economic, ethnic, or other prejudice turns into political opposition, when it becomes strong enough to group people in friends and enemies.[28]

World politics, as a starting point, has the reality of the international community with established relationships, institutions and an active role of many partners in determining the guidelines of this policy, through the instruments of foreign policy, negotiations, joint ventures, and influence. [29]

International regime is a set of principles, norms, rules, and decision-making procedures adopted by the countries (and other international actors) as binding within a given area.[30]

V. POLICY FOR INTERNATIONAL HUMAN RIGHTS IN GLOBAL SOCIETY

After several decades of successfully setting standards, the main challenge for human rights became the implementation by the countries, or the implementation of commitments undertaken. Being developed are several new methods to enhance the enjoyment of human rights at the local, national, and global level. Among them is a more active approach of the international community, which now includes human rights officers in international missions and thus institutionalizes the consideration of human rights issues on the ground as, which is expected to have a significant

[26] CHRISTINA GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 10 (Foundation for International Law, Prosvetnodelo AD-Skopje 2009).
[27] WILLIAMS, GOLDSTEIN AND SCHFRITZ, CLASSIC READINGS OF INTERNATIONAL RELATIONS 7 (Wadsworth Publishing Company, Belmond California 1994).
[28] SCHMIT CARL, DER BEGRIFF DES POLITISCHEN 37 (Duncker und Humbolt, Berlin 1979).
[29] MIRCEV DIMITAR, THE MACEDONIAN FOREIGN POLICY 1991-2006 13 (Skopje, Az-buki 2006).
[30] Stephen D. Krasner, *Structural Causes on Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL REGIMES 2 (Krasnered. Ithaca: Cornell University press 1982).

preventive effect. The reform of the Human Rights Council, by replacing the Commission for Human Rights with a Human Rights Council should result in significant strengthening of human rights institutions.

Respect for human rights is also strengthened at the local and national level through building the capacity of human rights in local institutions or through the cities of Human Rights and the establishment of national institutions for the promotion and monitoring of human rights, in which NGOs play a key role as representatives of civil society. There is still a need to establish standards in several areas of concern as can be seen from the ongoing work of the United Nations on drafting conventions for people with disabilities, conventions for the protection from enforced disappearances, facultative protocol which allows appeals in terms of economic, social and cultural rights, legal instruments which deal with human rights issues related to biotechnology and genetic engineering, human organ trade, cultural diversity, etc.

At the same time, existing human rights can become more visible by focusing on "fundamental rights", as proven by the approach of the International Labor Organization. New challenges can also be seen in the need of dedicating more attention to the interconnectedness of human rights and humanitarian law, just like the "fundamental standards of humanity". The same applies to the relationship between human rights and refugee law, which exists in both terms of prevention of refugee problems and the plan of returning refugees. In both cases, the human rights situation in the country of origin confers a decisive impact.[31]

CONCLUSIONS

In determining the nature and validity of this article, the inspiration for the theoretical overview can be found in the definition of human rights, but also in the current country of protection and their implementation by the countries.

Behind the current country of human rights on an international level, stands a long process of acquiring certain rights, their affirmation and promotion of their practice. In international relations, the central role is given to the individual, and thus human rights play an important role in international relations.

Theorists speak about three groups of developmental stages of human

[31] UNDERSTANDING THE HUMAN RIGHTS 49 (the Macedonian Information Center in cooperation with the Directorate for Public Diplomacy, Ministry of Foreign Affairs of Macedonia, Printing House Europe 92, Kocani 2008).

rights. The first group includes those rights that should allow the release of the man from the pressure of the country, i.e. rights aimed at freedom, and they include civil and political rights. As such, they should allow a person active engagement in the management of the country and its control. Among civil and political rights include: the right to life, liberty and security of person, freedom of thought and expression, the right to a fair trial, the right to effective remedies, and freedom of association. Some of these rights can also be restricted, for example, in the case of an emergency or crisis in the country. The second group includes: economic, social, and cultural rights, i.e. rights aimed at protecting the man. They enable the existence of man, adequate standard of living, employment, social, and health care and so on. The third group of rights is called collective rights that are still called solidarity, because their realization requires cooperation on the international level.

In order for all three groups of rights to implement, promote, and protect, it is extremely important that the country, as a subject of international law, find ways and models on how to successfully support individuals in finding the way to their accomplishments.

THE UTILITY OF INTERNATIONAL INVESTMENT ARBITRATION IN SOVEREIGN DEBT RESTRUCTURING

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Adjudicating claims arising from sovereign debt default in the absence of an acceptable international legal framework on the subject has raised fundamental questions regarding the appropriateness of employing investor-state dispute settlement mechanism under international investment law to address such claims. Tribunals have been polarized and scholars have expressed divergent views. Debtors and creditors are in a dilemma. Using some ICSID awards, this article examines the contending perspectives on the use of investment arbitration in sovereign debt restructuring claims. The article argues that investment arbitration and sovereign debt restructuring ought not to be in a collision course if we reflect on the significance of parties' consent in general international law. It argues that accepting international investment arbitration as a method of sovereign debt crises resolution will create the needed balance, certainty and ultimately enhance creditor confidence and debt sustainability for debtor countries. However, for this to succeed the observed lapses in the current ISDS mechanism must be addressed.

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INTRODUCTION

The central question on the use of investment treaty arbitration in adjudicating claims arising from sovereign debt default was lucidly raised by Prof. George Abi Saab in his dissenting opinion in the famous Abaclat's case in the following words: "Do ICSID tribunals have jurisdiction over sovereigndebt instruments issued internationally, expressed in foreign currency and payable abroad, governed by various external laws and subject to the jurisdiction of various external courts, and traded as dematerialised security entitlements in global capital markets?" [1] This question adds precision to an increasingly unsettled area of international adjudication. The question also reflects the growing controversies in this area. Indeed, over the years the utility of international investment arbitration in Sovereign Debt Restructuring (SDR) has generated a lot of scholarly discourse and sharply polarized academic opinions on the subject.[2] But despite initial skepticism, international arbitration is gradually becoming an option for addressing claims arising from sovereign debt defaults.[3] This is understandable because of the absence of a legal framework for SDR at the international level[4] and

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[1] *Abaclat and Others v. The Argentine Republic*, Decision on Jurisdiction and Admissibility, Dissenting Opinion of Professor Georges Abi-Saab, at para 269, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC5313_En&caseId=C95 (last visited November 12, 2016) (hereafter "Abaclat Dissenting Opinion").

[2] *See* for instance Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 AJIL 711—759 (2007) (hereafter Waibel, Opening Pandora's Box); O. Sandrock, *The Case for More Arbitration when Sovereign Debt is to be Restructured: Greece as an Example*, 23 AMERICAN REVIEW OF INTL ARBITRATION 507 (2012) (hereafter Sandrock, More Arbitration); E. Norton, *International Investment Arbitration and the European Debt Crisis*, 13 CHICAGO JOURNAL OF INTERNATIONAL LAW 291 (2012), http://chicagounbound.uchicago.edu/cjil/vol13/iss1/11 (accessed 13 August 2016) (hereafter "Norton, Intl Arbitration and the European Debt Crisis"); K. P. Gallagher, *Financial Crises and International Investment Agreements: The Case of Sovereign Debt Restructuring*, 3(3) GLOBAL POLICY 362 (2012) (hereafter Gallagher, Case of Sovereign Debt Restructuring); R. D. Thrasher & K. P. Gallagher, *Mission Creep: The Emerging Role of International Investment Agreements in Sovereign Debt Restructuring*, BOSTON UNIVERSITY CENTER FOR FINANCE, LAW & POLICY WORKING PAPER 003 2/2016 (2016), http//www.bu.edu/bucflp (last visited accessed October 20, 2016) (hereafter Thrasher & Gallagher, Mission Creep); J. Ostřanský, *Sovereign Default Disputes in Investment Treaty Arbitration: Jurisdictional Considerations and Policy Implications*, 3(1) GROJIL 27—58 (2015), https://groningenjil.files.wordpress.com/2015/05/grojil_vol3-issue1_ostransky_.pdf (last visited accessed October 12, 2016) (hereafter Ostřanský, Sovereign Default Disputes in Arbitration); M. D. Nolan, et al. *Leviathan on Life Support: Restructuring Sovereign Debt and International Investment Protection after Abaclat* 485, http://ssrn.com/abstract=2248096 (accessed October 12, 2016) (hereafter M. D. Nolan, et al. Leviathan on Life Support).

[3] M. Waibel, *Opening Pandora's Box* (n 2) 711.

[4] UNCTAD, *Sovereign Debt Workout: Going Forward, Roadmap and Guide*, UNCTAD2015 12—15 (hereafter UNCTAD, *Sovereign Debt Workout Guide*).

the fact that international investment agreements (IIAs) typically make provisions for investment treaty arbitration and other substantive investment protections.[5] Investors have been availing themselves of these investment protections.[6] However, extending these guarantees to the realm of sovereign debt default is not without challenges partly because of the novelty of the claims as well as the uncertainty, disparity and lack of uniformity characterizing the current legal regime on SDR.[7] Thus, while some scholars consider investor-state dispute settlement (ISDS) through arbitration in disputes arising from sovereign debt default and restructuring as an obstacle to effective SDR by debtor countries,[8] others maintain that investment treaty arbitration offers a viable and fairly balanced option for both sovereign debtors and creditors.[9] Recent incidents of sovereign default have shown that an ISDS mechanism can offer thousands of creditors the rare opportunity of dragging sovereign debtors before arbitral tribunals in order to ensure the enforcement of their claims using the substantive guarantees provided under Bilateral Investment Treaties (BITs) between their home state and the sovereign debtors. Before the advent of investment treaty arbitration, enforcement of sovereign debt took a variety of forms including intervention by creditors' States often through the use of force.[10] BITs seem to have changed the dynamics by providing an alternative route through investment treaty arbitration.[11] In addition, countries are cautiously

[5] M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 276—362 (3rd ed., Cambridge University Press 2010).
[6] Gus Van Harten, *Private Authority and Transnational Governance: The Contours of the International System of Investor Protection*, 12(4) REVIEW OF INTERNATIONAL POLITICAL ECONOMY 600, 602 (2005).
[7] UNCTAD, *Sovereign Debt Workout Guide*, (n 4) 12—15. *See* also L. Brahm, *Legitimacy in Global Governance of Sovereign Default: The Role of International Investment Agreements*, PIPE Working Paper No. 16 Centre for International Political Economy, Berlin (2013) (hereafter "Brahm, Legitimacy in Global Governance of Sovereign Default").
[8] Waibel, *Opening Pandora's Box* (n 2); K. P. Gallagher, *The New Vulture Culture: Sovereign Debt Restructuring and Trade and Investment Treaties*, IDEAs Working Paper No 02/2011, IDEAs New Delhi (2011), http://unctad.org/en/Docs/webdiaepcb2011d3_en.pdf; Gallagher, *Case of Sovereign Debt Restructuring* (n 2); Thrasher & Gallagher, *Mission Creep* (n 2); Ostřanský, *Sovereign Default Disputes in Arbitration* (n 2)
[9] Norton, *Intl Arbitration and the European Debt Crisis* (n 2); MD Nolan and others, *Leviathan on Life Support* (n 2).
[10] WMC Weidemaier, *Contracting for State Intervention: the Origins of Sovereign Debt Arbitration*, 73 LAW AND CONTEMPORARY PROBLEMS 335 (2010).
[11] UNCTAD, *Recent Developments in Investor-State Dispute Settlement* IIA Issues Note (2013), http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf (last visited Dec. 21, 2016) (hereafter UNCTAD, ISDS 2013); UNCTAD, Recent Trends in IIAs and ISDS, IIA Issue Note, UN, New York and Geneva, 2 (2015), available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf (last visited Dec. 21, 2016) (hereafter UNCTAD, ISDS 2015).

remodeling their BITs with some ousting sovereign debt instruments from arbitral jurisdiction[12] while others are removing or downplaying the ISDS provisions in their BITs.[13] Other countries simply denounced their ICSID membership on ideological or other grounds.[14]

This article examines the contending perspectives on the use of investment arbitration in sovereign debt crises through the juris prudence of International Center for the Settlement of Investment Disputes (ICSID). Over the past decade, ICSID tribunals have become the *locus* of this debate with holdout bondholders increasingly using them to seek enforcement of their claims.[15] The ICSID awards also re-echoed the dilemma of creditors in the current regime of SDR. They equally raised fundamental questions regarding the capacity of the international financial system to deal with issues related to sovereign debt default. In other words, they re-ignited the debate and the calls for a global legal framework on SDR.[16]

Against the backdrop of the perspectives of both ICSID tribunals and scholars as well as the recurring sovereign debt crises around the world, this article argues that minimizing sovereign debt crises requires some form of flexibility with a sound theoretical basis and a careful reconnection to the root of *general* international law. The article argues that investment arbitrations and SDR ought not to be in a collision course if we reflect on

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[12] Thrasher & Gallagher (n 2) 17—19. By February 2015, at least 45 countries were revising their model BITs. *See* UNCTAD, ISDS 2015 (n 11) 1.

[13] *See* for instance, the Australia-US Free Trade Agreement (2004). *See* also J. Pohl, K. Mashigo and A. Nohen, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey*, OECD Working Papers on International Investment 2012/02 OECD 11 (2012) (hereafter "Pohl and others ISDS Sample Survey").

[14] For example, Ecuador, Venezuela and Bolivia. *See* IA Vincentelli, *The Uncertain Future of ICSID in Latin America*, 16 LAW & BUS REV AM 409, 410 (2010). There are over 150 signatories to the Convention. For the contracting parties see *List of Contracting States and Other Signatories of the Convention*, ICSID, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home (last visited May 11, 2015).

[15] Prominent among them are: *Abaclat & Others v. The Argentine Republic*, Decision on Jurisdiction and Admissibility (ICSID) ICSID Case NO. ARB/07/5 [4th August, 2011] also reported in 52 ILM 667 (2013), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC5313_En&caseId=C95 (hereafter Abaclat); *Geovanni Alemanni v. Republic of Argentina*, ICSID Case No ARB/07/8 (17th November, 2014), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC5132_En&caseId=C100 (last visited December 12, 2016) (hereafter "*Alemanni v. Argentina*"); *Poštová Banka, A. S. and Istrokapital S. E. v The Hellenic Republic*, ICSID Case No. ARB/13/8, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC5752_En&caseId=C2823 (last visited December 23, 2016) (hereafter "Postova Banka").

[16] In Abaclat, Argentina argued that "opening of ICSID arbitration with regard to sovereign debt restructuring would … go against current efforts to modernize foreign debt restructuring process". *See Abaclat* ILM (2013) 755.

the significance of parties' consent in general international law. A fundamental element missing in this discourse has been the failure to recognize the fact that today, both international investment law and modern sovereign debt scheme largely involve consensual "investor-state" relationships and that the increasing rejection of this reality by some arbitrators and scholars is unhelpful to the overall goal of developing an effective legal framework for SDR. Thus, accepting international investment arbitration as a method of sovereign debt crises resolution will create the needed balance, certainty and ultimately enhance creditor confidence and debt sustainability for debtor countries. However, for this to succeed the observed lapses in the current ISDS mechanism must be addressed.

To articulate the above arguments, the rest of the article is structured as follows: Section I examines the nature of international investment arbitration as well as the nature of sovereign debt, sovereign default and sovereign debt restructuring. Section II shows how international arbitration is gradually being employed to adjudicate over disputes arising from sovereign debt default. Section III reviews the contending positions to see their respective arguments on the issue and to support the need for ISDS in SDR. Section IV advances the argument that with the blessing of parties' consent investment arbitration is suitable for adjudicating disputes arising from SDR. Section V concludes with some suggestions.

I. INVESTMENT ARBITRATION AND ISSUES IN SOVEREIGN DEBT CRISIS

To appreciate the contending views on the use of investment arbitration in disputes arising from SDR, a conceptual foundation is important here.

A. International Investment Arbitration & the ICSID

Since the second half of the 20th century, investor-state dispute settlement has become a central feature of international investment law.[17] ISDS is a mechanism for ordered resolution of investment disputes mostly through invocation of arbitration provisions of bilateral and other investment agreements.[18] In the words of Abbott and others, ISDS "grants investors the right to call for arbitration in the event that they believe that

[17] Advisory Council on Intl Affairs, *International Investment Dispute Settlement: From Ad hoc Arbitration to a Permanent Court* 7 (The Hague, 2015).
[18] R. Abbott and others, *Demystifying Investor-State Dispute Settlement*, ECIPE Occasional Paper No 52 (2014), http://www.ecipe.org/app/uploads/2014/12/OCC52014_1.pdf (last visited November 20, 2016) (hereafter Abbot and others, Demystifying ISDS).

the government has violated such an agreement."[19] It may also include recourse to local courts and alternative disputes resolution (ADR) mechanisms such as mediation and conciliation.[20] Arbitration as a concept involves a determination of disputes by an independent third party other than the court pursuant to the agreement of parties.[21] It is an adversarial process leading to a binding, enforceable award.[22] Parties have crucial role in constituting the tribunal. Therefore, international investment arbitration allows investors' access to a neutral, depoliticized and relatively independent and flexible adjudication forum in the event of a host government's untoward conducts amounting to either an expropriation or anyviolation of a treaty obligation or actionable guarantee under the treaty.[23] Indeed, ISDS is the cornerstone of investment protection as it "serves as a procedural enforcement mechanism for the core substantive provisions" of BITs.[24] The substantive investment guarantees normally come in the form of common investment standards such as the fair and equitable treatment (FET) standard, most favored nation (MFN) and national treatment (NT) standards.[25]

As noted above, prior to the institutionalization of ISDS, foreign investors were at the mercy of their home states.[26] Today however, thousands of BITs enable investors to directly drag their host governments to arbitral tribunals for adjudication thereby eliminating the circuitous diplomatic route with its attendant negatives.[27] Although there are notable variations in the language of the ISDS and the expropriation provisions of these BITs, there seems to be a general consensus about their ultimate objective of creating a level-playing ground for investors vis-à-vis their host governments when a dispute arises.[28] These are perhaps the most important

[19] *Ibid*, at 3.
[20] UNCTAD, Course on Dispute Settlement in International Trade, Investment and Intellectual Property: ICSID (UNCTAD 2003) 7—19.
[21] E. A. Martin, (ed.) OXFORD DICTIONARY OF LAW 5th ed. 31 (OUP, 2003).
[22] C. Schreuer, International Center for the Settlement of Investment Disputes (ICSID) para 23, http://www.univie.ac.at/intlaw/wordpress/pdf/100_icsid_epil.pdf (last visited December 21, 2016).
[23] UNCTAD ISDS 2014 (n 11) 25—29. *See* also UNCTAD, *Investment Law, Investment Policy Monitor*, (UNCTAD 2016) http://unctad.org/en/PublicationsLibrary/webdiaepcb2016d5_en.pdf (last visited Dec. 21, 2016).
[24] UNCTAD, Investor-State Disputes: Prevention and Alternatives to Arbitration UNCTAD Series on International Investment Policies for Development, (UNCTAD 2010) at p. xxii.
[25] M. Sornarajah, (n 5) 233—255.
[26] WMC Weidemaier, (n 10) 337—340.
[27] The number of IIAs is growing. As at 2014 for example, there were over 3268 BITs in force. *See* UNCTAD, Recent Trends in IIAs and ISDS, IIA Issue Note, 2 (UNCTAD 2015), http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf (last visited December 22, 2016).
[28] M. Jean-Frédéric & J. Gagné, *What Can Best Explain the Prevalence of Bilateralism in the Investment Regime?*, 36 INTERNATIONAL JOURNAL OF POLITICAL ECONOMY 53—74 (2007).

provisions in modern BITs.[29]

Most BITs specify the conditions for recourse to arbitration as well as the forum for the resolution of the disputes.[30] Although ICSID is one of many arbitral institutions, it is however, at the center of the sovereign debt restructuring debate as revealed by the increasing number of cases being handled by ICSID tribunals. ICSID, as an institution of the World Bank Group (WB), was established under the Washington Convention to primarily provide the institutional framework that will effectively facilitate the settlement of investment disputes between foreign investors and their host governments.[31] Apart from providing an arbitration forum for investors, it enables States to improve their investment climate, attract foreign capital by allaying the fears of investors and avoiding diplomatic tensions or unnecessary international litigations.[32] Not surprisingly, today ICSID is the preferred arbitral institution for aggrieved investors.[33]

The jurisdiction of ICSID tribunals is determined by an "intersection" between the Washington Convention and the investment treaty upon which a complaint is founded.[34] But, as noted above, the jurisdiction of ICSID tribunals over creditors' claims arising from sovereign debt default has remained deeply controversial.[35] As will be discussed in Section III infra, one of the key objectives of the WB in establishing the ICSID was to provide foreign investors a direct access to "an international tribunal in the field of financial and economic disputes with Governments".[36] Disputes arising from sovereign debt defaults should ordinarily be part of "financial and economic disputes with governments". But until the Argentine debt

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[29] An OECD study found that 93% of 1660 BITs studied had ISDS provisions. *See* Pohl and others, ISDS Sample Survey (n 13) 7.

[30] UNCTAD, Course on Dispute Settlement in International Trade, Investment and Intellectual Property: Dispute Settlement ICSID 5—6 (UNCTAD 2003); M. Sornarajah, (n 5) 249—250.

[31] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965 17 UST 1270, 575 UNTS 159 (the Washington Convention).

[32] D. Gaukrodger & K. Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, 2012/03 OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT 10 (2012).

[33] C. Schreuer, ICSID at para 7, http://www.univie.ac.at/intlaw/wordpress/pdf/100_icsid_epil.pdf (last visited November 10, 2016).

[34] Washington Convention (1965) Article 25.

[35] Waibel, (n 2); Norton, Intl Arbitration and the European Debt Crisis (n 2); Thrasher & Gallagher (n 2) 20.

[36] Note by A. Broches Settlement of Disputes between Governments and Private Parties in *History of the ICSID Convention Vol II-1*, (ICSID 2009) 1—2, https://icsid.worldbank.org/en/Documents/resources/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-1.pdf; Y. Krayvoi, *International Centre for Settlement of Investment Disputes (ICSID)* (January 2010) Intergovernmental Organizations—Suppl 37, para27, http://ssrn.com/abstract=1449363 (last visited November 9, 2016).

crisis of 2001, sovereign debtors were rarely brought to ICSID-based arbitration for debt default perhaps because of the uncertainty regarding the nature of investments capable of conferring jurisdiction on ICSID tribunals.[37] Though it did not directly define what is an investment, Article 25 of the Washington Convention provides the jurisdictional base for ICSID arbitration, which is the consent of the parties plus "a legal dispute arising directly out of an investment" between a national of a State party and a State party to the Washington Convention. Whether sovereign debts qualify as "investment" under the Washington Convention for the purpose of conferring jurisdiction on ICSID Tribunals is still debatable point.

B. Sovereign Debts and Default in International Finance

Modern international finance involves the "provision of finance at a financial center by foreign lenders to foreign borrowers largely in a currency which is not the currency of the financial center".[38] Therefore, the problems associated with sovereign debt largely reflect the contextual and multi-jurisdictional complexities that characterize international finance itself. It is important to examine the nature of sovereign debt and default here.

1. Nature and Forms of Sovereign Debts

(1) Sovereign Debt as Contract

It is debatable whether sovereign debt is a form of loan contract.[39] But in so far as there is a lender providing funds to a borrower in need, then sovereign debt may qualify as a form of "loan" contract.[40] The concept of "loan" presupposes the mutuality of minds that characterizes general contracts. [41] Parties freely assume obligations to realize commercial objectives. Loan is however, a unique form of contract because of its inherent character of asymmetrical performance: One party lends and the

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[37] OECD, *International Investment Law: Understanding Concepts and Tracking Innovations* (OECD 2008) 46—75.

[38] R. V. Tennekoon, *The Law and Regulation of International Finance* 2 (Butterworth 1991).

[39] *See* for instance *Fedax N.V. v. Republic of Venezuela* ICSID Case No ARB/96/3 Decision on Objection to Jurisdiction (11 June 1997)(1998) 37 ILM 1378; *Ceskoslovenska Obchodni Banka AS (CSOB) v. The Slovak Republic* ICSID Case No ARB/97/4 Decision on Jurisdiction (24 May 1999); Cf *Postova Banka Decision* (n 15).

[40] *Alpha Projektholding GMBH v. Ukraine* ICSID Case No ARB/07/16 Award (20 October 2010) 273, where the Tribunal observed that it is unaware of any ICSID decision that has held that a loan cannot be an "investment". Cf *Postova Banka Decision* (n 15), paras 335—338.

[41] M Bello, Globalization, Sovereign Debt Crises and the Demise of Sovereignty: Towards a Legal Framework for Sovereign Debt Restructuring (2016) 2 *Bayero Journal of Private & Commercial Law* 42, 43.

other subsequently repays over a period of time.[42] In the words of Aguir "payments are typically contingent only on time".[43] This asymmetrical performance is equally an inherent feature of sovereign debt. But like other forms of contract, effective and efficient legal system, certainty and predictability in terms of enforcement are of fundamental importance in assuring the parties to loan contracts of the desired legal protection.[44] For the creditors, this assurance is critical to the integrity of the agreement itself as it provides them the needed protection against possible default.

Borrowing is a viable financing option for entrepreneurs, corporations, public entities and national and sub-national governments. Indeed, for countries borrowing is generally considered to be good for development purposes.[45]

Therefore, *sovereign debt* is a product of loan contract and consists of the accumulated financial undertakings or the aggregate of all claims against a country as monitored and recognized by countries, international financial institutions and the international financial system in general.[46] It is a "debt issued or guaranteed by the government of a sovereign state".[47] It has certain peculiar features that distinguish it from other forms of borrowing: It is an instrument of monetary policy; it is susceptible to market volatility, internal and external forces and general political risks; and "creditors have much more limited legal resources if a sovereign debtor fails to make a contracted payment".[48] It may not fit the character of a loan under a municipal system but it is submitted that it is a loan nonetheless. The sovereign status of the borrower does not change the character of the transaction although it makes this loan unique and less attractive to lenders.[49]

(2) Forms of Sovereign Debt

Borrowing by governments takes a variety of forms: It could be either *domestic* or *external* depending on the governing laws and sources of such funds. While domestic borrowing by governments is normally regulated through specific legislative instruments without much difficulty, external borrowing presents particularly complex enforcement and multi-jurisdictional

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[42] Lee C. Buchheit, *Law, Ethics, and International Finance*, 70(3) LAW AND CONTEMPORARY PROBLEMS 1—6 (2007).
[43] M. Aguir, Sovereign Debt: Empirical Facts 2—3 (2015).
[44] Lee C. Buchheit (n 42) 2.
[45] R. M. Nelson, *Sovereign Debt in Advanced Economies: Overview and Issues for US Congress*, CONGRESSIONAL RESEARCH SERVICE 2—3 (Washington DC, 2013) (hereafter Nelson, Sovereign Debt in Advanced Economies).
[46] J. BLACK, (ED.) OXFORD DICTIONARY OF ECONOMICS 238 (2nd edn, OUP 2004).
[47] US Das and others, *Restructuring Sovereign Debt: Lessons from Recent History* 4 (2012).
[48] Postova Banka (n 15), paras 318—324.
[49] G. R. Delaume, *Sovereign Immunity and Public Debt*, 23(4) THE INTERNATIONAL LAWYER 811—825 (1989).

issues. *Domestic debt* is denominated in local currency and exclusively controlled by the domestic legal system and therefore is not normally subject to international investment arbitrational though it may be susceptible to adverselegislative measures or other actions of government.[50] On the other hand, "external debt is expressed in some foreign currency, typically payable abroad, governed by some external law and subject to the jurisdiction of externalcourts".[51] Thus, different systems of law are potentially applicable.[52] Conflicts of law and jurisdiction clauses are invariably inserted by the parties to determine the forum and the "proper" (or governing) law.[53]

Furthermore, external debt may come in the form of bilateral official loan between governments or their authorized agencies.[54] Secondly, it could be a debt owed to international financial institutions (IFIs). These two forms of loan are often described as *official loans*.[55] Private investors are not involved. But these forms of borrowing are gradually being de-emphasized due to some concerns of moral hazards and the flexibility of bonds.[56] External debt can also be in the form of a "syndicated bank loan" otherwise called "multi-currency loans" consisting of separate loans made by different banks to the same borrower.[57] In both official and syndicated bank loans there is a sort of direct relationship between the borrower and the lender. This is unlike sovereign bonds as we now examine.

(3) Sovereign Bonds

The commonest but complex form of sovereign financing today is by issuing of sovereign bonds. It enables sovereign borrowers to obtain long-term financing by way of issuing bonds in international capital markets. Bonds are fixed-income securities by which a bondholder extends money to an entity for a defined period of time and at certain interest rates.[58] They are different from domestic bonds.[59] Unlike sovereign bonds, domestic bonds raise little or no conflict of law, enforcement and related jurisdictional problems. Sovereign bonds are issued in a currency different from the

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[50] International Law Association, *State Insolvency: Options for the way Forward* a Revised Report of the Sovereign Insolvency Study Group, presented at the Hague Conference, August, 2010 (hereafter ILA, State Insolvency) 9.
[51] *Ibid*.
[52] RV Tennekon (n 38) 15.
[53] *Ibid*.
[54] ILA, State Insolvency (n 50) 9.
[55] *Ibid.*
[56] S. Ghosal & M. Miller, *Co-Ordination Failure, Moral Hazard and Sovereign Bankruptcy Procedures*, 113(487) THE ECONOMIC JOURNAL 276—304 (2003).
[57] RV Tennekon (n 38) 45.
[58] R. Andritzky, *Government Bonds and Their Investors: What Are the Facts and Do They Matter?*, IMF Working Paper WP/12/158 (2012).
[59] RV Tennekon (n 38) 145. *See* also Abaclat (n 15), para 304.

currency of the place of issue and target international investors from different countries.[60]

It is still debatable whether sovereign bonds are loan contracts.[61] As it will be examined in the next section, the tribunal in Postova Banka's case held that they are not.[62] This is arguable. But unlike the official and syndicated bank loans, sovereign bonds do not create a direct relationship between the borrower and the multitude of bondholders who purchase their securities on the secondary markets. In as much as the bondholder has legitimate expectations and rights as against the sovereign issuer, it is difficult to argue that there is no privity between the parties as held by some arbitral tribunals.[63] Like other investors, bondholders are entitled to a return on their investments in the form of interest. Apart from the contextual variations and the peculiar circumstances of the cases to be considered later, it may be argued that excluding bondholders from the meaning of "investors" seems oblivious of the core objectives of sovereign bonds.

From the above, sovereign bonds are species of international bonds issued in capital markets, traded on the secondary markets and target investors worldwide. Thus, the bondholders need not have any direct relationship with the sovereign debtor but they have certain rights as against the debtor. It is submitted that the reciprocal contractual obligations created by the definitive bonds makes it tenuous to argue that no privity of contract exists between the bondholders and the sovereign debtor.[64]

(4) Sovereign Debt as a Treaty Obligation

Like other forms of sovereign debt, it is still debatable whether sovereign bonds constitute a subject matter of investment treaty arbitration.[65] This raises fundamental questions in the area of debt restructuring. Ordinarily, their enforcement is governed by the contractual documents. Recently however, bondholders have been resorting to ISDS to challenge sovereign debt defaults and restructuring which may have affected their rights with a view to reclaiming the full value of their investment.[66]

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[60] *Ibid*, at 148.
[61] *Postova Banka Decision* (n 15), para 337.
[62] RV Tennekoon (n 38), 147.
[63] For instance *Postova Banka* (n 15), para 338.
[64] As held in the Poštová Banka Decision (n 15), para 338.
[65] Nolan and others, Leviathan on Life Support (n 2) 487—512; Brahm, *Legitimacy in Global Governance of Sovereign Default* (n 7);Waibel (n 2); Norton (n 2); Sandrock (n 2); Thrasher & Gallagher (n 2).
[66] *Abaclat's Decision* (n 15): *Alemanni v. Argentina* (n 15); *Ambiente Ufficio S.P.A. & Others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 Feb 2013), https://icsid.worldbank.org/ICSID/FrontServlet?requestType_CasesRH&actionVal_showDoc&docId_DC2992_En&caseId_C340.

Indeed, ICSID tribunals have made pronouncements on this issue as discussed in the next section. The prevailing view is that sovereign debt does not merely give a contractual cause of action; it is also capable of giving rise to treaty claims depending on the context and language of the BIT.[67] The question is: Can sovereign debt defaults and restructuring qualify as violation of BIT obligations? This too depends to alarge extent on the language of the BIT and the nature of the sovereign debt restructuring in question.

2. Sovereign Default and Restructuring

Sovereign default is the inability or refusal of a sovereign debtor to make payments as they become due.[68] Standard & Poor describes it as "missed payments on interest or principal of bonds or bank loans".[69] For sovereign bonds this occurs when the debtor fails a scheduled debt service on the due date or merely exchanges new debts under less favorable terms than the original bonds.[70] It is principally determined by time and contractual terms. Default usually follows economic crises in the debtor country.[71] Other triggers include worsening terms of trade, poor macroeconomic policies, increase in borrowing cost, structure of sovereign's debt port-folio, market perceptions, poor sovereign ratings and systemic banking crises.[72] Any of these factors could lead to either a partial or a complete default.[73]

Regardless of how it emerged, sovereign default naturally affects creditors' rights. But as noted above, legal action upon default raises concerns of enforcement and other challenges.[74] This is because unlike in corporate insolvency, few (or no) reorganization options exist for sovereign debt in the event of actual or anticipated default.[75] Sovereign debtors often

[67] Abaclat (n 15).
[68] P. WOOD, LAW AND PRACTICE OF INTERNATIONAL FINANCE 164 (Sweet & Maxwell 1980).
[69] RATINGS DIRECT, DEFAULT, TRANSITION, AND RECOVERY: 2014 ANNUAL SOVEREIGN DEFAULT STUDY AND RATING TRANSITIONS 26 (Standard &Poor's Rating Services 2015), https://www.standardandpoors.com/ru_RU/delegate/getPDF;jsessionid=hbpzg4PmQXq1EGd4vSr9Q9YzGOIybq-7AGTGjVxk1VMcAjDU1h7C!2083099107?articleId=1664058&type=COMMENTS&subType=REGULATORY. *See* also M. Tomz & M. L. J. Wright, *Empirical Research on Sovereign Debt and Default*, (2013) NBER Working Paper 18855 9, http://web.stanford.edu/~tomz/working/TomzWright2012-w18598.pdf.
[70] M. Aguair, *Sovereign Debt: Empirical Facts* (n 43) 8.
[71] *Ibid*, at 14—17.
[72] US Das and others (n 47) 6.
[73] *Ibid*.
[74] *Republic of Argentina v. Weltover Inc* (1992) 504 U.S. 607.
[75] Waibel (n 2) 712.

restructure their debts in the light of their financial and economic situations. Thus, SDR consists of various methods of altering the repayment plan under the original agreement to respond to actual or anticipated default. It involves "an exchange of outstanding sovereign debt instruments, such as loans or bonds, for new debt instruments or cash".[76] Its effects include slashing down the expected returns of the creditors. Thus, it could amount to a violation of either the bonds indenture or a treaty obligation.[77] But default *simplicita* does not necessarily invoke a state's international responsibility because it is considered as a contractual breach.[78]

Defaults have remained recurring hallmarks of sovereign lending since the medieval times.[79] An ILA Study Group has found that almost all sovereign debtors have defaulted over the past century and that sovereign defaults tend to occur at the rate of one to three in every year.[80] Indeed, history has shown that sovereign default affects country's development drive.[81] In 2002, Argentina made a record-breaking default leading to several litigations before domestic courts mostly in the US.[82] The creditors expanded their options by filing claims before ICSID tribunals seeking to reclaim their investments.[83] As will be shown infra, the tribunals handed down ground breaking jurisdiction awards that could have profound impact on the future of sovereign debt restructuring.

While the cases against Argentina were pending, the global financial crises struck in 2008. This leds to increased government borrowing to address budget deficits, plunging so many countries into financial crises and forcing them to default on their sovereign debt commitments.[84] A notable

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[76] US Das and others (n 47) 4.
[77] US Das and others, *Sovereign Debt Restructurings (1950-2010): Concepts, Literature Survey, and Stylized Facts*, IMF Working Paper WP/12/203 (hereafter "US Das and others, Sovereign Debt Restructurings Concepts") 8 (2012).
[78] *See C. M. S. Gas Transmission Co. v. Argentine Republic*, Award, ICSID Case No. ARB/01/08, Award (12 May 2005) (2005) 44 ILM 1205.
[79] M. S. Tammen, *The Precarious Nature of Sovereign Lending: Implications for the Brady Plan*, 10 CATO JOURNAL 239 (1990).
[80] ILA (n 50) 4.
[81] K. Rogoff & J. Zettelmeyer, *Bankruptcy Procedures for Sovereigns: A History of Ideas (1976-2001)*, 49(3) IMF STAFF PAPERS 470—507 (2002) (hereafter "Rogoff & Zettelmeyer, A History of Ideas") 472—474.
[82] *See* for instance, *Republic of Argentina v. NML Capital Ltd* 134 S. Ct. 2250, 189 L. Ed. 2d 234 (2014), http://www.supremecourt.gov/opinions/13pdf/12-842_5hdk.pdf; *E. M. Ltd. v. Republic of Argentina* 473 F.3d 463, 481 n.19 (2d Cir. 2007); *Aurelius Capital Partners LP v. Republic of Argentina*, 584 F.3d 120 (2d Cir. 2009).
[83] P. Di Rosa, *The Recent Wave of Arbitrations against Argentina under Bilateral Investment Treaties: Background and Principal Legal Issues*, 36 UNIVERSITY OF MIAMI INTER-AMERICAN LAW REVIEW 41—74 (2004).
[84] Nelson, *Sovereign Debt in Advanced Economies* (n 45) 1—2.

case was the Greek debt default of 2015, which followed series of failed negotiations with the IMF and the Euro Group.[85] The Greek default also led to another round of claims through investment arbitration.[86]

Therefore, decisions with far reaching effects were made by ICSID tribunals in both the Argentine and Greek debt crises respectively. As reviewed later, these decisions re-echoed the persistent problems of restructuring sovereign debts particularly those incurred by way of sovereign bonds issue.

II. THE PROBLEMS OF SDR: INTERNATIONAL ARBITRATION TO THE RESCUE?

Prior to the Argentine debt default, there were some proposals for the use of arbitration in resolving sovereign debt disputes.[87] But it was the Argentine debt crisis of 2001 that literally opened the "Pandora's Box"[88] for recourse to ISDS in challenging sovereign debt restructuring. As noted above, sovereign debts create rights under two regimes: treaty and contractual claims.[89] SDR could affect creditors' rights, which in turn might violatesubstantive and procedural investment guarantees under BITs. For official loans and syndicated bank loans, the IMF, London and Paris Clubs offered different frameworks for relatively orderly restructuring of sovereign debts.[90] But for sovereign bonds, bondholders seem to be in a dilemma: either accept the sovereign debtor's proposed debt restructuring plan or forego their original claims. There is also the problem of holdout creditors who might frustrate any orderly restructuring. Unfortunately, international finance is still ill equipped to deal with this dilemma.[91]

Therefore, the major problem is the lack of an acceptable, universal legal framework for the enforcement of creditors' claims while balancing the debtors' desire for a return to debt sustainability.[92] This has been described as "a missing link in international financial architecture".[93] It is

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[85] LC Buchheitand M Gulati, *How to Restructure Greek Debt*, Duke Law School Working Paper (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1603304 (13 December 2016).
[86] *See* for example the Postova Banka Decision (n 15).
[87] J. KAISER, A FAIR AND TRANSPARENT ARBITRATION PROCESS FOR INDEBTED SOUTHERN COUNTRIES (2001) *erlassjahr.de*.
[88] Waibel (n 2).
[89] In *Alemanni V. Argentina* (n 15), para 320, it was held that it is not open to the Claimants to use "this arbitration as a means for vindicating their contractual rights as 'bondholders', but only such rights (and the associated remedies) as they can properly lay claim to as 'investors' under the BIT".
[90] US Das and others, *Sovereign Debt Restructurings Concepts* (n 77) 14—18.
[91] *Ibid*, 28.
[92] M. L. J. Wright, *Sovereign Debt Restructuring: Problems and Prospects*, 2 HARVARD BUSINESS LAW REVIEW 153, 158 (2012), http://www.hblr.org/wp-content/uploads/2012/07/HLB206.pdf.
[93] UNCTAD *Sovereign Debt Workout Guide* (n 4), 12.

manifested by the disorderly debt restructuring methods with poor creditor coordination, disparate processes and prolonged negotiations.[94] Although the collective action clauses (CACs) have emerged to remedy the collective action and holdout problems in sovereign bonds, they could not address the "too little, too late" problem.[95] Other connected problems include lack of institutional legitimacy and inefficiency.[96]

Furthermore, the present SD system has a disparate institutional process of negotiation in the event of default. This is because sovereign debt restructuring largely reflects the nature of the debt itself and the institutional framework, hence bilateral debts, multilateral debts, bank loans and bonds are necessarily treated differently for this purpose.[97] Except in few cases, multilateral debts managed by IFIs are largely not restructured owing to their special status.[98] In the case of sovereign bonds, the collective action problem and the possibility of holdouts makes SDR even more complex and challenging. [99] Despite the provisions for forum selection in bonds instruments, the forum for resolution of disputes arising from sovereign debt default has remained a key challenge for both creditors and debtors.[100] For the debtor, the multiplicity of creditors and potential suits in multiple jurisdictions poses significant challenges of coordination. [101] For the "indirect claimants" there is the problem of exclusion due to the informal and non-public character of the negotiations.[102]

In the light of these problems, investment arbitration is gradually being pursued especially to address creditors' dilemma in the event of sovereign debt default and restructuring but not without resistance from sovereign debtors. Interestingly, bondholders find solace in the Washington Convention as they invoke the ISDS provisions and the various investment guarantees under BITs to activate the arbitration machinery. This emerging trend is not uncontroversial as there are contending perspectives with respect to the policy implications of this approach especially in view of some ICSID tribunals' decisions on the subject.

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[94] Rogoff & Zettelmeyer, *A History of Ideas* (n 81) 475—489.
[95] UNCTAD, *Sovereign Debt Workout Guide* (n 4); T. Jonasson, *Lessons from the Recent Debt Crisis*, a paper presented at the 10th UNCTAD Debt Management Conference, Geneva, 23rd-25th (November, 2015) 8.
[96] US Das and others, *Sovereign Debt Restructurings Concepts* (n 77) 28—30; Brahm, Legitimacy in Global Governance of Sovereign Default (n 7).
[97] UNCTAD *Sovereign Debt Workout Guide* (n 4), 32.
[98] *Ibid*, at 32—34.
[99] US Das and others, *Sovereign Debt Restructurings Concepts* (n 77), 21—28.
[100] RV Tennekon (n 38) 147.
[101] UNCTAD *Sovereign Debt Workout Guide* (n.4), 34.
[102] *Ibid*.

III. THE CONTENDING PERSPECTIVES AND THE POSITION OF ARBITRAL TRIBUNALS

As noted above, creditors of sovereign debtors, especially bondholders have now resorted to ISDS in challenging sovereign debt restructuring with a view to reclaiming the full value of their investments. However, this is far from generating the needed consensus among scholars and arbitral tribunals. There are two contending views on the use of investment arbitration in claims arising from SDR. The task now is to examine these contending views.

A. Arguments against International Arbitration

Many scholars have expressed deep skepticisms about dragging sovereign debtors before arbitral tribunals.[103] Michael Waibel led the skeptics in his seminal article on the subject arguing that at the point of conception of ICSID, sovereign debt was not contemplated as a "typical investment" and that bond contracts in particular contemplate contractual rather than treaty remedies.[104] The main arguments of the skeptics are summarized below.

1. Sovereign Debt Claims Are Ill-Suited for Investment Arbitration

The skeptics contend that ICSID Arbitration was originally tailored for "typical investments" and not sovereign debt. A *typical investment* must meet some basic tests including the *Salini* tests:[105] sufficient duration, territorial link, risk sharing, substantial commitment, regularity of returns and contribution to the development of the host state.[106] Although some debt instruments were interpreted as falling within the scope of "investment" for ICSID arbitration,[107] the skeptics argued that ICSID tribunals have no jurisdiction over debt instruments especially sovereign bonds because these are essentially commercial transactions governed by municipal laws and are

[103] For convenience we called this group "the skeptics".
[104] Waibel (n 2). *See* also Kevin P Gallagher, *The New Vulture Culture: Sovereign Debt Restructuring and Trade and Investment Treaties*, INTERNATIONAL DEVELOPMENT ECONOMICS ASSOCIATES WORKING PAPER No 02/2011, http://www.networkideas.org/working/jul2011/02_2011.pdf (last visited 10 April 2016).
[105] Laid down in *Salini Costruttori SpA v. Kingdom of Morocco,* ICSID Case No ARB/00/4, Jurisdiction (23 July 2001) 42 ILM 609 (2003).
[106] Waibel (n 2).
[107] *Fedax NV v. The Republic of Venezuela*, ICSID Case No ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (11 July 1997).

therefore outside the "core investment" under article 25 of the Washington Convention.[108]

As will be examined infra, this view had influenced both the dissenting opinion in Abaclat and the decision in Postova Banka. The problem with this argument is that it interpreted "typical investment" almost consciously to exclude sovereign debt instruments. For instance, the "sharing of risk" argument that the mere risk of default is inadequate[109] failed to appreciate the true implication of the word "risk" in sovereign debt-like investments as examined earlier. Secondly, if sovereign debts are "commercial" [110] transactions but not loans, then it seems curious whether it is possible to have a "non-commercial" loan. If both are "commercial" in nature, then it becomes a distinction without a difference.

2. Exclusive Domestic Jurisdiction in Bonds Contract

The skeptics also argued that unlike a typical investment, sovereign debts especially sovereign bonds contemplate contractual remedies obtainable in the domestic courts.[111] They maintained that unlike typical investment contracts, in sovereign bondsthe law of the host state "does not govern the bond; its courts do not enjoy jurisdiction; and bondholders are guaranteed access to an impartial forum" (in other jurisdictions) and therefore using investment arbitration "would undermine legal certainty in the sovereign debt market and… upset long-standing expectations".[112] They however acknowledged that not all bond contracts confer exclusive jurisdiction on specific domestic courts. The Postova Banka Jurisdiction award equally knocked this argument on its head because the host State's law like in the cases of the so-called typical investment governed the bonds there.

3. Substantive Protections, Holdout Creditors and Policy Considerations

According to the skeptics, most of the substantive investment protections in BITs cannot conveniently address the predicament of

[108] Waibel (n 2) 720.
[109] *Ibid*, at 726.
[110] "Commercial" in the sense of arm's length financial dealings and not in the context of ordinary commercial transactions such as contract of sale.
[111] Waibel (n 2) 735.
[112] *Ibid*, at 733—734.

creditors of sovereign debtors.[113] In addition, given the volatility of the sovereign debt markets, the "prompt, effective and adequate" standard of compensation would become nugatory since the market value *ex post* would be less than the face value of the bonds.[114] Therefore, the skeptics advocate the inclusion of collective action clause (CAC) and argued that SDR pursuant to a CAC in the bond contract is a mere "modification" amounting to a "contractual restructuring" and not a "sovereign act", which could violate a treaty obligation.[115] The skeptics also advanced some policy arguments. First, the promise of a successful ICSID arbitration could encourage holdouts and unravel any debt restructuring. Second, investment arbitration could conflict with the institutional roles of the IMF and development banks in addressing debt unsustainability of countries.[116] Third, international tribunals are incompetent to determine sovereign debtor's payment capacity in the event of an award. Fourth, apart from the likelihood of creditor moral hazard, the number of claims will increase thereby diverting ICSID from its core mandates.[117]

It is clear that the above arguments were advanced to segregate international investment law's established ISDS mechanism from international financial law's undeveloped dispute resolution mechanism with regard to SDR. It is however curious that the peculiarities of one form of sovereign debt (i.e. sovereign bonds) were used to discountenance the use of investment arbitration in SDR regardless of the forms of the debt. In addition, the skeptics were oblivious of the fact that without arbitration of these types of claims by international tribunals, the status quo is one-sided as it does not take cognizance of any "equality of arms" between the contracting parties. In other words, SDR without recourse to arbitration is largely debtor-determined.

B. Arguments in Favor of International Investment Arbitration

Admittedly, the above arguments raised some legitimate concerns. Apart from the above criticisms however, the arguments were countered by other scholars.[118] Their arguments which we find more appealing are summarized below.

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[113] *Ibid*, at 338—754.
[114] *Ibid*, at 757.
[115] *Ibid*, at 736—737.
[116] *Ibid*, at 759.
[117] *See* J. I. Blackman & R. Mukhi, *The Evolution of Modern Sovereign Debt Litigation: Vultures, Alter Egos, and other Legal Fauna*, 73 LAW AND CONTEMPORARY PROBLEMS 49—50 (2010).
[118] Norton (n 2); Sandrock (n2).

1. The Coverage of Sovereign Debts Depends on the Intention of Parties to BIT

It is tenuous to argue that sovereign debt instruments are ill suited for investment treaty arbitration on account of the so-called *typical investments* because investment arbitration, like other aspects of international law, is founded on the parties' consent.[119] If the parties to a BIT expressly included sovereign debt instruments as "investments", then an arbitral tribunal must respect the parties' intention.[120] Indeed, parties' intention seems to implicitly favour investment arbitration since both before and after Argentina'shistoric default, countries signed BITs without express exclusion of sovereign debt instruments from the covered investments in the treaty. This is a clear indication of countries' intention to include sovereign debts as covered investments. There should therefore be a general presumption in favor of sovereign debt instruments except where expressly excluded.[121] This is because serious negotiations always precede the conclusion of BITs.

In addition, contractual and treaty claims are not mutually exclusive.[122] The "umbrella clause" in BITs enables investors to have recourse to investment treaty arbitration. Indeed, once a claim meets the conditions for jurisdiction and admissibility, it can be adjudicated upon regardless of the availability of a cause of action in contract[123] as "a State may breach a treaty without breaching a contract, and *vice versa*."[124] The important condition is that once submitted to ICSID, the other forum lacks jurisdiction over the same claims.[125]

2. Substantive Protections, Holdout Creditors and Policy Considerations

SDR normally follows a specific sovereign act usually in the form of

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[119] MD Nolan and others, *Leviathan on Life Support* (n 2) 578—510.
[120] *Malaysian Historical Salvors v. The Government of Malaysia*, ICSID Case No ARB/05/10, Decision on the Application for Annulment (16 April 2009), paras 73—79.
[121] They are debt instruments having direct nexus with the host state. See for instance, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* ICSID Case No ARB/09/02 Award (31 October 2012), paras 288 and 292.
[122] *See* for instance *Lanco International Inc v. Argentine Republic* Case No ARB/97/6, Preliminary Decision on Jurisdiction 8 December 1998 (2001) 40 ILM 457; *SGS SociétéGénérale de Surveillance SA v. Islamic Republic of Pakistan*, Decision on Jurisdiction 6 August 2003.
[123] E. Gaillard, *Investment Treaty Arbitration and Jurisdiction over Contract Claims—the SGS Cases Considered*, in T .Wieler (ed.) INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW, 325.
[124] *Compañ ía de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic*, Decision on Annulment, 3 July 2002, 19(1) ICSID Review-FILJ, paras 95-96 (2004).
[125] *CDC Group Plcv Republic of the Seychelles* ICSID Case No ARB/02/14.

legislative measures that often affect creditors' rights as happened in Argentina and Greece. Regardless of the economic justifications, these measures, depending on the context and the terms of the BIT, could touch on a debtor's treaty obligations such as those of non-expropriation, FET, NT and MFN.[126] Secondly, far from undermining the institutional roles of IMF in sovereign debt crises management, an enforceable arbitral award could make this institutional intervention unnecessary[127] thereby avoiding the diplomatic complications which could "undermine a key purpose of international investment agreements-the promotion of foreign investment."[128]

On the incompetence of ICSID tribunals to determine a sovereign debtor's capacity to repay, the proponents argued that the alternative is even worse since it allows the debtor and domestic courtsthe powers to do the same.[129] Indeed, an arbitral institution might develop consistent and uniform principles for this purpose.

3. Equality of Bargaining Power and other Policy Arguments

As noted earlier, an effective, depoliticized adjudicating forum to resolve claims arising from SDR provides a level-playing ground for both creditors and their sovereign borrowers. The proponents maintain that presently exchange offers are done largely on the debtor's terms, on a take-it-or-leave-it basis and this lacks transparency as it completely ignores creditors' voice.[130] This makes SDR a one-sided affair.[131] It goes against the contractual spirit that the skeptics emphasized on. In addition, judgments of national courts may face enforcement constraints including sovereign immunity. Therefore, investment arbitration could provide the needed balance with a promise of compliance. This is because under the Washington Convention, arbitral awards are final, binding and enforceable in all member countries.[132] This could in turn create creditor confidence in the debt market leading to a "greater access to financing for all states".[133]

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[126] Abaclat (n 15).
[127] Norton (n 2) 303.
[128] *Ibid*.
[129] *Ibid*, at 304.
[130] *Ibid*, at 301.
[131] After the Argentine exchange offer of 2005 Gelpern noted that "Argentina's crisis seems to suggest that default shifts the balance of power in favour of the debtor absent official intervention". *See* A Gelpern, "After Argentina" Institute of Intl Economics, *Policy Briefs in International Economics*, No PB 05-2, 9 (2005).
[132] Washington Convention (1965) Articles 53 and 54.
[133] Norton (n 2) 302.

Therefore, flowing from the above, it is submitted that the emerging trend in sovereign debt claims seems to clearly favor the second view. This position will be clearer with the aid of arbitral jurisprudence, which we now turn to.

C. The Perspective of ICSID Tribunals

It is important to evaluate the growing trend from the perspectives of ICSID arbitrators in at least three jurisdiction awards. The conclusions support the claim that investment arbitration is a viable answer to some of the problems of SDR.

1. Abaclat v. Republic of Argentina

Following the debt crisis of the 1980s, Argentina restructured its economy.[134] It issued 179 bonds worth over US$186.7 billion in both domestic and foreign capital markets.[135] Out of the 179 bonds, 173 were denominated in foreign currencies and the Claimants allegedly purchased 83 of the 173 foreign currency bonds, which were governed by the laws of different jurisdictions and traded on various capital markets around the world.[136] By the late 1990s, the Argentine economy was in deep recession and by December 2001 it defaulted over US$100 billion of external bond debt.[137] Following the enactment of the *Public Emergency and Reform Law* of 2002, Argentina lunched two Exchange Offers in 2005 and 2010 respectively. The Emergency Law prohibited a re-opening of the Offers thereby preventing eligible but un-exchanged bonds from being renegotiated. The claimants did not participate in both Exchange Offers. They filed their request for arbitration before ICSID challenging, among others, the unilateral debt restructuring as expropriation and a violation of the FET standard under the Italy-Argentina BIT, 1990.[138] Argentina questioned ICSID tribunal's jurisdiction arguing that it was "an unprecedented abuse of the investment treaty regime" and "a legally unsupported attempt to turn a sovereign's non-payment of external debt into a violation of investment treaty protection".[139] Since the bondholders purchased their security claims on the secondary markets, it argued that they were not investors as

[134] P. Di Rosa, The Recent Wave of Arbitrations against Argentina (n 83) 41—74.
[135] Abaclat (n 15), 681—683.
[136] *Ibid*.
[137] *Ibid*, at 683.
[138] *Ibid*, at 714.
[139] *Ibid*, para 234.

contemplated by the Washington Convention. Interestingly, Argentina advanced a policy argument against the claim insisting that ICSID tribunal proceedings were inappropriate in claims arising from SDR and would be "counterproductive"[140] as holdout creditors were "the biggest threat to the stability and fairness of sovereign debt restructuring."[141] The claimants responded that "opening the door to ICSID arbitration would create a supplementary leverage against such rogue debtors and therefore be beneficial to the efficiency of foreign debt restructuring."[142]

The majority decision of the tribunal disagreed with the position of Argentina and held that the tribunal has jurisdiction over "investments" by way of sovereign bonds, noting that issues of public policy were for the parties to consider at the point of negotiating the BIT.[143] However, in his dissenting view Prof. George Abi Saab held that the Washington Convention did not "foresee" or contemplate sovereign bonds as covered investments and assuming jurisdiction by the tribunal will lead "to tenuous anduntenable interpretations … over-stretching the text beyond the breaking point, in order to extend jurisdiction to where it does not exist…"[144]. Prof. Abi Saab did not however answer another vital question that he raised at the end of his opinion: "what is the proper and prudential course for ICSID tribunals to take in this regard?"[145] We shall revisit this question after reviewing the other cases.

2. Alemanni v. Republic of Argentina[146]

The background facts in this case were similar to those of Abaclat's. Based on the formal default by Argentina, the claimants alleged breaches of the guarantees under the same BIT with respect to FET and the prohibition of expropriation. Among other objections to the jurisdiction of the tribunal, Argentina argued that "investment arbitration is an inherently unsuitable and unacceptable way of dealing with default on sovereign bonded debt".[147]

The tribunal held that the complaints "are capable of constituting a breach of one or more of the provisions of the BIT".[148] It held that as investors under a BIT, the claimants could use arbitration to enforce their

[140] *Ibid*, para 755.
[141] *Ibid*, para 514.
[142] *Ibid*, para 514.
[143] *Ibid*, para 479.
[144] *Ibid*, paras 268—273.
[145] *Ibid*, para 274.
[146] *Geovanni Alemanni V. Republic of Argentina* (n 15).
[147] *Ibid*, para 318.
[148] *Ibid*, para 300.

claims. While disagreeing with the dissenting opinion of Prof. Abi Saab in Abaclat, which imported "policy considerations into one area while vigorously rejecting them in others", the tribunal held "As a fact of international economic life, sovereign bond issues were plainly within the normal field of contemplation of the Contracting Parties."[149]

3. Postova Banka and Istrokapital SE v. Hellenic Republic

The global financial crises of 2008 led to the downgrading of Greek sovereign bonds including the ones held by the claimants.[150] Unlike the situation in Abaclat, the Greek law governed the bonds in contention.[151] The Greek government issued the bonds to the participants of the Bank of Greece's Securities System. The participants delivered the bonds to the primary dealers who provided the funds and sold the bonds on the secondary markets.[152] The financial situation of the country deteriorated despite the intervention of the IMF and the Euro Group. In 2012, the *Greek Bondholder Act* was enacted paving way for the debt restructuring.[153] A Private Creditor-Investor Committee negotiated a haircut on the face value of the Greek debt and the government declared this to be the only available offer to bondholders.[154] Through their intermediary, the claimants rejected the Exchange Offer and filed a request for arbitration to reclaim the value of the bonds. Greece raised objection to the jurisdiction of the tribunal and the tribunal upheld the objections.[155]

After examining the peculiarities of sovereign debt, the tribunal distinguished the facts of the case from Abaclat's and held that the BITs under which the claims were filed excluded the sovereign bonds in question as "investments".[156] Curiously however the tribunal held that since the bonds were purchased at the secondary market through an intermediary, there was no privity of contract between the parties.[157] But even if there was privity, the crucial point is that the parties to the BIT hadexcluded sovereign bonds from ICSID's arbitration. The tribunal held that "Loans and bonds are distinct financial products."[158]

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[149] *Ibid*, para 320.
[150] *Postova Banka Decision* (n 15), paras 44—65.
[151] Pursuant to Law 2198 of 1994.
[152] *Postova Banka Decision* (n 15), para 54.
[153] *Ibid*, para 67.
[154] *Ibid*, para 72.
[155] *Ibid*, paras 229—289.
[156] *Ibid*, paras 284—305.
[157] *Ibid*, paras 344—349.
[158] *Ibid*, paras 335—338.

From the above arbitral jurisprudence, it is obvious that investment arbitration could be used in addressing claims arising from sovereign debt default. The determining factor is the language of the BIT under which the claims were founded as well as the intention of the parties. A definition of "investment" broad enough to include sovereign bonds will evince a clear intention to invoke the ISDS provisions in BITs and likely to receive the nod of ICSID and other arbitral tribunals in claims arising from SDR. Parties' BITs should determine whether it is included or excluded.[159]

IV. INVESTMENT ARBITRATION AND THE GAP IN THE LEGAL FRAMEWORK ON SDR

What emerged from the above decisions is that it is plausible and prudent (reverting back to Prof AbiSaab's unanswered question) for international tribunals to assume jurisdiction over claims arising from sovereign debt defaults where the parties to BITs either expressly or by necessary implication included sovereign debts as covered investments. This, it is respectfully submitted, is more in line with the spirit of the progressive development of international law, itself anchored on the consent of states.[160] Policy considerations and historical conjectures must not be employed to undermine this fundamental principle. In the light of the problems of SDR framework, it is submitted that investment arbitration could aid in filling the existing vacuum on sovereign debt governance because parties' consent is also the fulcrum of ISDS. In other words, the use of arbitration could address the age-long vacuum in international finance with respect to SDR because of the significance of parties' consent.[161] Parties to BITs should determine the continued relevance of arbitration in SDR. No special regime of international law can ignore the position of parties' consent.[162] Negating parties' consent is simply doing violence to the root of international law itself. Indeed, international finance and international investment have the same purpose: to promote smooth commercial intercourse and support economic development of nations through the involvement of private and

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[159] A. Viterbo, *Tension between International Investment Protection and Financial Stability*, 17TH INVESTMENT FORUM, BIICL, (9th September 2011) slides 11—13 (2011), http://www.biicl.org/files/5794_viterbo_09-09-11_biicl.pdf (last visited 2012/16).

[160] M. N. SHAW, INTERNATIONAL LAW 9—11 (6th edn, Cambridge University Press 2012).

[161] On the place of consent *see* AM Steingruber, *Notion, Nature and Extent of Consent in International Arbitration* (Ph.D. Thesis, School of International Arbitration, Queen Mary University of London 2009).

[162] ILC, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, REPORT OF THE STUDY GROUP OF THE INTERNATIONAL LAW COMMISSION (C. Koskenniemi) UN Doc A/CN.4/L682, 193 (13 April 2006).

institutional capital providers.

Second, it is historically incorrect to detach sovereign debt from the underlying objectives of ICSID. ICSID was established to, among other objectives, provide "an international tribunal in the field of financial and economic disputes with Governments".[163] Claims arising from or connected with sovereign debt default are arguably within the scope of "financial and economic disputes with Governments". This is the umbilical connection between sovereign debt and international investment law as it relates to dispute settlement mechanism. Thus, international arbitration is clearly a major point of intersection between international financial law and international investment law.[164]

Third, while the calls for a multilateral framework on sovereign debt restructuring continue to make analogies with corporate and sub-national insolvency regimes,[165] they tend to ignore the fact that a fairly balanced and effective SDR could also operate in the "shadow" of international investment law. This may address the one-sidedness of the present debt restructuring system. In fact, arbitral awards on sovereign debt defaults could actually empower the parties while at the same time minimising the politics that accompany institutional interventions in the matter.

Fourth, history has shown that the involvement of arbitral tribunals in sovereign debt crisis resolution is not really a new phenomenon.[166] Indeed, at a point they "were the only form of adjudication that proved remotely effective at resolving disputes arising out of sovereign default". [167] Investment treaty arbitration should therefore be seen as a continuation of the age-long efforts towards finding a normative framework that could create a level-playing ground between the parties and specifically address creditors' dilemma in SDR. In addition, ICSID tribunals could conveniently adjudicate over "loans" other than sovereign bonds contracts. In this situation, the existence of a BIT with substantive and procedural investment guarantees could form the basis for a claim by the creditors.

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[163] Y. Krayvoi (n 36).
[164] J. Ostřanský (n 2).
[165] *See* A. O. Krueger, *A New Approach to Sovereign Debt Restructuring* (International Monetary Fund 2002); IMF, *Proposals for a Sovereign Debt Restructuring Mechanism* (2003), available at http://www.imf.org/external/np/exr/facts/sdrm.htm; K. Raffer, *Applying Chapter 9 to International Debt: An Economically Efficient Solution with a Human Face*, 18(2) WORLD DEVELOPMENT 301—311 (1990).
[166] WMCWeidemaier, *Origin of Sovereign Debt Arbitration* (n 10) 340.
[167] *Ibid*.

A. The Future of Investment Arbitration in SDR

Even as investment treaty arbitration is creating the level-playing field for parties and is "depoliticising" sovereign debt crises across the world, experience has shown that it has its downsides in the typical ISDS.[168] It exposes the debtors to the jurisdiction of arbitral tribunals and States are becoming suspicious.[169] Indeed, there is an on-going effort to increase recourse to the alternatives of ISDS through arbitration with emphasis on prevention policies.[170] Because of its peculiar nature, investment arbitration raises concerns of high cost, case management, legitimacy and fairness, coherence and legal certainty.[171] As noted above, ICSID has its own challenges.[172] These and other problems contribute to the search for alternatives. Thus, there is a gradual move towards conciliation, mediation and negotiation as well as dispute prevention policies through engagement in inter-institutional information sharing within states.[173] These are however far from providing the needed guarantee.

CONCLUSION

The advantages offered by investment arbitration have over the years contributed in stabilizing the international investment regime. Sovereign debt must not be detached from this system except where the parties to any IIA expressly agreed to do so. From their inception, IIAs have played pivotal role in building and cementing economic relations among nations with a common goal of enhancing economic cooperation and development as well as opening opportunities for nationals of the respective parties. Interestingly, ISDS and substantive investment protection provisions feature in these IIAs to create a level-playing field for disputing parties. IIAs are often the products of long negotiations hence inclusion or exclusion of sovereign debt instruments as a subject matter of arbitration should be a matter for the parties to decide in the light of the fundamental place of consent in international law. States can control their participation in ICSID arbitration through conscious exclusion of SD or other unwanted claims at the point of negotiating a BIT. Opting out of the Washington Convention is

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[168] Robert M. Ziff, *The Sovereign Debtor's Prison: Analysis of the Argentine Crisis Arbitrations and the Implications for Investment Treaty Law*, 10 RICH J GLOBAL L & BUS 345, 380—381 (2011).
[169] I. A. Vincentelli, (n 14).
[170] UNCTAD, Investor—State Disputes: Prevention and Alternatives to Arbitration (n 24).
[171] Advisory Council on Intl Affairs, (n 17) 25—26.
[172] L. E. Trackman, *The ICSID Under Siege*, 4 CORNELL INTERNATIONAL LAW JOURNAL 5604 (2012).
[173] UNCTAD, Investor—State Disputes: Prevention and Alternatives to Arbitration (n 24).

certainly another option, but it is a costly option especially for the developing countries. States must either rethink/remodel their BITs to exclude sovereign debts instruments from the jurisdiction of ICSID tribunals or they must be presumed to have implicitly consented to investment treaty arbitration.

In fact, the fear of creditor action itself could instill financial discipline to ensure proper utilization and management of foreign loans. While empowering bondholders and other creditors to use arbitration, it could also minimize institutional intervention by IMF and reduce moral hazard problems. Countries in need of foreign investments must balance their interests with those of their investors and creditors. The reservations against investment arbitration must be carefully addressed rather than rejecting it completely. A recent study found that "ISDS claims are directly proportional to FDI stock" and that "the growth in ISDS claims and the growth in outward FDI stock follow a similar trend".[174] In fact, more developed states are increasingly being subjected to the ISDS mechanisms.[175]

Admittedly, sovereign debt restructuring consistently present challenges because of economic uncertainties, political risks and a clear absence of a comprehensive legal framework to govern such restructuring. It also opens the gate for vulture funds actions.[176] These however must not preclude creditors from submitting claims for arbitration in a depoliticized and more effective forum, which both the sovereign debtor and the home state of the creditors consensually agreed by way of treaty. Policy considerations must give way to prior consent of the parties. The direct and indirect advantages of ICSID and other arbitrations to the sovereign debt scheme are too enormous to ignore on the basis of technical gymnastics. Apart from effective and efficient enforcement, there is the "equality of arms" between the parties. In addition, one cannot ignore the fact that sometimes principles emerge out of adjudication. Although ICSID arbitration is not precedent-based[177], the tribunals could aid in developing consistent, predictable and uniform principles that might form the basis for a normative framework on SDR globally. Investment arbitration could

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[174] *See Investor-State Dispute Settlement: A Reality Check*, A Report by the Scholl Chair in International Business at CSIS7.

[175] *See* UNCTAD, *Recent Trends in IIAs and ISDS*, IIA Issues Note, No 1 (UNCTAD February 2015) 5.

[176] C. Olivet & Eberhardt, *Profiting from Crises: How Corporations and Lawyers are Scavenging Europe's Crisis Countries*, TRANSNATIONAL INSTITUTE AND CORPORATE EUROPE OBSERVATORY 6, 36 (2014).

[177] Washington Convention Article 53(1) (1965). *See* also, AI Umar, Precedent…BUJPL.

therefore be a basis for the progressive development of this aspect of international law.

Finally, as promising as investment arbitration isin SDR it is not shielded from many challenges especially regarding costs of proceedings, length of proceedings, efficiency and unpredictability of outcomes. Pre-proceeding disputes prevention measures should be introduced into sovereign debt dispute management. ISDS cannot prevent sovereign debt disputes totally, but it canminimize them. This is an important window which should therefore remain open except where State parties to BITs expressly close such window.

DEMOCRACY AND MEDIA—TYPES OF THEORIES FOR MEANS OF MASS COMMUNICATION

Aneta Stojanovska-Stefanova[*] *& Drasko Atanasoski*[**] *& Zoran Chachorovski*[***]

The quality of the practice of the political culture is closely linked to the democratic development of a country. The development of the civil society requires development of a democratic political culture, free media, a creation of critical public, democratic socialization of citizens and promotion of civic values which focus on the citizen. Today, there are different conceptions of democracy. One would be that in which democratic society possesses means of assistance that could, in some reasonable way, to participate in the management of their works and the information would be free and available to all, said Noam Chomsky 2003. The second concept is that, according to Chomsky, the public is banned in the management of its obligations and the information is strictly controlled. Depending on who accomplishes influence of the media, whether it concerns the country or the ruling party or the owner of the media company, there are different kinds of theories and those divisions are discussed in this paper. Hence, this paper is devoted on the types of theories of mass media which correlates to the level of development of democracy.

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INTRODUCTION

In the political theory, there is no unanimity about the definition of the term politics.

The politics can broadly be defined as the achievement of certain ideas essential to a community. It is, above all, the essential ideas for a community. It is above all, the ideas for the common good, justice and general usefulness. As individually a man tends to improve their moral qualities, in terms of life in a community, they tend toward justice and the common good i.e. towards the improvement of their community[1].

By definition, the foreign politics should be part, a substantial part of the politics that any country or sovereign political entity implements. We name this politics as foreign politics, but other people call it: international politics, world politics, global politics, international relations, comparative politics.[2]

Among several approaches and even more concepts in the study of foreign politics, geopolitics as already mentioned is certainly one of those inevitable ones. It has a long history and has produced a wealth of academic resources and conceptual criticism. Some authors associate the origin of the analysis of Aristotle's spatial factors that affect the political forms of ancient Greek cities. Indeed, many social thinkers since ancient time until today when thinking about politics had and still have on their tables geographical maps, despite their notebooks and pencils.[3]

Today, there are different conceptions of democracy. One would be that in which democratic society possesses means of assistance that could, in some reasonable way, to participate in the management of their works and the information would be free and available to all (Noam Chomsky 2003: 147). The second concept is that, according to Chomsky, the public is banned in the management of its obligations and the information is strictly controlled. It may sound strange, but it is important to know that the second concept is the one that prevails.

I. DIFFERENT CONCEPTIONS OF PUBLIC RELATION

Defining public relations makes it easier to attempt a definition of public affairs.

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[1] ENCYCLOPEDIA OF POLITICAL CULTURE 873 (Contemporary Administration, Belgrade 1993).
[2] MIRCEV D., THE MACEDONIAN FOREIGN POLITICS 1991-2006 9 (Skopje, Az-buki 2006).
[3] *Ibid*, at 11.

Public affairs are a comparatively new function. Little has been published on wither theory of practice to build the base for a professional approach.[4]

Kotler defines lobbying thus: "Lobbing involves dealing with legislators and government officials to promote of defeat legislation or regulation".[5]

The Chinese salutation "May you live in interesting times" certainly applies in today's rapidly changing public policy arena, where continuous change seems the only certainty. There is, though, one constant and that is that truth is a precious commodity, "precious and divine", to be valued.

The need to cherish that commodity is perhaps, even greater in today's multi-media society that it has ever been.

Public Relations practitioners, whether public affairs managers, or lobbyists, if they are to refute the constant charge of being vehicles for propaganda, must adhere to a clear code of ethics, vigorously enforced by their peer group and profession.[6]

A. Parameters for Development of Public Relations

Professional managers of public relations act in all areas of business life:

1. Administration—national, regional, local, international;
2. Business and economy—small, medium, large and international;
3. Social community and social affairs;
4. Educational institutions universities, colleges etc.;
5. Hospitals & Healthcare;
6. Charities;
7. International relations;

Public informing includes the following:

- Advisory work based on an understanding of human behaviour;
- Analysis of future trends and prediction of their effects;
- Surveying public opinion, attitudes and expectations;
- Establishing and maintaining two-way communication based on accurate and complete information;
- Preventing conflicts and misunderstandings;

[4] BLACK SAM, THE PRACTICE OF PUBLIC 4TH EDITION 41 (Routledge Taylor & Francis Group London and New York) RELATIONS, 4TH EDITION 31 (Routledge Taylor & Francis Group London and New York).

[5] KOTLER PHILIP, MARKETING MANAGEMENT (PRENTICE HALL 1988).

[6] BLACK SAM, THE PRACTICE OF PUBLIC 4TH EDITION 41 (Routledge Taylor & Francis Group London and New York) RELATIONS, 4TH EDITION 41 (Routledge Taylor & Francis Group London and New York).

- Promoting mutual respect and social responsibility;
- Synchronization of private and public interest;
- Gaining reputation among people, suppliers and customers;
- Improving economic relations;
- Attracting quality people and reduce fluctuation of the workforce;
- Promotion of products and services;
- Planning a corporate identity.

This list appears as intimidating, but it only highlights the fact that the public relations are an integral part of every form of organization or planning.[7]

B. Hexagon of Public Relations

One way of describing the role of public relations is a hexagonal pattern (Figure 1). The six sides of the hexagon represent different causes affecting the role and the capacity of public relations.

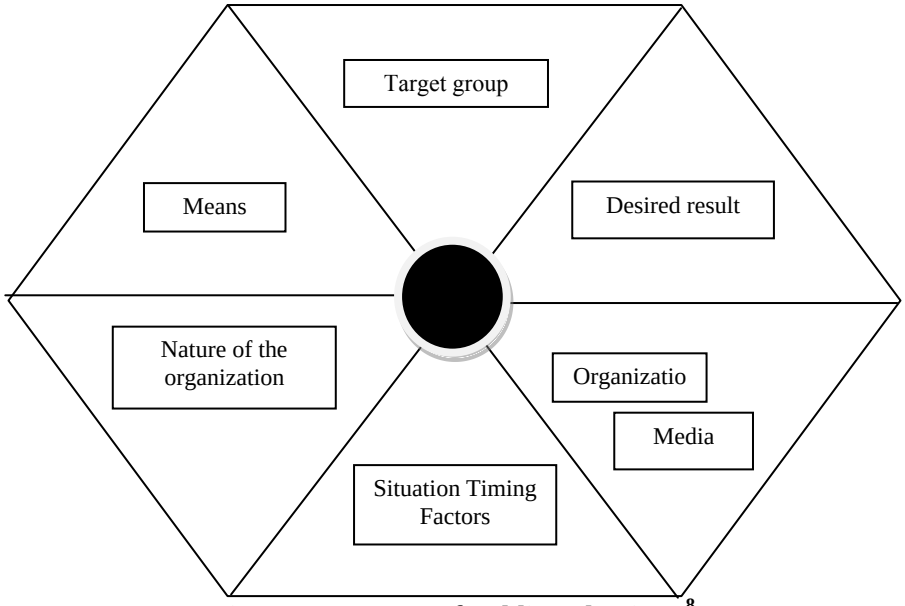

Figure 1 Hexagon of Public Relagtions.[8]

C. The "Iceberg" Syndrome

The syndrome of "iceberg" will be presented below in Figure 2. According to (Black Sam 2003: 10) it illustrates the contrast between public

[7] SAM BLACK, PUBLIC RELATIONS, 2ND EDITION 8—9 (Clio, Belgrade 2003).
[8] *Ibid.*

relations, as imagined by many people and their complex reality.

The model of "iceberg" is characteristic of those organizations that public relations have reactive function. In such organizations, public relations have a small and almost no role in determining strategy. Organizations which until now accepted limited reactive approach to the public relations office, began increasingly to realize that the active access directly assists in operations especially in business environments.

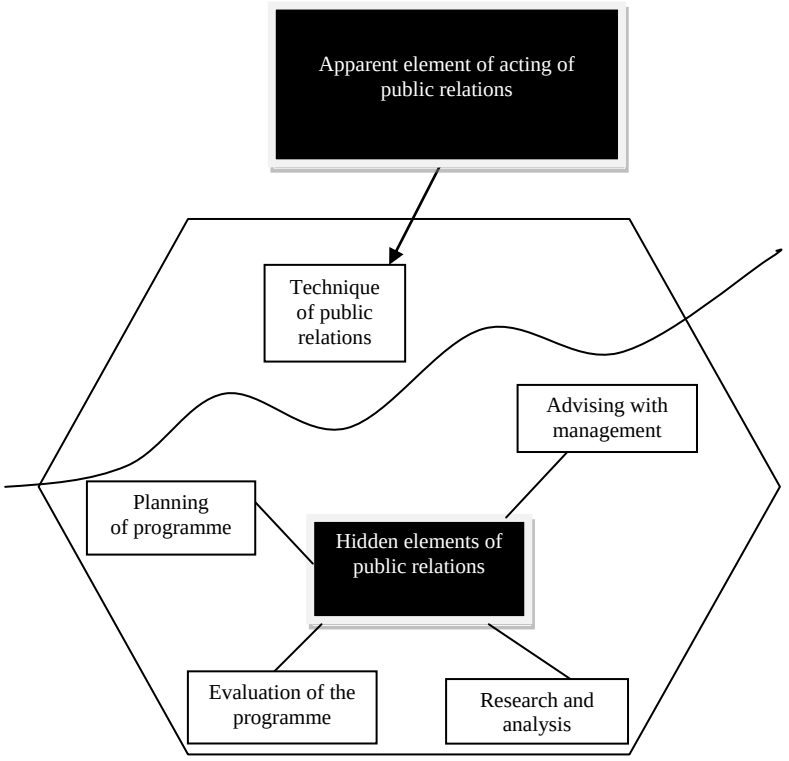

Figure 2 The "Iceberg" Syndrome.

Black finds it very difficult to define public relations as a whole.

Most of the definitions, if not all definitions, are a description of the effects of public relations, and not actual definitions.

In an attempt to get to the proper definition, the Institute for Informing the Public in November 1987 publishes a corrected definition which states: "Informing the public means planned and sustained effort to achieve and maintain goodwill and mutual understanding between an organization and its target group in public." A more complex attempt to define is the Mexican Declaration from August 1978, which was signed by representatives of more than thirty national and regional organizations dealing with public

relations, which states: "The application of public relations is the art and social science that analyses trends, predicting their consequences, advising the leadership of an organization and achieving planned programs and actions that will be of interest of the society and a specific organization."

Sam Black, while mentioning a few simple definitions, mentions the categories: good performance with public recognition, reconciliation of private and social interest, a bridge between an organization and the world and so on. These categories will help him come to a simple but accurate definition: "The application of public relations is the art and knowledge that achieves harmony with the environment, through mutual understanding, based on the true and full information."

Noam Chomsky says that country power has the same effect as owners of media houses or the companies that advertise.

The media tend to maintain an intimate relationship with country power. They want to find out secret information; they want to be a part of secret conferences. They are willing to have acquaintances with Secretary of State. To achieve this, they have to play a game that involves lying and serving the country in the form of an apparatus for misinformation. Let's ignore the fact that the media without that kind of pressure will work anyway due to their interests and status in society. It is very low control composition. This prompts the question regarding the independent journalists...[9]

Depending on who accomplishes influence of the media, whether it concerns the country or the ruling party or the owner of the media company, there are different kinds of theories and those divisions are discussed later in this paper.

D. Seven Deadly Sins of Public Relations

The author Sam Black in his capital work "Public Relations" stated the most common failures of the non-effective PR under the category of "seven deadly sins of the public relations" and gave them the following titles:

- Functional short-sightedness: Insufficient appreciation of the scope of the overall contribution that public relations can provide to good leadership;
- Philosophy of "strange turn": You will be addressing public relations only when are needed;
- Running ahead: Who needs research?

[9] CHOMSKY NOAM, MEDIA, PROPAGANDA AND SYSTEM 61—62 (Society for Promoting Literature in New Media Zagreb 2003).

- Local anaesthesia: We will settle this at the local level;
- Neurasthenia: Believe in global public opinion only if it is positive and beneficial for us;
- One-time communication flick, why not blame the communication, so, for it was discussed in our most recent annual report;
- Secret illusion: Philosophy of low profile. This error is based on the belief that the organization can become invisible whenever she wants.[10].

II. TYPES OF THEORIES OF MASS MEDIA

Often in science when discussing about all means of mass communication they are known under one name—the *press*. Although the print media are older and more accumulated from the theory and philosophy of mass communication, however this term includes the radio, television, Internet, film...

In historical terms, in different geographical areas, the mass media means have appeared in different forms and served different purposes. For example, the press of the former Soviet Union was different from that of the US, and the press of Argentina was also different from that of the United Kingdom. These differences partly reflect the ability of a country to pay its means of mass communication, beyond mechanical achievements and assets that can be used for mass communication as well as the relative degree of urbanization making it easier and necessary distribution of mass media.

The differences in mass media in different countries are somewhat a reflection of what people do in different places, as well as the experience which indicates what those citizens want to read. However, there is a greater difference, which is that the press always gets the shape and colour of the social and political order in which it acts. The above, in particular reflects the system of social control, which adjusts the relationship between individuals and institutions. In the end, the type of social structure and political system, and the circumstances in which a country is, significantly affecting the development of media freedom.

The differences in the press, is actually a difference in philosophical and political explanations or theories behind the different types of print today in the world.

These are the four theories:

- *Authoritarian theory*, rooted in centuries of authoritarian political thought from Plato to Machiavelli;
- *Libertarian theory*, based in Milton, Locke, Mill and Enlightenment;

[10] *See* more in *The Power of PR—The Power of Public Rrelations* (Josef F. Awad, Praeger 1985).

- *Theory of social responsibility*, enshrined in the communications revolution and in certain behavioural doubts philosophy of the Enlightenment;
- *Soviet Communist theory*, grounded in Marx, Lenin and Stalin and the dictatorship of the Communist Party of the Soviet Union.[11]

A. Authoritarian Theory of the Mass Media

As of the four listed theories above about the relationship of the mass media to society and government, authoritarianis historically and geographically most widespread.

Nearly 200 years after the distribution of the press throughout the Western world, authoritarian theory was the sole basis for determining the position and attitude of the popular press to modern society. The Tudors in England, the Bourbons in France, Hapsburgs in Spain, practically in all of Western Europe, used the basic principles of authoritarianism as a theoretical base for their methods of control of the press. The application of this theory was not limited to the sixteenth and seventeenth centuries. It was the basic doctrine of much of the world in the coming centuries. In different time, consciously or unconsciously, they accept and so it spills into the countries like Japan, Czarist Russia, Germany, Spain and other Asian and Latin American governments. All human societies, it seems, possess an inherent ability to create systems of social control which adjusts the relationship of individuals and institutions and provides the Common interests and desires. As V. J. Shephard described, "there are mainly two types of such systems; those who act spontaneously and automatically, directly arising from the common sense of community law, enforced by sanctions of social pressure, and those who have acquired certain institutional organization and work with the legal custody and implemented with certain penalties. This second form of social control is the government, in its broadest sense."[12]

One of the basic assumptions of this theory is that the country is essential for the full development of people, which assumption has resulted in some basic conclusions about the nature of the country. By its individual elements, the country became a summation of all desirable attributes. Its power to determine the goals and methods to achieve those goals is realized by using a process which generally could not be fully analysed. In terms of

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[11] FRED SEATON SIEBERT, FOUR THEORIES OF THE PRESS 8 (Theodore Peterson & Wilbur Schramm, Print-House Step Skopje 1994).
[12] *Ibid*, at 10.

the more important philosophical problems about the nature of knowledge and truth, authoritarian theory suggests equal and categorical answers, so hence the knowledge could come with great mental effort. Authoritarian theory as a prerequisite sets the unity of intellectual activity, the existence of so-called absolutist aura, because it meant the opportunity to successfully take on the so-called collective good.

On the line with the basic tenets of the authoritarian theory of the mass media is that Plato envisioned the ideal society in a way where the country establishes and enforces unity of political and cultural purposes. Plato wanted to coordinate the lives of citizens under strict cultural law that prohibited all types of art, even mere opinion which is not in harmony with his sermon. Very politely, in his Republic, he would have "sent to another city" all offenders of the rules prescribed for the artist, philosopher and poet.

In the works of Machiavelli, there is an implicit view that patriotic reasons justify the strict control of the methods of discussion and massive dissemination of information as a basis for political action. Stability and progress of the country are the most important: the individual thoughts of the citizen are less important.

The famous English philosopher Thomas Hobbes, starting from two basic desires of man, to get rid of the pain and to rule, has developed a complete system of political philosophy in which the most important was the power to control the individual in the interest of all.

The theories of Hobbes on the nature of the country and the human relationship to it tend to justify much of the authoritarian politics of the governments of the XVII century.

German philosopher Georg Hegel, who is considered the main representative of the theory of political authoritarianism of the modern era, is credited as the genesis of modern communism and fascism. Namely Hegel writes:

> ... The country is the embodiment of morality. It is ethical spirit that is clear and sustained substantial form of *will*, which manifests before world that is aware of itself, knows their goals and implement what we know there to where knowledge allows. *Custom* and *morality* are external visible form of an internal, self-consciousness of the individual citizen, his knowledge and activity, external and visible form of indirect existence of the country. *Self-consciousness* of the individual finds the essence of freedom in view of the citizen, what is the essence, purpose and accomplishment of his consciousness. The country is intelligence *per se*. This is due to the fact that it embodies the essential will, which in turn, is nothing but an individual consciousness understood in its abstract form on ascended universal level. This solid unity is absolute and fixed target by itself. It achieves maximum freedom rights, but at the same time, the country, an end in

itself, securing maximum rights to individual citizens, whose highest goal is to be members of the country.

These theoretical reflections characteristic of authoritarian theory of the mass media, point to the conclusion that within the same real freedom is actually the freedom within the country, not freedom from the country.

Sieber S. Fred[13] (1994: 16), says that although neither Hitler nor Mussolini were political philosophers, though their published statements procedures in history, represent the distorted form of the doctrines of authoritarianism, and their treatment of the mass media was entirely consistent with the basic principle of absolutism.

B. Libertarian Theory of the Mass Media

Libertarian theory of mass communication is turning back position of the people and the country than what we saw in the authoritarian theory. Man is no longer understood as a dependent creature, which should be lead and guided, but as a migratory creature, able to distinguish between truth and deception, between better and worse alternative when faced with conflicting evidence and alternatives. Truth is no longer seen as the property of the government. On the contrary, the right to search for truth is one of the inalienable rights of man.

In libertarian theory, the media are not perceived as an instrument of government, but as a means to present evidence and arguments based on which the Government is subject to the control of their work, and people have the exclusive right to form their opinion about politics and the job of the rulers and office holders. In this theory, there is a pressing need for the media to be free from government control and influence.

According to libertarian theory, man is a rational being and a goal. The purpose of the society is the happiness and welfare of the individual and the man as a thinking organism is able to organize the world around them and make decisions tailored to their own interests.

Libertarian theorists have given different explanations for the origin of society, but they all agree that the basic function of the society is to promote the interests of its individual members. The philosophers of liberalism expressly deny knowing that the country is the highest expression of human effort, though with some reluctance, they admit that the country is useful and even indispensable tool. The country exists as a method of providing an

[13] Fred S. Siebert, former dean of the College of Communications at the State University of Michigan and author of FREEDOM OF THE PRESS IN ENGLAND, 1476-1776: THE RISE AND DECLINE OF GOVERNMENT CONTROLS.

environment for individual where will be able to realize their own potential. Like other theories about the status and function of the mass media in society, libertarian doctrine is an explanation of the philosophical principles that provide the foundation of the social and political structure in which the media operate.[14]

This doctrine where minorities and majorities, the weak equals to the strong, must have access to the media is actually a model of information that serves as an influential component in the management process. This model resembles the theological doctrines of early Christianity. The ability to think is a gift from God, in which man differs from other living beings and has individual ability to solve problems guided by evidence kept abreast of his senses, not on the basis of imposed authority as was the case in authoritarian theory.

C. Theory of Social Responsibility of Mass Media

The theory of social responsibility of the press, according to Theodore Peterson[15] (1994: 81), is established as a product of number of matters. One of them was the technological and industrial revolution that changed the image of the nation and the American way of life which, in turn, influenced the nature of the press. The second was the sharp voice of the criticism that often spoke out, in proportion to the growth of media in size and importance, which sometimes wore a tacit threat of government provisions. The next one was his intellectual climate in which some persons with suspicion looked at the basic principles of the Enlightenment. And finally, the developing professional spirit of journalism that attracted people with principles and education, highlighted sense of social responsibility other than so-called "guerrilla" spirit that ruled in the Middle Ages, has appeared.

Development impact was achieved by the technological and industrial revolution that contributed to promote speed, number and quality of old media and the emergence of new media such as film, radio and television. Industrialization at this stage was accompanied by increased advertising, which is a main support of newspapers, magazines and radio-programs.

It is hard to say exactly when the traditional theory of virtually unrestricted freedom began to depart before accepting certain responsibilities of the editors. Certainly, there was no chance publishers

[14] FRED SEATON SIEBERT, FOUR THEORIES OF THE PRESS 41—42 (Theodore Peterson & Wilbur Schramm, Print-House Step Skopje 1994).

[15] Theodore Peterson is a professor of journalism at the University of Illinois, and previously was dean of the College of Communication and author of Magazines in the Twentieth Century.

might have cared about the moral aspects, because they primarily were printers that newspapers can be viewed in addition to their printing, although at an early age among journalists there were people with great determination. By the mid-19th century journalism began to attract people's education and principles that set high standards in their craft and tried to respect them more. Some people like that formulated ethical laws for their own staff.

In the early 20th century, publishers were increasingly talking about the duties according to the constitution, which accompanied the privileged position of the press[16]. Joseph Pulitzer[17], in defence of its proposal for a journalism school, he wrote in the North American Review in 1904:

> Nothing less than the highest ideals, the most scrupulous anxiety to do right, the most accurate knowledge of the problems it has to meet and a sincere sense of moral responsibility will save journalism from a subservience to business interests, seeking selfish ends, antagonistic to public welfare.

The rise of radio and television led the government to give a major contribution to the theory of social responsibility. In the beginning of the twenties, when radio stations sprung up in chaotic abundance competitors aired on the same wavelength, the amateurs to mix their signals with professionals, and the cacophony entered in a growing number of homes listeners. So, concludes Peterson, the Government, from where the radio industry reluctantly had to bring order to the radio waves, and in 1927 she created the Federal Radio Commission for awarding frequencies and care for the contents of the programs.

The theory of social responsibility of the press, built on the foundation of thinking which are complemented some basic assumptions of libertarian theory, and thus largely discarded others. The term freedom, which it represents, is fundamentally different from that which is the traditional theory. Libertarian theory was born the concept of negative liberty, which can freely be defined as "freedom from", or more specifically freedom from external constraint. The theory of social responsibility, on the contrary is based on the concept of positive liberty "freedom", which requires the

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[16] FRED SEATON SIEBERT, FOUR THEORIES OF THE PRESS 88 (Theodore Peterson & Wilbur Schramm, Print-House Step Skopje 1994).

[17] Joseph Pulitzer (April 10, 1847, Mako, Hungary—October 29, 1911, Charlottesville, South Carolina, USA), is an important name in the American journalism. He'sconsidered the originator of the "yellow press", i.e. the mass boulevard press in the world. Since 1917 it is introduced "Pulitzer Prize" for journalism, culture and literature. This award with his name in the world of journalism today is one of the most prestigious and is considered as the ultimate accolade in the field of action. Pulitzer Prize has various areas, some of which are: American history, poetry, drama, novel, music and journalism.

presence of the necessary means to achieve their goal[18]. Considering the characteristics of this theory we come to the conclusion is that the government must not only allow freedom, but must actively promote it as well.

D. Soviet—Communist Theory of the Mass Media

While the libertarian theory was dealing with the problems, one new dramatic development of the authoritarianism has arisen, it is the Soviet communist theory of media. This theory is rooted in the Marxist determinism and cruel political necessity to maintain political progress of the party. The Soviet press acted as a tool of the ruling power as open as the authoritarian theory. Unlike the old model, here it is a country, not private ownership of the media. Maybe not even one press in the world's history was not so strictly controlled, yet Soviet spokesmen felt that their press is free, so it was free to speak the "*truth*" in a way that he perceived the ruling party. While the libertarian theory dealt with the problems, there was an appearance of a new and dramatic development of authoritarianism, it is the Soviet Communist theory of media.

Representatives of this theory argue that the American press is not truly free, because it is controlled by a business, so hence was not free to say, "Marxist truth".

These two theories are completely opposite in their postulates, though apparently, they both strive to contribute to the search for truth, even though these people have tried to contribute to the search for a Marxist-Leninist-Stalinist true.

Representatives of this theory put forth extraordinary efforts to ensure that the Soviet media presented only the information designated for sharing.

According to Schramm V.[19] (1994: 117), representatives of the Soviet Communist theory of mass media, claim that they feel happy with the only real freedom of the press, while their US counterparts are the ones who are unhappy because they worship a press which is "corrupt, controlled by special interests and irresponsible". In contrast, American journalists proudly spoke about the ability of the US media informing the people about the news around the world and the ability to provide entertainment and fun. In order to understand this theory, you should follow its roots in Marx, and

[18] FRED SEATON SIEBERT, FOUR THEORIES OF THE PRESS 100 (Theodore Peterson & Wilbur Schramm, Print-House Step Skopje 1994).

[19] Wilbur Schrammis a former director of the West-East Institute of Communications, West-East Center (Honolulu), former director of the University of Illino is Press and author of Mass Media and National Development.

its mutations in Lenin and Stalin.

CONCLUSION

Today, there are different conceptions of democracy. One would be that in which democratic society possesses means of assistance that could, in some reasonable way, participate in the management of their works and the information would be free and available to all (Noam Chomsky 2003: 147). The second concept is that, according to Chomsky, the public is prevented in the management of its obligations and the information is strictly controlled. It may sound strange, but it is important to know that the second concept is the one that prevails. The differences in the press, is actually a difference in philosophical and political explanations or theories behind the different types of print today in the world, so there are four different theories for press: *Authoritarian theory*, rooted in centuries of authoritarian political thought from Plato to Machiavelli; *Libertarian theory*, based in Milton, Locke, Mill and Enlightenment; *Theory of social responsibility*, enshrined in the communications revolution and in certain behavioural doubts philosophy of the Enlightenment; *Soviet Communist theory*, grounded in Marx, Lenin and Stalin and the dictatorship of the Communist Party of the Soviet Union. Sam Black, while stating a few simple definitions, points out the categories: good performance with public recognition, reconciliation of private and social interest, a bridge between an organization and the world and so on. These categories will help him come to a simple but accurate definition: "The application of public relations is the art and knowledge that achieves harmony with the environment, through mutual understanding, based on the true and full information." Noam Chomsky says that country power has the same effect as owners of media houses or the companies that advertise.

The differences in mass media in different countries are somewhat a reflection of what people do in different places, as well as the experience which indicates what those citizens want to read. However, there is a greater difference, which is that the press always gets the shape and colour of the social and political order in which acts. The above, in particular reflects the system of social control, which adjusts the relationship between individuals and institutions.

In the end, it might be concluded that the type of social structure and political system, and the circumstances in which a country is, significantly affect the development of media freedom.

COULD WE CADASTER FASTER IN AN INTEGRATED IT SYSTEM BY USING UAVS WITH GIS SERVICES IN A CLOUD INFRASTRUCTURE?

Mihnea Mihailescu[*]*, Diana Irimia*[**]*,*
Răzvan Rădulescu[***] *& Răzvan Simion*[****]

There is a significant number of geographies around the world where the percentage of land with cadaster and land books registered in an integrated IT system is rather low and increasing it is a real challenge for all stakeholders: the governmental institution managing the domain, surveyors, IT businesses and citizens. The typical duration and costs are too high for collecting all geospatial and deeds data, for all processing phases necessary before registering all data in a centralized IT system and issuance of land books. In order to improve the duration and costs of mass registration we analyze the involvement of modern technologies along the process, automation of eligible registration sub-processes, usage of UAVs for faster field data collection and storing and sharing all work in progress in the cloud infrastructure. We measure the improvements for each sub-process, analyze the impact of proposed actions, tools and environments, and quantify the duration, costs, quality and total cost of ownership for each scenario, based on simulations and prototype construction, to determine whether such improvements are a real "win" for all stakeholders. Comparing the mass registration process in several scenarios with different levels of automation on the sub-processes reveals a decrease of the duration or cost of sub-processes with 20-40%, a decrease in number of validation iterations with 25-50% and the improvement of public registration service transparency for the citizens. We argue that when such a technological improvements are applied to a large scale registration, the total cost of ownership of the IT system could be amortized early in the regstration process with a clear impact on the economy and public service quality of the registered geography.

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INTRODUCTION

Over the history, land has proved to be one of the most important resources that played a major role in the evolution of our species, as it offered the ingredients the human kind needed to survive and develop: food, construction materials, minerals etc. Due to these, it still represents an endless source of disputes of diverse magnitudes and impacts.

Tribes, communities, societies have developed faster as they found more efficient ways to manage land. From finding better tools and techniques to work land in order to produce food, the concept of land management has continuously evolved; nowadays more efficient politics in poverty reduction, sustainable urbanization, climate change government, equity assurance represent the current challenges. However, due to unequal development of communities around the world, all types of needs, from basic to *sophisticated,* are present on the public agendas of local administrations, governments, international institutions.

Land registration is the process of official identification and recording of the property boundaries, rights, restrictions and responsibilities through deeds or title. It is regularly conducted by central or local public authorities. Land registration represents the main pillar of land administration as it is commonly accepted that is difficult to manage the "unknown".

All around the world, governments are looking into implementing or continuously optimizing and adapting their land registration systems, as economic and social needs are rapidly changing. As many developing countries are dealing with budgetary restrictions, the need of self-sustainable solutions is a constant challenge.

In many countries, individual, on-the-need basis land registration represents the initial and still most used process. It responds to the urgent needs of the parties that can afford to pay its price. Even if the government facilitates the individual registration by offering fee and/or tax discounts, it

will take an indefinite time to complete the registration and to obtain fair quality data (ex. gaps and overlaps may probably occur).

Mass or systematic registration is the alternative to individual registration process. It is usually run or supervised within programs by local or central public authorities who can afford to support the cost, to manage the complexity, to offer the legal, procedural and technical frameworks that proved to be compulsory ingredients to success.

The design and preparation stage of these programs is probably the most important time to address the potential systemic problems as legal framework ambiguities, poor data quality of property documents (e.x. titles), incomplete project procedures and insufficient training material and courses. Experience has shown that ill prepared programs not only fail but they use up the goodwill and enthusiasm that are essential for the success of a mass campaign, such as systematic registration.[1]

I. PROBLEM STATEMENT

Mass registration process is probably the most efficient way to obtain a complete cadastral map and property rights (restrictions, responsibilities) registry for certain geography, in a time frame that is considered acceptable in the current world landscape.

The process complexity can be evaluated as high considering its following characteristics:

- diverse types of stakeholders (citizen, companies, surveyors, public authorities) in terms of culture, communication habits, institutional relations, knowledge and understanding of laws and procedures;
- massive data management of various type, quality, availability;
- extremely important results for the further development of the socio-economic environment.

IT companies and domain experts are striving to find ways to connect the technological boom of the last decades with the development of systematic registration by finding the appropriate IT solutions to key business problems.

The target of our study is to explore ways of optimizing this process from a technology-based perspective, by assessing the impact of the proposed solutions to the quality and total cost of ownership, to determine whether such improvements are a real "win" for all stakeholders.

[1] Systematic Property Registration: Risks and Remedies (2016), https://openknowledge.worldbank.org/handle/10986/26048.

II. APPROACH

Our methodology is to study each phase of systematic registration process in order to identify activities that can be supported by an IT solution, to validate their effectiveness through the analysis of the results of the projects that used such or similar solutions or simulated scenarios.

The most common phases of the mass registration process are:

- assignment preparation;
- data collection and processing;
- data validation;
- public display and complaint management;
- issuing of registration certificate.

We have identified these phases based our experience and analysis of the available mass registration methodology.

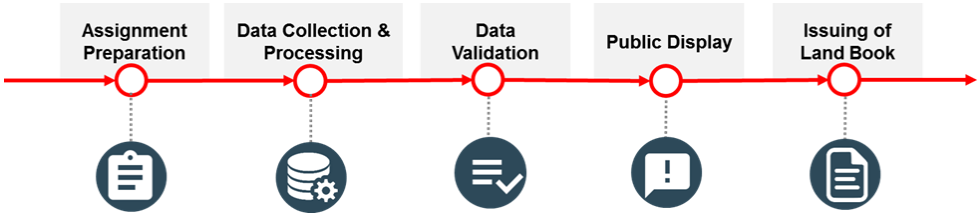


Figure 1 Phases of a standard mass registration process.

The following chapter presents the analysis of each phase activities and the solutions we have identified to improve the duration, effort or cost.

III. RESULTS

A. Assignment Preparation (Start-Up)

This is the initiation phase when the communication, procedural, technical infrastructure of the project are setup.

1. Communication Infrastructure Setup

An efficient mass land registration process requires a good collaboration between all involved parties that can be achieved using effective information dissemination tools and methods to inform the stakeholders about their requested involvement and benefits, the procedures they have to comply with, to facilitate their communication, to push alerts and reminders in order to avoid side slips.

In our opinion all of these can be enabled by an efficient

communication platform based on modern technology—a Project Portal. The uploaded content may address:

- project plan: activities, milestones, owners;
- simplified version of procedures, grouped by activity and/or role in-charge;
- dashboards with the evolution of main project indicators (ex. surveyed parcels, interviewed persons);
- events which trigger alerts/reminders: milestone approaching, delays in delivery, rejection of critical areas during validation phases which requires immediate corrections etc;
- templates of documents;
- contact information of involved institution representatives.

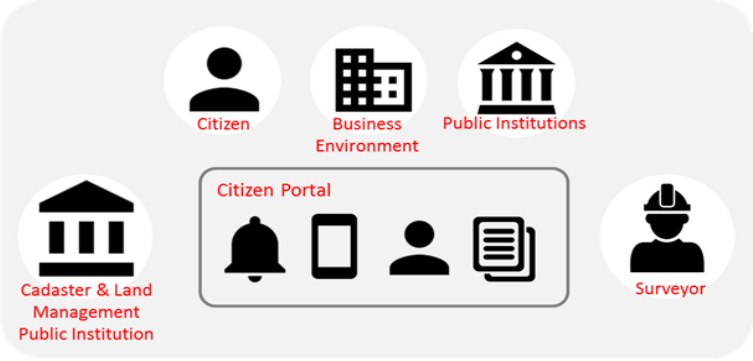


Figure 2 Citizen Portal.

The solution implementation analysis should consider some key attributes of the audience such as: cultural patterns, computer literacy level and internet penetration rate as the success of adaption is highly dependent on these. The result of this analysis should determine the adequate level of formalization, access and communication methods to be used (ex. sms, email) in order to maximize the capabilities of this tool.

In conclusion, the implementation of this modern communication tool may represent an improvement to the general process if the target audience possesses the required minimum technical and educational level. In that case, we consider it may be a reliable and efficient communication channel and a good alternative to the traditional one which is based on direct human interaction, information exchanged on paper, centralized and controlled by local (administrative) authorities.

2. Data Infrastructure Setup

The mass registration process is characterized by intensive data

management activities: collection, aggregation analysis, processing, displaying operations are (sometimes) repeatedly performed. Impressive volumes of scatter, incomplete, various types of data represent inputs that generate high processing whenever they are manually, redundantly, insecurely handled. Additional costs may occur if information is exchanged on paper: material, transportation, cover of eventual losses.

3. Legacy Data

Essential data is usually hosted and managed by different public authorities. Cadastral maps, enviromental plans, taxation zoning, urbanization plans etc. should be centralized, cleansed, analysed and spatially indexed in order to serve the project scope. Similar approach should be followed with respect to alfanumeric data registries: titles, taxation units etc.

For legacy data which rests on paper, a cost-benefit analysis may conclude that the digitalization of the legacy registry certificates (land books, land cards), property documents and map archives should be run to speed up the data collection phase activities.

The duration of such projects depends on factors like the quality of the scanned paper, the overall performance of the equipment, the organization of the scanning activity (workflow), the experience of the human operator, the involement of the beneficiary in the preparation phase etc.

Our case study is the digitization process of land books. A number of 80,000 land books with an average number of 9 pages were scanned with a speed of 2,800 pages per hour in less than 2 months. The resulted digital archive was used in the mass registration process managed by the local administration (City Hall).

In our opinion, it is important that legacy data are checked for inconsistencies and the major findings are fixed before sharing it with the involved parties. A special attention should be paid to "property-proof" documents like titles in case they represent the baseline for mass registration process. They should be digitized, their main attributes value should be stored into a database and cleansed using consistency check algorithms and correlations with other property-related data repositories, such as taxation database.

Based on our expericence on the analysis of over 10,000 parcels we can say that around 15% of the corresponding property titles contain data completion (typos) or corellation (totals) errors. The manual validation of the title main attribute value (cadastral identifier, parcel area) for each parcel

may take up to 10-15 minutes per parcel which leads to 200-300 working days. We estimate that reducing the error occurences in title-related data with 25% may improve the data collection activity that consists of spatial—property title data paring with 20-30% in terms of effort.

Our proposed solution for managing legacy data is an IT platform which has the appropriate tools to:

- import and remotely access external data exposed in standard formats (services);
- consolidate and index data of different types on regular basis;
- facilitate data cleasing by data correlation tools;
- offer data interrogation via internal user interfaces or services.

The core components of the solution are represented by:

- an alphanumeric engine that features full-text search, hit highlighting, faceted search, real-time indexing, dynamic clustering and rich document handling;
- an spatial engine that runs advanced queries on internal and external sources exposed in standard formats, can manage huge data caches, may generate *analytical* reports based on real-time identified spatial data relations.

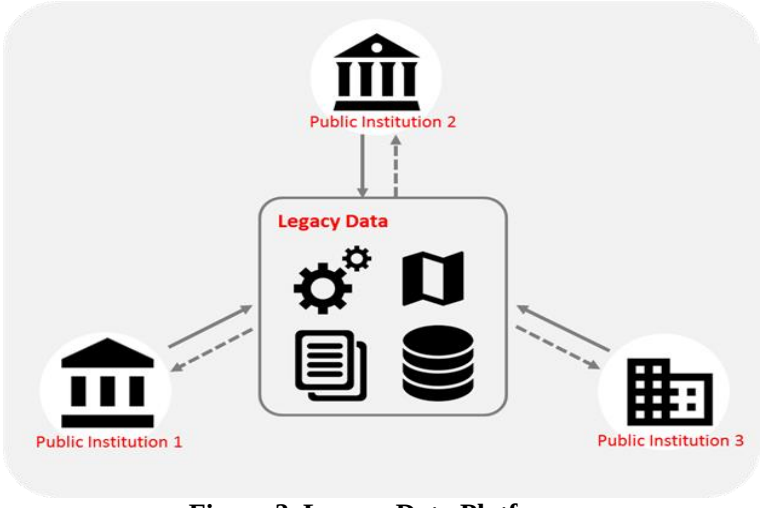


Figure 3 Legacy Data Platform.

The data managed by the platform should be organized around the two main pillars of land registration: the property and the parties which hold rights, responsibilities or which are restricted to perform actions in relation to a specific property. The main goal of the data platorm is to provide consolidated, fairly realiable, easy accessible, baseline data for supporting the project publicity and field visits.

B. Data Collection and Processing

This phase is characterized by extensive field activities conducted by a team (private surveyor company, public cadastre institution) which is responsible for interviewing, surveying and collecting ownership-related documents from citizens and companies.

1. Cadastral Mapping

The cadastral mapping activity is currently benefiting a lot from the huge development of the "unmanned aerial vehicles (UAVs), commonly known as drones. These commercial drones are small and feather-light. They offer a turnaround mapping service from planning to product in a matter of days or weeks rather than months or a year and at a fraction of the cost of conventional aerial surveying using manned aircraft"[2].

These advances were possible due to the rapid development of specialized software algorithmes that enabled the tessellation of aerophotograms taken by non-metric cameras with very good results in terms of precision.

Our case study to prove that "this new approach significantly reduces the cost and time for high quality cadastral mapping"[3] is based on the following figures.

Table 1 Technical Parameters.

UAV	HIRRUS[4]
Cruise speed	90 km/h
Wigspan	3.3 m
Range	15 km
Altitude (max)	3,000 m
Autonomy	3 h
Get-off system	Launching platform
Landing system	Air-drop
Load (max)	0.9 kg
Camera	Sony Nex 7 (https://en.wikipedia.org/wiki/Sony_NEX-7) 24 MegaPixel, 30 mm

[2] WORLD BANK GROUP, DRONES OFFER INNOVATIVE SOLUTION FOR LOCAL MAPPING (Washington DC 2016), http://www.worldbank.org/en/news/feature/2016/01/07/drones-offer-innovative-solution-for-local-mapping.

[3] WORLD BANK GROUP, DRONES OFFER INNOVATIVE SOLUTION FOR LOCAL MAPPING (Washington DC 2016), http://www.worldbank.org/en/news/feature/2016/01/07/drones-offer-innovative-solution-for-local-mapping.

[4] HIRRUS is a trademark of a research project between Autonomous Flight Technologies, www.aft.ro and Teamnet International, www.teamnet.ro.

Table 2 Flying Plan, Data Collection and Processing Parameters.

Overflight	2,600 ha
Landmarks	30 points
Flying bands coverage	60% (min)
Check pointssurvey	GPS Trimble Geo 7x, real time kinematic mode

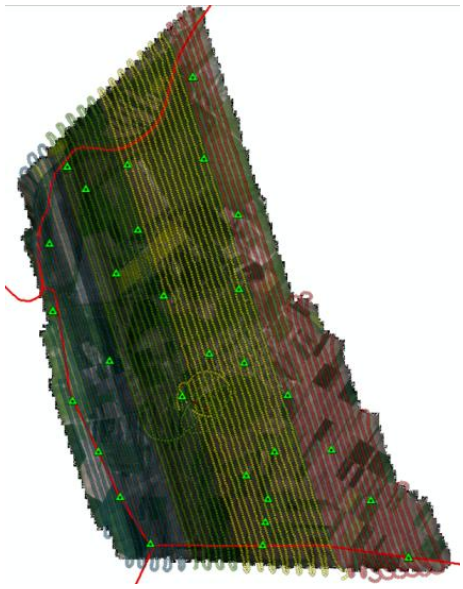


Figure 4 Flying plan.

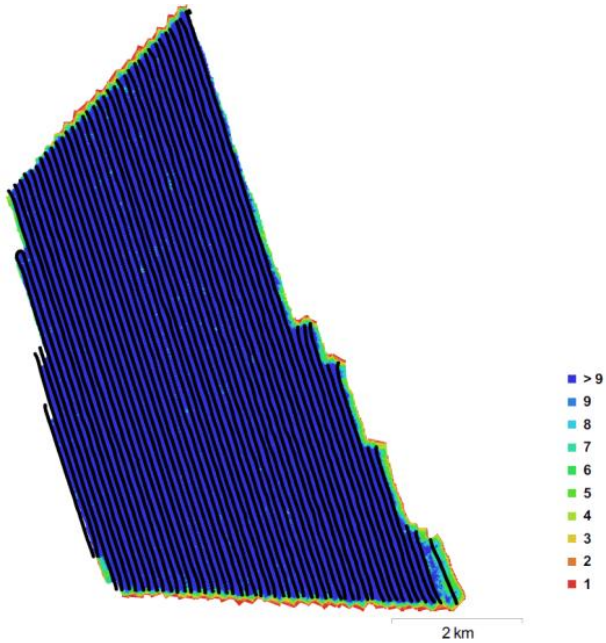


Figure 5 Photogram coverage.

2. Data Processing

A number of 10,000 images have been processed going through these steps: automatic alignment of images (tie points generation), scene reconstruction, placing of measured markers, scene optimization, full 3D model reconstruction (dense points cloud generation), digital surface model generation based on 3D model, images ortho rectification, mosaicking of rectified images and the export of products (ortho images and digital surface model).

(1) Results

The resulted products consist in an orthophoto plan of 5 cm GSD resolution and a Digital Surface Model of 20 cm GSD resolution.

Table 3 The Orthophoto Accuracy Parameters (Meters).

Root-mean-square deviation	0.045 m
Average deviation	0.036 m
CE90(CMAS)=	0.068 m
CE90(Empiric)=	0.071 m
CE95(CMAS)=	0.078 m

Here are some samples:

Figure 6 Orthophoto Map (GDS = 5cm).

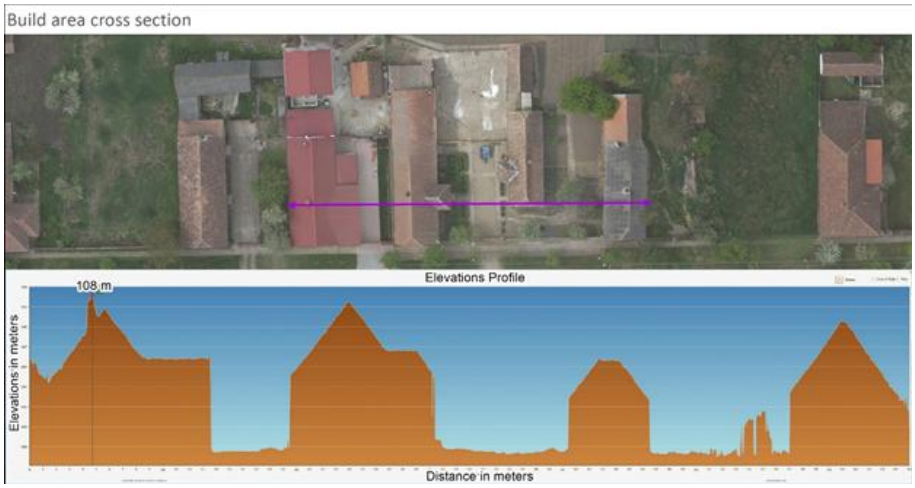


Figure 7 Digital Surface Model (GDS 20 cm).

We have measured the vectorizing effort of around 0.5-1 hour per land parcel, including the field validation work which is absolutely necessary for boundaries which cannot be drawn from the office due to visual obstacles (ex. vegetation, clouds) etc.

Figure 8 Cadastral Map.

(2) Conclusion

The precision of the ortho photo map recommends the use of the products derived from UAV-collected aerial images for a variety of areas in particular the systematic registration of lands, urban, infrastructure and utilities planning, land use monitoring etc. It will reduce time and lower costs at a reasonable quality of the final product.

2. Field Visit Management

The activities of this resource consuming phase can be optimized by facilitating the organization, capturing and exchange of data between the ground-based and office-based teams.

Below are briefly presented some improvements which can speed up the process by using a dedicated (mobile) application connected to a central server:

- team structure and the optimized routes of the areas to be visited can be defined beforehand, using specialized features;
- team members may access online or check-out for offline use essential spatial and alphanumeric data for the allocated visit areas;
- list of persons and immovables with a selected list of atributes;
- customized interview forms, prefilled with identification data for parcels, parties and legacy property documents;
- the parcelor the address of the person to be interviewed can be located using GPS technology depending on availability;
- the interview results can be directly input into the mobile application along with the photocopy of the ownership-related documents;
- the field-collected spatial vector data can be rapidly transferred to the central system by interconnecting the total stations with the mobile application.

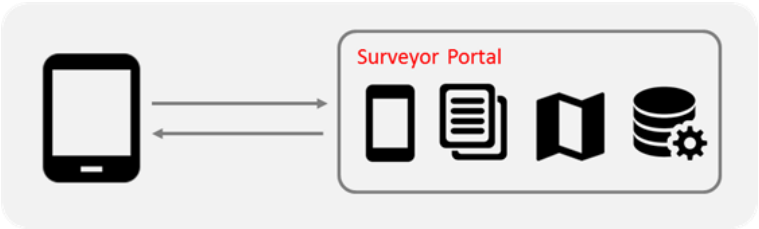


Figure 9 "Field Assistant" Mobile Application.

Our study, based on interviews with surveyor team leaders, show the following improvements in the scenario of using the above mentioned features:

- the effort related to team allocation activity will decrease by 50-60%;
- the preparation of the interview (per land parcel) will be reduced by 30-50% from 30 to 15 minutes;
- the filling of interview form and property documentation photocopying duration (per land parcel) will decrease by 50-75% from 20 minutes to 5-10 minutes;

- the collected data transfer per cadastral zoning (cadastral sector) will decrese by 33-50% from 3 days to less then 2 days, considering the paper-based information cannot be excluded from this activity.

The above figures are highly dependent on the methodology required by the project, the experience of the team members and performance and availability of internet connection etc.

3. Data Processing

This activity is dedicated to the management of collected data (spatial, alphanumeric and fotocopies): consolidation, processing, validation, correction, transformation and export. All these operations are successively and repeatedly applied in order to meet the quality standards required by the beneficiary authority.

Our proposed solution is a set of capabilities provided by an IT application to assist the surveyor in the manipulation and validation of the collected data. It can be seamlessly integrated with the application we have proposed for data collection to ensure a smooth data feed from collection to processing operations.

This application may offer the following set of features:

- import of various spatial data file formats;
- enhanced data entry capabilites for capturing alphanumeric property description and right-related data;
- import of standard format documents (pdf): field interview sheets, property documents, building unit blueprints;
- advanced querying focused on modern text search capabilities;
- integration of external spatial data sources (standard file and service formats) and real-time spatial interrogation;
- manual and automated triggered validations based on a configurable business rule engine for both spatial and alphanumeric data;
- quantitative and qualitative data evaluation reports;
- generation of specialized reports like: cadastral plan, land parcel and building index, owners' index;
- export of spatial data and associated right registrations in an XML format transport file (standards may be used: i.e. GML).

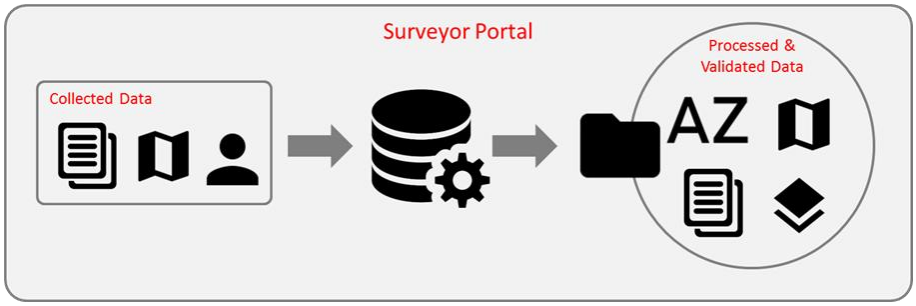


Figure 10 Data Processing.

The surveyor team leaders we have interviewed during this case study emphasized that this bundle of features will reduce the data processing effort by 20-30%. They consider the business rule engine, evaluation reports and XML transport file generator to be tools which will improve most their data processing and packaging activity.

4. Services from Cloud

The implementation and further administration of the proposed IT solutions for field data collection and processing may engage a total cost of ownership which cannot be profitably absorbed by small and medium surveying companies.

A more increasingly adopted solution is to access such IT capabilities as software services provided via an SaaS software distribution model in which the provider makes available its application capabilities via an internet platform that serves as a host. This contracting approach lowers the capital expeditures of the service beneficiary and ensures a flexible business relation with the provider. High availability, strong performance and security are becoming standard characteristics of SaaS.

In conclusion, this contracting model should be an alternative not to be missed in the planning of IT capabilities acquisition or distribution.

C. Data Validation

The activities of this phase are targeted to validate the high volumes of the collected data against the content of the corresponding ownership-related documents and a set of pre-defined business rules which address the structure, correlation and completeness.

As systematic registration deals with volumes of cadastral unit (parcel, immovable etc.) data which belong to the same superior zoning, mass validations are required at least for topological reasons. The huge amount of

data needs to be verified in a rather short period of time as it is presumed it may change in real life due to nature, owner's or authority's will.

Our proposed solution to improve the activities of this phase consists inan information system which features capabilities for:

1. Data Exchange

The transfer of the collected data can be done using:

(a) Edicated user interface which offers to surveyor operators all necessary features to directly input and real-time validate data into the beneficiary system;

(b) transport file format for spatial data, alphanumeric data or both, based on standard international formats (i.e. GML);

(c) specialized service interface which enables secure and quality controlled data transfer between surveyor and beneficiary systems.

The last two options may be preffered by large surveying companies which possess the requested technical capabilities to (directly) connect their system to benecifiary system, whereas the small ones and individual surveyors may follow the first two options which requireless expertise in IT solution and lower costs.

2. Data Validation

It is better to start the validation as soon as possible along the process in order to provide feedback which can be faster incorporated into the deliverables. Considering this, the information system should integrate data validation in data transfer methods: data entry forms (client side), technical specification of transportation file format (xsd) and web services (server-side) and it should offer easy-to-access result validation reports and alerts.

As soon as data is transferred, the electronic validation operations may be manually or automatically triggered based on the rules managed though a business rule engine:

- alphanumeric data is scanned to detect any deviations;
- topological relations are checked using spatial features.

Both provider and beneficiary users can be authorized to perform data transfer (where applicable) and validation activities within the platform, so that data updates are performed faster and real-time official feedback is accessible be all parties involved. This will reduce the overall number of data production/correction—transfer validation iterations which will consequently shorten the duration of data validation phase.

The system can offer sampling mechanisms to select the data which

has to be visually checked against the content of the field-collected or other legacy documents. This approach will increase trust and lower the possibility of the validation operators to commit abuses by applying the same rules to all cases.

The validation decisions (approval, rejection) and progress (how many) should be transparently shared to all involved parties in order to rapidly find solutions and to apply corrections. Communication platform may be used to triggeralerts and to push reminders. Cadastral map, built-in and custom reports should be available to disseminate relevant information.

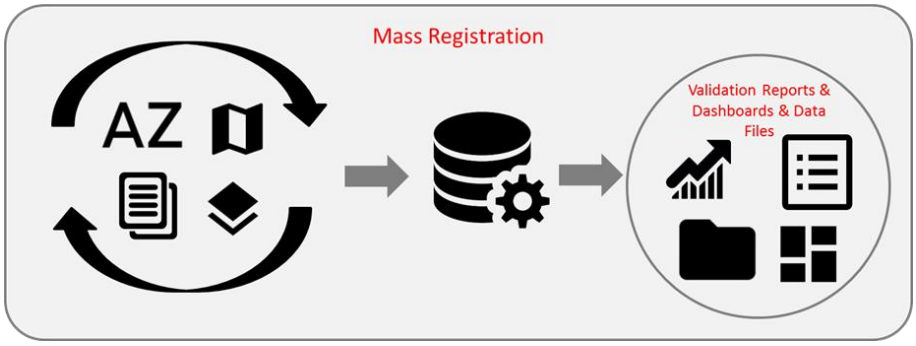


Figure 11 Data Validation.

The results of the question naire-based study show that a transparent validation process, based on an IT platform which interconnects data providers (surveyors) and beneficiaries (land registration office specialists) and provides a common tool set for data exploration and validation is highly appreciated by the involed parties. The main arguments are:

- A fair treatment as the validation tools and result reports are accessible to each side;
- The standardization of the validation procedure by continuous integration of the solutions to the exceptional cases;
- The reduction of thecorection-validation iterations with 2-4 weeks per delivery (cadastral sector) as the surveyor can initiate the correction operations as soon as the rejection motivation is registered.

D. Public Display

The traditional public display procedure based on printed cadastral plans, property and owner oriented indexes, called cadastral technical documents, which are usually pinned on boards located at City Halls or Cadastre/Land Registry Offices will continue to be primarly used as it is the only format of presentation that’s accessible to large masses of people.

In regions where internet penetration has a good rate, the public display can be supplementary realized in a digital environment.

Our improvement proposal is an IT system component which provides the following features:

- Cadastral technical documentation rendering in printable format;
- Automated websites generation to present cadastral map, associated property rights, restrictions and responsibilities (if registered) and the copies of the collected documents (where available);
- Dedicated online forms for capturing user disputes in relation with property boundaries, attributes and right registrations and to upload relevant documents;
- Automatic generated messages to inform about the dispute solutioning progress;
- User registration and authorization workflow.

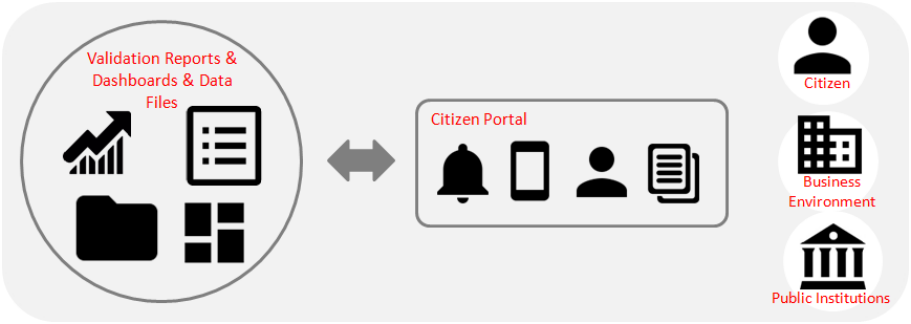


Figure 12 Public Display.

The feature which offers to the project leading authority the possibilty to generate the final version of the cadastral map and property registries at the end of the validation phase is considered a major process improvement by the surveyor team leaders we have questioned. This way, the validated data set is the only, secure, official source for the printed systematic registration documents which are displayed on the local authority boards and the website which facilitates the remote interaction with the owners who cannot be present onsitefrom various reasons (distance, illness etc.) to visually check the displayed information. They estimate this feature may determine a decrease with 30-50% of the effort associated with the management of these documents (intermmediate incorporation of fixes and deliveries).

Online registration and real-time information of the disputes facilitates the early start of the investigation and correction activities and ensure a transparent and collaborative environment for the entities which have to address the reported issues. From our respondents point of view, this is so

important as the major data inconsistencies, usually related to the mapping discrepancies between the field reality and property documents, are addressed within this phase.

E. Phase 6: Issuing of Land Books

At the end of the display phase, the public validated data which incorporates the disputes' resolution is uploaded into the land management system (Cadaster Registry, Land Registry) and the document which represents the evidence of registration is issued.

The data specification used within mass registration process should be compatible with the one implemented by land registration management system in order to ensure a smoother transfer of data.

It is vital that the cadastral/land registry authority has an electronic land registration system so that the results of the mass registration project will be further dinamically updated to reflect the changes which occur in real life related to property boudaries (natural alterations: floods, river course changes, landslides) and rights (transfer of property rights etc.).

The registration certificate (land book, land card, excerpt etc.) is usually issued within the land book registration system as it provides such built-in functionality by default.

Our proposal in terms of improvement is an integrated solution which:

- Connects systematic registration solution with the core land registration management system;
- Offers mass registration certificates generation capabilities (merged PDFs);
- Integrates with external systems (i.e. Citizen Portal) via web services to facilitate automatic or self-service distribution of e-signed electronic version of registration certificates.

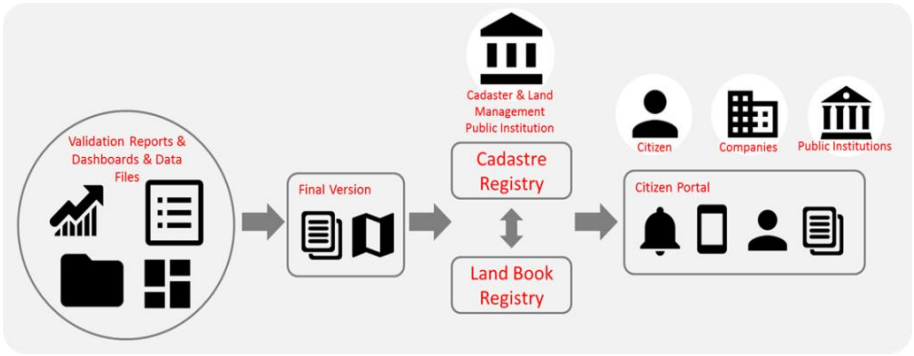


Figure 13 Mass Registration Process Finalization.

The practical adoption of the mass document generation and printing of the registration certificates (cadastral plan excerpt, land book excerpt) will reduce the average duration of obtaining the printed copy to seconds per certificate (average no. of pages/document: 2).

A server signed e-version of these documents can be downloaded by citizens and official representatives of the companies as long as they have an authorized account and are registered as owners or other property right holders. They can make use of this electronic copy as long as the required legal framework is enforced, therefore the potential recipients officially recognize its legal value.

IV. CONCLUSIONS

Nowadays, the systematic registration process can be more efficiently addressed by integrating modern data collection technologies, software capabilities, specific knowledge within the process. A detailed analysis of each phase is compulsory to understand the specific needs, select the right IT solutions and adapt them to match the requirements, integrate and tune the entire system in order to maximize the results of its support in day to day business outcome.

The solutions we have presented for each phase generate the highest added value when they are integrated to act together as a system. The image below offers the big picture: stakeholders, components and data flows.

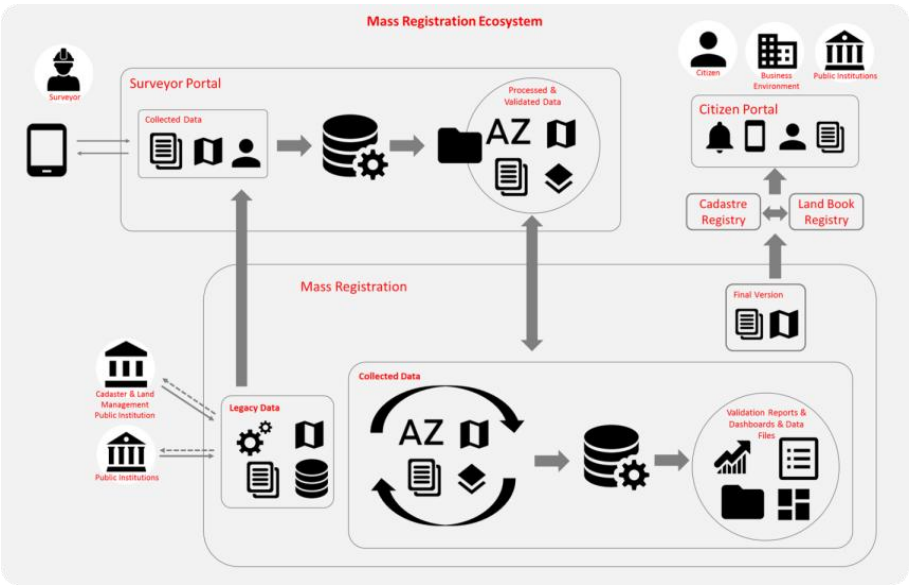


Figure 14 Mass Registration Ecosystem.

The adoption of such a system is a complex, iterative process itself that may require piloting phases followed by the deployment of the components which may add the highest value to current landscape.

Our estimations show that an average improvement of duration or effort with 20-40% is achievable. Its scale differs from phase to phase and it is dependent to the level of automatization. The implementation of real-time access to data validation decisions and citizen complaints may reduce the number of validation iterations with 25-50%.

Communication and collaboration tools are essential components in the current social environment as the need of information is continuously increasing driven by the technological boom. A smoother and more transparent access to information related to the property registration process will trigger an increase of population trust, involvement and general satisfaction.

We would like to take this opportunity to introduce our Cadaster and Land Management technology expertise. We are a top IT company in Romania, with presence in Europe, Middle East and Africa. We provide complex IT systems' integration projects and proven product suites in areas of Land Management, Healthcare and Smart Cities, with more than 100 years of cumulated cadaster and land management IT services experience in our team.

V. OUR LAND MANAGEMENT SOFTWARE PRODUCT

Our Cadastral Software Product is a suite of Integrated Land Management Applications which provides complete services for the management of cadastral and land book information. The solution automates all cadastral and land registry data updates and legal outputs.

Main benefits for the regional/central government:

- Creates a system which can process more citizen requests, faster, thus increasing the state budget revenues;
- Reduces time required for delivering business outputs (i.e.: excerpts can be delivered instantly, online, fully-automated);
- Integrates legacy systems through seamless modular architecture replicability;
- It is built on most reliable technologies provided by solid vendors like Oracle, Microsoft, ESRI and IBM, or in an open-source architecture;
- It is compliant with the international standards requests: OGC (Open Geo Consortium) and LADM (Land Administration Domain Model).

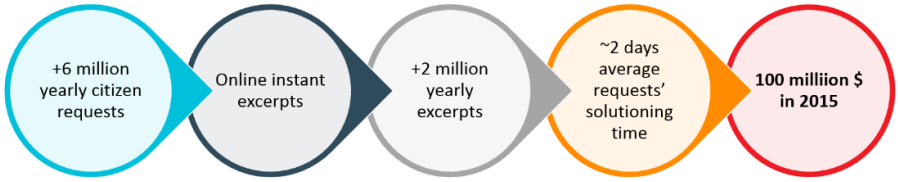


Figure 15 2015 Results of One System Implemented by Our Team.

The Cadastral Software Product brings openness, interoperability, standardization, automation and flexibility.

The list of main components for our product includes: Registration, Land Book Registry, Mass Registration, Cadaster Registry, Citizen Portal, Surveyors Portal, Spatial Data Integration, Notification Engine, Administration Audit & Monitoring and Business Intelligence & Reporting (and a complete list is shown in the picture below).

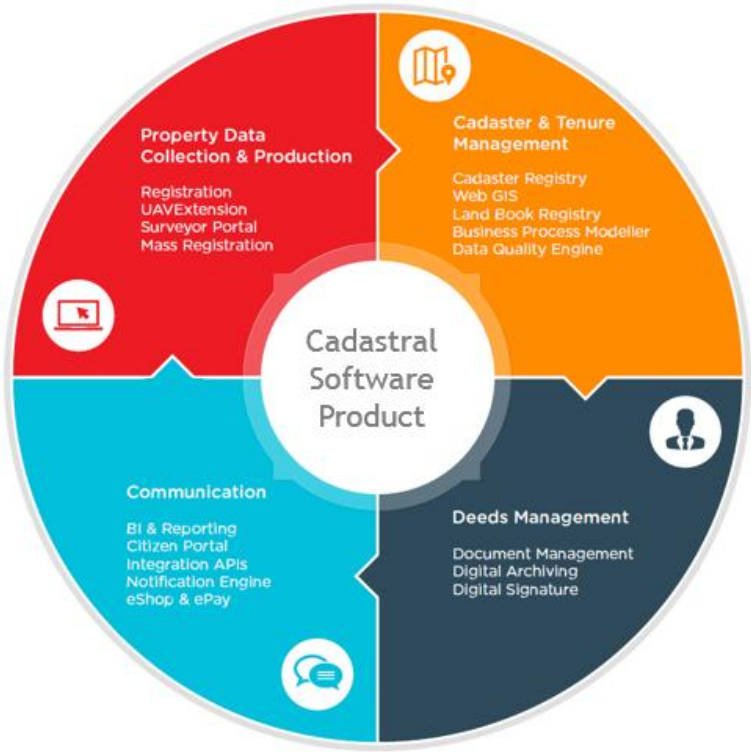


Figure 16 Cadastral Software Product Ecosystem.

Investing in an integrated IT system for a large scale mass registration process could be the first step into decisively increasing the chances of success for such a project. Of course, legal support needs to be harmonized

with such a strategy and stakeholders trained before the start of such a project. We argue that when such improvements are applied to large scale registration, the total cost of ownership of the IT system could be amortized in less than half of the mass registration duration with a clear impact on the economy and public service quality of the registered geography.

VI. LAND ADMINISTRATION IMPACT ON THE GOVERNMENTAL ECOSYSTEM

Land administration is about the way people relate to land, probably the most important resource that has modeled the human kind development over its history. Its origins are related to the cadastral and land registration, but its focus has expanded over time to new functions: land use, land value and land development as more specialized polices and strategies are needed to address new and rapidly evolving challenges of developing countries: poverty alleviation, economic development, environmental sustainability, and management of rapidly growing cities and developed ones: emergency management, environmental protection, economic decision making.[5]

Land administration systems are the tools that governments use to manage land-related information in the benefit of the social, economic and environmental development of their countries. They are based on land information infrastructures that are currently benefiting from the technology boom.

The authorities' policies related to land tenure, value, use and development are more efficiently calibrated as they are supported by operative cadastral and land registry (land registration) systems. It is said that "the cadastral system of a country reveals its level of progress, both economically and socially".[6]

A. Land Valuation and Taxation

Land valuation is about developing an opinion related to the value of the land. It is based on characteristics like: location, socioeconomics, government regulations, desirability for residents as a place to live, vicinity to schools, parks and recreational facilities, roadway accessibility, and

[5] Stig Enemark, *Key Demands for Sustainable Land Administration*, INTERNATIONAL FEDERATION OF SURVEYORS (2012), https://www.fig.net/resources/articles_about_fig/coordinates/2012_10_coordinates_enemark.pdf.

[6] CARMEN GRECEA, GEORGIANA RUSU, COSMIN CONSTANTIN MUSAT & ANA MARIA MOSCOVICI, CHALLENGES IN IMPLEMENTING THE SYSTEMATIC LAND REGISTRATION IN ROMANIA (Romania: University of Timisoara 2013), http://www.wseas.us/e-library/conferences/2013/Antalya/GENG/GENG-12.pdf.

distance to retail establishments.[7]

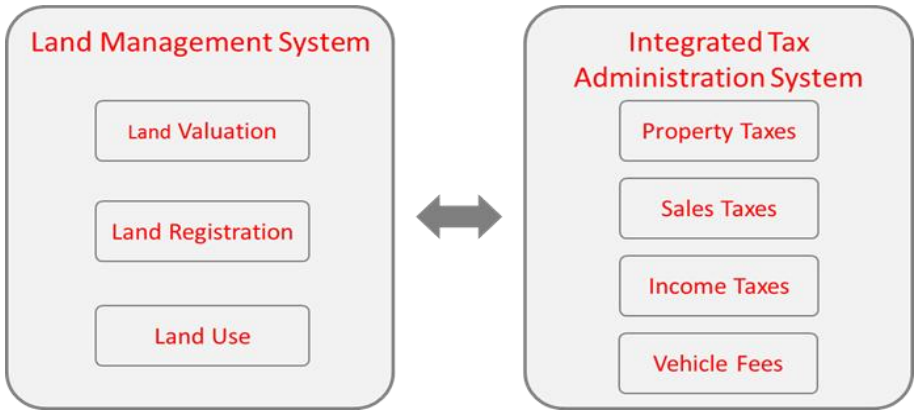
A fair, transparent land valuation framework enables governments and local administrations to efficiently support the development of the real estate markets, to set up land value capture tools such as development fees, land auctions and property taxation based on market valuation in order to generate public revenue to finance investments in land development projects[8].

The land valuation process is getting more complex as people can easier access and process more diverse and reliable information about its characteristics as a response to the evolution of their needs.

Land valuation provides the necessary input data for the property taxation that represents one of the most reliable generators of Internal Generated Revenue (IGR) since land and buildings are: easily identified, can be seized for nonpayment and represent a repository for accumulated wealth.

These three administrative functions (registration, valuation and taxation) are highly interdependent as incomplete list of properties, delayed or absence of properties updates, inexact property data, difficulties to properly identify owners, conflicts between alleged owners generate property valuation issues that impact the taxation process.

These issues can be addressed by computerization and integration of the systems which manage these public administration functions that would ensure the modified data is updated across all systems when a relevant event occurs, a single-point and real-time access to better information for all stakeholders (citizen, companies and public authorities).



[7] www.businessdictionary.com/definition/land-value.html.

[8] WORLD BANK GROUP, MONGOLIA-LAND ADMINISTRATION AND MANAGEMENT IN ULAANBAATAR (Washington DC 2015), http://documents.worldbank.org/curated/en/834131468045555488/Mongolia-Land-administration-and-management-in-Ulaanbaatar.

This kind of solution may provide extensive benefits for involved parties:

Land Management:

- Owners are attributed a unique identifier by Tax Administration that facilitates tracking of transactions;
- Transactions can be blocked when issues arise with the owner tax accounts (e.x. selling transactions can be stopped if the taxpayer is under legal action to recover debts by tax administration).

Tax Administration:

- Properties are properly identified and defined through Cadastre;
- Owners are correctly identified based on the Land Registry;
- Transactions are known real-time and taxed accordingly.

Tax Payers:

- A single point of contact can be offered for public services through a portal (Citizen Portal):
- Filing of Tax return;
- Review and payment of existing liabilities;
- Access to cadastral map and land registry;
- Registration of complaints related to property registration and taxes.

B. Emergency Management

Land administration is highly interconnected with emergency and disaster management at all its functions level:

- Land tenure: provides the information about the land that is affected by a natural or technological disaster or it is the location of an event that requires urgent intervention of the public authorities, its owner and other parties that have "tenure relationships" in relation with the land; this is used to rapidly assess the situation based on land and owner attributes, to contact the owner and other parties in order to limit the potential impact and to efficiently manage the rescue and recovery activities.
- Land valuation: mainly provides the necessary data to correctly evaluate the post-disaster situation in order to protect the vulnerable citizen from the unfair treatment of the assurance companies, to efficiently calibrate the public authorities recovery policies etc;
- Land use: provides valuable information in mitigation and preparedness for intervention activities.

Governments, local authorities and private companies are raising their interest in relation with emergency and disaster management due to the increase of urbanization and industrialization which are generating more and

new environmental threats.

A performing emergency management system relies on a land management system that can offer real-time, accurate information about the diverse attributes of immovable properties (parcels, buildings and building units) in a spatial context.

This information can be used in:

- search and rescue missions;
- hazard areas mapping;
- evacuation management;
- hazardous materials management.

In conclusion, governmental institutions should manage the implementation of the IT systems in a unique framework which follows an integrated view. The value of the data managed by one institution increases as it is efficiently shared with other individual or institutional consumers that enable all of them to provide or receive a better public service.

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