

CONFIRMING THE OBVIOUS: WHY ANTIQUE CHINESE BONDS SHOULD REMAIN ANTIQUE

Brenda Luo and Alex Xiao[†]

Abstract

As the Sino-U.S. relationship goes on a downward spiral, points of conflict have sparked at places one might not expect: antique sovereign bonds. In recent years, the idea of making China pay for the sovereign bonds issued by its predecessor regimes a century ago have received increasing attention in the U.S. This note takes this seeming strange idea seriously and maps out the possible legal issues surrounding a revival of these century-old bonds. Although two particular bonds show some potential for revival—the *Hukuang* Railways 5% Sinking Fund Gold Bonds of 1911 and the Pacific Development Loan of 1937—the private bondholders would unlikely be able to toll the statute of limitations on the repayment claims based on these bonds. Even in the unlikely scenario that they succeed, the Chinese government would have an arsenal of contract law arguments against the enforcement of these bonds, most notably defenses based on duress, impracticality, and public policy. By going into the details of the legal arguments and history behind these bonds, we seek to confirm the obvious, that is, the idea of making China pay for these bonds is as far-fetched as it sounds and would not be taken seriously by courts.

I. INTRODUCTION

Sovereigns live forever,¹ but what about the money they owe? Over the years, the question of whether the United States can seek

[†] Brenda Luo and Alex Xiao both graduated from Duke University School of Law. They are members of the Class of 2021 and 2020, respectively. We are extremely grateful for Professor Mitu Gulati's guidance on this project.

repayment from a group of defaulted Chinese bonds issued before the People's Republic of China's inception has attracted attention from law professors,² speculators,³ schemers,⁴ and potentially the Trump White House.⁵ With the growing call to punish China for the COVID-19 pandemic rising inside the Beltway, even members of Congress have entertained the idea of compelling China to pay for these century-old bonds. A concurrent resolution has even been introduced to Congress,⁶ driving the issue under the spotlight yet again.⁷

What exactly are these bonds? Before the Chinese Communist Party (the "CCP") established the People's Republic of China (the "P.R.C."), its predecessors, the Qing Empire, and the succeeding Republic of China (the "R.O.C.") under the Kuomintang (the "KMT"), both issued government bonds to Western investors from 1861 to 1949. After the P.R.C. was founded in 1949, following the Soviet Union's lead in repudiating the pre-communist era

We would also like to thank Kate Dai, Yanchao Di, Robertson Dorsett, Tom Yu, Yiran Wang, and Larry Hong for their valuable comments and critiques. Our gratitude also goes to the fantastic editors of the University of Pennsylvania Asian Law Review. All errors are ours.

¹ See JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 249 (1906) ("A monarchy may be transformed into a republic, or a republic into a monarchy . . . though the government changes, the nation remains, with rights and obligations unimpaired.").

² Joseph Cotterill, *Back to the Future with Pari Passu*, FIN. TIMES (Nov. 5, 2013), <https://ftalphaville.ft.com/2013/11/05/1667042/back-to-the-future-with-pari-passu/> [<https://perma.cc/7ZPU-LS2C>].

³ Mark Weidemaier, *Pre-Revolutionary Chinese Debt: An Investment for the Truly Stable Genius*, CREDIT SLIPS (July 21, 2019), <https://www.creditslips.org/creditslips/2019/07/pre-revolutionary-chinese-debt-an-investment-for-the-truly-stable-genius.html> [<https://perma.cc/9X6P-GS6F>].

⁴ Press Release, U.S. Sec. and Exch. Comm'n, SEC Charges Prominent Pastor, Financial Planner in Scheme to Defraud Elderly Investors (Mar. 30, 2018), <https://www.sec.gov/news/press-release/2018-51> [<https://perma.cc/NP4U-LEXE>].

⁵ Tracy Alloway, *Trump's New Trade War Tool Might Just Be Antique China Debt*, BLOOMBERG BUSINESSWEEK (Aug. 29, 2009), <https://www.bloomberg.com/news/articles/2019-08-29/trump-s-new-trade-war-weapon-might-just-be-antique-china-debt> [<https://perma.cc/S9DG-A9KK>].

⁶ S. Con. Res. 43, 116th Cong. (2020).

⁷ Izabella Kaminska, *Antique Chinese Bonds are Now in Play*, FIN. TIMES (July 29, 2020), <https://www.ft.com/content/7a65b99c-e419-49da-bf47-33acb91ed4a3> [<https://perma.cc/B3EE-22UD>].

obligations to the Western powers,⁸ the P.R.C. ceased all diplomatic relations with the West⁹ and refused to recognize its predecessors' sovereign debt obligations.¹⁰ These bonds have since gone into default and have been left with only antique value.¹¹

This paper is an attempt to analyze this seemingly far-fetched idea in earnest. The authors try to explore if a U.S. court would entertain the idea of ordering the present Chinese state to pay for its predecessors' obligations, which, by some estimates, have accrued to worth just north of a trillion dollars.¹² While courts have refused to do so several times in previous decades on a variety of grounds,¹³ our

⁸ Eric Toussaint, *Russia: Origin and Consequences of the Debt Repudiation of February 10, 1918* (Feb. 15, 2021), *COMM. FOR ABOLITION ILLEGITIMATE DEBT*, <http://www.cadtm.org/Russia-Origin-and-consequences-of-the-debt-repudiation-of-February-10-1918> [<https://perma.cc/3ED4-A455>].

⁹ See Mao Zedong, Former Chairman, P.R.C., Report to the Second Plenary Session of the Seventh Central Committee of the Communist Party of China (Mar. 5, 1949) (transcript available at https://www.marxists.org/reference/archive/mao/selected-works/volume-4/mswv4_58.htm [<https://perma.cc/4DTM-XZ4W>]) (“We must . . . [r]efuse to recognize the legal status of any foreign diplomatic establishments and personnel of the Kuomintang period. . .”).

¹⁰ *Caizheng Bu, Waijiao Bu Guanyu Chuli Woguo Jiu Zhengfu Faxing de Gongzhaiquan Wenti de Tongzhi* (财政部、外交部关于处理我国旧政府发行的公债券问题的通知) [Joint Announcement by the Ministry of Finance and the Ministry of Foreign Affairs on the Public Debts Issued by the Former Regimes] (Jan. 8, 1982), <https://www.chinaacc.com/new/63/64/80/2006/3/ca247397581360022628-0.htm> [<https://perma.cc/ZP88-EATS>] [hereinafter *Joint Announcement*] (confirming the State Council of the People's Republic of China's policy since 1953 on repudiating payment for any public debt issued by the Republic of China and the Qing Empire). See DAI XUEWEN (戴学文), *CONG TAIWAN HAIFANG JIEKUAN DAO AIGUO GONGZHAI, LISHU ZAOQI ZHONGGUO DUIWAI ZHAIQUAN, 1974–1949* (从台湾海防借款到爱国公债：历数早期中国对外公债, 1874–1949) [From the Taiwan Defense Bond to the Patriotic Bond: A Collection of Foreign Debt in China, 1874–1949] 315 (2017) (offering a full Chinese Translation of the Pacific Development Loan). See also JEROME A. COHEN & HUNGDAH CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW; A DOCUMENTARY STUDY* 681–82 (1974).

¹¹ See Kaminska, *supra* note 7 (discussing how the value of the antique Chinese bonds has changed over time).

¹² See Alloway, *supra* note 5.

¹³ See, e.g., *Jackson v. People's Republic of China*, 794 F.2d 1490, 1494–95, 1497–99 (11th Cir. 1986), *Morris v. People's Republic of China*, 478 F. Supp. 2d 561, 566–73 (S.D.N.Y. 2007); *Pons v. People's Republic of China*, 666 F. Supp. 2d 406, 411 (S.D.N.Y. 2009) (showing how courts have either punted or

goal in this paper is to examine whether they would change their position in light of recent developments in law and, if so, what defenses would be available.

The authors address two categories of legal issues in this paper: Whether the P.R.C. could (1) procedurally and (2) substantively challenge a bondholder-plaintiff's lawsuit against it. Procedural challenges include issues of jurisdictional reach of U.S. courts and the statute of limitations.¹⁴ Although there are two particular bonds that have a higher chance of surviving the jurisdictional challenge, they are very unlikely to survive the statute of limitations challenge.

The substantive issues, however, are unsatisfactorily answered by existing legal precedent. This paper does not seek to provide any definitive answers, but only to illustrate that even in the unlikely scenario of a plaintiff-bondholder circumventing the procedural hurdles, she would still have to face further challenges against her recovery on substantive grounds. Arguments against the enforcement of these bonds are rooted in traditional contract law arguments—duress, impracticability, and public policy.

The rest of the paper is presented in the following order: Section II concerns the two relevant procedural issues, Section III focuses on the substantive issues against the enforcement of these bonds, and Section VI concludes.

II. PROCEDURAL CHALLENGES: JURISDICTION & STATUTE OF LIMITATIONS

To survive the P.R.C.'s motion to dismiss, the plaintiff-bondholders will have two major procedural barriers to overcome.

dismissed suits regarding debt held by the P.R.C. as the successor state to previous regimes in China).

¹⁴ Several academic articles have addressed this topic: Mark Weidemaier & Mitu Gulati, *Enough With the Old Chinese Debt Already*, CREDIT SLIPS (Sept. 10, 2019), <https://www.creditslips.org/creditslips/2019/09/enough-with-the-old-chinese-debt-already.html> [<https://perma.cc/ZD2Q-MUGD>]; *see also* Michael Chen et al., *The Emperor's Old Bond 2–8* (Mar. 20, 2020) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544241 [<https://perma.cc/RNT3-FM3V>]) (examining jurisdictional challenges to the collection of the old Chinese bonds).

First, the bondholders must establish that U.S. courts have jurisdiction over the P.R.C. for their bond claims. Second, they must establish that the statute of limitations has not lapsed on these claims.

After examining all historical bonds issued by the pre-P.R.C. governments that we could find, we identified two specific bonds—the *Hukuang* Railways 5% Sinking Fund Gold Bonds issued in 1911 by multiple U.S. banks (the “*Hukuang* Bond”), and the Secured Sinking Bond Fund of 1937, also known as the Pacific Development Loan of 1937 (the “PDL”)—that have the potential to overcome the jurisdictional barrier. Our discussion in this paper is based on the language in the indentures of these two bonds because they provide the strongest case for the bondholders to survive a motion to dismiss compared to a few dozen other bonds issued in the same era. Our discussion also assumes that the P.R.C. is the sole legitimate successor to inherit all rights and obligations of the Qing Empire and the R.O.C.,¹⁵ as has always been the position of both the P.R.C. and the U.S.¹⁶ Therefore, we will not include any potential involvement of the Taiwanese government in our discussion, a topic intricate enough to merit its own paper.

Jurisdictional Barrier: Sovereign Immunity

The first hurdle bondholders must overcome is to establish jurisdiction over the P.R.C. While in past cases courts had held that a U.S. court does not have jurisdiction over foreign governments,¹⁷ the *Hukuang* Bond and the PDL are particularly susceptible to suit

¹⁵ U.S. Dep’t of State, Bureau of East Asian and Pacific Affairs, Relations with Taiwan, Bilateral Relations Feet Sheet (Aug. 31, 2018), <https://www.state.gov/u-s-relations-with-taiwan/https://www.state.gov/u-s-relations-with-taiwan/> [<https://perma.cc/8GQV-9VL4>].

¹⁶ See RESTATEMENT (THIRD) OF FOREIGN REL. L. § 209(2) (AM. L. INST. 1987) (noting that rights and obligations of the predecessor state are transferred to the successor state).

¹⁷ See, e.g., *Schooner Exch. v. McFaddon*, 11 U.S. 116, 147 (1812) (holding that a French warship was immune from the jurisdiction of U.S. courts). See also Richard Parker, *China's Secret? It Owes Americans Nearly \$1 trillion*, OREGONIAN (Jan. 10, 2019), https://www.oregonlive.com/opinion/2012/05/chinas_secret_it_owes_american.html [<https://perma.cc/P8X6-KVV8>] (explaining that investors who tried to sue the Chinese government in the 1980s and 1990s often failed because the law back then provided that U.S. courts do not have jurisdiction over foreign governments).

for repayment issues in light of the more restrictive theory of sovereign immunity adopted by the U.S. in the 1952 Tate Letter.¹⁸

The notion of absolute sovereign immunity has gradually declined in relevance as Western governments have turned to a more restrictive version of sovereign immunity.¹⁹ The Foreign Sovereign Immunities Act (1976) (“FSIA”) has codified the U.S. version of the restrictive theory.²⁰ Under the FSIA, foreign sovereigns will be held accountable for their commercial activities so long as those activities have a connection to the U.S. The connection can be established if the action is based upon (1) a commercial activity carried on in the U.S. by a foreign state; (2) an act performed in the U.S. in connection with a commercial activity of the foreign state elsewhere; or (3) an act outside the U.S. in connection with a commercial activity of the foreign state elsewhere that causes a direct effect in the U.S.²¹ While Congress seems to have left defining the connectivity requirement to courts on a case-by-case basis, a congressional committee report does demonstrate its intent through a list of examples, showing that indebtedness incurred by a sovereign that negotiates or executes a loan agreement in the U.S. may create the connection required under the FSIA.²² In short, the issuance of bonds to U.S. investors is likely to be viewed as within the range of commercial activity that establishes the necessary connection to the U.S.

Furthermore, in *Republic of Austria v. Altmann*, the Supreme Court reversed the old rule laid out in *Jackson v. The People’s Republic of China*,²³ allowing for the FSIA to be applied retroactively.²⁴ This means that a sovereign no longer enjoys

¹⁸ See Letter from Jack Tate, Acting Legal Adviser, Sec’y of State, to Philip Perlman, Acting Att’y Gen., Dep’t of Just. (May 19, 1952), reprinted in 26 DEP’T ST. BULL. 984 (1952) [hereinafter the *Tate Letter*] (“The Department [of State] has now reached the conclusion that [sovereign] immunity should no longer be granted in certain types of cases.”).

¹⁹ Joan E. Donoghue, *Taking the Sovereign Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception*, 17 YALE J. INT’L L. 489, 490 (1992).

²⁰ 28 U.S.C. § 1602 (“[S]tates are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned . . .”).

²¹ 28 U.S.C. § 1605(a)(2).

²² H.R. REP. NO. 94–1487, at 17 (1976).

²³ *Jackson v. People’s Republic of China*, 794 F.2d 1490, 1497–99 (11th Cir. 1986).

²⁴ *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004).

absolute immunity in cases brought before U.S. domestic courts, regardless of when the underlying activity happened.²⁵ U.S. courts now would have subject matter jurisdiction in the event in which one of the exceptions laid out in the FSIA is triggered.

In two early cases related to pre-P.R.C. Chinese bonds, *Morris* and *Pons*, plaintiff-bondholders, who were U.S. citizens, purchased the bonds on the secondary market.²⁶ There, no U.S. bank participated in the initial issuance of the bonds, and loan repayments by the Chinese government were not paid to U.S. banks.²⁷ Instead, these bonds were only redeemable at issuing banks outside of the U.S.²⁸ As a result, the court held that the acts did not have substantial contact with the U.S. sufficient to establish liability of the Chinese government for commercial activities.²⁹

Unlike *Morris* and *Pons*, bondholders of the *Hukuang* Bond and the PDL will likely succeed in establishing substantial connection to the U.S. under the FSIA. First, for the PDL, the underlying commercial activity was arguably carried out in the U.S. by a foreign state, meeting the first exception to sovereign immunity under the FSIA. The issuing bank negotiated the terms of the bond *directly* with the Chinese government *in the U.S.* (at a company called Pacific Development Corp.) and the bond was listed in U.S. currency.³⁰

Second, the PDL provides one additional fact that further supports the finding of a connection to the U.S. The place of performance of this bond (i.e., the recoupment of the principal) was designated as J.P. Morgan in New York.³¹ This scenario is similar to *Republic of Argentina v. Weltover, Inc.*, where, because Argentina designated New York as the place of repayment on the bonds and made some interest payments to New York accounts before defaulting, the court found a connection to the U.S. for the purpose

²⁵ *Altmann*, 541 U.S. at 698 (noting that many of the provisions under FSIA unquestionably apply to cases arising out of conduct that occurred before 1976).

²⁶ *Morris*, 478 F. Supp. 2d, at 564–65; *Pons v. People's Republic of China*, 666 F. Supp. 2d, at 409.

²⁷ *Morris*, 478 F. Supp. 2d, at 570.

²⁸ *Id.* at 564.

²⁹ *Id.* at 570–71.

³⁰ See DAI, *supra* note 10, at 175, 315 (stating that the bond was signed by the Chinese ambassador to United States and showing that the bond was listed in U.S. currency in a full Chinese translation of PDL).

³¹ *Id.* at 175.

of applying the FSIA exception and piercing the immunity shield.³² While the American citizenship of the bondholders is not in itself sufficient for courts to decide that the effect was “felt” in the U.S.,³³ the place of signing and performance together with the identity of the issuing bank in our case is likely sufficient to locate the effect in the U.S.³⁴

Third, for the *Hukuang* bond, even though it was negotiated and signed in Paris,³⁵ the direct effect test could likely be met since the bond was issued by a bank syndicate including four American banks, including J.P. Morgan & Co., and the principal amount was split equally among the four participating states.³⁶ Since U.S. banks actively participated in the initial issuance of the bond and were the counterparties entitled to the contractual obligations, the breach of those obligations had a direct effect in the U.S. In sum, for both bonds, it would be hard for the P.R.C. to claim the immunity defense under the FSIA.

One potential counterargument available to the P.R.C. is the one it made in *Jackson*. There, China argued that the U.S. cannot abrogate the long-accepted international law principle of absolute sovereign immunity by changing its domestic laws.³⁷ However, this argument suffers from several flaws. To begin with, while the Supreme Court stated in *The Paquete Habana* that international law is “part of our law,”³⁸ scholars have noted that, in application, what

³² *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 620 (1992).

³³ *Morris*, 478 F. Supp. 2d, at 569–71 (holding that plaintiff suffered no “direct effect in the United States” sufficient to establish jurisdiction under the commercial activity exception of the FSIA, the court noted that “the *only* evidence of a nexus with the United States clearly presented to the court is plaintiff’s citizenship No issuing banks were located in the United States The P.R.C. had no designated agent to administer the bonds in the United States. No negotiations concerning the bond issuance or payment occurred within the United States. The bonds were not issued or payable in U.S. currency. And, importantly, the contractually designated locations where payments of principal and interest were to be paid were all in cities outside the United States.”).

³⁴ *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 620 (1992).

³⁵ *Id.* at 112.

³⁶ *Id.*

³⁷ *Jackson v. China*, 794 F.2d 1490, 1494 (11th Cir.1986).

³⁸ *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”).

this means is ambiguous due to twentieth-century developments in the relationship between customary international law (“CIL”) and U.S. domestic law.³⁹ Consequently, even assuming that there is a material difference between the FSIA and CIL, a U.S. domestic court will likely avoid applying international law, especially when CIL is in conflict with U.S. statutes. When there is a direct conflict between the two, courts have concluded that the U.S. statutes prevail.⁴⁰

Furthermore, CIL has also evolved to treat commercial activity as one category of exceptions to sovereign immunity. The U.N. General Assembly clarified this principle when it adopted the U.N. Convention on Jurisdictional Immunities of States and Their Property.⁴¹ The Convention, although not yet in force, recognizes a general immunity for states with certain exceptions similar to those stated in the FSIA.⁴² Thus, regardless of the applicable law, U.S. domestic courts will likely apply a more restrictive sovereign immunity standard and assert jurisdiction over the P.R.C.

Admittedly, there have been slight differences between the FSIA and CIL, and the question of which law should apply to our current case may seem to make a difference to the bondholders. It is true that changes in the FSIA are now retroactive, whereas changes in CIL are not and thus inapplicable to prior transactions.⁴³ Also, if CIL were to be applied, the P.R.C. could further argue that it is a *persistent objector* to the particular CIL related to the immunity defense and should therefore not be subject to its standards.⁴⁴ The

³⁹ See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 852–55 (1997) (“After Erie . . . a federal court can no longer apply [customary international law] in the absence of some domestic authorization to do so, as it could under the regime of general common law.”).

⁴⁰ See, e.g., *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 136 (2d Cir. 2005) (“[C]lear congressional action trumps customary international law . . .”).

⁴¹ G.A. Res. 59/38, annex, *Convention on Jurisdictional Immunities of States and Their Property*, at 3–7 (Dec. 2, 2004).

⁴² *Id.* at 4–7.

⁴³ See generally Antoine Buyse, *A Lifeline in Time—Non-Retroactivity and Continuing Violations under the ECHR*, 75 NORDIC J. INT’L L. 63, 64–66, 70–73 (2006) (showing that the European Court of Human Rights, in accordance with common practice in international law, has adopted a non-retroactivity principle).

⁴⁴ See Holning Lau, *Rethinking the Persistent Objector Doctrine in International Human Rights Law*, 6 CHI. J. INT’L L. 495, 495 (2005) (“The doctrine of the persistent objector (“the doctrine”) limits the enforceability of international laws. According to the doctrine, if a state persistently objects to the

P.R.C.'s past insistence on invoking the odious debt doctrine, which relieves the successor regime from inheriting its corrupt predecessor's debt,⁴⁵ can be viewed as such evidence of it being a *persistent objector*. While it has always been controversial, the odious debt doctrine is at least recognized by the international community.⁴⁶ As noted above, however, it is well established that an Congressional act can effectively control what role an international doctrine or a CIL rule such as the odious debt doctrine and the *persistent objector* rule plays in the U.S. legal system.⁴⁷ Moreover, U.S. courts have not recognized the odious debt doctrine.⁴⁸ Since the courts under discussion here are U.S. domestic courts which will likely apply U.S. law, the potential difference between CIL and the FSIA resulting from the retroactivity aspect and the ability of a nation to withdraw from CIL becomes moot.⁴⁹ In sum, on the facts of our case, bondholders are likely able to establish jurisdiction over the P.R.C.

development of a customary international law, it cannot be held to that law when the custom ripens.”).

⁴⁵ James V. Feinerman, *Odious Debt, Old and New: The Legal Intellectual History of an Idea*, 70 L. & CONTEMP. PROBS. 193, 197–98 (2007). See also Bucheit et al, *supra* note 8, at 1208 (noting that the new citizens who are going to inherit unpaid debt from previous regime are victims of the linear progression of time).

⁴⁶ Feinerman, *supra* note 45, at 208–218.

⁴⁷ See STEPHEN P. MILLER, CONG. RSCH. SERV., RL 32528 INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW (2018) (“Congress is likely to continue to play a critical role in shaping the role of international law in the U.S. legal system in the future.”).

⁴⁸ See RESTATEMENT (THIRD) OF FOREIGN REL. L. § 209(2) (AM. L. INST. 1987) (noting that rights and obligations of the predecessor state are transferred to the successor state).

⁴⁹ See William S. Dodge, *Withdrawing from Customary International Law: Some Lessons from History*, 120 YALE L. J. 169 (2010) (explaining that a more permissible view towards withdrawal from CIL would not make a legale difference but only gives a foreign country the right to complain diplomatically about a retroactive change in the rules).

Statute of Limitations: the Pari Passu déjà vu

Under the FSIA, the law of the forum state defines the length of time of the applicable statute of limitations.⁵⁰ Because there was no choice-of-law clause in the original Chinese bonds, we must first determine the forum state where the bondholders are likely to bring the lawsuit against the P.R.C. New York would be the likely forum for such a lawsuit because the case law there provides the strongest argument for a bondholder-plaintiff to toll the statute of limitations.

A federal court sitting in New York applies New York's "borrowing statute" for statute of limitations issues arising from bond indentures.⁵¹ New York law provides that the bondholder's claim against the P.R.C. would be time-barred six years after the bond's maturity.⁵² For the *Hukuang* bond and the PDL, this would be 1957⁵³ and 1960,⁵⁴ respectively. Therefore, the statute of limitations would have long passed unless the bondholders could find a way to toll the statute of limitations.

The bondholders' strongest argument for tolling the statute of limitations is to argue that the P.R.C. has been continuously breaching the *pari passu* clause in the bond indentures every time it had serviced its other debt instruments. New York law provides that, if a contract requires "continuing performance over a period of time, each successive breach may begin the statute of limitations running anew."⁵⁵ This means that each time the P.R.C. breaches the bond indenture by making a payment, the statute of limitations restarts, and

⁵⁰ See *Morris*, 478 F. Supp. 2d, at 571 ("When a claim is brought under the FSIA, the law of the forum state determines whether plaintiff's claim is time-barred.").

⁵¹ N.Y. C.P.L.R. § 202(5) (Consol. 2021) (determining which statute of limitations will be applied); N.Y. C.P.L.R. § 213(2) (Consol. 2021) (providing that an action brought pursuant to a contractual obligation or liability must be commenced within six years); *Morris*, 478 F. Supp. 2d, at 571 ("A federal court sitting in New York will apply New York's 'borrowing statute,' N.Y. C.P.L.R. §202.") (citation omitted).

⁵² *Morris*, 478 F. Supp. 2d, at 572.

⁵³ See *Jackson v. China*, 794 F.2d 1490, 1492 (determining that the *Hukuang* bonds matured in 1951).

⁵⁴ See *DAI*, *supra* note 10, at 315 (documenting that the PDL matures in 1954, six years after which is 1960).

⁵⁵ *Guilbert v. Gardner*, 480 F.3d 140, 150 (2d Cir. 2007).

the bondholders would be able to bring the otherwise time-barred claims against the P.R.C.

Therefore, in order to toll the statute of limitations, the bondholders must prove that the P.R.C. had breached these old bonds at least once in the past six years. For this purpose, the Second Circuit's two decisions in favor of NML Capital as the holder of the Argentine sovereign bond (the "NML cases") would be their best precedents.⁵⁶

The NML cases are useful for the bondholders because of their interpretation of the Equal Treatment Provision (i.e., its *pari passu* clause) in the Argentine Fiscal Agency Agreement ("FAA").⁵⁷ The Second Circuit found that Argentina breached the Equal Treatment Provision of its old bond in a debt restructuring effort through debt exchange by taking three actions: "(1) defaulting on the [old] Bonds, (2) enacting legislation ["the Lock Law"] specifically forbidding future payment on them, and (3) continuing to pay interest on subsequently issued debt"⁵⁸

The P.R.C., however, would have a better chance of refuting the claim than Argentina had for two reasons. First, the language in the two Chinese bond indentures contains less restrictive covenants. Second, the Second Circuit's holding is very narrow. As the Second Circuit made clear, it did not rule on whether either (i) paying one creditor and not another or (ii) enacting a law disparately affecting a group of creditors' rights would alone constitute a breach of the *pari*

⁵⁶ NML Cap. v. Argentina, 699 F.3d 246 (2d Cir. 2012); NML Cap. v. Argentina, 727 F.3d 230 (2d Cir. 2013).

⁵⁷ The authors recognize the difference between the *pari passu* clause contained in the Argentine FAA and the first priority protection found in the Chinese bond, which may render different treatments offered by the court in its application of the NML cases. While it is beyond this paper's scope to discuss the litigation strategy in this regard, it is an important point worth addressing at the actual litigation planning stage.

For the specific language of the Equal Treatment Provision being violated, see NML Cap. v. Argentina, 699 F.3d at 251 ("The Securities will constitute . . . direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank *pari passu* without any preference among themselves. The payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness.").

⁵⁸ NML Cap. v. Argentina, 727 F.3d at 237.

passu clause.⁵⁹ It was important for the Second Circuit that the combination and accumulation of these three actions caused a breach of the *pari passu* clause.⁶⁰ In fact, the Second Circuit even noted that these three factors appearing together are so extraordinary that it made Argentina a “uniquely recalcitrant” debtor, a scenario that the court found as “unlikely to occur in the future”.⁶¹ Therefore, the P.R.C. can distinguish the language contained in its bond indentures from the Argentine FAA’s and ask the court to adopt a narrow reading of the NML cases and their progeny.⁶²

The bondholders may argue that the P.R.C. has been breaching the first priority clause found in the *Hukuang* Bond and the PDL. The *Hukuang* Bond provides that, if the principle and the interest are not paid in full, the bondholders will have a security interest in the tax revenue of the provinces of Hubei and Hunan that enjoys a priority over all future loans, and the government shall not incur any indebtedness or guarantee any indebtedness using the same collateral.⁶³ For the purpose of this article, we assume that this provision effectively puts a security interest of first priority on the Chinese Government’s tax revenue, because every Chinese central government collects taxes from its provinces, including Hubei and Hunan.⁶⁴ Similar but with less restriction, the PDL provides that the

⁵⁹ *Id.* at 247.

⁶⁰ *See id.* (“[W]e have not held that a sovereign debtor breaches its *pari passu* clause every time it pays one creditor and not another, or even every time it enacts a law disparately affecting a creditor’s rights. We simply affirm the district court’s conclusion that Argentina’s extraordinary behavior was a violation of the particular *pari passu* clause found in the FAA.”) (citations omitted).

⁶¹ *Id.*

⁶² *See* Lee C. Buchheit, *The Pari Passu Fallacy—Requiescat in Pace 3* (Jan. 24, 2018) (on file at <https://ssrn.com/abstract=3108862> [<https://perma.cc/NF66-XWP5>]) (describing a case where the facts reflect those in NML but, without the Lock Law, no breach of the *pari passu* clause was found); *see also* Lee C. Buchheit & G. Mitu Gulati, *Restructuring Sovereign Debt after NML v Argentina*, 12 *CAP. MKTS. L. J.* 224, 226–27 (2017) (arguing that future cases standing on the NML precedent may go either way depending on how similar the fact-specific factors are between the cases).

⁶³ *See* DAI, *supra* note 10, at 273 (discussing the Chinese translation of the *Hukuang* bond, which states the priority enjoyed over future loans).

⁶⁴ Other commentators have made similar observations; *see* Michael Chen et al., *The Emperor’s Old Bonds*, at 6–7 (Mar. 20, 2020) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544241

bond has a first priority lien on the salt tax revenue of the Chinese government, and enjoys priority over all future loans collateralized by the salt tax revenue. There is no restriction on the future incurrence of new debt.⁶⁵

The bondholders may further argue that, because the P.R.C. refused to inherit these old bonds while paying for new sovereign debt as recently as October 2020, the P.R.C. has effectively subordinated these old bonds and breached the covenants that granted them the highest priority.⁶⁶ The bondholders may add that the P.R.C. has breached an even more stringent condition than that of the Equal Treatment Provision in Argentina's FAA because the Equal Treatment Provision only provides a requirement of equal treatment, not the highest priority.⁶⁷ Therefore, an argument can be made that the P.R.C.'s violation of the first priority clause would be more outrageous than that of the Argentine FAA and therefore render the P.R.C. a uniquely recalcitrant debtor.⁶⁸

This argument is not likely to succeed. For the PDL, the language of the indenture suggests that as long as the Chinese government has not been granting a first priority security interest to other creditors in the same collateral—the salt tax revenue—there would not be any subsequent breach for the purpose of tolling the statute of limitations.⁶⁹ Having a first priority in a collateral does not by itself give a loan a seniority position in terms of payment.⁷⁰ For the *Hukuang* bond, the language suggests that there will be a

[<https://perma.cc/RNT3-FM3V>] (reasoning that the security interest in the “Provincial Revenues” of the Hukuang Bond “could be analogized to a present-day tax on or relating to the province of Hubei.”).

⁶⁵ *Id.* at 316.

⁶⁶ See Hudson Lockett & Thomas Hale, *Beijing's First Bond Offer to US Investors Draws Record Demand*, FIN. TIMES (Oct. 15, 2020), <https://www.ft.com/content/c1e8897c-32a5-402d-837a-ba7df135c069> [<https://perma.cc/5EDA-QXQT>] (noting the P.R.C. began selling debt to US buyers in mid-October, 2020).

⁶⁷ For the language of the Equal Treatment Clause, see *supra* note 57.

⁶⁸ See Michael et al., *supra* note 14, at 9–10 (noting that the P.R.C. has engaged in preferential treatment for nearly half a century since 1949).

⁶⁹ See *supra* note 60.

⁷⁰ The “first in time first in right” rule under UCC Article 9 will only apply to conflicting security interests in the same collateral. Between a creditor having a first priority interest in collateral A and another creditor having a first priority in collateral B, there is no prescribed order of payment if there is no separate provision restricting payment on other debt. U.C.C. § 9-322(a).

subsequent breach only if the government has been granting a first priority interest in the same collateral *or* incurring any new debt. Making selective payments to other creditors in itself does not trigger a breach. Both bonds have less restrictive provisions than those in the *NML* cases, and it will be harder for the bondholders to establish a subsequent breach.

Admittedly, the indentures we found thus far by researching on a secondary source might only present part of the entire agreements. Moreover, the bondholders of the *Hukuang* bond may be able to show that the Chinese government has been incurring some new debt.⁷¹ The P.R.C., however, can take advantage of the Second Circuit's narrow reading of the *NML* cases since *White Hawthorne, LLC v. Republic of Argentina* to distinguish itself from the unique situation of Argentina.

In fact, the cases following the *NML* decisions took the language on the uniqueness of Argentina seriously. The district judge of the *NML* cases, Judge Griesa of the Southern District of New York, has held in *White Hawthorne* that, at least absent the "Lock-Law style" legislative action, the bare government decision to pay some creditors but not others does not constitute a breach of the *pari passu* clause.⁷² Such reasoning has been adopted by other federal judges in New York,⁷³ including the Second Circuit as recently as March 2020.⁷⁴ Leading experts have argued that the *pari passu* argument used

⁷¹ The chances for the bondholders of the two bonds to be able to show the Chinese government has been granting first priority interests in the two kinds of collateral is very thin and thus the authors assume away this possibility in this paper. We, of course, welcome any historical evidence to show the opposite.

⁷² *White Hawthorne, LLC v. Republic of Arg.*, No. 16-cv-1042(TPG), 2016 U.S. Dist. LEXIS 177895, at *2–3 (S.D.N.Y. Dec. 22, 2016).

⁷³ *Bugliotti v. Republic of Arg.*, 952 F.3d 410, 415 (2d Cir. 2020); *Bison Bee LLC v. Republic of Arg.*, 778 F. App'x 72, 73 (2d Cir. 2019).

⁷⁴ *Bison Bee LLC v. Republic of Argentina*, No. 18-CV-3446, 2018 WL 2018WL 8058126, at *3 (S.D.N.Y. Oct 22, 2018) (stating that a breach of *pari passu* clause requires Argentine to commit "extraordinary conduct"); *Ajdlar v Province of Mendoza*, No. 17-CV-1530, 2017 WL 36351222, at *10 (S.D.N.Y. Aug 2, 2017) (confirming that a breach of *pari passu* clause could not be found unless the facts in the current case are "substantially similar" to the extraordinary conduct in the *NML* cases).

against Argentina in the *NML* cases has become essentially toothless after *White Hawthorne*.⁷⁵

Two caveats, however, remain in the Second Circuit's later narrow reading of the *pari passu* argument: (1) these appellate cases are unreported, thus providing limited precedential value and preserving *NML* as relevant case law; (2) the *pari passu* argument is ultimately based on state law and the possibility remains that the Second Circuit would be bound by state court's view on this argument. Therefore, *the pari passu* may still have a spark of life.

The P.R.C., however, can take advantage of the Second Circuit's narrow reading of *NML* since *White Hawthorne*. To begin with, not all three elements present in the *NML* cases that make Argentina uniquely recalcitrant exist in the case against the P.R.C.: although the P.R.C. government defaulted on these bonds and has been issuing and paying off new bonds, the P.R.C. legislators have never passed formal legislation subordinating the debt it renounced. The National People's Congress, the P.R.C.'s legislative body, has never passed legislation like the Lock Law enacted by the Argentine legislature. Rather, the decision on repudiating these debts was made by the executive branch of the government alone through a decree.⁷⁶ This would help distinguish the P.R.C. from Argentina in the *NML* cases in the eyes of the Second Circuit, which held that any missing element from the original *NML* cases fact pattern—here, the absence of legislation—would deny the finding of a breach of the first priority clause.⁷⁷

As a counterargument, bondholders can try to establish that the P.R.C. in fact did enact a law like the Lock Law. They might argue that the P.R.C. has no effectual separation of powers when it renounced the debt in 1953, and that the decrees of the executive branch should be viewed as *de facto* legislation because they are

⁷⁵ See Buchheit & Cruz, *supra* note 62, at 3–4 (stating that without aggravating factors, discriminatory payment alone does not constitute a breach of a *pari passu* clause).

⁷⁶ See *Joint Announcement*, *supra* note 10 (confirming State Council of the People's Republic of China's policy since 1953 on repudiating payment for any public debt issued by the Republic of China); see also *Morris v. People's Republic of China*, 478 F.Supp.2d 561, 563 n.2 (S.D.N.Y. 2007) (holding that the commercial activity exception was inapplicable because there was no direct effect in the United States).

⁷⁷ Bugliotti, 952 F.3d at 415; *Bison Bee LLC*, 778 F. App'x at 73.

“policy-laws” and have the same legal effect as any formal legislation under Mao’s P.R.C.⁷⁸ As one commentator puts it, “[u]nder Mao, policy alone as articulated and applied by [the CCP] had directed and guided the entire Chinese Party-state, and legislation had been used only formalistically to declare policy.”⁷⁹ An argument can be made that the absence of Lock Law-like legislation when the P.R.C. denounced its obligation was a mere formality, and substantively, the P.R.C. in 1953 was just as recalcitrant as Argentina to legally forbidding fulfilling its obligations. Making an argument through analyzing the nature of the Chinese Constitution, though not unprecedented,⁸⁰ would be extremely unconventional as it would require a federal court to review the P.R.C.’s political structure and constitution in 1953, a task that courts are reluctant to undertake.⁸¹

Other commentators have noticed that bondholders may argue that the P.R.C. has established a much longer pattern of uncooperative behavior than Argentina and thus could more likely be characterized as a “uniquely recalcitrant” debtor.⁸² However, assuming that the odious debt doctrine cited by the P.R.C.,⁸³ though not a recognized defense, at least morally stands for justice for the oppressed, the P.R.C. may appear to be much less outrageous or even justified in declaring those old debts void.⁸⁴

⁷⁸ For more detailed discussion on the legal significance of the policy-laws in China and their development from the Mao era to the 2000s, *see generally* Litong Chen, *Chinese Policy Laws and Separation of Powers*, 1 U. PA. E. ASIA L. REV. 49 (2005).

⁷⁹ Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 NW. J. INT’L L. & BUS. 383, 384 (2000).

⁸⁰ *See* *Trans. Chem. Ltd. v. China Nat. Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266 (S.D. Tex. 1997) (analyzing independently the Chinese Constitution and Codes in addition to affidavits from three experts).

⁸¹ Matthew J. Wilson, *Demystifying the Determination of Foreign Law in U.S. Courts: Opening the Door to a Greater Global Understanding*, 46 WAKE FOREST L. REV. 887, 896–9 (2012).

⁸² *See* Chen et al., *supra* note 14, at 8–9 (noting that the P.R.C. has engaged in preferential treatment for nearly half a century since 1949).

⁸³ *Jackson v. People’s Republic of China*, 794 F.2d 1490, 1495 (11 Cir. 1986) (“PRC maintains that under the principle of non-liability for ‘odious debts’ China bears no responsibility for the bonds.”).

⁸⁴ In the next section, this paper will offer a more detailed discussion on the odious debt doctrine regarding whether it could potentially function as an adequate defense in U.S. courts, *see infra* Section III.

The P.R.C. also renounced the obligations of its predecessors under very different circumstances from that of Argentina. For one, it was impractical for the P.R.C. to pay the *American* bondholders back in the early 1950s.⁸⁵ From 1945 to 1949, the Chinese Communist Party had been fighting a civil war with the then R.O.C. government who was receiving monetary support from the U.S. Just a year after the war, in 1950, the newly established P.R.C. engaged in a direct military conflict with the U.S. in Korea and the Seventh Fleet entered the Taiwan Strait to neutralize the P.R.C.'s attempt to attack the exiled R.O.C. forces in Taiwan.⁸⁶ It was absurd for the dirt-poor early P.R.C. to pay the Americans, who had sponsored the regime the P.R.C. had overthrown in a brutal civil war and was now fighting the P.R.C. themselves. In the eyes of the P.R.C., it had shed blood to get rid of the strings from Western colonial powers, a situation that couldn't be more different from that of Argentina, a willing and frequent participant of the modern global capital market.⁸⁷

Furthermore, the P.R.C. and Argentina are very different debtors today. The debt in the NML case was issued and defaulted by the same regime that rules Argentina, and Argentina has been repeatedly unable to honor its obligations in the U.S. capital market. In fact, Argentina just defaulted the ninth time early this year.⁸⁸ It makes sense for the Second Circuit to deal with one extraordinary market participant with extraordinary solutions. The P.R.C., on the other hand, is current on all its sovereign debt obligations to U.S. investors and has maintained a history of doing so. The debt defaulted on was not issued by the same regime and was from a century ago. It would make little sense for a New York court to

⁸⁵ In fact, we think the P.R.C. may cite common law impracticality as defense against the validity of these bonds, see *infra* Section III.C.

⁸⁶ Statement by the President on the Situation in Korea, 1 PUB. PAPERS 173 (June 27, 1950).

⁸⁷ See Ben Bartenstein, Sydney Makim & Marisa Gertz, *One Country, Nine Defaults: Argentina Is Caught in a Vicious Cycle*, BLOOMBERG (Sept. 11, 2019), <https://www.bloomberg.com/news/photo-essays/2019-09-11/one-country-eight-defaults-the-argentine-debacles?sref=LTGwPLw9>.

⁸⁸ Nicole Alcoba, *Argentina Defaults Again as Debt Talks Progress*, AL JAZEERA (May 22, 2020), <https://www.aljazeera.com/ajimpact/argentina-defaults-debt-talks-progress-200522212222639.html> [<https://perma.cc/9HTF-9634>].

enforce the law, which was specifically curated for Argentina, against the P.R.C.

Finally, the policy rationale behind the statute of limitations falls on the P.R.C.'s side. Allowing the *NML* type argument to toll the statute of limitations against the P.R.C. would make these bonds from a century ago never expire as long as the Chinese government is paying for its public debt.⁸⁹ This implies that the statute of limitations may never run depending on how the contract was drafted,⁹⁰ the exact scenario that the statute of limitations was created to avoid in order to save public resources and ensure equitable outcomes.⁹¹ One could argue that the judiciary should not waste public resources on rejuvenating stale claims.⁹² The antique Chinese bonds are probably the best example of stale claims that are still afforded attention from the public discourse. It would be a good public policy to let these claims find their peace.

In sum, the PDL bondholders seem to be out of luck, unless they can dig some gold out of the muddy history related to the salt tax revenue. If the *Hukuang* bondholders can establish successive breaches by the P.R.C. within the six-year timeframe leading up to the litigation because of the issuance of new sovereign debts, they could have a chance to establish that the P.R.C. has been continuously breaching the restriction on incurring new debt found in the *Hukuang* bond under the *NML* standard.⁹³ This would theoretically allow the statute of limitations to be renewed every time a new bond is issued, and thus bondholders may have a chance to bring the lawsuit to court today. However, the bondholders are not likely to succeed in light of

⁸⁹ A wonderful point made by Professor Weidemaier in his podcast; see Mark Weidemaier & Mitu Gulati, *Episode Two of Clauses and Controversies: Imperial Chinese Bonds*, CREDIT SLIPS (Aug. 28, 2020), <https://www.creditslips.org/creditslips/2020/08/episode-two-of-clauses-and-controversies-imperial-chinese-bonds.html#more> [<https://perma.cc/5W9Q-D5KM>].

⁹⁰ *Id.*

⁹¹ *Bell v. Morrison*, 26 U.S. 351, 360 (1828).

⁹² *Id.*

⁹³ The P.R.C. started issuing treasury bonds in 1988. See Haizhou Huang & Ning Zhu, *The Chinese Bond Market: Historical Lessons, Present Challenges and Future Perspectives* 25 (Apr. 2007) (unpublished manuscript) (available at <http://depot.som.yale.edu/icf/papers/fileuploads/2582/original/07-04.pdf> [<https://perma.cc/65QD-HV3P>]) (providing an overview of the history and current challenges facing the Chinese bond market).

the Second Circuit's recent rulings on the *pari passu* issue, the very different circumstances surrounding the P.R.C. and Argentina's debts, and the policy rationale behind having a statute of limitations in the first place.

III. SUBSTANTIVE CHALLENGES: CONTRACT LAW DEFENSE

The authors recognize the uncertainty brought by international law argument and the odious debt doctrine in a U.S. court. Therefore, this section introduces defenses that are more appealing to a federal court—New York contract law. Due to the different circumstances surrounding the issuance of these two bonds, we found two different lines of common law defense for potential litigation over the two bonds, respectively.

For the *Hukuang* Bond, the P.R.C. could invoke duress because of the precarious situation the Qing Empire was in during its last decades. The PDL, however, was issued not by the Qing Empire, but by the R.O.C.⁹⁴ as part of its effort to reorganize its sovereign debt with colonial powers, specifically, the U.S. Unlike the Qing Empire, the R.O.C. in 1937 was not in as precarious of a situation. Although it faced a looming military threat from Japan, which had annexed Manchuria since 1931, the R.O.C. in 1937 was on track to becoming a modern state with a growing economy and even paying off most of its foreign debt.⁹⁵ The duress defense against the validity of the contract is therefore weaker for the PDL given the time and context it was signed. However, the P.R.C. does have alternative contract law defenses against the enforcement of PDL, namely impracticability and the frustration of purpose. Because contract law defenses are based on state law, we will determine the choice of law first and then elaborate on the defenses available to the *Hukuang* bond and the PDL, respectively.

⁹⁴ See DAI, *supra* note 10, at 315.

⁹⁵ Of course, paying off the foreign debt became impossible after the Japan invasion in July 1937. See SUN DI, MINGUO SHIQI JINGJI JIANSHE GONGZHAI YANJIU (1927–1937) (民国时期经济建设公债研究 (1927–1937)) [A STUDY ON THE REPUBLIC OF CHINA'S PUBLIC DEBT (1927–1937)] 18 (2015) (stating that had Japan not invaded China, China's foreign debt could have been paid off fully).

The Choice of Law

Before diving into the specific argument of contract defenses, we first establish why New York contract law is likely to control for these bonds that have no choice-of-law provision. Since New York federal courts follow New York state courts on the issue of choice of law,⁹⁶ this section looks at common law principles and New York state court cases to address the question of governing law in our case.

Other than the fact that New York law provides a better argument for the bondholders to toll the statute of limitations, plaintiff-bondholders are more likely to pick New York as their go-to forum because its courts have demonstrated in the past a series of efforts to induce parties to use its laws and forum by promoting enforceability of contract provisions through legislation and the creation of specialized business courts.⁹⁷ There are many developments within the New York court system, for example, efforts to supply high-quality business courts, in order to give New York a leading position in the market for contracts.⁹⁸ In addition, New York is very respectful of parties' decisions, either explicit or implicit,⁹⁹ to select New York as the forum and its law as the governing law.¹⁰⁰

In general, the choice-of-law rule in New York would lead us to “the law of jurisdiction having the greatest interest in the litigation” based on the facts and contacts found in a specific case.¹⁰¹ More specifically, for contracts that do not provide a specific choice-of-law

⁹⁶ See *Ancile Inv. Co. v. Archer Daniels Midland Co.*, 992 F. Supp. 2d 316, 318 (S.D.N.Y. 2014) (citing *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 151 (2d Cir. 2013) and *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)) (noting that a federal court must apply the choice-of-law rules of the state in which the court sits to determine the rules of decision that would apply, and after using state conflict-of-laws principles to ascertain the rules of decision that would apply, federal courts apply those state rules of decision).

⁹⁷ See Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475, 1481–87 (2009) (describing New York's efforts to induce parties to use its laws).

⁹⁸ *Id.* at 1485–86.

⁹⁹ *Compania De Inversiones Internacionales v. Industrial Mortg. Bank*, 269 N.Y. 22, 26–28 (1935).

¹⁰⁰ Theodore Eisenberg & Geoffrey P. Miller, *The Market for Contracts*, 30 CARDOZO L. REV. 2073, 2087 (2009).

¹⁰¹ *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 24 N.Y.2d 372, 382 (1969).

clause, the test based on the “center of gravity” or “grouping of contacts” most relevant to the contract enables courts to apply this general rule with more guidance.¹⁰² As opposed to focusing on a “single possibly fortuitous event,” a set of factors should be considered in this grouping analysis.¹⁰³ This set includes: (1) the place where the contract is made, including the place of negotiation, (2) the place of performance of the obligation, (3) the location of the subject matter of the contract, and (4) the domicile of the parties.¹⁰⁴ It is worth noting that these factors may carry different weights in courts’ analyses in different types of cases, but the general rule behind always stays true—to locate the jurisdiction that parties intend to submit to and that has the greatest interest in the litigation based on the particular set of facts.¹⁰⁵

The place where the contract is made is typically the place where the last necessary act in order to form a binding agreement is performed.¹⁰⁶ As has been already noted, for the PDL, since the negotiation and signing of the agreement were in New York, it is very likely that the contract was made in New York.¹⁰⁷ For the *Hukuang*

¹⁰² *In re Allstate Ins. Co. (Stolarz)*, 81 N.Y.2d 219, 226 (1993).

¹⁰³ *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF L. § 188 (AM. L. INST. 1995)).

¹⁰⁴ *Id.* at 227 (citing RESTATEMENT (SECOND) OF CONFLICT OF L. § 118 (Am. L. Inst. 1995); see also FOWLER V. HARPER, CONFLICT OF LAWS: CASES AND MATERIALS 363 (1950) (stating different ways courts approach the conflict of laws issues in contract law).

¹⁰⁵ See, e.g., *New Amsterdam Cas. Co. v. Stecker*, 3 N.Y.2d 1, 5 (1957) (emphasizing the place of contracting in automobile insurance disputes); *Stumpf v. Hallahan*, 101 A.D. 383, 386 (1906) (holding that “[t]hese general rules are subordinate to the primary canon of construction, which requires that where it can be ascertained the intention of the parties shall govern. Thus, though it may be stated generally that a contract is to be considered and determined under the law of the State where it was made, this rule is of no force in a case where it can be fairly said that the parties at the time of its execution manifested an intention that it should be governed by the laws of another State.”); see also *Auten v. Auten*, 308 N.Y. 155, 161 (1954) (“[T]he merit of [this] approach is that it gives to the place ‘having the most interest in the problem’ paramount control over the legal issues arising out of a particular factual context, thus allowing the forum to apply the policy of the jurisdiction ‘most intimately concerned with the outcome of [the] particular litigation.’”).

¹⁰⁶ HARPER, *supra* note 1044, at 363–64.

¹⁰⁷ DAI, *supra* note 10, at 175.

bond, this factor alone would point us to France.¹⁰⁸ The place of performance is typically where the repayment is to be made.¹⁰⁹ In the case of the PDL, New York will be deemed the place of performance, where the recoupment of the principal was supposed to be made.¹¹⁰ While the answer to this factor is less clear for the *Hukuang* bond, American banks actively participated in the initial issuance, which may suggest that the place of performance was intended to be the United States, at least for the portion of the principal amount assigned to the U.S. banks.¹¹¹

Perhaps what is more relevant to our case is not these specific factors, however, but rather the policy and state interest analysis in choosing conflicting laws, which are readily identifiable. In other words, in contract disputes where the overarching goal is readily identifiable without the need to resort to specific factors, courts may feel comfortable engaging in policy discussions and relying heavily on the determined state interests.¹¹² In *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd.*, which involves an international letter of credit that was valid when issued and later by virtue of subsequent governmental action became unenforceable in a foreign country, the court held that New York law should apply in order for the state to maintain its position as a financial capital of the world.¹¹³ The court also noted that where there was a conflict between the state public policy and the application of foreign law under the principle of

¹⁰⁸ *Id.* at 112 (stating that the *Hukuang* Bond was signed in Paris, France).

¹⁰⁹ *See Duval v. Skouras*, 181 Misc. 651, 653 (Sup. Ct. 1943), *aff'd*, 267 A.D. 811 (App. Div. 1944), and *aff'd*, 270 A.D. 841 (App. Div. 1946) (holding that payments are regulated by the law of the place of performance).

¹¹⁰ DAI, *supra* note 10, at 315.

¹¹¹ *See Id.* at 112 (stating that the United States actively asked to participate and several U.S. banks issued the bond).

¹¹² *See in re Allstate Ins. Co. (Stolarz)*, 81 N.Y.2d 219, 226–27 (1993) (noting that there are of course instances where the policies underlying conflicting laws in a contract dispute are readily identifiable, and that in those cases courts may properly consider State interests to determine whether to apply New York law).

¹¹³ *See J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd.*, 37 N.Y.2d 220, 227 (noting that New York, as the financial capital of the world, serves as an “international clearinghouse and market place for a plethora of international transactions, such as to be so recognized by our decisional law,” and therefore “New York has the greatest interest and is most intimately concerned with the outcome of this litigation”).

comity, “our own sense of justice and equity as embodied in our public policy must prevail.”¹¹⁴ As previously discussed, the *Hukuang* Bond was partly issued by four U.S. banks,¹¹⁵ and PDL was issued by JP Morgan Chase.¹¹⁶ The fact that these bonds were issued by U.S. banks and to U.S. investors, coupled with New York’s longstanding efforts to make itself the financial center of the world, is likely to lead courts to find a prevailing state interest in this litigation.

Similarly, the same facts suggest that the Chinese government made a deliberate choice to structure its commercial activities with U.S. investors.¹¹⁷ This may suggest the intent of the parties to submit themselves to the U.S. jurisdiction.¹¹⁸ Accordingly, it is likely that courts will read into the factual context as it demonstrates parties’ unwritten intent and honor it in court, especially when the outcome from this line of analysis would render the same result as an analysis of state interests.¹¹⁹

In sum, we expect that New York to be the most likely forum for potential bondholder litigants. It follows that New York law would also most likely be the governing law on the substantive issues that we will discuss next.¹²⁰

¹¹⁴ *Id.* at 228.

¹¹⁵ *Jackson v. People’s Republic of China*, 794 F.2d 1490, 1491 (11th Cir. 1986).

¹¹⁶ *DAI*, *supra* note 10, at 315.

¹¹⁷ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2788 (2011) (noting that the issue of the case is whether the defendant’s activities manifest an intention to submit to the power of a sovereign. “In other words, the defendant must ‘purposefully avai[l] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.’”) (quoting *Hanson*, at 253, 78 S.Ct. 1228; *Insurance Corp.* at 704–705, 102 S.Ct. 2099).

¹¹⁸ *Id.*

¹¹⁹ *See J. Zeevi & Sons, Ltd.* 37 N.Y.2d 227 (“The parties, by listing United States dollars as the form of payment, impliedly accepted these facts and set up procedures to implement their trust in our policies. In order to maintain its pre-eminent financial position, it is important that the justified expectations of the parties to the contract be protected.”).

¹²⁰ Our conflict of law analysis focuses solely on the substantive issues and skips over procedural issues, as it is well noted that matters of procedure are governed by the law of the forum and matters of substantive law fall within the choice-of-law analysis. *See, e.g., Matter of Frankel v. Citicorp Ins. Servs., Inc.*, 80 A.D.3d 280, 285.

Duress Defense: The Hukuang Bond

The P.R.C. would have a fairly strong argument against the validity of the *Hukuang* bond by citing economic duress because of the perilous position the Qing Empire was in when issuing the bonds to the U.S. banks.

Economic duress is a common law doctrine. Shifting away from a clear-cut common law version of duress, which was merely a by-product of tort and criminal law, “the extension of duress into the field of economic pressure began in the eighteenth century.”¹²¹ Courts have been compelled to take into consideration the issue of modern politics and the control of economic power.¹²² Especially with the expansion of industrialism, inequalities of bargaining power resulting from state-conferred monopolies were used to justify this extension of the duress doctrine.¹²³ The economic duress doctrine is rooted in the theory that “agreement[s] in which one party has unjustly taken advantage of the economic necessities of another and thereby threatened to do an unlawful injury”¹²⁴ are unenforceable. To establish economic duress, the claimant must show that “the agreement was procured by means of (1) a threat, (2) which was unlawfully made, and (3) caused the involuntary acceptance of contract terms, (4) because the circumstances permitted no other alternative.”¹²⁵ The party asserting economic duress has a burden of proof to show both an unlawfully made threat and causation between the threat and the involuntary acceptance of the contract due to lack of choice.¹²⁶ Federal courts sitting in the state of New York generally look to New York substantive law in diversity actions and thus this section will focus on New York’s law of economic duress.¹²⁷

¹²¹ John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 253–55 (1947).

¹²² *Id.*

¹²³ *See id.* at 259 (noting that the economic and political power of the railroads and many other types of utilities made them the focal point of the new doctrine).

¹²⁴ *Mandavia v. Columbia Univ.*, 912 F. Supp. 2d 119, 127 (citing *VKK Corp. v. NFL*, 244 F.3d 114).

¹²⁵ *Kammerman v. Steinberg*, 891 F.2d 424, 431 (2d Cir. 1989).

¹²⁶ *Davis & Assocs. v. Health Mgmt. Servs.*, 168 F. Supp. 2d 109, 114.

¹²⁷ *KiSKA Constr. Corp.-USA v. G & G Steel, Inc.*, 2005 U.S. Dist. LEXIS 9821, at *15 (S.D.N.Y. May 19, 2005).

First, the P.R.C. must show the Qing was under threat. While courts have been insistent on demanding proof of the “unlawful”¹²⁸ aspect, it is at least acknowledged that a threat to do what may have been lawful in the ordinary sense should be held unlawful if the threat is inflicted upon the complaining party in unreasonable cases.¹²⁹ For example, in *KiSKA Constr. Corporation-USA v. G & G Steel, Inc.*, the contractor was forced to enter into a subsequent settlement agreement with additional demands¹³⁰ due to the subcontractor’s threat to refuse to deliver bridge components and appurtenances under the original contract until the disputes were solved.¹³¹ The district court found that if the subcontractor had failed to deliver, the extra costs for the contractor to secure materials elsewhere and the anticipated delay of the project, which may have resulted in negative performance ratings and inconveniences to the public, were more than the press of financial pressures coupled with inequality of bargaining position,¹³² and thus were sufficient to survive a motion to dismiss.¹³³ The fact that the contractor was represented by an experienced construction attorney did not offset this deemed

¹²⁸ *Kammerman*, 891 F.2d, at 431.

¹²⁹ See Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 608 (1943) (“When the damaging act is done for the purpose of bringing the other party to terms, courts which follow this doctrine will hold the act unlawful, even though in ordinary circumstances it would not be, if they think the terms insisted on do not justify the infliction of the damage.”).

¹³⁰ *But see* 4218 Partners LLC v. Maguire Ft. Hamilton LLC (*In re* 4218 Partners LLC), 2020 Bankr. LEXIS 2203, at *12 (distinguishing the case at bar from *KiSKA*). The court reasoned that the *KiSKA* court found an economic duress claim where the plaintiff argued that it was coerced into a settlement agreement with respect to claims that arose *outside of its original contract* with a supplier that threatened to suspend delivery of parts it was obligated to deliver under the original contract unless an “extra” term was reached. The threat to suspend delivery was a “further demand” in relation to coercing settlement of the supplemental claims. But in the case at bar, the court found that Defendant did not seek *additional* demands but only to alter the existing agreement. Thus, the court could not plausibly find that the circumstances warrant the “extreme and extraordinary” relief of economic duress.

¹³¹ *KiSKA Constr. Corp.-USA*, 2005 U.S. Dist. LEXIS 9821, at *4–6.

¹³² *Business Incentives Co. v. Sony Corp. of America*, 397 F. Supp. 63, 69 (noting that “[m]ere hard bargaining positions, if lawful, and the press of financial circumstance, not caused by the defendant, will not be deemed duress.”).

¹³³ *KiSKA Constr. Corp.-USA*, 2005 U.S. Dist. LEXIS 9821, at *17–18.

unlawful threat that caused the involuntary acceptance of settlement terms.¹³⁴

Second, what constitutes a lack of choice and free will is a difficult question. The existence of choice cannot disprove the existence of duress.¹³⁵ For example, a person who makes a deliberate choice to enter into an agreement when facing blackmail, while not deprived of his free will entirely, is not offered with meaningful options and thus under duress. On the other hand, in most situations where the party has the ability to make a choice, courts tend to hold that there is no coercion or duress.¹³⁶

Bringing sovereign entity to the picture, the Supreme Court in *United States v. Bethlehem Steel Corp.* denied the government's argument that certain shipbuilding contracts made during wartime were made under duress.¹³⁷ In rejecting the government's argument, the Court relied heavily on the notion that the word "duress" "implies feebleness on one side, overpowering strength on the other."¹³⁸ A government, in the Court's view, is typically too powerful to be subjected to duress by private individuals.¹³⁹ More specifically, the Court pointed out that the Constitution grants Congress the power "to raise and support Armies," "to provide and maintain a Navy," and "to make all laws necessary and proper to carry these powers into

¹³⁴ It is not clear on the present record whether G&G had a clear legal right to require payment at the time and in the amounts so demanded. Should G&G ultimately demonstrate that it was entitled on the facts and the law to demand a payment of \$1.5 million from KiSKA before delivering the materials and furnishing the services necessary to complete the replacement bridge project, then G&G's conduct was not unlawful, and KiSKA's claim of economic duress will fail.

¹³⁵ See *Union P. R. Co. v. Public Service Com.*, 248 U.S. 67, 70 (1918) (noting that "the fact that a choice was made according to interest does not exclude duress").

¹³⁶ See e.g., *Mandavia v. Columbia Univ.*, 912 F. Supp. 2d, at 128 (noting that "[p]laintiff undoubtedly had options other than signing the Agreement, such as pursuing his legal remedies").

¹³⁷ *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 301 (1942) (finding "no evidence of that state of overcome will which is the major premise of the [government's] argument of duress").

¹³⁸ *Id.* at 300.

¹³⁹ See *id.* at 305 ("We cannot regard the Government of the United States at war as so powerless that it must seek the organization of a private corporation as a helpless suppliant.").

execution.”¹⁴⁰ Under this authority, Congress can “draft men for battle service and draft business organizations to support the war.”¹⁴¹ In other words, because the government could have foregone all negotiation and simply compelled Bethlehem to undertake the contract at a price set by the President, and it had the power to commandeer Bethlehem’s entire facilities in accordance with the authority delegated by the President, the Court found that the government acting through its agent was actually equipped with “bargaining power to which no ordinary private corporation can possibly compare”¹⁴² and was not deprived of choice.

Moreover, even if there was a “traffic of profit,”¹⁴³ here, the Court found that this was foreseeable when Congress authorized the procurement of ships through ordinary commercial negotiations.¹⁴⁴ In other words, the government must have known that the purchases could not be made in a market of open competition resulting in price and terms exactly at fair market value because existing shipbuilding facilities would be overtaxed by the construction program.¹⁴⁵ This fact further supports the finding that the government entered into the contract voluntarily.

In direct comparison to the situation of the U.S. in *Bethlehem, Ukraine v. Law Debenture* shows how the court may consider a government as a party vulnerable to duress. There, the English Court of Appeal found that Ukraine had sufficiently alleged a duress defense against a Russian state-controlled lender for Ukraine’s default on a bond payment.¹⁴⁶ Ukraine’s duress argument alleged the following. First, Ukraine had an urgent need for a substantial amount of capital to fund its budgetary need.¹⁴⁷ Second, other than Russia,

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 303.

¹⁴³ The principle that courts of admiralty “will not tolerate the doctrine that a salvor can take the advantage of his situation, and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit.” *Post v. Jones*, 60 U.S. 150, 160.

¹⁴⁴ *Bethlehem Steel Corp.*, 315 U.S. at 304.

¹⁴⁵ *Id.* (citing Department of Commerce, Government Aid to Merchant Shipping (rev. ed. 1923) 433).

¹⁴⁶ *Ukraine v. Law Debenture Trust* [2018] EWCA (Civ) 2026, [181] (Eng.).

¹⁴⁷ *Law Debenture Trust v. Ukraine* [2017] EWHC 655 (Comm), [221] (Eng.).

Ukraine effectively had no access to the international capital markets,¹⁴⁸ nor had it been able to raise funds from the EU, the IMF, or any other supranational institutions.¹⁴⁹ Third, Ukraine was not able to raise sufficient funds in the domestic market in order to meet its needs.¹⁵⁰ As a result, Ukraine alleged that it had no other choice but to issue a bond to Russia with unfavorable terms.¹⁵¹ Although the substantive duress issues had not been tried by the English court, Ukraine's duress argument was found strong enough to go to trial.¹⁵²

The Qing Empire was very similar to Ukraine vis-à-vis its relationship to international investors and can be distinguished from *Bethlehem*. The *Bethlehem* court's main assumption that sovereign power is too powerful to be put under duress by a private party is inapplicable to the Qing Empire. Both modern scholars and Qing statesmen have recognized that the Qing Empire had no choice but to work with colonial powers on public finance due to the absence of a modern banking system.¹⁵³ The need for public finance was also largely the result of lost wars against invading colonial powers and maintaining defense against future colonial threats. In fact, during the period of time between the First Opium War (1840) to the Xinhai Revolution (1911), about two-thirds of the government budget was spent on the military and payment to colonial powers for war reparations and other debt.¹⁵⁴

Without an effective infrastructure to borrow domestically, Qing had no alternative access to capital other than tax and tariffs,¹⁵⁵ which were also largely under the control of colonial powers until the

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See Harriet T. Zurndorfer, *Imperialism, Globalization, and Public Finance: The Case of Late Qing China*, at 12 (Working Paper No. 06/04), <https://www.lse.ac.uk/Economic-History/Assets/Documents/Research/GEHN/GEHNWP06HZ.pdf> [<https://perma.cc/MGH3-AVH5>] (“All three kinds of these banks loaned money to the state which by the 1860s was in heavy debt, but which had no single financial institution to redress this situation.”).

¹⁵⁴ SUN, *supra* note 95, at 2.

¹⁵⁵ See generally *id.* at 5 (noting that the Qing Empire tried three times to issue domestic debt and failed to reach its fundraising target each time).

early 1930s.¹⁵⁶ Before the National Government of the R.O.C. was established in 1927, the Chinese government would deposit a great sum of revenue from salt tax and tariffs to foreign banks as collaterals, amounting to around half of the annual government budget.¹⁵⁷ The *Hukuang* bond's collateral covenant is a good illustration of this history, where the collaterals to bonds were typically the salt tax revenue of the Qing. The U.S. banks underwriting the bonds therefore presumably knew or should have known the level of dependency the Chinese government had on the West back then and arguably entered the transaction to take advantage of the borrower's precarious financial and political position.

Besides economic pressure, just like Ukraine, which was under military threat by Russia given Russia's history of invading former Soviet nations, China was invaded by the U.S. before during the Siege of the International Legations.¹⁵⁸ The lack of alternative sources of funding, coupled with the constant existential threat of military invasion, suggests that the Qing government was stripped of bargaining power to effectively negotiate with the counterparties and was deprived of choice. This would support an argument for involuntary acceptance of contract terms as the circumstance permitted no other alternative.

The *Bethlehem* court left it open as to whether it would find that the contract was made out of necessity and thus the government was under duress if the government was indeed in a helpless position as it alleged. The answer to that is unclear from the case. The majority of the opinion insisted that the negotiation itself did not show that Bethlehem forced the government's representatives to accept the contract.¹⁵⁹ The majority also found that in view of the

¹⁵⁶ XU YI, CONG BAINIAN QURU DAO MINZU FUXING—NANJING GUOMIN ZHENGFU WAIZHAI YU GUANLIAO ZIBEN (从百年屈辱到民族复兴—南京国民政府外债与官僚资本) [From a Century of Humiliation to National Resurgence—Foreign Debt and State Capital of the Nationalist Government of the Republic of China] 279–80 (2004).

¹⁵⁷ *Id.* at 279.

¹⁵⁸ See R.G. Grant, *Siege of the International Legations*, ENCYC. BRITANNICA (June 13, 2020), <https://www.britannica.com/event/Siege-of-the-International-Legations-1900> [<https://perma.cc/NS7F-5M2D>].

¹⁵⁹ See *Bethlehem Steel Corp.*, 315 U.S., at 301 (noting that the courts below have found that “the contracts resulted from negotiations in which both parties were represented by intelligent, well informed and experienced officers

rising prices and unpredictable labor supply during wartime, Bethlehem's demand on such terms did not seem unreasonable.¹⁶⁰ This line of reasoning suggests that assuming the complaining party has already been in a helpless position due to special circumstances, the court will look at the negotiation process itself and the reasonableness of the other party's demand at such special time such as wartime to determine whether a contract is so coercive that it causes the ultimate involuntary acceptance of the contract terms and should be void on the ground of duress. This in turn depends on how much the demand deviates from a fair market value in a normal market.¹⁶¹ Additionally, whether the other party has intentionally tried to take advantage of the economic necessities of another seem to play a role in court's consideration.¹⁶²

While the Qing government was in a precarious negotiation position for its bond issuance, it is not clear whether the negotiation process was fair and the demand from U.S. banks was reasonable. However, if the P.R.C. government could show the severe unequal bargaining power between the Qing and the U.S. banks and the unreasonableness of the banks' demand in court, the economic duress defense is likely to hold water.

Finally, this defense has one weak spot: it can be deemed waived by delaying in the prompt repudiation of the agreement and by ratifying the debt through partial interest and principal payments,¹⁶³ even if a party has sufficiently pled a claim of economic duress in order to void a contract under the *Twombly* standard.¹⁶⁴ U.S. investors could counter with the facts that since the Chinese government later accepted the benefits of the contract, the government could not then claim duress even if the claim was

whose sole object was to make the best trade possible, under conditions which included the uncertainties of war-time contingencies”).

¹⁶⁰ See *id.* at 302 (noting that representative of the government who approved these contracts “was of the opinion that high estimated cost figures would be advantageous to the Government because ‘care must be exercised that they be not placed at too low a figure, for if they are, the probabilities are that the contractor will lose interest in keeping the cost down’”).

¹⁶¹ See Hale, *supra* note 129, at 624 (discussing the definition of what constitutes fair market value).

¹⁶² See *Mandavia v. Columbia Univ.*, 912 F. Supp. 2d, at 127 (citing *VKK Corp. v. NFL*, 244 F.3d 114, 122 (2d Cir. 2001)).

¹⁶³ *Sosnoff v. Carter*, 165 A.D.2d 486, 491–92 (N.Y. App. Div. 1991).

¹⁶⁴ *In re Marketxt Holdings Corp.*, 361 B.R. 156, 402 (S.D.N.Y. 2011).

otherwise meritorious and plausible.¹⁶⁵ In other words, the bondholders can counter this duress defense with further affirmative defense of ratification, which may occur via “‘intentionally accepting benefits under the contract,’ by ‘remaining silent or acquiescing in the contract for a period of time after [a party] has the opportunity to avoid it,’ or by ‘acting upon it, performing under it, or affirmatively acknowledging it.’”¹⁶⁶

If, however, the Chinese government could establish a case of “continuing duress,” it need not repudiate the contract until the duress has ceased.¹⁶⁷ In fact, such continuous duress would even be able to toll any period of limitations if the Chinese government were to commence this action.¹⁶⁸ The Chinese government could argue that the Qing Empire had been under financial pressure and continuous duress by the colonial powers even after being funded by the issuing of the *Hukuang* bond.¹⁶⁹ It was impossible for the Qing Empire to try to repudiate the contract as it continued to be a government without adequate alternatives and a self-sustained internal financial system. Although, by 1937, the R.O.C. government had largely cleared up its debt obligations from its foreign creditors and maintained a relatively healthy credit history as a new regime and a growing economy,¹⁷⁰ the ensuing invasion by Japan in the same year destroyed any potential to keep growing the economy and government revenue.¹⁷¹ That said, historians have questioned the actual economic benefits of these bonds. For example, John K.

¹⁶⁵ See *VKK Corp.*, 244 F.3d at 122 (discussing applicable law regarding a judicial proceeding related to a duress claim pursuant to a contract).

¹⁶⁶ *Id.* at 123 (quoting *In re Boston Shipyard Corp.*, 886 F.2d 451, 455 (1st Cir.1989)).

¹⁶⁷ Sosnoff, 165 A.D.2d at 492.

¹⁶⁸ See *Baratta v. Kozlowski*, 94 A.D.2d 454, 458 (holding that when duress is part of the cause of action alleged, the limitations period is tolled until the termination of the duress) (citing *Pacchiana v Pacchiana*, 94 A.D.2d 721; *Kamenitsky v Corcoran*, 97 Misc 384, *revd on other grounds*, 177 A.D. App 605 (N.Y. App. Div. 1917); *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1219; Annotation, *Duress or undue influence as tolling or suspending Statute of Limitations*, 121 A.L.R. 1294).

¹⁶⁹ See SUN, *supra* note 95, at 18 (stating the statistics of the foreign bond, which had been mostly cleared up, and that had there been no foreign invasion, the bond would have been paid in full).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

Fairbank has pointed out the high interest rate and fees imbedded in these bonds, observing that these bonds in the end might not be net-positive to the Chinese government.¹⁷² This would imply that R.O.C.'s continuous acceptance of the terms under these bonds was largely due to its lack of choice other than maintaining its financial relationship with the colonial powers, rather than gaining actual financial benefits.

This line of argument seems to be acceptable to courts.¹⁷³ In some sense, the continuous duress argument holds water as the Chinese government had continuously relied on a sound financial relationship with the U.S. even after the R.O.C. government took power. It is perhaps reasonable for the Chinese government to not repudiate the debt back then and only now as a defense argument to the bondholders' action. Compared to a typical short-term commercial contract, our case here is a long-term relational contract involving a government going through a complicated historical period. Perhaps it is not proper to judge this case based on what constitutes a delay in ordinary contract cases. Additionally, the P.R.C. was likely not on notice of the possibility of this lawsuit and had not realized the need to promptly repudiate the agreement by arguing for duress—from the outset the P.R.C. may have viewed the repayment claims as unenforceable against itself. The arguments that bondholders relied on to overcome procedural barriers only become available recently. *Altmann*, which holds that FSIA could apply retroactively to overcome jurisdictional barriers, did not become law until 2004. Similarly, the *NML* sequel, which makes tolling the statute of limitations possible for the bondholders, only came out in 2013. The P.R.C. may very well argue that its delay in initiating this duress shield is not unreasonable.

¹⁷² See, e.g., *id.* at 214 (citing Fairbank's comments on the high borrowing cost of bonds issued in the era).

¹⁷³ See *Austin Instrument v. Loral Corp.*, 29 N.Y.S.2d 2, 28 (finding that the delay in bringing action did not waive economic duress claim where the complaining party feared that "another stoppage of deliveries which would again put it in an untenable situation" and it was reasonable in waiting until after appellee's last delivery to sue given appellee's conduct).

Impracticability: The Pacific Development Loan (PDL)

The PDL was issued under a different circumstance where the issuer, the then-R.O.C. government, was in a much better shape than the Qing. However, a different piece of history would afford today's P.R.C. government impracticability defense to challenge the enforceability of the PDL in court. This key historic episode is that the R.O.C. was a government friendly to and supported by the United States around the time when the PDL was issued, while the P.R.C. was a hostile regime to the U.S. from the beginning and fought a bloody war with the U.S. right after its establishment.

Under New York Law, the defense of impracticability requires that (1) an unforeseeable contingency occurs, rendering the performance impracticable, (2) the nonperforming party must not have caused the contingency, and (3) the nonoccurrence of the contingency was a basic assumption of the contract when it was made.¹⁷⁴ Given the uniqueness of the situation, we could not find case law analogous to our discussion, but the P.R.C. could at least assert a reasonable defense of impracticability given the general principle of the doctrine.

A Series of Contingencies Did Happen to Make the Performance Impracticable.

From 1937, when the PDL was issued by the R.O.C. government to 1953, when the P.R.C. Government refused to inherit this bond, a series of historical events had happened that transformed China from a country friendly to the U.S. to a hostile one. The P.R.C. was dragged into a direct military conflict with the U.S. in Korea Peninsula and China's economic, financial, and trade system had also shifted towards the communist system. Under this regime, the P.R.C. had taken a radically different approach when dealing with foreign affairs from the global capitalism order of which the R.O.C. was a part when it issued the PDL in 1937. Such a radical change, although initiated by the leaders of the Communist Party, was also necessarily a product of the international environment of the time. At the dawn of the Cold War, the Chinese leadership found itself had no choice

¹⁷⁴ 4C N.Y. PRAC., *Commercial Litigation in New York State Courts* § 89:33 (database updated Oct. 2020).

but to fully commit to the alliance with the Soviet Union.¹⁷⁵ These historic realities rendered a payment to U.S. bondholders by the P.R.C. impracticable in 1953.

These contingencies were also in no way foreseeable. At last, even to President Franklin Roosevelt, it was inconceivable in 1945 that the Communist Party would have taken over China and built a Communist regime that committed to an entirely different set of rules in international finance.¹⁷⁶

The P.R.C. Did Not Cause the Contingencies (Alone).

This part seems to be the weak link of the impracticability argument. Although the P.R.C. government led by the CCP did commit the last few actions triggering the situation that rendered its performance impracticable, there were so many other factors leading up to this specific historical event. For example, the U.S. could have maintained a much more friendly relationship with the CCP, but chose not to, after the Chinese Civil War.¹⁷⁷

¹⁷⁵ See MAO ZEDONG, *Farewell*, Leighton Stuart, MARXISTS.ORG (Aug. 18, 1949), https://www.marxists.org/reference/archive/mao/selected-works/volume-4/mswv4_67.htm [<https://perma.cc/L8NV-XUJW>] (discussing the failure of American imperialism as represented by the departure of a United States ambassador who was supportive of cultural aggression in China); MAO ZEDONG, *On People's Democratic Dictatorship* (June 30, 1949), https://www.marxists.org/reference/archive/mao/selected-works/volume-4/mswv4_65.htm (“Internationally, we belong to the side of the anti-imperialist front headed by the Soviet Union, and so we can turn only to this side for genuine and friendly help, not to the side of the imperialist front.”).

¹⁷⁶ See Arthur Waldron, *How China Was ‘Lost’*, WASH. EXAM’R (Jan. 28, 2013, 12:00 AM), <https://www.washingtonexaminer.com/weekly-standard/how-china-was-lost> (“Davies’s China reporting had certainly been pessimistic about Chiang Kai-shek and his Nationalist government—which Franklin Roosevelt was determined should take its place as one of the “Big Four” after World War II—while consistently upbeat about the Communists, to whom, he forecast, ‘China’s destiny’ belonged.”).

¹⁷⁷ President Henry Truman attempted to negotiate peace between the CCP and the KMT before the Chinese Civil War and had given up on protecting Taiwan against the CCP attack after the war. Truman only changed this policy and re-committed to protect the remaining KMT forces in Taiwan six months later when the Korean War began. See Chen Yi-shen, *The Korean War and the Fate of Taiwan*, TAIPEI TIMES (June 10, 2010), <http://www.taipeitimes.com/News/editorials/archives/2010/06/30/2003476734> [<https://perma.cc/S4PX-QM4V>] (“[O]n Jan. 5, Truman had announced that . . .

The Basic Assumption of the Contract Was Destroyed.

The historical contingencies must also destroy the “basic assumption” on which both parties made the contract.¹⁷⁸ Generally, the death of a person or destruction of a specific thing necessary for performance would excuse such performance for impracticality.¹⁷⁹ Here, of course, we have to stretch the common law to apply to the Chinese bonds in question because a party is a sovereign entity, and the relevant facts stretch across a century.

The contingent historical events followed leading to 1950 had altered the basic assumption of the contract: the PDL would help maintain a good relationship between China and the colonial Western powers, especially the U.S.,¹⁸⁰ and such relationship was necessary for the issuance of PDL. Such an assumption was essential to the contract and was shared by both parties when the bond was issued: no U.S. investors would invest in China if the Chinese government was in a war with the U.S. and did not recognize the rules of international finance of the capitalist bloc, and the R.O.C. would not take on such debts but for this purpose.

the US would not provide any form of military support or consultation to his forces stationed in Taiwan. Truman changed his policy less than six months later when he ordered the Seventh Fleet into the Taiwan Strait.”).

¹⁷⁸ See RESTATEMENT (SECOND) OF CONTRACTS: IMPRACTICABILITY OF PERFORMANCE AND FRUSTRATION OF PURPOSE § 261 (AM. LAW INST. 1981) (“Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.”).

¹⁷⁹ See *id.* (“The continued existence of the person or thing (the non-occurrence of the death or destruction) is ordinarily a basic assumption on which the contract was made, so that death or destruction effects a discharge.”).

¹⁸⁰ Our argument here is inspired by Prof. Mark Weidemaier’s discussion on whether Ukraine could use the doctrine of impracticality under English law to excuse its bond payment to Russian state enterprise when the bond indenture was signed by a former pro-Russia government. See W. Mark C. Weidemaier, *Contract Law and Ukraine’s \$3 Billion Debt to Russia*, 11 CAP. MKTS. L.J. 244, 248 (Jan. 2016) (“In some cases, a party whose performance has been rendered impracticable is permanently excused from the obligation to perform. In others, the party is excused only temporarily. Either outcome should prove acceptable to Ukraine; delay effectively amounts to a re-profiling of the debt.”).

As mentioned earlier, the PDL was part of the R.O.C.'s efforts to reorganize its debt with the colonial powers.¹⁸¹ It was the new bond issued to exchange for the old 1919 Gold Bond.¹⁸² Historians of Chinese public debt have long observed that the R.O.C.'s effort to reorganize debt purported to build the R.O.C.'s national credit to the colonial Western powers, as evidenced by countless statements made by the R.O.C. statesmen and commentators.¹⁸³ In mid-1928, almost all of R.O.C.'s foreign debt was in default, and only through massive debt reorganization to restore confidence in the regime could R.O.C. regain access to the international capital market again.¹⁸⁴ And by 1937, when PDL was signed, R.O.C. was on track to paying off all of its foreign debt and its credibility in the international finance market had been well restored.¹⁸⁵ The R.O.C. was successfully incorporated into the international capital market as of 1937 due to the successful debt reorganization by the KMT government.

However, when the CCP defeated the KMT in the Chinese Civil War to establish the P.R.C. in 1949, the circumstances in China had changed dramatically. The newly established P.R.C. did not need to go back to the international capital market which the R.O.C. was part of in the 1930s. Mao and his government decided to ally with the newly emerged Communist bloc headed by the Soviet Union largely due to the hostility from the West.¹⁸⁶ In fact, recalling the "who lost China" discussion in the U.S. after 1949, the KMT was financially and militarily supported by the U.S. during the Civil War

¹⁸¹ See SUN, *supra* note 95, at 40–42.

¹⁸² See DAI, *supra* note 10, at 314 (recording that the company that issued the 1919 bond went bankrupt and the 1919 bond was paid by the R.O.C. with a haircut in 1937 through an agreement between the then-Chinese Treasury Secretary Dr. H. H. Kung and the U.S. banks that issued the 1919 bond).

¹⁸³ See XU, *supra* note 156, at 120–40 (detailing the thinking behind the R.O.C.'s efforts to restructure its foreign debt by citing Chinese and Western commentators and statesmen's statements at the time). See also ARTHUR N. YOUNG, CHINA'S NATION-BUILDING EFFORT, 1927–1937: FIN. & ECON. REC. 23–25 (1971) (summarizing the inception of the R.O.C.'s effort to restore credit).

¹⁸⁴ YOUNG, at 23–25.

¹⁸⁵ See XU, *supra* note 156, at 139 (illustrating that the Chinese sovereign bond prices in the Western capital market have gone up since 1930 and reached their peak in 1936).

¹⁸⁶ See MAO, *supra* note 175 (describing American foreign policy regarding China and the resulting need for alliance with the Soviet Union).

and the U.S. even started to engage in a direct military conflict with China in Korea in 1950.

Unlike the R.O.C. in the 1930s, the P.R.C. was not a regime in need of maintaining a good relationship with the colonial Western powers and their private banks, nor would the U.S. banks lend the money to a Communist government in China that was at war with the United States. The basic assumption of the bond issuance was therefore no longer in effect.

In sum, the circumstances in early 1953 have deprived all practical means and reasons for the P.R.C. to pay its creditors in the U.S. It would be nonsensical to imagine P.R.C. paying the investors of the U.S., with which it had a history of direct military conflict, and held different ideology and the accompanying economic, trade, and financial systems.

The impracticality argument is not bulletproof, and a contract law argument built on so many dramatic historic events in the last century is more than unconventional. However, the general principals of impracticality may just be enough for the P.R.C. to make its case against the validity of the PDL and add more roadblocks on the path of recovery to a plaintiff-bondholder.

Public Policy against Enforcement

The P.R.C. may also argue that the court should not enforce these bond contracts for public policy reasons. New York courts typically will not enforce a contract, if its enforcement is contrary to the policy of the forum.¹⁸⁷ Although it is not clear what policy courts would look at when making a particular decision, certain norms and principles upheld by the international community can be argued to have an impact on decisions by New York courts.¹⁸⁸

The conditions of valid treaties set up under the Vienna Convention provide that if the expression of a State's consent to be

¹⁸⁷ See e.g., *F.A. Straus & Co. v. Canadian Pac. Ry. Co.*, 254 N.Y. 407 (1930) (“[T]o allow public service corporations by contract to absolutely exempt themselves from liability for negligence is opposed to the best interest of the citizens of the State.”).

¹⁸⁸ See, e.g., *Banco Do Brasil, S.A. v. A.C. Israel Commodity Co.*, 12 N.Y.2d 371, 378 (1963) (Desmond, C.J., dissenting) (noting that it is the national policy to co-operate with other Bretton Woods signatories to further promotion of international economic relations).

bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.¹⁸⁹ Even though the Vienna Convention does not apply to our case as we do not have a treaty between States, this can be viewed as the international community's acknowledgment that no sound relationship can start with and be based upon bad faith negotiations such as the induction of a State's consent.

Moreover, it is also worth noting that our case rests against the historical backdrop of developments in international law as the international community started to recognize the unequal bargaining powers among states due to the economic and political reality and its impact on legal relations. The International Law Commission began to work upon the law of treaties in 1949 and during this period, developing countries had held a number of meetings to express their concern at economic pressure and their economic situation.¹⁹⁰ The final *Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties*, together with a Resolution requesting member states to give the Declaration the "widest possible publicity and dissemination," suggests that the issue regarding economic duress and unequal bargaining power has been widely noticed at the international level.¹⁹¹

While a Declaration has limited legal force, it can constitute an international obligation if it has become an integral part of future international law.¹⁹² Leaving legal force aside, a Declaration like this does influence international and domestic policy, as it demonstrates the value upheld by the international community. While the debt in our case was incurred between a State and private parties, the state power behind those U.S. individual investors at the negotiation table

¹⁸⁹ In order to be a ground for invalidating the treaty, the corrupt acts must be shown to be either directly or indirectly imputable to the other negotiating State. Christos L. Rozakis, *The Conditions of Validity of International Agreements*, 26 RHDJ 221, 241 (1973).

¹⁹⁰ Cornelius Murphy, *Economic Duress and Unequal Treaties*, 11 VA. J. INT'L L. 51, 54-57 (1970).

¹⁹¹ U.N. Conference on the Law of Treaties, *Final Act of the United Nations Conference on the Law of Treaties*, U.N. Doc. A/CONF. 39/26, annex (May 22, 1969).

¹⁹² See Murphy, *supra* note 190, at 61 ("The degree to which the Vienna Declaration will become an integral part of future international law depends upon the extent to which it is met with genuine acceptance.").

cannot be ignored. To hold the contract valid and free from duress challenge, the court might run against the public policy upheld at the international level that economic pressure can be an unethical form of conduct in this circumstance.

All we seek to argue in this section is that there are plausible contract law defenses available to the P.R.C. It would be very hard to predict how would these arguments fly in a federal court due to the uniqueness of the facts related to the litigation, but if the P.R.C. has the will to fight, it may have these arguments we have listed at its disposal.

IV. CONCLUSION: TIME TO DIE

To reiterate, this paper is an attempt to take a seemingly far-stretched idea seriously. Despite the immense intellectual joy that we enjoyed while writing this paper, we wanted to show why any legal effort to revive these bonds would be nonsensical.

Even holding the two most promising antique Chinese bonds, the *Hukuang* Bond and the PDL, a plaintiff-bondholder would have an extremely hard time just surviving a motion to dismiss by citing the *NML* approach to toll the statute of limitations. Even if in the unlikely case where a judge does toll the statute of limitations, the P.R.C. can still rely on contract law arguments to challenge the enforcement of these bonds. How the court would treat these arguments is unclear. What is clear is that any serious adjudication on these arguments would require courts to step into uncomfortable territories such as ruling on the political history of a foreign nation spanning a hundred years. Given how unlikely a plaintiff would succeed in winning her day in court, devoting the limited resources of public discourse into these bonds seem to be unworthy,¹⁹³

¹⁹³ Commentators have expressed similar sentiment. See Mark Weidemaier & Mitu Gulati, *Enough with the Old Chinese Debt Already*, CREDIT SLIPS (Sept. 10, 2019, 8:31 PM), <https://www.creditslips.org/creditslips/2019/09/enough-with-the-old-chinese-debt-already.html> [<https://perma.cc/XX97-GWX3>] (“Still, the idea is crazy. Even if claims under these old bonds would suddenly be timely if assigned to the U.S., there is no practical way to use them to reduce the U.S. government’s payments on debt held by the P.R.C. And the attempt to do so would likely violate regulations governing the Treasury’s issuance and payment of bonds.”).

especially at a time where much noise surrounds a deteriorating Sino-U.S. relationship.

As to the moral aspect of this issue where the bondholders claim that a sovereign debtor like the P.R.C. has the moral responsibility of repaying its debt,¹⁹⁴ we can only stress that the history of sovereign debt is never one of moral clarity. The U.S. also has a history of “dishonoring” its own obligations under unique situations. It has repudiated its debt during the Great Depression by abrogating the gold clauses,¹⁹⁵ and refused to inherit Cuba’s debt after annexing Cuba through the Spanish-American War.¹⁹⁶ Granted, the factual situations of these two occasions are also complicated and the argument on whether the U.S. “dishonored” its obligations in bad faith is also muddy. But this is exactly the point. When major historical events intervene in how a sovereign has been conducting its affairs, the discussion on successor liability becomes so much more complicated than the simple moral lesson that one should always pay for its debt.

This paper attempts to unfold those unique history episodes that we found highly relevant to the case and should be taken into consideration when applying legal arguments and sovereign debt doctrines. Given the unique historical background and the delicate

¹⁹⁴ See Jonathan Garber, *\$1.6T in Century-Old Chinese Bonds Offer Trump Unique Leverage against Beijing*, FOX BUS. (May 14, 2020), <https://www.foxbusiness.com/markets/historic-chinese-bonds-trump-leverage-beijing> [<https://perma.cc/63PG-7PD9>] (reporting that American Bondholder Foundation President Jonna Bianco says, “the U.S. would have the weight of common law and moral responsibility on its side [against China].”).

¹⁹⁵ See generally Sebastian Edwards, *AMERICAN DEFAULT: THE UNTOLD STORY OF FDR, THE SUPREME COURT, AND THE BATTLE OVER GOLD* (2018) (detailing the history of American abrogation of various gold clauses). See also, *Perry v. United States*, 294 U.S. 330, 353 (1935) (“The Constitution gives to the Congress the power to borrow money on the credit of the United States, an unqualified power, a power vital to the government, upon which in an extremity its very life may depend. The binding quality of the promise of the United States is of the essence of the credit which is so pledged. Having this power to authorize the issue of definite obligations for the payment of money borrowed, the Congress has not been vested with authority to alter or destroy those obligation.”).

¹⁹⁶ See Lee C. Buchheit, *supra* note 62, at 32–34 (“A particular point of controversy centered on certain loans that the Crown of Spain had incurred in its own name but for which it had pledged Cuban revenue streams. Spain wanted the United States to assume responsibility for these debts in its capacity as the new sovereign power in Cuba; the United States was disinclined to do so.”).

Sino-U.S. relationship, the authors urge readers to seriously consider the effect of opening this Pandora's box. Drawn from examining both the history and legal arguments, the unavoidable conclusion is that it is the time to put this topic to rest and to let people simply appreciate the antique value of those bonds.