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Pacta Sunt Servanda and Empire: A Critical Examination of the Evolution, Invocation, and Application of an International Law Axiom

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PACTA SUNT SERVANDA AND EMPIRE: A CRITICAL EXAMINATION OF THE EVOLUTION, INVOCATION, AND APPLICATION OF AN INTERNATIONAL LAW AXIOM

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ABSTRACT

In public international law, pacta sunt servanda is the foundational principle that international agreements are binding on treaty parties and must be kept. Insufficient attention, however, has been given to the role played by this international law axiom in organizing and shaping the international legal order. Accordingly, this note undertakes a critical historical analysis of how pacta sunt servanda was, and continues to be, applied as a legal basis and used as an argumentative method for the formation and maintenance of empire despite its conceptual evolution across time. Importantly, it does not argue that pacta sunt servanda should be abandoned as an international law rule or that pacta sunt servanda is not essential to the functioning of the international legal order. This note instead examines the conceptual evolution, invocation and application of pacta sunt servanda, and its relation to informal empire, across time.

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I. INTRODUCTION

This note offers a critical historical analysis of how *pacta sunt servanda*, the foundational concept that international agreements must be kept, was, and continues to be, applied as a legal basis and used as an argumentative method for the formation and maintenance of empire despite its conceptual evolution across time. In the law of treaties, *pacta sunt servanda* refers to the proposition that "treaties are binding on the parties and must be performed in good faith."[1] Used by decision-makers to justify promissory enforcement, *pacta sunt servanda* includes exhortative statements, labels and theories that support the notion that promises must be kept.[2] Unless otherwise stated, any mentions of *pacta sunt servanda* in this note refers to *pacta sunt servanda* in the law of treaties.

Importantly, this note does *not* argue that *pacta sunt servanda* should be abandoned as an international legal rule or that *pacta sunt servanda* is not essential to the functioning of the international legal order. This note also does *not* argue that there is no need for agreements or contracts (*pacta*) or that agreements or contracts must not be observed or kept (*sunt servanda*).

This episodic, historical analysis instead examines the history and role played by an international legal idea in organizing and shaping the global order, as well as how the concept, invocation, and application of this idea underwent modification and re-negotiation in the face of world developments and theoretical contestations.[3] That the concept of *pacta sunt servanda* is not absolute[4] and is subjected to exceptions is distinct from a study of its conceptual evolution, invocation, and application by states and jurists across different historical periods. As this note demonstrates, the concept of *pacta sunt servanda* under international law–specifically its scope of applicability and exceptions–was contested and evolved over time.

This note begins in Part II by explaining the relationship between the application of *pacta sunt servanda* and imperialism. The case study of informal empires in nineteenth century East Asia shows how *pacta sunt servanda* was invoked and used to establish, maintain, and conceal informal empire. In Part III, this note investigates the Third World's failed attempts at decolonizing and reshaping *pacta sunt servanda* during the International Law Commission ("ILC") debates and the Sixth Committee negotiations on

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1. *Comm'n to the General Assembly, Draft Articles on the Law of Treaties with Commentaries,* at 211, [1966] 2 Y.B., Int'l L. Comm'n 187, U.N. Doc. A/CN.4/SER.A/1966 /Add.1 (1966); MALCOLM SHAW, INTERNATIONAL LAW 788 (9th ed. 2021).

2. James E. S. Fawcett, *The Legal Character of International Agreements*, 30 BRIT. Y.B. INT'L L. 381, 396–97 (1953); Jason Webb Yackee, *Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality*, 32(5) Fordham Int'l L.J. 1550, 1572 (2008).

3. GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER 11 (2004).

4. BHEK PATI SINHA, UNILATERAL DENUNCIATION OF TREATY BECAUSE OF PRIOR VIOLATIONS OF OBLIGATIONS BY OTHER PARTY 77 (1966).

the Vienna Convention on the Law of Treaties ("VCLT"). In Part IV, this note argues that the invocation and application of *pacta sunt servanda* were instrumental to protecting foreign private property in response to the assertions of economic sovereignty by newly independent states during the decolonization era. In Part V, this note examines the evolution and plausible continuities in the relationship between *pacta sunt servanda* and informal empire in modern-day investment and trade treaties. This Part further explores the issue of whether the relationship between *pacta sunt servanda* and informal empire could persist despite a multipolar international order.

II. THE RELATIONSHIP BETWEEN THE APPLICATION OF *PACTA SUNT SERVANDA* AND ECONOMIC IMPERIALISM

Informal empire is defined as a stable situation whereby the metropolitan state secures economic advantages through unequal legal arrangements while avoiding overt foreign rule.[5] In contrast to formal empire, which involves direct rule over an acquired territory, informal empire involves significant influence and control short of direct rule.[6] The periphery state remains intact as an independent polity, which has its own political system, is able to conduct its foreign policy, and is capable of regulating its domestic affairs.[7] Through treaties, the metropolitan state secures from the periphery state guarantees for certain privileges including protection of foreign citizens from enforcement of indigenous laws, extraterritoriality, as well as a well-defined investment and free trade regime.[8] Informal empire problematizes "the conventional narrative that inexorably leads from empire to nation-state," as empire is "a remarkably durable form of state."[9]

Informal empires provided economic advantages without the complications and responsibilities attached to political governance of annexed territories.[10] This was because the metropolitan power could secure privileged access to a peripheral economy without having to bear the economic and political costs of administering the local state or controlling the local population.[11] The British, for example, had no interest in conquering China, as it desired "privileged access to overseas markets" for British exports and raw

5. Jürgen Osterhammel, *Britain and China, 1842–1914*, *in* THE OXFORD HISTORY OF THE BRITISH EMPIRE: VOLUME III: THE NINETEENTH CENTURY 146, 148 (Andrew Porter, ed., 1986).

6. ANDREW PORTER, EUROPEAN IMPERIALISM, 1860–1914, at 2 (1994).

7. JÜRGEN OSTERHAMMEL, COLONIALISM: A THEORETICAL OVERVIEW 20 (1997).

8. *Id.*

9. JANE BURBANK & FREDERICK COOPER, EMPIRES IN WORLD HISTORY: POWER AND THE POLITICS OF DIFFERENCE 2 (2010).

10. Peter Duus, *Japan's Informal Empire in China, 1895–1937: An Overview*, *in* THE JAPANESE INFORMAL EMPIRE IN CHINA, 1895-1937, at xi, xvii (Peter Duus, Ramon Hawley Myers, & Mark R. Peattie eds., 1989).

11. *Id.*

materials imports.[12] Indeed, British manufacturers were told during the closure of the First Opium War that "a new world was open to their trade."[13]

Given that textbooks written by major publicists were prevalent sources of public international law in the nineteenth century,[14] this Part examines the concept and application of *pacta sunt servanda* through international law textbooks and writings published in that period. This Part examines the relationship between *pacta sunt servanda* and informal empire through the treaty port system in nineteenth-century China, which comprised trade and commerce centers where special rights and privileges were acquired by foreign powers through treaties.[15] While there were multiple nineteenth century commercial treaties, this note focuses on four commercial treaties, namely the 1842 Sino-British Treaty of Nanking, 1843 Sino-British Treaty of Bogue, 1844 Sino-American Treaty of Wanghia, and 1844 Sino-French Treaty of Whampoa, which constituted the new legal foundation for economic relations between China and the colonial powers after the First Opium War until the twentieth century.[16]

A. How Pacta Sunt Servanda was Applied to Enable Economic Imperialism

The treaty port system in nineteenth century China reveals the two ways in which colonial powers applied *pacta sunt servanda* to advance their economic interests without formal territorial conquest. First, the application of *pacta sunt servanda* to treaties procured by military force enabled the establishment and expansion of informal empires. International lawyers in the nineteenth century interpreted *pacta sunt servanda* as giving legal force to treaties procured by military force against China during the First Opium War, such as the 1842 Sino-British Treaty of Nanking.[17] For example, on May 31, 1841, British Foreign Secretary Lord Palmerston instructed the British negotiator of the Nanking Treaty, Sir Henry Pottinger, to employ the

12. *Id.* at xiv.

13. HARLEY MACNAIR, MODERN CHINESE HISTORY: SELECTED READINGS 293 (1923).

14. ONUMA YASUAKI, A TRANSCIVILIZATIONAL PERSPECTIVE ON INTERNATIONAL LAW: QUESTIONING PREVALENT COGNITIVE FRAMEWORKS IN THE EMERGING MULTI-POLAR AND MULTI-CIVILIZATIONAL WORLD OF THE TWENTY-FIRST CENTURY 221 (2010).

15. WANG TIEYA, INTERNATIONAL LAW IN CHINA: HISTORICAL AND CONTEMPORARY PERSPECTIVES 257 (1990).

16. HOSEA BALLOU MORSE, THE INTERNATIONAL RELATIONS OF THE CHINESE EMPIRE: THE PERIOD OF CONFLICT 1834–1860, at 298–99 (1910).

17. MONTAGUE BERNARD, FOUR LECTURES ON SUBJECTS CONNECTED WITH DIPLOMACY 183–84 (1868); *see* Treaty of Nanking, China-U.K., June 26, 1843, *in* 1 TREATIES, CONVENTIONS, ETC., BETWEEN CHINA AND FOREIGN STATES 351–56 (1917); Treaty of Peace, Amity, and Commerce Between the United States of America and the Chinese Empire *reprinted in* 1 TREATIES BETWEEN THE EMPIRE OF CHINA AND FOREIGN POWERS, TOGETHER WITH REGULATIONS FOR THE CONDUCT OF FOREIGN TRADE (William Frederick Mayers, ed. 1877) [hereinafter Treaty of Wanghia].

force necessary to "induc[e] the Chinese Government to comply with the British Demands," if negotiation with China proved futile.[18]

International lawyers justified the binding force of treaties procured by military force based on interstate order and welfare. According to the British international lawyer Mountague Bernard, who was also the former president of the Institut de Droit International, *pacta sunt servanda* must be "inevitably applied with rigour" even when a treaty was "extorted at the sword's point in an aggressive war" due to the absence of authority to adjudicate the validity of treaties and the "necessity for mutual confidence[.]"[19] Thus, if military coercion against a state could void a treaty, anarchy would occur.[20] In his *Commentaries Upon International Law*, the British lawyer and judge Robert Phillimore also reasoned that if treaty obligations that were procured through coercion could be "avoided", the "faith of Treaties—the great moral tie which binds together the different nations of the globe—would be rent asunder."[21]

Similarly, the British international lawyer William Edward Hall stated that international law "regards all compacts as valid, notwithstanding the use of force or intimidation, which do not destroy the independence of the state which has been obliged to enter into them."[22] Hall recognized that validating treaties procured by force would legally sanction an infinite number of agreements where one of the treaty parties had "no real freedom of will."[23] He nevertheless justified the applicability of *pacta sunt servanda* to treaties procured by military force based on the difficulty of deciding "what is due in a given case" and the need for binding treaties to end and avert wars.[24]

The proclamation by Western jurists that treaties procured by military force were valid, however, was at odds with the domestic sphere, which conditioned contract validity on freedom of consent. These jurists thus devised ways to justify and distinguish between the domestic and international spheres. For Hall, the domestic law requirement that freedom of consent was necessary to the validity of contracts between individuals was inapplicable to legal relations between states.[25] Since the threat and use of military force against a state was a legal way to obtain redress for wrongs, it was "impossible to look upon permitted means as vitiating the agreement."[26] Phillimore also found that there were "great limitations" in analogizing the

18. Morse, *supra* note 16, at 655.

19. *See* BERNARD, *supra* note 17.

20. *See id.*

21. ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW 76 (3rd ed. 1879).

22. WILLIAM HALL, A TREATISE ON INTERNATIONAL LAW 341–42 (1895).

23. *Id.* at 342.

24. *Id.*

25. *Id.* at 341.

26. *Id.*

validity of private contracts and treaties procured by force because war was "the terrible litigation of nations."[27]

Although war as an instrument of national policy was subsequently prohibited by the 1928 Kellogg-Briand Pact, treaties procured through the use of force continued to be valid.[28] For example, the British Legal Adviser John Fischer Williams wrote in 1928 that treaties could not be disregarded by States for reasons "on which contracts in municipal law may be avoided," such as duress, because respect for treaties constituted "a fundamental condition of an orderly and peaceable international life."[29] Similarly, during the 1932 American Society of International Law Proceedings, American lawyer Charles Henry Butler affirmed the nineteenth century rule that a treaty procured by duress against a state remained binding and not voidable.[30] Supporting Butler's view that *pacta sunt servanda* applied to treaties procured by military force against a state, the American Legal Advisor at the Department of State Edgar Turlington cautioned against departing from the nineteenth century rule because such a departure required drawing a "dangerous analogy" between treaties and private contracts. Turlington highlighted the "great danger" of "attempting to transfer to the field of public law the conceptions of private law." He further stressed the "danger" in transferring rules of morality that are ordinarily considered binding among individuals to international relations because they overemphasized parties' free consensus, which was "not essential in international law." Free consent, which was a fundamental condition of contract validity in private law, was non-essential in international law[31] because the "controlling consideration" was "the superior interest of international society"[32] and the "welfare of society" demands that states observe their treaties.[33] Therefore, by reference to interstate order and welfare, *pacta sunt servanda* operated to protect the binding force of treaties procured by military force.

Second, despite being excluded from the international society of European states and thus lacking the status of a sovereign state,[34] China was spe-

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27. PHILLIMORE, *supra* note 21, at 75.

28. *See Article 32 of the Harvard Draft Convention on the Law of Treaties*, 29 AM. J. INT'L L. 653, 1152–53 (1935).

29. John Fischer Williams, *The Permanence of Treaties*, 22 AM. J. INT'L L. 89, 103 (1928).

30. Charles Henry Butler & Edgar Turlington, *Proceedings of the American Society of International Law at Its Annual Meeting: Treaties Made Under Duress (Apr. 28–30, 1932)*, 26 PROC. AM. SOC'Y INT'L L. 45, 48 (1932).

31. *Id.*

32. *Id.* at 49-53.

33. *Id.* at 50.

34. According to the English School, the international society of European states was "a European association, to which non-European states could be admitted only if and when they met a standard of civilisation laid down by the Europeans." All members of this European international society were considered states, and members "all have the same basic rights, that the obligations they undertake are reciprocal, that the rules and institutions of international society

cifically recognized by the European states to possess partial external sovereignty, namely, the sovereign right to negotiate and enter into treaties with binding legal force. China's exclusion from the international society of European states raised the problem of the binding force of treaties between China and the colonial powers because only externally sovereign states had the full "power of negotiating and contracting public treaties between nation and nation."[35] Only states were "subject to international law are capable of contracting."[36] External sovereignty was determined by whether China was admitted into the "great society of nations," which depended on the recognition of European States.[37] Accordingly, where there was no uniform law of nations, "non-civilized" states would lack the external sovereignty to enter into binding treaties with the imperial powers. Indeed, there was "serious doubt and discussion whether one nation could enter into Treaties with another which professed a different religion[,]"[38] as international law was conceived in the nineteenth century to be "limited to the civilized and Christian people of Europe or to those of European origin."[39] Without the external sovereign right of treaty making, *pacta sunt servanda* would be inapplicable, in that uncivilized states could not contract away their internal sovereign rights, such as those relating to territorial jurisdiction and tariff autonomy, and be bound by such agreements.[40]

Such a conundrum was resolved by recognizing that "uncivilized" states possessed partial external sovereignty limited to treaty making. This was illustrated by an analysis of Henry Wheaton's *Elements of International Law*. As an American lawyer and diplomat, Wheaton was the first North American lawyer to systematically study international law.[41] Wheaton's *Elements* was an authoritative international law text recognized by the Western states in the nineteenth century.[42] For example, the then-United States

derive from their consent." Accordingly, entities not part of this European international society were not considered states. *See* HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 32–33 (4th ed. Palgrave Macmillan 2012).

35. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 185 (Philadelphia: Carey, Lea & Blanchard 1836).

36. *See* HALL, *supra* note 22, at 340.

37. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW §§ 21–22 (Little, Brown & Co. 1866).

38. PHILLIMORE, *supra* note 21, at 74.

39. WHEATON, *supra* note 37, § 11; WHEATON, *supra* note 35, at 45.

40. WHEATON, *supra* note 35, at 185 ("The power of negotiating and contracting public treaties between nation and nation exists in full vigour in every sovereign state which has not parted with this portion of its sovereignty, or agreed to modify its exercise by compact with other states.").

41. Lydia Liu, *Henry Wheaton*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 1132, 1133 (Bardo Fassbender & Anne Peters eds., 2012).

42. American jurist and *Chargé d'affaires* to Great Britain William Beach Lawrence characterized Wheaton's *Elements* as replacing Vattel's treatise in the cabinets of Western

Minister to China, John Elliott Ward, advised the American Christian missionary, William Alexander Parsons Martin, to translate Wheaton's *Elements* into Chinese for the Chinese government because it was "generally recognized as a full and impartial digest" and "found its way into all the Cabinets of Europe."[43]

According to Wheaton's *Elements*, although semi-sovereign states had "only a limited faculty" of entering into treaties,[44] there was "no doubt" that China had the "ability and capacity" to "form binding international engagements."[45] Thus, the colonial powers' recognition of China as possessing the sovereign right to enter into treaties meant that *pacta sunt servanda* became applicable to the treaty relations between China and the colonial powers. Nevertheless, China remained excluded from the "great society of nations."[46] The question of "how far" China had entered into the international society of European States was "another matter" distinct from recognizing that it had the sovereign right to enter into treaties.[47] Thus, although the colonial powers recognized China's right to enter into treaties, they did not consider China as a member of the international society of sovereign states.

Similarly, in 1875, the Institut de Droit International sent out a questionnaire to 'Oriental' law experts with the aim of finding out if the beliefs and legal institutions of 'Oriental' and Christian states were sufficiently similar to admit 'Oriental' states into the general community of international law.[48] Two of the eight questions related to the applicability of *pacta sunt servanda* to 'Oriental States', namely, "were the beliefs of the West and the Orient in regard to obligations towards foreigners sufficiently similar? Did Oriental peoples share the same view of the binding force of treaties as Christians?"[49]

The Institut's report concluded that the beliefs of 'Oriental' States such as China did not differ from "the ideas and faith of Christian and Oriental nations or in their attitudes towards the *pacta sunt servanda*[.]"[50] Its conclusion mirrored the 1860 dispatch by the British Foreign Minister Lord Russell to the British Ambassador in China that "universal notions of justice and humanity teach even the worst barbarians among human beings, that, if

states. *See* HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW, at xiii (Boston: Little, Brown & Co. 1855).

43. WANG, *supra* note 15, at 231.

44. WHEATON, *supra* note 37, § 252.

45. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW § 13a (London, Stevens & Sons, Ltd. 1904).

46. *Id.*

47. *Id.*

48. MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960, at 132 (2002).

49. *Id.*

50. *Id.* at 133.

an agreement has been made, the law demands its observance."[51] *Pacta sunt servanda* became the conduit to bind "uncivilized" states to international law despite their exclusion from the international society of European States. Through *pacta sunt servanda*, the colonial powers managed to bind China to treaty terms that embedded China in their empires without territorial annexation.

The centrality of *pacta sunt servanda* in establishing informal empires was evident from how the imperial powers ensured that treaty formalities were strictly met. In his May 31, 1841 instructions to Pottinger during the First Opium War, Lord Palmerston stated that:

> [W]hatever arrangements [he] may succeed in making with the Chinese Plenipotentiary, those arrangements must be embodied in a Treaty, to be signed by [himself] and by the Chinese Plenipotentiary, in the name of [each] respective Sovereigns; and to be afterwards ratified by each Sovereign; and [he] should obtain a formal announcement of the ratification of the Treaty by The Emperor of China before [he] can consider the Treaty as valid.[52]

These instructions to the British negotiator of the Nanking Treaty demonstrate how the British used *pacta sunt servanda* to bind China to non-reciprocal and unequal arrangements. This focus on the applicability of *pacta sunt servanda* was further demonstrated by how the principle was explicitly recalled in the text of the Treaty of Nanking, which in Article 13 states that "all its provisions and arrangements shall take effect."[53] Accompanying the Chinese signatures and seal in the text of the Nanking Treaty was a paragraph dedicated to China's affirmation of *pacta sunt servanda*, which stated "[China] will sincerely and faithfully perform and observe all and singular the things which are contained and expressed in the Treaty aforesaid."[54]

Similarly, Article 34 of the 1844 Sino-American Treaty of Wanghia, which sought to secure the favorable terms that the British managed to obtain through the Treaty of Nanking,[55] stated that the treaty "shall be faithfully observed in all its parts by the United States and China."[56] These expressions of the treaty parties' pledges to faithfully observe their treaty commitments reflect or "declare" the existing rule of *pacta sunt servanda*,

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51. Hans Wehberg, *Pacta Sunt Servanda*, 53 AM. J. INT'L L. 775, 783 (1959).

52. MORSE, *supra* note 16, at 658.

53. Treaty of Nanking, China-U.K., June 26, 1843*, in* 1 TREATIES, CONVENTIONS, ETC., BETWEEN CHINA AND FOREIGN STATES 362 (1917).

54. *Id.*

55. Ping Chia Kuo, *Caleb Cushing and the Treaty of Wanghia, 1844*, 5 J. MOD. HIST. 34, 34 (1933).

56. Treaty of Wang-hea, 1844, China-U.S., May 18, 1844, *in* 1 TREATIES, CONVENTIONS, ETC., BETWEEN CHINA AND FOREIGN STATES 690 (1917).

namely, the obligation of the parties to their duty of performance.[57] Accordingly, the Treaty of Nanking was known as the *wannian heyue* or the "Peace Treaty of Ten Thousand Years," which was "supposedly unalterable and forever valid" once the treaty was ratified.[58] Chinese officials also feared that violating *pacta sunt servanda* would give colonial powers opportunities to make new demands, and thus "did not even consider turning to their advantage the official occasions for treaty revision."[59]

Before 1870, *pacta sunt servanda* was not circumvented by *rebus sic stantibus*, which was "rarely invoked" and there was "no cogent sense of its application" in terms of state practice.[60] Even when *rebus sic stantibus* was invoked in the late nineteenth and early-twentieth centuries, it was an ineffective strategy to evade *pacta sunt servanda*, as *rebus sic stantibus* was merely a "method" for semi-sovereign states to secure further discussions on extraterritoriality, and had not been successfully invoked to terminate extraterritorial treaty rights imposed on them.[61]

Furthermore, the application of *pacta sunt servanda* had the effect of entrenching informal empire in China by requiring China to meet the standards of Western civilization as a condition for treaty revision or abrogation. These standards reflected the legal norms of Western states and were thus "premised on European perceptions of appropriate standards of governance."[62] For example, the extraterritorial rights the colonial powers enjoyed under the treaty port system remained binding on China unless the Western powers were "satisfied that the state of the Chinese laws, the arrangement for their administration, and other considerations warrant" relinquishment of such rights through treaty revision.[63] Since the colonial powers would only revise or abrogate the treaties when they were satisfied that China met the standards of Western civilization,[64] this inability to unilaterally revise or abrogate the treaty meant that China had to reform its legal system to protect and promote foreign property and trade, thereby embedding it within the Western powers' informal empires.

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57. *Article 20 of the Harvard Draft Convention on the Law of Treaties*, *supra* note 28, at 977.

58. IMMANUEL HSU, CHINA'S ENTRANCE INTO FAMILY OF NATIONS 142 (1960).

59. *Id.* at 143.

60. David J. Bederman, *The 1871 London Declaration, Rebus Sic Stantibus and a Primitivist View of the Law of Nations*, 82(1) AM. J. INT'L L. 1, 8 (1988).

61. GEORGE W. KEETON, EXTRATERRITORIALITY IN INTERNATIONAL AND COMPARATIVE LAW 332 & 350 (1948).

62. Jacinta O'Hagan, *The Role of Civilization in the Globalization of International Society*, *in* THE GLOBALIZATION OF INTERNATIONAL SOCIETY 185, 188 (Tim Dunne & Christian Reus-Smit eds., 2017); GERRIT GONG, THE STANDARD OF "CIVILIZATION" IN INTERNATIONAL SOCIETY 14-15 (1984).

63. Commercial Treaty, China-U.K., art. XII, Sept. 5, 1902, *in* 1 TREATIES, CONVENTIONS, ETC., BETWEEN CHINA AND FOREIGN STATES, AT 365.

64. George W. Keeton, *The Revision Clause in Certain Chinese Treaties*, 10 BRIT. Y.B. INT'L L. 111, 118 (1929).

Thus, semi-colonies such as China were caught in a Catch-22: If China asserted its sovereignty in defiance of treaty terms, it would further reinforce its "uncivilized" status because adherence to *pacta sunt servanda* in treaty relations indicates a state's civilizational progress.[65] For the international society of European states, the test for determining whether a state was civilized and thus entitled to full recognition as an international personality was "merely whether its government was sufficiently stable to undertake binding commitments under international law and whether it was able and willing to protect adequately the life, liberty and property of foreigners."[66] However, if China were to adhere to *pacta sunt servanda* and rely on mutual consent for treaty revision, it would undermine its sovereignty because it would have to reform its legal system and conform to standards of Western civilization so as to foster foreign commerce.[67]

This Catch-22 situation in the nineteenth and early-twentieth centuries, however, departed from how *pacta sunt servanda* was previously applied to treaty relations between Europe and the Afro-Asian states prior to the nineteenth century. Since the nineteenth century, the concept of and the application of *pacta sunt servanda* to treaty relations between Europe and Afro-Asian states "came under the sway of positivist international law[,]" which differed from the classic law of nations existing from the sixteenth to the nineteenth century.[68] Although the "freedom of consent" in treaty-making between Europe and Afro-Asian states was "sacrosanct" under the classic law of nations, the concept of consent in treaty-making under the nineteenth century positivist international law "admitted a measure of compulsion" that would not necessarily invalidate a treaty.[69]

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65. GONG, *supra* note 62, at 28 ("[T]he requirement that 'civilized' countries adhere to generally accepted international agreements"); Keeton, *supra* note 64, at 111 ("That one civilized state should be able to rely upon the pledged word of another civilized state, embodied in a formal document, seems to be a corner-stone of international relations."). *See* LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE, VOL. I. PEACE ¶ 27 (3d ed. 1920).

66. Georg Schwarzenberger, *The Standard of Civilisation in International Law*, 8 CURRENT LEGAL PROBS. 212, 220 (1955).

67. *See, e.g.*, U.S. STATE DEP'T, COMM'N ON EXTRATERRITORIALITY IN CHINA, REPORT OF THE COMMISSION ON EXTRA-TERRITORIALITY IN CHINA 8 (1926) ("[M]eans as they may find suitable to improve existing conditions of the administration of justice in China, and to assist and further the efforts of the Chinese Government to [a]ffect such legislation and judicial reforms as would warrant the several Powers in relinquishing either progressively or otherwise their respective rights of extra-territoriality."); *see also* OPPENHEIM, *supra* note 65, ¶ 28(5).

68. Charles H. Alexandrowicz, *The Partition of Africa by Treaty (1974)*, *in* THE LAW OF NATIONS IN GLOBAL HISTORY 232 (David Armitage & Jennifer Pitts eds., Oxford Univ. Press 2017).

69. *Id.* at 246.

B. *How the Invocation of Pacta Sunt Servanda Could Conceal Economic Imperialism*

Part II.B shows how the invocation of *pacta sunt servanda* could conceal economic imperialism because the extralegal justifications of *pacta sunt servanda* reorient the binding force of a treaty from state consent to interstate order and welfare. Furthermore, although *pacta sunt servanda* is essential to a minimally predictable and stable international legal order, this "thin" version of order could conceal and legitimize a "thick" version of order that is normatively contested and conducive to the economic interests of the imperial powers.

The binding force of a treaty is derived from *pacta sunt servanda*, which is "the real source of the treaty obligation."[70] The "nonconsensual norm" of *pacta sunt servanda*, not state consent, becomes the "metanorm" that "must be assumed to exist" to give treaty relations their binding force.[71] While *pacta sunt servanda* is "divorced from the will of States" and "a necessary *a priori* assumption of the international legal systems," which "cannot itself be proved juridically," it remains "capable of explanation by reference to political or moral considerations."[72] Additionally, Professor Hersch Lauterpacht used the existence of "an international community of interests and functions" to synthesize the "two incongruous elements" of *pacta sunt servanda*, namely, its respect paid to both "the will of States as the fountain of law and to the heteronomous command of the rule of law."[73]

For the purpose of Part II.B, the relevant issue is the extra-legal explanation or justification of *pacta sunt servanda* as the basis of international law. This note *only* focuses on the *implications* of *pacta sunt servanda* being explained or justified with reference to extra-legal considerations. These explanations or justifications for *pacta sunt servanda* are extra-legal, usually securing order and welfare.[74] International law writers usually justified *pacta sunt servanda* as the basis of international law either by reference to the "fear of the consequences of a wanton breach of a treaty" or the "well-being of the community of nations which would be impossible without the regular observance of treaties."[75]

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70. Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 534 (1993); IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 3 (1973); HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 316 (1966).

71. KOSKENNIEMI, *supra* note 48, at 364.

72. HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 426 (2011).

73. *Id.* at 430.

74. *See e.g., Article 20. Pacta Sunt Servanda*, 29 AM. J. INT'L L. 977, 983 (1935) [hereinafter *Article 20*]. Igor I. Lukashuk, *The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law*, 83 AM. J. INT'L L. 513, 513 (1989).

75. HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW 56 (1927).

In the nineteenth and early twentieth centuries, jurists emphasized the "necessity of the rule as a fundamental condition of the utility of international law and of an orderly international life."[76] Phillimore characterized the "treaty-breaking State [as] the great enemy of Nations" because such a state "is the disturber of their peace, the destroyer of their happiness, the obstacle to their progress, the cause . . . of War."[77] Therefore, *pacta sunt servanda* is the consequence of necessity to maintain "the security of relations between peoples."[78]

However, the justification of securing interstate order and welfare does not render *pacta sunt servanda* politically neutral, as this extra-legal focus could conceal an international order conducive to informal empires. For example, nineteenth century international law explicitly justified the binding force of treaties procured by military coercion against a state based on the need to secure the "welfare of society."[79] According to Wheaton, refusing to recognize a treaty because it was concluded by a nation under duress from the "defeat of its military forces, the distress of its people, and the occupation of its territories by an enemy" would mean that "wars could only be terminated by the utter subjugation and ruin of the weaker party."[80]

The binding force of treaties between China and the colonial powers was justified based on the welfare of China and the international community. For example, in rationalizing and justifying the First Opium War and subsequent treaty relations, the British Consul at Shanghai Rutherford Alcock stated that the right to forbid commerce with other states was "imperfect" and subjected to the rights of other states, including Britain.[81] Forbidding commerce was an abuse of sovereign power and an "injury" not only to Britain but also to the "common rights" of the "community of nations."[82] Accordingly, China was obligated to engage in commerce with Britain.[83]

Moreover, since the right to decide whether to trade with another state "must be shared by the interdicted party," China's "undoubted right of self-preservation as a political society . . . does not involve the incidental right of interdicting intercourse."[84] Similarly, during the Second Opium War, the British Plenipotentiary to China and the Far East, Lord Elgin, characterized his policy in China as "multiplying those commercial ties which are destined to bind the East and West together in the bonds of mutual advantage" so as to "more fully . . . develop the vast resources of China and to extend

76. *Article 20*, supra note 74.
77. PHILLIMORE, *supra* note 21, at 70.
78. *Article 20*, *supra* note 74, at 984.
79. WHEATON, *supra* note 37, ¶ 268.
80. *Id.*
81. MACNAIR, *supra* note 13, at 16.
82. *Id.* at 17.
83. *See id.*
84. *Id.*

among the people the elevating influence of a higher civilization."[85] This welfarist justification of informal empire refers to how Britain molded its imperial rule based on the assumption that Britain was "the trustee for the moral and material welfare of the races of the earth[.]"[86] The notion that a state did not have the right to shut itself off from economic relations with the international community enabled the colonial powers to bind formally sovereign states to commercial treaties containing trade liberalization and foreign property protection terms.[87]

Given its extralegal justifications of order and communal welfare, *pacta sunt servanda* could be employed as a seemingly neutral principle to secure the binding force of treaties and implicitly legitimize a particular conception of 'international community' and international order, which provisions in these treaties presume. The concept of an 'international community' not only refers to interstate relations, but also a "superior good" or the "common weal" that transcends the particular interests of a state, which is no longer the ultimate depositary of the highest interests.[88] Claims to speak for the international community, however, are not innocent descriptive statements about how the world is, but are implicit claims for the special authority to represent and articulate universal interests.[89]

Therefore, although *pacta sunt servanda* is essential to a minimally predictable and stable international order, this minimum or "thin" version of order could conceal and legitimize a "thick" version of community and order informed by substantive principles, which are not only normatively contested but also protective of the interests of imperial powers.[90] Moreover, while employing and invoking *pacta sunt servanda* to justify the binding force of a treaty is necessary to ensure stability in interstate relations, it could at the same time protect the treaty from being questioned for its implicit "thick" versions of order.

III. THIRD WORLD ATTEMPTS AT DECOLONIZING *PACTA SUNT SERVANDA*

Although *pacta sunt servanda* evolved after the Second World War to accommodate coercion against a state as an 'exception' to the binding force

85. *Id*. at 293.

86. Oliver Furley, *The Humanitarian Impact*, *in* BRITAIN PRE-EMINENT: STUDIES IN BRITISH WORLD INFLUENCE IN THE NINETEENTH CENTURY 128 (C. J. Bartlett ed., 1969).

87. *See* Treaty of Nanking, China-U.K., arts. I, II, X, June 26, 1843*, in* 1 TREATIES, CONVENTIONS, ETC., BETWEEN CHINA AND FOREIGN STATES 351–56 (1917).

88. ROBERT KOLB, THEORY OF INTERNATIONAL LAW 261 (2016).

89. Martti Koskenniemi, *The Subjective Dangers of Projects of World Community*, *in* REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW 3, 9–11 (Antonio Cassese ed., 2012).

90. *See* Randall Peerenboom, *Varieties of Rule of Law: introduction and provisional conclusion*, *in* ASIAN DISCOURSES OF RULE OF LAW 1, 2–5 (Randall Peerenboom ed., 2004).

of treaties,[91] the Third World and former colonial powers competed to reshape the contours of coercion as an 'exception'[92] to *pacta sunt servanda*. This was evident from the ILC debates and the Sixth Committee negotiations on the VCLT, where the Third World challenged the concept of *pacta sunt servanda* as being applicable to and thus giving binding force to treaties procured by economic and political coercion, which they found to be a new means of maintaining informal empire.

In fact, for the Third World states, the legal nature and consequences of *pacta sunt servanda* could not be divorced from the problem of coercion. For example, in the 1967 United Nations General Assembly ("UNGA") Sixth Committee meeting on draft Article 23 (now VCLT Article 26), which embodied the *pacta sunt servanda* principle, Third World states emphasized the relationship between *pacta sunt servanda* and coercion. The Third World states stressed that *pacta sunt servanda* must never be "invoked" or "used to" enforce unjust or unequal treaties imposed by the threat or use of force.[93] Thailand contended that "*pacta sunt servanda* had been imbued with an unwarranted sacrosanctity" in the colonial era and "had been invoked by more powerful nations to impose their will on smaller and weaker ones[.]"[94] Highlighting "the need to protect newly independent States against the tyranny which might result from excessive and unqualified reliance on the principle of *pacta sunt servanda*[,]" India stressed that the coer-

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91. Humphrey Waldock (Special Rapporteur on the Law of Treaties), *Second Rep. on the Law of Treaties*, U.N. Doc. A/CN.4/156, at 51-52 (1963).

92. Coercion has been conceptualized as an exception to *pact sunt servanda*. *See* ROBERT KOLB, THE LAW OF TREATIES: AN INTRODUCTION 101 (2016); Kirsten Schmalenbach, *Article 52*, *in* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 878 (Oliver Dörr & Kirsten Schmalenbach eds., 2012). Accordingly, this note defines 'exception' in terms of how a treaty would lack any binding force due to its voidness, and in this sense, *pacta sunt servanda* would be inapplicable. In other words, if a treaty procured by coercion is hypothetically valid and has binding force, the state parties to the treaty would be subject to rule of *pacta sunt servanda* and would be obligated to perform the treaty in good faith. Together with *rebus sic stantibus*, grounds for invalidity of a treaty based on vices of consent including coercion have been conceived of as tempering the *pacta sunt servanda* rule. Christina Binder, *The Pacta Sunt Servanda Rule in the Vienna Convention on the Law of Treaties: A Pillar and its Safeguards*, *in* INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION FESTSCHRIFT IN HONOUR OF GERHARD HAFNER 326 (Isabelle Buffard, James Crawford, Alain Pellet, & Stephan Wittich eds., 2008); *Fisheries Jurisdiction Case* (U.K. v. Ice.), Judgment, 1973 I.C.J. 37, 47 (Feb. 2) (Dissenting Opinion by Nervo, J.) ("There are moral and political pressures which cannot be proved by the so-called documentary evidence, but which are in fact indisputably real and which have, in history, given rise to treaties and conventions claimed to be freely concluded and subjected to the principle of *pacta sunt servanda*."). *But see* Jean Salmon, *Article 26*, *in* THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, VOL. I 669 (Oliver Corten & Pierre Klein eds., 2011).

93. U.N. GAOR, Sixth Comm., 22d Sess., 979th mtg. at 118, ¶ 6, U.N. Doc. A/C.6 /SR.979 (Oct. 24, 1967) (Bulg.); U.N. GAOR, Sixth Comm., 22d Sess., 980th mtg. at 124–26, ¶¶ 28, 43, 54, U.N. Doc. A/C.6/SR.980 (Oct. 25, 1967) (Libya, U.A.E, Cyprus).

94. U.N. GAOR, Sixth Comm., 22d Sess., 976th mtg. at 102, ¶ 13, U.N. Doc. A/C.6 /SR.976 (Oct. 20, 1967).

cion 'exception' implies a recognition that "the principle *pacta sunt servanda* should not be used as a means of insisting on the implementation" of obsolete or unjust treaty rights.[95] For the Third World, this coercion 'exception' was "one of the most important" articles of the VCLT, namely, the now Article 52.[96]

The coercion 'exception' was first proposed by the Second Special Rapporteur Hersch Lauterpacht who viewed the invalidity of treaties procured by military force against a state as a logical consequence of the prohibition on the threat and use of force.[97] Despite doubts by the subsequent Third Special Rapporteur Gerald Fitzmaurice, the Fourth Special Rapporteur Humphrey Waldock endorsed Lauterpacht's proposal and included the coercion 'exception' in draft Article 12 (later draft VCLT Article 36 and now Article 52).[98] In the May 1963 ILC meetings, upon the introduction of Article 12 to the ILC by Special Rapporteur Waldock for comments, the Ecuadorian member Angel Modesto Paredes was the first to take the floor. He pointed out that Article 12(1) "seemed to refer only to the use of armed force," but "should also cover other forms of coercion which obviously had serious effects in international life" such as "economic blockades, which could be severe enough to strangle a nation" and diplomatic pressure that "was also frequently used to influence the conduct of a State."[99] Paredes' comment would foreshadow the Third World's subsequent attempts to expand the contours of the coercion 'exception' by including political and economic force.

Indeed, later that year, multiple Third World states advanced numerous arguments for expanding the coercion 'exception' (then draft Article 36) in the October meetings of the Sixth Committee. These arguments revealed the Third World's concerns about how *pacta sunt servanda* could be invoked and applied to embed them in the informal empires of former colonial powers despite possessing independent statehood. Noting the absence of political and economic coercion in Article 36, Algeria,[100] Bolivia,[101] Came-

95. U.N. GAOR, Sixth Comm., 22d Sess., 979th mtg. at 119, ¶ 12, U.N. Doc. A/C.6 /SR.979 (Oct. 24, 1967).

96. *See* U.N. Conference on the Law of Treaties, *Documents of the Conference*, at 173–75, U.N. Doc. A/CONF.39/ll/Add.l (1971).

97. Hersch Lauterpacht, (Special Rapporteur on the Law of Treaties), *Law of Treaties*, U.N. Doc. A/CN.4/63, at 147–48, ¶¶ 2-3 (1953).

98. Waldock, *supra* note 91, at 51–52, ¶¶ 1-7.

99. *Summary Record of the 681st meeting*, [1963] 1 Y.B. Int'l L. Comm'n 46, at 52, ¶ 69 U.N. Doc. A/CN.4/SR.681

100. U.N. GAOR, Sixth Comm., 18th Sess., 789th mtg. at 42, ¶¶ 28–30, U.N. Doc. A /C.6/SR.789 (Oct. 11, 1963).

101. U.N. GAOR, Sixth Comm., 18th Sess., 793d mtg. at 64, ¶ 20, U.N. Doc. A/C.6 /SR.793 (Oct. 15, 1963).

roon,[102] Ghana,[103] and Morocco[104] called for the consideration of economic coercion as a ground for treaty invalidity. The expansion of the coercion 'exception' was conceived as an effort at "eradicat[ing] colonialism in all its forms" and "protect[ing] the new States from unequal treaties."[105] Indonesia argued that if the precise scope of Article 36 were delineated by the UN Charter, it would cover "all forms of coercion employed to induce a State to act against its own interests[,]" including "a threat to strangle the economy of a country."[106] Even Poland and Spain maintained that *pacta sunt servanda* "could not be invoked to maintain" the "unequal treaties obtained by pressure or force[.]"[107]

For the newly independent states, economic pressure represented "a typical kind of coercion sometimes exercised in the conclusion of treaties."[108] Indeed, Ecuador,[109] the United Arab Emirates,[110] and Iraq argued that pressures that "pass unperceived were more to be feared nowadays than threats or the use of physical force which could be easily denounced."[111] Morocco stated economic pressure "often influenced the attitude of a country," in that a country whose "economy depended upon another powerful State which controlled either its national production or the international market for its products" would feel compelled to sign a treaty even when doing so placed it in an unfavorable position.[112]

Specifically, three types of treaties procured by political and economic coercion were singled out. The first type consisted of economic assistance treaties between highly and less developed states, which gave the highly de-

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102. U.N. GAOR, Sixth Comm., 18th Sess., 791st mtg. at 53, ¶ 42, U.N. Doc. A/C.6 /SR.791 (Oct. 14, 1963).

103. *Id*. at 52, ¶ 35.

104. U.N. GAOR, Sixth Comm., 18th Sess., 792d mtg. at 57, ¶ 16, U.N. Doc. A/C.6 /SR.792 (Oct 14, 1963).

105. U.N. GAOR, Sixth Comm., 18th Sess., 791st mtg. at 50, ¶ 10, U.N. Doc. A/C.6 /SR.791 (Oct. 14, 1963) (Byelorussia); U.N. GAOR, Sixth Comm., 21st Sess., 925th mtg. at 152, ¶ 9, U.N. Doc. A/C.6/SR.925 (Nov. 4, 1966) (Hungary).

106. U.N. GAOR, Sixth Comm., 18th Sess., 785th mtg. at 24, ¶ 8, U.N. Doc. A/C.6 /SR.785 (Oct. 7, 1963); U.N. GAOR, Sixth Comm., 21st Sess., 929th mtg. at 174, ¶ 8, U.N. Doc. A/C.6/SR.929 (Nov. 11, 1966) (Colom.).

107. U.N. GAOR, Sixth Comm., 18th Sess., 788th mtg. at 37, ¶ 38, U.N. Doc. A/C.6 /SR.788 (Oct. 10, 1963) (Pol.); U.N. GAOR, Sixth Comm., 18th Sess., 792d mtg. at 55, ¶ 4, U.N. Doc. A/C.6/SR.792 (Oct 14, 1963) (Spain).

108. Humphrey Waldock, (Special Rapporteur on the Law of Treaties), *Fifth Rep. on the Law of Treaties*, U.N. Doc. A/CN.4/183, at 16 (1966).

109. U.N. GAOR, Sixth Comm., 18th Sess., 789th mtg. at 41, ¶ 25, U.N. Doc. A/C.6 /SR.789 (Oct. 11, 1963).

110. U.N. GAOR, Sixth Comm., 18th Sess., 791st mtg. at 51, ¶ 15, U.N. Doc. A/C.6 /SR.791 (Oct. 14, 1963).

111. U.N. GAOR, Sixth Comm., 18th Sess., 788th mtg. at 35, ¶ 21, U.N. Doc. A/C.6 /SR.788 (Oct. 10, 1963)

112. U.N. GAOR, Sixth Comm., 18th Sess., 792d mtg. at 57, ¶ 16, U.N. Doc. A/C.6 /SR.792 (Oct 14, 1963) (Spain).

veloped state "a large measure of control over the latter country's economy," as the assistance could be arbitrarily and unilaterally cancelled.[113]

The second type consisted of treaties concerning the provision of military assistance and the granting of military bases.[114] These treaties were used to "sanctify subjugation and exploitation of the smaller and weaker states" as well as to protect and "extort exclusive economic privileges[,]" as they required the granting of military concessions as a precondition for independence and obligated many newly independent states to "adhere to military alliances under strong pressures."[115] For example, colonial powers conditioned independence on the granting of military bases by concluding alliance treaties and devolution agreements with the successor states.[116]

The third type referred to treaties concluded between former colonial powers and newly independent states, where independence was conditioned on agreements conferring continued economic advantages to the former colonial powers, such as those obligating the newly independent State "to leave the control of its mineral wealth to the former metropolitan Power."[117] The acquired rights derived from concessions remained specifically "supported and strengthened" by the principle of *pacta sunt servanda*.[118]

However, at the Sixth Committee, some states such as China[119] and the United Kingdom[120] voiced concerns that expanding the coercion 'exception' to include economic and political coercion could generate pretexts for treaty violations. These concerns foreshadowed the former colonial powers' employment of *pacta sunt servanda* to resist and defeat the Third World's final attempt at expanding the contours of the coercion 'exception' at the Committee of the Whole meetings in the 1968 United Nations Conference on the Law of Treaties.

These Third World attempts to reshape *pacta sunt servanda* resulted in a proposal, which would give rise to "a major confrontation" where states

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113. U.N. GAOR, Sixth Comm., 18th Sess., 784th mtg. at 18, ¶ 10, U.N. Doc. A/C.6 /SR.784 (Oct. 4, 1963).

114. U.N. GAOR, Sixth Comm., 18th Sess., 784th mtg. at 18, ¶ 11, U.N. Doc. A/C.6 /SR.784 (Oct. 4, 1963); U.N. GAOR, Sixth Comm., 17th Sess., 741th mtg. at 36, ¶ 27, U.N. Doc. A/C.6/SR.741 (Oct. 15, 1962).

115. Georges M. Abi-Saab, *The Newly Independent States and the Rules of International Law: An Outline*, 8 HOW. L.J. 97, 108 (1962).

116. LUNG-FONG CHEN, STATE SUCCESSION RELATING TO UNEQUAL TREATIES 66 (1974).

117. U.N. GAOR, Sixth Comm., 18th Sess., 784th mtg. at 18, ¶ 12, U.N. Doc. A/C.6 /SR.784 (Oct. 4, 1963). *See also* Oliver J. Lissitzyn, *International Law in a Divided World*, 34 INT'L CONCILIATION. 3, 53 (1963).

118. Pierre A. Lalive, *The Doctrine of Acquired Rights*, *in* Rights and Duties of Private Investors Abroad 145, 172 & 185 (Sw. Legal Found. Int'l & Comp. L. Center 1965).

119. U.N. GAOR, Sixth Comm., 18th Sess., 792nd mtg. at 57, ¶ 12, U.N. Doc. A/C.6 /SR.792 (Oct 14, 1963).

120. U.N. GAOR, Sixth Comm., 18th Sess., 786th mtg. at 26, ¶ 8, U.N. Doc. A/C.6 /SR.786 (Oct. 8, 1963).

"vociferously supported and vehemently attacked" it.[121] On May 2, 1968, during the forty-eighth meeting of the first session of the United Nations Conference on the Law of Treaties, a group of nineteen African, Asian, and Latin American states jointly proposed to amend Article 49, the coercion 'exception'.[122] This nineteen state amendment sought to insert the phrase "including economic or political pressure" in Article 49,[123] which would void any treaty procured by economic and political force.

The relationship between *pacta sunt servanda* and informal empire is evident from the arguments advanced by the Third World states in support of reshaping *pacta sunt servanda* to include economic and political coercion as a legal basis for treaty invalidity. In introducing the nineteen state amendment, Afghanistan reasoned that socio-economic force was "the real force of the present era[,]" especially due to how the "very existence of States, in particular the smaller ones, was based on economic needs" and that the "economic plight of more than three quarters of the world community was becoming steadily worse[.]"[124]

Given the economic and political vulnerability of newly independent and developing states, various Third World states contended that economic and political pressure was "just as dangerous and perhaps more frequent than resort to armed force."[125] For example, treaties could be procured by a communications blockade that seriously impaired a country's economy,[126] or by the use of economic pressures such as the "withdrawal of aid or of promises of aid, the recall of economic experts."[127] Economic coercion could arise during negotiation of a treaty for "food, the medical supplies or the building materials" needed by less economically developed states.[128] Guinea further contended that former colonial powers resorted to economic pressure to secure the continued binding force of treaties procured through military force before decolonization.[129]

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121. Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495, 532–33 (1970).

122. U.N. Conference on the Law of Treaties, 1st Sess., at 269, U.N. Doc. A/CONF.39 /11 (Mar. 26–May. 24, 1968).

123. U.N. Conference on the Law of Treaties, 1st Sess. & 2d Sess., at 172, ¶ 449, U.N. Doc. A/CONF.39/1 l/Add.2 (Mar. 26–May. 24, 1968 and Apr. 9–22 May, 1969) ("A treaty is void if its conclusion has been procured by the threat or use of force, including economic or political pressure, in violation of the principles of the Charter of the United Nations.").

124. U.N. Conference on the Law of Treaties, 1st Sess., at 269, U.N. Doc. A/CONF.39 /11 (Mar. 26–May. 24, 1968).

125. *Id.* at 270 (India), 274 (Syria and U.A.E.), 276 (Alg.), 277 (Mong.), 282 (Hung.), 291 (Pak.).

126. *Id.* at 270 (Bol.).

127. *Id*. at 270–71 (Tanz.).

128. *See id*. at 288 (Ghana).

129. *Id.*

Many Third World states construed the nineteen state amendment as central to their self-determination and the equality of states.[130] For newly independent states, economic and political pressure were increasingly used as subtle means of "contemporary neo-colonialism."[131] Noting that political independence was "illusory" if a state lacked "genuine economic independence," Algeria contended that the choice by some countries to assert economic independence "provoked intense opposition from certain interests which saw their privileges threatened and then sought through economic pressure to abolish or at least restrict the right of peoples to self-determination."[132] India argued that the nineteen state amendment reflected and protected the "sovereignty of States over their natural wealth and resources."[133] The developing states were especially conscious of the "economic pressures in international treaty making" because of their dependence on developed states for trade and finance, which meant they could be "devastated as thoroughly by the subtle strategies of economic strangulation as [they could] by the overt application of military power."[134] Moreover, economic pressure could be "more effective" than military force in "reducing a country's power of self-determination" where the developing country's "economy depended on a single crop or the export of a single product."[135]

However, *pacta sunt servanda* and its extra-legal justification of ensuring interstate order and welfare were successfully used by a group of primarily Western states to resist the Third World's attempt at expanding the contours of the coercion 'exception'. Emphasizing the need to protect the fundamental rule of *pacta sunt servanda*, the Netherlands and Portugal cautioned that the nineteen state amendment was "a serious danger to the stability of treaty relations"[136] and would "deprive of all meaning" the *pacta sunt servanda* rule.[137] Canada and the United Kingdom strongly opposed the nineteen state amendment because the economic or political pressure was "vague," "had no objective content," and would "threaten to destroy the *pacta sunt servanda* rule" by inviting states to use it as an excuse to escape a bad bargain.[138] Similar to Belgium,[139] the United Kingdom further warned that expanding the contours of coercion in Article 49 would "inevitably cre-

130. *Id.* at 270 (Afg.).

131. *Id.* at 275 (Cuba) and 276 (Alg.).

132. *Id.* at 276.

133. *Id.* at 270.

134. Cornelius Murphy, *Economic Duress and Unequal Treaties*, 11(1) VA. J. INT'L L. 51, 53 (1970).

135. U.N. Conference on the Law of Treaties, 1st Sess., at 274, U.N. Doc. A/CONF.39 /11 (Mar. 26–May. 24, 1968) (United Arab Republic [Syria.]).

136. *Id.* at 275.

137. *Id.* at 278.

138. *Id.* at 281 (Can.) and 283 (U.K.).

139. *Id.* at 287.

ate a serious threat to the stability and security of treaty relations."[140] Therefore, as a form of reverse discourse, *pacta sunt servanda* was invoked to undermine a counter-conception of *pacta sunt servanda* and the Third World's attempt to reshape international law.

The United States' rejection of the nineteen state amendment was significant in signaling the use of extra-legal welfare justifications, such as "developmentalism," to justify the binding force of treaties and contracts aimed at protecting foreign private property and trade. While characterizing the nineteen state amendment as "so lacking in juridically acceptable content," the United States argued that "[i]nvestors would regard the amendment as increasing their risks and would raise the cost of their investments."[141] The United States contended that the nineteen state amendment hurt the Third World's aim of achieving economic self-determination by narrowing "the gap between rich and poor countries."[142]

Despite being in the minority, the Western industrial states managed to undermine the nineteen state amendment and by extension, a decolonized conception of *pacta sunt servanda*. Recognizing that there could exist a two-thirds majority required for the nineteen state amendment to be adopted, Western states emphasized that the future convention would not express accepted international law doctrines if the amendment was adopted.[143] The United States highlighted that Article 49 "could play a large part" in determining the American position to the Convention as a whole and that the states disagreeing with the proposed amended Article 49 would refuse to adopt the Convention.[144] Although it was clear during the course of the debate that the amendment "would carry by quite a substantial majority" if it was put to a vote, private discussions made it "quite clear to the proponents that adoption could wreck the conference because states concerned with the stability of treaties found the proposal intolerable."[145]

In response to such resistance, Afghanistan indicated the willingness of the nineteen state amendment sponsors to accept proposals for conciliation and mentioned the sponsors "did not wish to take advantage of their majority to impose their point of view on the minority."[146] The Netherlands followed up on Afghanistan's remarks by proposing not to put the nineteen state amendment to vote and instead carry out informal consultations regarding an "agreement on a resolution to accompany Article 49, which would facilitate its adoption."[147] The Netherlands' proposal thus portended

140. *Id.* at 284.

141. *Id.* at 292.

142. *Id.*

143. *Id.* at 281 (Can.).

144. *Id.* at 292.

145. Kearney & Dalton, *supra* note 121, at 534.

146. U.N. Conference on the Law of Treaties, 1st Sess., at 293, U.N. Doc. A/CONF.39/11 (Mar. 26–May. 24, 1968) (United Arab Republic [Syria]).

147. *Id.*

the relegation of the nineteen state amendment from a hard law proposal to a document falling short of a soft law instrument that possesses interpretive effects.

The outcome of the informal consultations was a Draft Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties ("Draft Declaration").[148] Notably, the first sentence of the Draft Declaration reaffirmed *pacta sunt servanda*. In contrast to the nineteen state amendment, the Draft Declaration, which "solemnly condemns" the use of political and economic coercion to procure a treaty, only forms part of the Final Act of the Conference on the Law of Treaties, which does not appear in the text of the Convention itself.[149] Even the status of the Draft Declaration as an interpretive supplement to Article 49 (now Article 52) remains questionable. This ambiguity stems from how the Draft Declaration "has and can have no normative force of its own" because it "stops short of casting doubt" on the validity of treaties concluded through political and economic force.[150]

Furthermore, although military coercion against a state could now void a treaty, the application of *pacta sunt servanda* under the VCLT and its application in the nineteenth century arguably remain similar in terms of practical effects. This is because invalidating a treaty procured by coercion requires the coercing state's consent without which such a treaty remains binding on the coerced state. The VCLT's procedural rules[151] seek "to prevent States from eroding *pacta sunt servanda* under the pretext of forced consent."[152] These rules result in a situation where a treaty procured by coercion is only invalidated when the coercing state accepts its invalidity either at the outset or upon the recommendation of a conciliation commission established per VCLT Article 66(b) and the Annex.[153] Moreover, since the coerced state bears the burden of invoking the treaty's invalidity,[154] invocation may be deterred by the very coercive conditions that gave rise to that treaty, especially because the coerced state's willingness to take action

148. U.N. Conference on the Law of Treaties, *Final Act of the United Nations Conference on the Law of Treaties*, at 285, U.N. Doc. A/CONF.39/26 (Mar. 26–May 24, 1968 & Apr. 9–May 22, 1969).

149. *Id.*

150. Lucius Caflisch, *Unequal Treaties*, 35 GERMAN Y.B. INT'L L. 52, 74 (1992); *see also* IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 99 (Manchester Univ. Press 1973); SHAW, *supra* note 1, at 822.

151. Vienna Convention on the Law of Treaties arts. 65, 66(b), 69, Annex ¶ 6, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] ("The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.")

152. Schmalenbach, *supra* note 92, at 872.

153. Omar M. Dajani, *Contractualism in the Law of Treaties*, 34 MICH. J. INT'L L. 1, 56 (2012).

154. VCLT, *supra* note 151, art. 65(1).

could expose it to further retaliatory actions by the more powerful state.[155] Even when there is no direct retaliation, economic dependency may deter invocation. For example, in the *Chagos Marine Protected Area Arbitration* proceedings, two arbitrators referenced Mauritius' economic dependency on the United Kingdom as an explanation for why Mauritius took some time to raise the invalidity of its consent to agree to the excision of the Chagos Archipelago as a condition for independence.[156] Moreover, the *rebus sic stantibus* doctrine as reflected in VCLT Article 62 is not an escape clause for treaties procured by economic and political coercion. The purpose of VCLT Article 62 is not to allow termination of treaties procured by coercion,[157] as it only applies when the unforeseen change of circumstances radically transforms the extent of the obligations still to be performed.[158]

Nevertheless, the persuasiveness of the arguments against the Third World's attempt at reshaping the scope of applicability of *pacta sunt servanda* through the nineteen state amendment is open to question. First, the former colonial powers contended that political or economic pressure was too vague, uncertain, and lacking in objective content such that it would undermine *pacta sunt servanda* and cause instability in treaty relations.[159] Preliminarily, the notion of military pressure was similarly vague as political or economic pressure.[160] Additionally, as Syria and Guinea contended, even if political or economic pressure was difficult to define, such pressure was not a subjective phenomenon but a concrete fact, in that it was "manifested in acts that could be identified"[161] and was "easy to detect objectively."[162] Mexico was also unconvinced by the argument that the lack of clear legal definition of political or economic pressure meant that it was impossible to distinguish between lawful forms of pressure.[163] The scope and meaning of many legal concepts that had seemed vague and imprecise at their inception were subsequently clarified through interpretation within reason and practice.[164]

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155. Julius Stone, *De Victoribus Victis: The International Law Commission and Imposed Treaties of Peace*, 8 VA. J. INT'L L. 356, 367 (1968).

156. Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), Award, 2011 P.C.A. 2011–03, ¶¶ 77–78 (Mar. 2015) (Dissenting and Concurring Opinions of Kateka, J. & Wolfrum, J.), https://pcacases.com/web/sendAttach/1570.

157. Matthew Craven, *What Happened to Unequal Treaties? The Continuities of Informal Empire*, 74 NORDIC J. INT'L L. 335, 369 (2005).

158. Gabcikovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep 7, ¶ 104 (Sept. 25).

159. U.N. Conference on the Law of Treaties, *supra* note 122, at 275, 278, 281, 284, 287.

160. *Id.* at 293.

161. *Id.* at 274

162. *Id.* at 288.

163. U.N. Conference on the Law of Treaties, 2d Sess., at 86–87, U.N. Doc. A/CONF.39 /ll/Add.l (Apr. 9–May 22, 1969).

164. *Id.* at 87.

Additionally, states resistant to the nineteen state amendment, such as the United Kingdom, recognized that there "might be cases where flagrant economic or political pressure amounting to coercion could justify condemnation of a treaty,"[165] thereby suggesting the possibility of a broader interpretation of the coercion 'exception'[166] and a missed opportunity to delineate its scope. Similarly, during the 1973 Arab oil crisis, some American scholars invoked Article 52 and the Final Act to argue that the VCLT prohibited Arab states from using economic coercion in the form of an "oil weapon" to attain their political objectives either though the conclusion of a treaty or interpretations of an existing treaty vis-à-vis other states.[167]

Moreover, the arguments based on interstate order reflected international law's "exclusive focus" since the nineteenth century on "how to establish order in the absence of an overarching sovereign," which fails to provide a historical understanding of the relationship between international law and the non-European world.[168] Similar to how the use of self-determination to effect the transformation of colonies into sovereign states was perceived by European states as a threat to a stable and established international legal system,[169] the Third World's attempt to shape the scope of applicability of *pacta sunt servanda* by reconceptualizing the coercion 'exception' was construed as destabilizing. Furthermore, stability of treaty relations has not always been prioritized by Western states themselves when their national interests were at stake, as they have "disregarded solemnly concluded treaties when they felt that their interests were adversely affected by them."[170]

Second, some states asserted that allowing treaties to be invalidated based on economic or political force would cause states to find excuses to escape treaties.[171] However, as Indonesia noted, a state is unlikely to invoke political or economic coercion without well-founded reasons because it "would otherwise lose its prestige in the eyes of the world."[172] Noncompliance with treaty obligations based on unfounded invocation of politi-

165. U.N. Conference on the Law of Treaties, 1st Sess., at 283, U.N. Doc. A/CONF.39 /11 (Mar. 26–May. 24, 1968).

166. Olivier Corten, *Article 52 in* THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, VOL. I, at 1208 (Olivier Corten & Pierre Klein eds., Oxford Univ. Press 2011).

167. James A. Boorman II., *Economic Coercion in International Law: The Arab Oil Weapon and the Ensuing Juridical Issues*, 9 J. INT'L L. & ECON. 205, 216 (1974); Jordan J. Paust & Albert P. Blaustein, *The Arab Oil Weapon–A Threat to International Peace*, 68 AM. J. INT'L L. 410, 426 n.64 (1974).

168. Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 66 (1999).

169. *Id.* at 3.

170. R.P. ANAND, NEW STATES AND INTERNATIONAL LAW 68–69 (Hope India Publications 2d ed. 2008).

171. U.N. Conference on the Law of Treaties, 1st Sess., at 281, 283, U.N. Doc. A /CONF.39/11 (Mar. 26–May. 24, 1968).

172. *Id.* at 285.

cal or economic coercion could result in the non-compliant state suffering from negative collateral consequences on its reputation for agreement-keeping, thereby weakening the reliability of its current treaty commitments and undermining its long-term ability to enter into agreements with other states.[173] The Philippines further noted that abuses of a wider definition of coercion could be "avoided by inserting detailed provisions to prevent them and to permit easy ascertainment of the facts."[174]

Third, although former colonial powers relied on general principles of law in their domestic systems to inform international law, they failed to do so with respect to coercion.[175] As Cyprus argued, the "private law analogy of contracts concluded under duress or undue influence should be borne in mind" when determining the validity of treaties between parties in unequal bargaining positions.[176] One could question whether the positions of Western states in international relations were "truly reflective of national attitudes" in respect of domestic law voiding contracts based on economic duress.[177] The objections raised by the United States during the VCLT negotiations that economic pressure was too imprecise have also been made domestically, but such objections have been rejected by showing that such a concept has a core meaning that is sufficiently precise for judicial explication.[178]

Lastly, there is a potential concern regarding the effect of an expanded coercion 'exception' on the validity of peace treaties.[179] Article 52, however, does not "prejudice . . . any treaty obligations which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression."[180] Accordingly, where a peace treaty is concerned, its validity depends on whether the use of coercion in its conclusion breached the UN Charter principles.[181]

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173. ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 105–6 (Princeton Univ. Press 1984); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1846–50, 1861–65 (2002); Oona Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 504–11 (2005).

174. Int'l L. Comm'n *Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session Including the Reports of the Commission to the General Assembly*, at 18 [1966] 2 Y.B., Int'l L. Comm'n 18, U.N. Doc. A/CN.4/183.

175. Murphy, *supra* note 134, at 68

176. U.N. Conference on the Law of Treaties, 1st Sess., at 310, U.N. Doc. A/CONF.39 /11 (Mar. 26–May. 24, 1968).

177. Murphy, *supra* note 134, at 65.

178. *Id.* at 68.

179. U.N. Conference on the Law of Treaties, 1st Sess., at 395, U.N. Doc. A/CONF.39 /11 (Mar. 26–May. 24, 1968).

180. VCLT, supra note 151, art. 75.

181. LORD MCNAIR, THE LAW OF TREATIES 210 (Clarendon Press 1961); ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 317–18 (Cambridge Univ. Press, 2d ed. 2007).

In sum, the ILC negotiations on the VCLT illuminate two aspects of the relationship between *pacta sunt servanda* and imperialism. First, the Third World's rationales behind the nineteen state amendment revealed their concerns about how the invocation and applicability of *pacta sunt servanda* to treaties procured by economic or political coercion constituted a way to maintain informal empires despite the end of formal empire. Second, as evidenced by the former colonial powers' arguments, *pacta sunt servanda* was used to defeat the Third World's attempt at preventing the continuance of such informal empires by expanding the coercion 'exception'.

Against the historical backdrop of treaties imposed during the colonial era, newly-independent states attempted to circumvent *pacta sunt servanda* in evocative situations where they were immobilized and disadvantaged by treaties procured through coercion. This attempt to induce what the Third World perceived was a more just international legal order was successfully discredited by the deployment of *pacta sunt servanda*. However, the *pacta sunt servanda* principle that was invoked differed in its conceptual contours from the one that existed before the Second World War. Regardless of the legal implications arising from the VCLT procedures for treaty termination, the *conceptual* contours of *pacta sunt servanda* in terms of its scope of applicability after 1969 did not remain the same as that before the Second World War, the clearest evidence being the ILC's acceptance of Lauterpacht's proposal to introduce into the VCLT the now-Article 52. Thus, the survivability of *pacta sunt servanda* and its legitimate invocation to withstand postcolonial resistance partly rested on the ability of this principle to evolve in response to changing times.

IV. PROTECTING FOREIGN PRIVATE PROPERTY THROUGH *PACTA SUNT SERVANDA*

From the 1950s, *pacta sunt servanda* was invoked to "internationalize" or elevate contractual obligations between postcolonial states and corporations to the legally binding status of an international obligation. This had the sole objective of lifting the contract into "the sphere of application of *pacta sunt servanda*" in order to "neutralize" the postcolonial state's legislative sovereignty such that it bound itself not to modify or repeal the contract by subsequent legislation.[182] These contracts between states and corporations included concession and economic development agreements.

182. IVAR ALVIK, CONTRACTING WITH SOVEREIGNTY: STATE CONTRACTS AND INTERNATIONAL ARBITRATION 56 (Hart 2011); ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 233 (Cambridge Univ. Press 2004); Arghyrios Fatouros, *International Law and the Internationalized Contract*, 74 AM. J. INT'L L. 134, 136–37 (1980); Esa Paasivirta, *Internationalization and Stabilization of Contracts versus State Sovereignty*, 60(1) 315 BRIT. Y.B. INT'L L. 316–18 (1990); Derek W. Bowett, *Claims Between States and Private Entities: The Twilight Zone of International Law*, 35 CATH. U. L. REV. 929, 931 (1986).

A concession agreement gives the investor "exclusive, extensive, and plenary rights" to exploit a natural resource such as petroleum or timber, and excluded the host state's participation in the ownership, control, and operation of the resource exploitation, thereby amounting to "a virtual assumption of sovereignty by transnational corporations over the host country's natural resource."[183] While these concessions were granted to the investors by local authorities, such as traditional chiefs or the colonial governor during the colonial era, post-colonial governments "were persuaded by the former metropolitan powers as well as the companies concerned to preserve the concessions on grounds of sanctity of contracts."[184] An economic development agreement involved the host government granting to the investor exclusive or monopolistic privileges such as the "exclusive right to explore and extract in a defined area" for a mineral venture or an exclusive right to locally manufacture an item.[185]

The invocation of *pacta sunt servanda* to internationalize these contracts, however, entailed a reconceptualization of *pacta sunt servanda*, in that while *pacta sunt servanda* was inapplicable to contracts between an investor and a state before 1945, internationalization meant that *pacta sunt servanda* became applicable to such state contracts. This shift could be illustrated with reference to the legal discourse and arbitrations surrounding these state contracts. In addition to the *Sapphire* arbitration, attention will also be given to the *Texaco* and *Liamco* arbitrations, which were initiated against Libya by oil corporations whose contractual rights and properties were nationalized in breach of the concessions they concluded with Libya. Among the issues the tribunals decided were whether a concession agreement between a state and a corporation was governed by domestic or international law as well as whether Libya could invoke its sovereignty to justify the nationalization. These decisions turned on the contract's internal aspects such as stabilization clauses, arbitration clauses, and choice of law clauses drafted into the contract, as well as the contract's external aspects extraneous to the contract, such as economic benefits brought by the investment to the state and the magnitude of the investment, which were used as evidence for the choice of international law, or *pacta sunt servanda*.[186]

This Part examines the evolution, invocation, and application of *pacta sunt servanda* with respect to these state contracts in the context of the

183. Samuel Asante, *Restructuring Transnational Mineral Agreements*, 73 AM. J. INT'L L. 335, 338 (1979); Arnold McNair, *The General Principles of Law Recognized by Civilized Nations*, 33 BRIT. Y.B. INT'L L. 1, 3 (1957).

184. Asante, *supra* note 183, at 338–40.

185. Tom J. Farer, *Economic Development Agreements: A Functional Analysis*, 10 COLUM. J. TRANSNAT'L L. 200, 204 (1971).

186. MUTHUCUMARASWAMY SORNARAJAH, THE PURSUIT OF NATIONALIZED PROPERTY 81–103 (Martinus Nijhoff 1986); C.L. Lim, *The Worm's View of History and the Twailing Machine*, *in* ALTERNATIVE VISIONS OF THE INTERNATIONAL LAW ON FOREIGN INVESTMENT: ESSAYS IN HONOUR OF MUTHUCUMARASWAMY SORNARAJAH 3, 17 (C.L. Lim ed., 2016).

Third World's assertions of economic sovereignty, as defined in terms of the permanent sovereignty over natural resources[187] and the New International Economic Order (NIEO).[188] As Professor René-Jean Dupuy mentioned in a 1993 interview with Judge Antonio Cassese, the *Texaco* award "must be viewed in its juridico-historical context" where "frustration with the practice of having State contracts with aliens was still fresh" and international law doctrine was "immersed" in the NIEO ideology.[189] This Part accordingly examines how *pacta sunt servanda* was invoked in response to the Third World's assertions of economic sovereignty. It makes no assessments on whether these awards were correctly decided either as a matter of positive law or in terms of policy considerations, and instead focuses on how *pacta sunt servanda* was deployed as an argumentative strategy and the historical evolution in the applicability of *pacta sunt servanda* from state-state to investor-state relationships.

Before 1945, *pacta sunt servanda* was inapplicable to contracts between a state and a corporation. Although corporations could enter into contracts with a sovereign state, these contracts were "not Treaties properly so called."[190] In *Serbian Loans*, the Permanent Court of International Justice stated that a contract, which is "not a contract between States in their capacity as subjects of international law is based on the municipal law of some country."[191] The PCIJ "clearly took it for granted" that contractual relationships between the state and private individuals of foreign nationality were governed by the state's municipal law.[192] This was because foreign corporations lacked capacity and there could be no "mutual surrender of sovereignty . . . in the case of an investment agreement between a State and a foreign corporation."[193] Although the conclusion of a treaty, which constrains the state's exercise of its sovereign rights, is an attribute of state sovereignty and not an abandonment of its sovereignty,[194] a state contract before 1945

187. G.A. Res. 1803 (XVII), ¶ 1 (Dec. 14, 1962); G.A. Res. 2158 (XXI), ¶ 1 (Nov. 25, 1966) ; G.A. Res. 2386 (XXIII) (Nov. 19, 1968); G.A. Res. 3171 (XXVIII), ¶ 1 (Dec. 17, 1973); G.A. Res. 3281 (XXIX, art. 2, ¶ 1 (Dec. 12, 1974), *see also* G.A. Res. 3037 (XXVII) (Dec. 19, 1972); G.A. Res. 3082 (XXVII) (Dec. 6, 1973).

188. G.A. Res. 3201 (S-VI) (May. 1, 1974); G.A. Res. 3202 (S-VI) (May. 1, 1974).

189. ANTONIO CASSESE, FIVE MASTERS OF INTERNATIONAL LAW 31, 33 (Hart Publ'g 2011).

190. PHILLIMORE, *supra* note 21, at 75.

191. Concerning the Payment of Various Serbian Loans Issued in France (Fr. v. Kingdom of the Serbs, Croats and Slovenes), Judgment, 1929 P.C.I.J. (ser. A) No. 20, ¶ 86 (July 12); *see also* Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France (Fr. v. Braz.), Judgment, 1929 P.C.I.J. (ser. A) No. 15, 121 (July 12).

192. F.V. Garcia-Amador, (Special Rapporteur on State Responsibility), *Fourth report on State Responsibility*, U.N. Doc. A/CN.4/119, at 26, ¶ 105 (1959).

193. SORNARAJAH, *supra* note 186, at 109.

194. The S.S. "Wimbledon" (U.K. v Ger.), Judgment, 1923 P.C.I.J. (ser. A) No. 1, at 3 (Aug. 17).

was not a treaty, which required two sovereign entities.[195] Accordingly, a state's breach of a public contract was not in itself a breach of international law.[196]

However, after 1945, lawyers from capital-exporting states recognized that the "most cogent and persuasive argument" for holding sovereign states internationally responsible for breaching or abrogating a concession agreement was "based on the proposition of *pacta sunt servanda*."[197] By resorting to *pacta sunt servanda*, they sought to relax and thus depart from the strict application of the traditional position, which was unable to satisfactorily deal with modern forms of contractual relations between states and "aliens".[198] The Authors' Comment on the 1959 Draft Convention on Investments Abroad (also known as the Abs-Shawcross Draft Convention) noted that there was no basis for distinguishing between treaties and contracts with "aliens" where the applicability of *pacta sunt servanda* was concerned.[199] The "basis" of internationalization was "said to lie in the international doctrine of *pacta sunt servanda*," in that "it mattered not that a private contract with a foreign state could not amount to a treaty, the important point was that international law also required agreements to be honoured."[200] The applicability of *pacta sunt servanda* to the state contracts would thus be a "cornerstone" of a "modus operandi for investment, trade and the exchange of ideas and persons" between Western states and the less developed states of Asia, Africa and Latin America.[201]

Despite being fundamental to contract law, *pacta sunt servanda* is "too general to be serviceable without further definition in relation to particular classes of situation" and it "needs to be given a content" in the context of the relationship between international law and the proper law of the con-

195. MUTHUCUMARASWAMY SORNARAJAH, LAW OF INTERNATIONAL JOINT VENTURES 295 (Longman 1992).

196. John Baloro, *The Legal Status of Concession Agreements in International Law*, 19 COMP. & INT'L L. J. S. AFR. 410, 419 (1986).

197. Leo T. Kissam & Edmond K. Leach, *Sovereign Expropriation of Property and Abrogation of Concession Contracts*, 28 FORDHAM L. REV. 177, 207 (1959).

198. Garcia-Amador, *supra* note 192, at 31, ¶¶ 124.

199. *The Proposed Convention to Protect Private Foreign Investment—Introduction*, 9(2) J. PUB. L. 115, 120 (1960). The 1959 Draft Convention on Investment Abroad was a revised version of the 1957 International Convention for the Mutual Protection of Private Property Rights in Foreign Countries, which was published by an organization of German businessmen known as the Society to Advance the Protection of Foreign Investments. It was an effort at proposing "a multilateral treaty aimed at the protection of private foreign investment." Arthur S. Miller, *Protection of Private Foreign Investment by Multilateral Convention*, 53 AM. J. INT'L L. 371, 371 (1959).

200. Lim, *supra* note 186, at 17.

201. Cecil J. Olmstead, *Nationalization of Foreign Property Interests, Particularly Those Subject to Agreements with the State*, 32 N.Y.U. L. REV. 1122, 1136 (1957).

tract.[202] *Pacta sunt servanda* was invoked and applied to internationalize state contracts in four relevant ways.

First, *pacta sunt servanda* was invoked to challenge the unfettered economic sovereignty of states. In *Texaco*, arbitrator René-Jean Dupuy stated that "[n]o international jurisdiction whatsoever has ever had the least doubt as to the existence, in international law, of the rule *pacta sunt servanda*."[203] Given that "the maxim *pacta sunt servanda* should be viewed as a fundamental principle of international law," the concession agreement had binding force on Libya under international law.[204] Similarly, the *Liamco* arbitral tribunal stated that the fundamental right to conclude contracts, which "was always and constantly considered as security for economic transactions, and was even extended to the field of international relations," is protected and characterized by *pacta sunt servanda*.[205] As a result, the principle of respecting agreements was applicable to concession agreements.[206] Accordingly, apart from serving as a reason for not choosing the host State's national law and situating the contract in international law,[207] the applicability of *pacta sunt servanda* meant that a State does not have the absolute economic sovereignty to unilaterally modify or abrogate state contracts.[208]

This "new thesis on the status of concessions" meant that the validity of concessions "was based on the international legal principle of *pacta sunt servanda*, by virtue of which a contracting state could not unilaterally modify or cancel such agreements without engaging international responsibility."[209] Furthermore, some scholars argued that internationalization meant that state contracts were assimilated into or given the same legal status as treaties, in that when the state "concludes a contract with a private investor it accepts the same limitations on its sovereignty as when it enters into a treaty" and that "the doctrine of *pacta sunt servanda* precludes the repudiation of those commitments."[210]

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202. Robert Jennings, *State Contracts in International Law*, 37 BRIT. Y.B. INT'L L. 156, 175–76 (1961).

203. Texaco Overseas Petrol. Co. v. Gov't Libyan Arab Republic, Award, 53 I.L.R. 389, 462 (1977).

204. *Id.*

205. Libyan Am. Oil Co. ("LIAMCO") v. Gov't Libyan Arab Republic, Award, 62 I.L.R. 140, ¶ 212 (1977).

206. *Id.* ¶ 233.

207. Ole Spiermann, *Investment Arbitration: Applicable Law*, *in* International Investment Law 1373, 1376 (Marc Bungenberg, Jörn Griebel, Stephan Hobe & August Reinisch eds., Hart Publ'g 2015).

208. Samuel Asante, *Stability of Contractual Relations in the Transnational Investment Process*, 28 INT'L & COMPAR. L.Q. 401, 405 (1979).

209. John Baloro, *The Legal Status of Concession Agreements in International Law*, 19 COMPAR. & INT'L L. J. S. AFRICA 410, 420 (1986).

210. Henry Landau, *Protection of Private Foreign Investments in Less Developed Countries – Its Reality and Effectiveness*, 9 WM. & MARY L. REV. 804, 813 (1968); SORNARAJAH, *supra* note 186, at 94–96.

The device of the internationalized contract, however, applied to state contracts made by developing states, but not those made by developed states.[211] Although "developed nations rearrange their contracts in economic sectors perceived as vital to their progress," these rearrangements were "exempted" from internationalization.[212] In the domain of state contracts, the "qualification recognized by almost all legal systems" including those in France, West Germany, Italy, the United Kingdom, and the United States was that the state had "exceptional, prerogative powers to vary or even terminate the contract for the public good and in the public interest, subject only to the duty to pay compensation."[213] Thus, *pacta sunt servanda* "yielded" to the sovereign right of host states to restructure state contracts based on considerations such as public interest and changed circumstances.[214]

Second, *pacta sunt servanda* was found to apply to a state contract when the contract contained an arbitration clause. Where the contract referenced international arbitration as a means of resolving differences in the interpretation and performance of the contract, it is "unquestionable" that *pacta sunt servanda* applied to "situate" the contract within the "international order of the international law of contracts".[215]

Third, the principle of *pacta sunt servanda* was applicable to state contracts because such a principle is a general principle of law.[216] The arbitrator in *Texaco* found that reference to general principles of law was "always regarded" to be sufficient criterion to internationalize a contract and to subject such a contract to the international principle of *pacta sunt servanda*.[217] In *Sapphire*, Article 38 of the 1954 Consortium Agreement, which stated the parties' agreement to carry out the Agreement's provisions in good faith, was interpreted as evidence of the parties' intention to apply general principles of law.[218]

Despite the caution in the nineteenth and early-twentieth centuries against the "danger" of transposing general principles of law governing private contracts in domestic systems to public international law,[219] the use of

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211. MUTHUCUMARASWAMY SORNARAJAH, INTERNATIONAL COMMERCIAL ARBITRATION: THE PROBLEM OF STATE CONTRACTS 128 (Longman Singapore Pub. 1990).

212. *Id.*

213. Derek W. Bowett, *Claims Between States and Private Entities: The Twilight Zone of International Law*, 35 CATH. UNIV. L. REV. 929, 934 (1986).

214. Samuel K. B. Asante, *International Law and Foreign Investment: A Reappraisal*, 37 INT'L & COMPAR. L.Q. 588, 613–14 (1988).

215. Texaco Overseas Petrol. Co. v. Gov't Libyan Arab Republic, Award, 53 I.L.R. 389, 455 (1977).

216. SORNARAJAH, *supra* note 211, at 138.

217. Texaco Overseas Petrol. Co. v. Gov't Libyan Arab Republic, Award, 53 I.L.R. 389, 453 (1977).

218. Sapphire International Petroleums Ltd. v. National Iranian Oil Company, Award, 35 I.L.R. 136, 172-173 (1963).

219. *See* Part II.A.

pacta sunt servanda to internationalize concession agreements was justified by its status as a general principle of law. For example, according to the German jurist Hans Wehberg, the sanctity of contracts between states and corporations such as concessions were deemed to be "valid exactly in the same manner" as interstate treaties because *pacta sunt servanda* was a general principle of law found in all nations.[220] Given the "reciprocal character" of these private contracts and the basic human expectation that a promise will be kept, the protection of such an expectation is "a general principle of law universally recognized by civilized states."[221]

Moreover, since all legal systems seemed to enforce contracts between individuals under their jurisdiction, it would be "paradoxical" for states to "refuse to apply this same standard to their own agreements with individuals."[222] Although major legal systems around the world had begun to move away from the sanctity of contract, the principle of sanctity of contract was given "respectability in terms of international law by tying it with the international law principle, *pacta sunt servanda*."[223]

Fourth, international economic order and welfare were used to justify the applicability of *pacta sunt servanda* to concession agreements. For example, in *Texaco*, *pacta sunt servanda* applied to the contract because the contract was an economic development agreement, which was "a new category of agreements between States and private persons" that assumed "real importance" in realising the host state's economic and social progress.[224] Although the applicability of *pacta sunt servanda* to these contracts constituted "a new stage of the law governing a number of international transactions," it was justified based on the need to "meet the complexities of modern conditions and to serve the interests of international economic transactions."[225]

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220. Wehberg, *supra* note 51, at 786. Professor Yasuaki, however, disagrees with Professor Wehberg's view on the trans-historical universality of *pacta sunt servanda*. *See* Onuma Yasuaki, *Agreement*, *in* A NORMATIVE APPROACH TO WAR: PEACE, WAR, AND JUSTICE IN HUGO GROTIUS 176–77 (Onuma Yasuaki ed., Clarendon Press 1993); ONUMA YASUAKI, INTERNATIONAL LAW IN A TRANSCIVILIZATIONAL WORLD 62–63 (Cambridge Univ. Press 2017).

221. Kenneth S. Carlston, *Concession Agreements and Nationalization*, 52 AM. J. INT'L L. 260, 261 (1958).

222. Cecil J. Olmstead, *Nationalization of Foreign Property Interests, Particularly Those Subject to Agreements with the State*, 32 N.Y.U. L. REV. 1121, 1136 (1957).

223. Muthucumaraswamy Sornarajah, *The Battle Continues: Rebuilding Empire through Internationalization of State Contracts*, *in* THE BATTLE FOR INTERNATIONAL LAW: SOUTH-NORTH PERSPECTIVES ON THE DECOLONIZATION ERA 175, 189 (Jochen von Bernstorff & Philipp Dann eds., Oxford Univ. Press 2019).

224. Texaco Overseas Petrol. Co. v. Gov't Libyan Arab Republic, Award, 53 I.L.R. 389, 455-56 (1977).

225. Jean-Flavien Lalive, *Contracts between a State or a State Agency and a Foreign Company: Theory and Practice: Choice of Law in a New Arbitration Case*, 13 INT'L & COMPAR. L.Q. 987, 1006 (1964).

Pacta sunt servanda was deemed by Wehberg to be "an essential condition of the life of any social community," which was no longer based solely on interstate relations but also increasingly "on relations between states and foreign corporations or foreign individuals."[226] Since contractual arrangements between governments and foreign parties "play a great role in international economic relations" and had a decisive impact on the flow and promotion of private capital investment, "reliance on good faith in the performance of contractual arrangements will benefit all parties, and thereby contribute to the development of an international economic law."[227] For example, economic development was used as a justification to internationalize the investment agreement in the *Sapphire* arbitration, which concerned Article 46 of the 1954 Consortium Agreement between Iran and the oil companies.[228] Although Article 46 was a choice of law clause that contained "an implicit acceptance that Iranian law would normally apply,"[229] the arbitrator excluded the application of Iranian law to the Agreement by focusing on the clauses in the Agreement, the benefits it brought to the process of development, and the nature of the risks taken by the foreign corporation.[230] Internationalization of the contract was a particularly suitable solution for giving the "guarantees of protection" that were "indispensable" for foreign companies that underwent "very considerable risks in bringing financial and technical aid to countries in the process of development."[231] Moreover, *pacta sunt servanda* was conceived to be "of capital importance for the proper functioning of an enterprise," and weakening this principle "might ruin the contractual guarantees" that were "vital" to the enterprise's commercial operation.[232]

Similar to how the binding force of treaties was justified based on extralegal justifications of welfare in the nineteenth century, the internationalization of contracts through the application of *pacta sunt servanda* was justified based on its importance to the economic development of developing states. In 1961, the Arabian American Oil Company General Counsel argued in *The Business Lawyer* journal that these contracts should be called "development agreements" because performance of such contracts produced

226. Wehberg, *supra* note 51, at 786.

227. Martin Domke, *Foreign Nationalizations*, 55 AM. J. INT'L L. 585, 598 (1961).

228. Article 46 was a choice of law clause which provided that the Agreement "shall be governed by and interpreted and applied in accordance with the principles of law common" to Iran and the states in which the oil companies were incorporated, and "then by and in accordance with principles of law recognized by civilized nations" when domestic laws contain no such principles. *See* Sapphire International Petroleums Ltd. v. National Iranian Oil Company, Award, 35 I.L.R. 136, 136 (1963).

229. SORNARAJAH, *supra* note 186, at 101.

230. *Id.* at 116.

231. Sapphire International Petroleums Ltd. v. National Iranian Oil Company, Award, 35 I.L.R. 136, 175–76 (1963).

232. Maurice Bourquin, *Arbitration and Economic Development Agreements*, 15 BUS. L. 860, 862 (1960).

revenue for development projects.[233] Since development agreements constituted "a means for natural and essential international collaboration," which "assist[ed] in raising the standard of living of peoples in undeveloped and under-developed lands and in bettering the conditions of mankind," there should be more robust means of enforcement of such contracts.[234]

This new application of *pacta sunt servanda*, however, was at odds with the pre-1945 international law governing the applicability of *pacta sunt servanda*. The applicability of *pacta sunt servanda* to contracts between corporations and states after the Second World War was characterized by Professor Sir Ian Brownlie as "heretical" to the pre-1945 view that such state contracts did not operate on the plane of international law.[235] During the two decades after 1945, jurists from major capital-exporting states made "considerable effort" to establish that these state contracts were "valid on the plane of international law."[236]

By neutralizing the legislative sovereignty of formally decolonized states, the application of *pacta sunt servanda* to state contracts was instrumental in protecting foreign private property interests against the Third World's assertions of economic sovereignty. The Third World's conception of economic sovereignty subordinated *pacta sunt servanda* to the right of nations over their natural resources and distributive justice. On the one hand, permanent sovereignty over natural resources meant that *pacta sunt servanda* "pales into relative insignificance when set against a State's entitlement to have access to its own resources and to use them for its economy in the way that it thinks best."[237] For example, UNGA resolution 1803 (XVII) "sought to turn the emphasis from *pacta sunt servanda* and respect for acquired rights (with the concomitant obligation of adequate, prompt and effective compensation for a 'taking')" towards the right of peoples over natural resources.[238] Additionally, from the Third World's perspective, elevating a contract to the international plane was thought to be "insulting" to their sovereignty, as it amounted to "treating the private party as a State and the contract as a treaty."[239]

On the other hand, by reaffirming their sovereignty through the NIEO, Third World states espoused a "view of international obligation which is

233. George W. Ray, *Some Reasons for the Binding Force of Development Contracts Between States and Foreign Nationals*, 16 BUS. L. 942, 951–52 (1961).

234. *Id.* at 943.

235. IAN BROWNLIE, LEGAL STATUS OF NATURAL RESOURCES IN INTERNATIONAL LAW (SOME ASPECTS) 308 (1979).

236. *Id.*

237. ROSALYN HIGGINS, THE TAKING OF PROPERTY BY THE STATE: RECENT DEVELOPMENTS IN INTERNATIONAL LAW 347–48 (1979); *see also* DAVID ADEDAYO IJALAYE, INDIGENIZATION MEASURES AND MULTINATIONAL CORPORATIONS IN AFRICA 44 (1981).

238. HIGGINS, *supra* note 237, at 287.

239. Christopher Greenwood, *State Contracts in International Law–The Libyan Oil Arbitrations*, 53 BRIT. Y.B. INT'L L. 27, 43 (1982).

fundamentally different from the doctrine of *pacta sunt servanda*."[240] The NIEO "reject[ed] the principle of strict reciprocity in economic relations" and called for international obligations to fundamentally change from free trade towards distributive justice in light of the Third World's adverse material circumstances.[241]

The UNGA resolutions espousing the Third World's conception of economic sovereignty, however, were interpreted in *Texaco* and *Liamco* as reflecting a concept of economic sovereignty that was not absolute and subjected to *pacta sunt servanda*. For example, instead of interpreting the UNGA resolution on the Permanent Sovereignty over Natural Resources as evidence for the primacy of state sovereignty over its resources, arbitrator Dupuy relied on the last principle of the resolution, which was that "[f]oreign investment agreements freely entered into by or between sovereign States shall be observed in good faith," to arrive at the interpretation that the resolution placed "on the same footing agreements entered into between States and agreements concluded by a State and foreign private enterprises."[242] The applicability of *pacta sunt servanda* meant that Libya could not invoke "its sovereignty to disregard commitments freely undertaken through the exercise of this same sovereignty."[243] Similarly, regarding the 1974 Charter of Economic Rights and Duties of States, the *Liamco* tribunal drew attention to how the Charter recited "the fulfilment in good faith of international obligations."[244] The tribunal stated that such a sovereign right was "always subject to the respect for contractual agreements."[245]

At the same time, *pacta sunt servanda* was not circumvented by appeals to *rebus sic stantibus*. In the context of internationalized contracts, the doctrine of *rebus sic stantibus* was not accepted by tribunals to be generally applicable to concession agreements.[246] Despite efforts by developing states to reshape the contours of *pacta sunt servanda* through a broader definition of *rebus sic stantibus*, neither economic hardship nor the host state's change in government from colonial to independent status was considered sufficient to

240. ROBERT JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD 131 (Cambridge Univ. Press 1990).

241. *Id.*

242. Texaco Overseas Petrol. Co. v. Gov't Libyan Arab Republic, Award, 53 I.L.R. 389, 475 (1977).

243. *Id.*

244. Libyan Am. Oil Co. ("LIAMCO") v. Gov't Libyan Arab Republic, Award, 62 I.L.R. 140, ¶ 230 (1977).

245. *Id.* ¶ 206.

246. Robert B. von Mehren and P. Nicholas Kourides, *International Arbitrations between States and Foreign Private Parties: The Libyan Nationalization Cases*, 75(3) AM. J. INT'L L. 476, 531–33 (1981); Rainer Geiger, *The Unilateral Change of Economic Development Agreements*, 23(1) INT'L & COMP. L.Q. 73, 85–86 (1974); *See e.g.*, The American Independent Oil Co. ("AMINOIL") v. The Gov't of the State of Kuwait, Award, 21 I.L.R. 976 ¶ 212 (1982).

constitute an exception to *pacta sunt servanda*.[247] Although state contracts became "as binding as treaties between states or as contracts between individuals," the same scope of the *rebus sic stantibus* rule in the law of treaties was inapplicable to these contracts because they "typically have been freely entered in" and were "not characterized by the legalized duress treaties may have embodied."[248]

The application of *pacta sunt servanda* to state contracts reflected two main themes that characterized the "whole discourse of contracts as it applied to the Third World" since the nineteenth century. These are primarily: "the construction of 'consent' on the part of a non-European entity" and "the power that contracts bestow on a non-European entity, whether a tribe or a sovereign state, to transfer whatever resources it possesses."[249] The consequence of the internationalized contract was the maintenance of informal empire despite the collapse of formal empire. The invocation of *pacta sunt servanda* protected the legal sanctity of state contracts against the Third World's invocation of economic state sovereignty. *Pacta sunt servanda* thus became a method by which authorized decision-makers promoted certain values and legal consequences within Third World states.[250] Here, the significance of *pacta sunt servanda* was not merely the binding force of the contract as such, but also its invocation as an argumentative tactic to resist the Third World's assertion of economic sovereignty as well as prevent its dissociation from the existing economic order.

V. EVOLUTION AND PLAUSIBLE CONTINUITIES IN THE RELATIONSHIP BETWEEN *PACTA SUNT SERVANDA* AND INFORMAL EMPIRE IN MODERN-DAY INVESTMENT AND TRADE TREATY REGIMES

In Parts II, III, and IV, this note provided a historical analysis of how *pacta sunt servanda* was applied as a legal basis and invoked as an argumentative method to enable and protect informal empire. This Part now examines how this relationship between *pacta sunt servanda* and informal empire evolves or continues to manifest in the international legal order from the late-twentieth century onwards. Specifically, this Part examines two aspects of this relationship.

The first aspect concerns the implications of the Third World's failure to reshape the contours of the coercion 'exception' during the VCLT debates and negotiations. The second aspect pertains to how modern-day investment treaties continue to bear the nineteenth century legacies of the relationship between *pacta sunt servanda* and empire. This note also suggests

247. Michael E. Dickstein, *Revitalizing the International Law Governing Concession Agreements*, 6 INT'L TAX AND BUS. LAW. 54, 76-77 (1988).

248. Stephen M. Schwebel, *International Protection of Contractual Arrangements*, 53. AM. SOC'Y INT'L PROC. 266, 273 (1959).

249. ANGHIE, *supra* note 182, at 240.

250. *See* HIGGINS, *supra* note 237, at 269.

that the relationship between *pacta sunt servanda* and empire could persist even in a multipolar international order.

A. First Aspect: Implications of the Third World's failure to reshape the coercion 'exception'

Having traced in Parts II and III the historical evolution and application of *pacta sunt servanda* from the nineteenth century up to the 1980s, illuminating the full significance of the Third World's failure to reshape *pacta sunt servanda* requires a historical consideration of subsequent post-1969 developments. This note completes its historical analysis of *pacta sunt servanda* by examining the contemporary historical developments arising from the application of VCLT's concept of *pacta sunt servanda* after 1969, namely, a treaty remains binding even if it is procured by the threat or use of economic or political force.

As demonstrated in Part II, *pacta sunt servanda* as conceived in the nineteenth century gave legal effect to commercial treaty regimes procured by the threat or use of military force.[251] In contrast, after the Second World War, *pacta sunt servanda* does not give any legal effect to treaties if they are procured by the threat or use of military force. A treaty procured by military force is regarded in law as void *ab initio* irrespective of whether the militarily coerced state wishes to allow that treaty after it becomes liberated from the influence of a threat or use of force.[252]

The other distinction is whether international law views the military coercion 'exception' to *pacta sunt servanda* as destabilizing. Although invalidating commercial treaties procured by military coercion was viewed as destabilizing to an orderly international life in the nineteenth century,[253] invalidating treaties procured by military coercion is no longer perceived as destabilizing. In endorsing Rapporteur Lauterpacht's proposal to add the now-Article 52 to the VCLT, the Fourth Special Rapporteur Waldock found that invalidating treaties procured by military force would not "involve any undue risks to the general security of international treaties."[254] Nevertheless, while *pacta sunt servanda* no longer applies to modern treaties procured by military coercion, coercion in the form of economic and political force has not disappeared after 1969.

Coercion is the use of pressure, threats, intimidation or the use of force to compel another state to think or act in a certain way, interfering with matters that every state is permitted under the principle of state sovereignty to decide freely, including its choice of a political, economic, social, and cul-

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251. *See* Part II.A of this note.

252. *Draft Articles on the Law of Treaties with Commentaries*, *supra* note 1, at 247.

253. *See* Part II of this note.

254. Waldock, *supra* note 91, at 51–52.

tural system.[255] Such interference would likely involve actions of magnitude and actions that subordinate the state's sovereign rights or will.[256] Accordingly, economic or political coercion may exist if a state is compelled to enter a treaty that makes the granting of aid, loans, or trade preferences conditional on its choice of a particular economic or political system.[257]

However, the *factual existence* of economic and political coercion does not mean that it is *unlawful* under international law.[258] This is because identifying the existence of economic and political coercion is *distinct* from the legal issue of whether states enjoy an essential and irreducible right to be free from economic coercion under international law.[259] These are two separate issues, and this note neither makes any positivist claim on the latter nor any claim on the legality of the coercive acts discussed below. This note instead examines the existence of coercion as a factual matter.

During the 1979 ILC meeting on Article 52 of Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, a member commented that some "international financial organizations could exercise very great influence in their dealings with States" and "were capable of taking action that might be described as economic coercion or pressure" such as when the organization "might seek to dictate a State's economic policies."[260] This note examines the plausible factual existence of coercion in the conclusion of investment and trade treaties.

Regarding bilateral investment treaties ("BITs"), the coercive conditions under which developing states were compelled to conclude BITs with developed states were facilitated by international financial institutions through their conditional loans.[261] For example, in the American Society of

255. Mil. & Paramil. Activities in & Against Nica. (Nicar. vs. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 205 (June 27); *see also* Antonios Tzanakopoulos, *The Right to be Free from Economic Coercion*, 4 CAMBRIDGE INT'L L.J. 616, 623 (2015); Christopher Joyner, *Coercion*, *in* MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (Rüdiger Wolfrum 2008).

256. Maziar Jamnejad & Michael Wood, *The Principle of Non-Intervention*, 22 LEIDEN J. INT'L L. 345, 348, 380–81 (2009); *see also* G.A. Res. 2131 (XX), ¶ 2 (Dec. 21, 1965).

257. MUTHUCUMARASWAMY SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 219 (Cambridge Univ. Press 2021).

258. *See, e.g.*, Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 474–76 (1923).

259. Tzanakopoulos, *supra* note 255, at 630–33.

260. *Summary Record of the 1547th Meeting*, [1979] 1 Y.B. Int'l L. Comm'n 69, U.N. Doc. A/CN.4/SR.1547, at 40, ¶ 4.

261. The attaching of investment protection conditionalities to loans by international financial institutions was not an unprecedented approach. This was evident from the suggestion by the American commercial treaty negotiator Harry Hawkins that the U.S. government could "as a general and declared policy, take a less sympathetic attitude toward assistance in any form or for any purpose to countries that fail to negotiate establishment treaties containing satisfactory guarantees for private investors", so as to resolve the post-Second World War problem that underdeveloped states would rely on foreign loans rather than creating conditions necessary to attract private investment. *See* HARRY C. HAWKINS, COMMERCIAL

International Law Proceedings of the Annual Meeting, Professor José Alvarez noted that states "turn to the U.S. BIT with the equivalent of an IMF gun pointed at their heads" and that a BIT was "hardly a voluntary, uncoerced transaction."[262]

Furthermore, regulatory actions encouraged by BITs had been "aided and abetted by the actions of international financial institutions," including the International Monetary Fund ("IMF"), which pressured least developed countries ("LDCs") to "systematically reform[] their laws in favor of liberal capital flows" through structural adjustment conditions.[263] Structural conditionality means that a government "agrees to adjust its economic policies to overcome the problems that led it to seek financial aid" when it borrows from the IMF, and these loan conditions served to ensure that the borrowing state would be able to repay the IMF.[264] These conditionalities included "compliance measures . . . linked to a country's level of openness to investment and availability of foreign investment insurance linked . . . to the existence of a BIT with the host state."[265] The IMF "expanded the scope of its conditionality policies" to require stabilization programs, including greater hospitality for foreign private investment."[266] Loans were also conditioned on assurances by states to use investor-state dispute settlement mechanisms, which gave rise to "concerns" by some Latin American states that "hostility toward ICSID [also known as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States] may hamper access to World Bank credit."[267]

TREATIES AND AGREEMENTS PRINCIPLES AND PRACTICE 33 (Rinehart & Co. 1951); *see also* Kenneth J. Vandevelde, *Reassessing the Hickenlooper Amendment*, 29 VA. J. INT'L L. 115, 165–66 (1988). This article discusses the Hickenlooper Amendment, which requires the president to suspend foreign assistance to a country that expropriates the investment of American nationals without paying prompt, adequate and effective compensation. Writing in his personal capacity, former Legal Advisor to the United States' Department of State Kenneth Vandevelde noted that the "implicit assumption" of the Hickenlooper Amendment was that "a favorable investment climate can be coerced or bought with foreign assistance."

262. Asoka de Z. Gunawardana & José E. Alvarez, *The Inception and Growth of Bilateral Investment Promotion and Protection Treaties*, 86 PROC. AM. SOC'Y INT'L L. 544, 552 (1992).

263. JOSÉ E. ALVAREZ, THE IMPACT OF INTERNATIONAL ORGANIZATIONS ON INTERNATIONAL LAW 328 (Collected Courses Xiamen Acad. Int'l L. 2017); Daniel Kalderimis, *IMF Conditionality as Investment Regulation: A Theoretical Analysis*, 13 SOC. & LEGAL STUD. 103, 107–11 (2004).

264. Jochen Andritzky, Zsuzsa Munkacsi & Ke Wang, *How to Gain the Most from Structural Conditionality of IMF-Supported Programs* Annex I (IMF, Working Paper No. 21.139, 2021).

265. Asha Kaushal, *Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime*, 50 HARV. INT'L L.J. 491, 505 (2009).

266. *Id.* at 504; *see also* Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, 32 N.Y.U. J. INT'L L. & POL. 243, 256 (2000).

267. Silvia Karina Fiezzoni, *The Challenge of UNASUR Member Countries to Replace ICSID Arbitration*, 2 BEIJING L. REV. 134, 134–37 (2011).

Even if concluding a BIT may not be a formal condition for receiving IMF loans, more indirect pressures may be operating. For example, the complementary conditions for liberalization and privatization indicate that IMF and World Bank loan conditions "may overlap with the obligations of BITs, thus reducing the costs of signing the treaty."[268] Thus, a state in balance-of-payments difficulties could face "more subtle pressures" to use BITs to attract foreign capital.[269] Additionally, some developing countries might have entered into BITs to "entice more aid from the U.S. Congress or from other U.S. allies or to show the IMF that it was serious about complying with that organization's structural adjustment demands."[270]

Regarding trade treaties, since the 1980s, the IMF and the World Bank made trade liberalization, which included tariff cuts and reduction of non-tariff barriers, a key condition of their loans.[271] The IMF insisted on abolishing import controls in order to enforce free trade on loan recipients.[272] The structural and economic stabilization programs of the IMF and World Bank on developing states resulted in the "progressive liberalization of the domestic trade and financial regimes to facilitate greater integration of countries into the global economy," including the "drastic reduction and elimination of trade barriers."[273]

Paradoxically, developed states relied on the interventionist and protectionist trade and industrial policies such as tariffs and subsidies to achieve economic development.[274] During the industrialization of developed states, protectionism was the rule and free trade was the exception.[275] For example, the United States was "hardly a paragon of free-trade virtue while catching up with and surpassing Britain" and its import tariffs during the latter half of

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268. Zachary Elkins, Andrew T. Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, 2008 U. ILL. L. REV. 265, 301 (2008).

269. *Id*. at 288.

270. José E. Alvarez, *The Once and Future Foreign Investment Regime*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 607, 621 (Mahnoush H. Arsanjani, Jacob Cogan, Robert Sloane, & Siegfried Wiessner eds., Brill 2011).

271. Ha-Joon Chang, *Policy Space in Historical Perspective with Special Reference to Trade and Industrial Policies*, 41 ECON. & POL. WKLY. 627 (2006); DRAGOSLAV AVRAMOVIĆ, CONDITIONALITY: FACTS, THEORY AND POLICY: CONTRIBUTION TO THE RECONSTRUCTION OF THE INTERNATIONAL FINANCIAL SYSTEM 12 (World Inst. Dev. Econ. Rsch. U.N. Univ. 1988).

272. Trevor Parfitt & Stephen Riley, *The International Politics of African Debt*, 35 POL. STUD. 1, 6 (1987).

273. CELINE TAN, GOVERNANCE THROUGH DEVELOPMENT: POVERTY REDUCTION STRATEGIES, INTERNATIONAL LAW AND THE DISCIPLINING OF THIRD WORLD STATES 46 (Routledge 2011).

274. HA-JOON CHANG, KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE 2 (Anthem Press 2002).

275. Yilmaz Akyüz, *WTO Negotiations on Industrial Tariffs: What Is at Stake for Developing Countries?*, 40 ECON. & POL. WKLY. 4827, 4828–29 (2005).

the nineteenth century were higher than almost all of today's developing countries.[276]

Similarly, nearly all states that successfully developed since the early 1980s, such as China, India, Japan, and South Korea, engaged in sequenced, partial, and gradual trade liberalization.[277] They began industrialization with "a protectionist orientation"[278] and delayed trade liberalization.[279] They adopted a "mixed strategy" of export promotion and various protectionist industrial policies such as export subsidies and import barriers.[280] These states also deployed tariff measures to protect their infant industries until they became capable of international competition.[281] Although these trade measures were critical to the creation of new comparative advantages in the form of higher-value industries, they are now restricted or precluded by trade treaty rules today.[282]

Moreover, conditionalities by development banks could have the effect of weakening the bargaining power of developing states in the conclusion of bilateral and multilateral trade treaties. Where developing states were "required to liberalize using IMF conditionality," their bargaining power for more balanced treaty terms was further diluted because a developed state "will not compromise to gain something it can already get for free."[283] The conditionalities, which required states to reduce or eliminate applied tariff rates, weakened the ability of developing states to negotiate for higher bound tariff rates during bilateral or multilateral trade talks, such as at the World Trade Organization ("WTO"), because they would be "hard pressed" by powerful states "to justify a higher bound tariff rate in view of existing tariff structures."[284]

Indeed, the trade liberalization conditionalities attached to the loans of international financial institutions found their way as international obligations in multilateral trade treaties. The Agreement on Subsidies and Countervailing Measures of the WTO made "a significant dent" on developing

276. DANI RODRIK, ONE ECONOMICS, MANY RECIPES: GLOBALIZATION, INSTITUTIONS AND ECONOMIC GROWTH 240 (Princeton Univ. Press 2007); PAUL BAIROCH, ECONOMICS AND WORLD HISTORY: MYTHS AND PARADOXES 36–38, 52–53 (Univ. Chi. Press 1993).

277. RODRIK, *supra* note 276, at 86–87, 219–20.

278. WORLD BANK, THE EAST ASIAN MIRACLE: ECONOMIC GROWTH AND PUBLIC POLICY 295–301 (Oxford Univ. Press 1993).

279. RODRIK, *supra* note 276, at 86, 220–21.

280. Joseph Stiglitz, *Some Lessons from the East Asian Miracle*, 11 WORLD BANK RSCH. OBSERVER 151, 157, 170–71 (1996); AJIT SINGH, THE STATE OF INDUSTRY IN THE THIRD WORLD IN THE 1980S: ANALYTICAL AND POLICY ISSUES 33 (Helen Kellogg Inst. for Int'l Stud. 1990).

281. HA-JOON CHANG, BAD SAMARITANS: THE GUILTY SECRETS OF RICH NATIONS AND THE THREAT TO GLOBAL PROSPERITY 67–74 (Random House 2008).

282. DANI RODRIK, STRAIGHT TALK ON TRADE: IDEAS FOR A SANE WORLD ECONOMY 3 (Princeton Univ. Press 2017); RODRIK, *supra* note 276, at 226.

283. Kalderimis, *supra* note 263, at 110.

284. TAN, *supra* note 273, at 47.

countries' ability to "employ intelligently designed industrial policies."[285] Similarly, the Trade-Related Investment Measures Agreement prohibited tools that East Asian states previously used to maximize the benefit of foreign investment, including local content requirements, technology transfer, local employment, and research and development provisions.[286]

Although nineteenth century commercial treaties also curtailed the sovereign right to adopt industrial trade policies through the opening of ports for free trade[287] and fixing the tariffs imposable on foreign merchants,[288] they differed from modern-day trade treaties in two ways. One, while the nineteenth century commercial treaties only imposed trade liberalization obligations on one contracting party, trade liberalization provisions in modern-day trade treaties are formally reciprocal.[289] Despite their reciprocity, these modern-day trade liberalization treaties have prevented developing states from adopting the protectionist policies that the developed states themselves adopted in the past. Developed states had thus "kicked away the ladder" on which they used to climb to the top of economic development by concluding such treaties with developing states.[290] Two, in contrast to nineteenth century commercial treaties, which were procured through military coercion employed by states,[291] modern-day trade treaties were concluded under conditions characterized by more subtle forms of coercion exercised not only by states, but also by a different international law subject, namely, international

285. RODRIK, *supra* note 276, at 149; Alice H. Amsden, *Industrialization Under New WTO law*, *in* TRADE AND DEVELOPMENT: DIRECTIONS FOR THE 21ST CENTURY 82, 95 (John Toye ed., Edward Elgar Pub. 2003); MITSUO MATSUSHITA, THOMAS SCHOENBAUM, PETROS C. MAVROIDIS & MICHAEL HAHN, THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 301 (Oxford Univ. Press 3rd ed. 2015).

286. HUMAN DEVELOPMENT REPORT 2005: INTERNATIONAL COOPERATION AT A CROSSROADS – AID, TRADE AND SECURITY IN AN UNEQUAL WORLD 134 (U.N. Dev. Programme 2005)

287. For example, the Treaty of Nanking Arts. II and X mandated China open its five ports, Guangzhou, Xiamen, Fuzhou, Ningbo, and Shanghai, to free trade. Treaty of Nanking, *supra* note 17, arts. II, X.

288. Per the Treaty of Nanking Art. X, China also contracted away its tariff autonomy as it was bound by the treaty to fix the tariffs that it could impose on British merchants. Similarly, the Treaty of Wanghia Art. II fixed the tariffs that American citizens had to pay, which could not be modified without the United States' consent. Treaty of Nanking, *supra* note 17, arts. II, X*; see also* Yen-P'ing Hao & Erh-min Wang, *Changing Chinese Views of Western Relations, 1840-95*, *in* 11 CAMBRIDGE HISTORY OF CHINA: LATE CH'ING, 1800-1911, PART TWO 142, 195–96 (John K. Fairbank & Kwang-Ching Liu eds., Cambridge Univ. Press).

289. Marrakesh Agreement Establishing the World Trade Organization pmbl. ¶ 3, Apr. 15, 1994, 1867 U.N.T.S. 154; Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, ¶ 82, WTO Docs. WT/DS62/AB/R; WT/DS67/AB/R; WT/DS68/AB/R (adopted Jun. 22, 1998). *See also* Shinya Murase, *The Most-Favored-Nation Treatment in Japan's Treaty Practice During the Period 1854–1905*, 70 AM. J. INT'L L. 273, 274–275 (1976).

290. CHANG, *supra* note 274.

291. *See* Part II.

financial institutions. These differences suggest a different interplay between *pacta sunt servanda* and empire on two levels.

First, *pacta sunt servanda* operated to bind states in conditional loan agreements between a state and an international financial institution.[292] The negotiation process lies at the heart of conditionality, in that the IMF would "seek to use its superior financial position, its financial strength to offer support in exchange for a government commitment to effect particular changes in the member country's policies," especially where the country was "in the midst of a deep financial crisis, with a low level of international reserves and no access to external credit from other sources."[293] The lack of alternatives available to states seeking IMF and World Bank assistance created an asymmetry whereby financially troubled developing states lacked bargaining power to negotiate or refuse the loan terms.[294] Moreover, given that "most other potential sources of funding have insisted that any potential borrowers must have satisfactorily complied with the conditions attached to IMF loans," losing IMF's support by being unwilling to comply with loan conditions could delay or endanger other forms of credit.[295]

Second, *pacta sunt servanda* continued to be applicable to investment and trade treaties procured under economically or politically coercive conditions, which arose from the conditionality of financial loans. Even so, *pacta sunt servanda* now functions in the context of the WTO treaty regime as "the guardian of the WTO Member States' mutual consent and level of concessions."[296] Although it is important to recognize that developmental inequality was sustained by the nature of domestic institutions,[297] the international legal system was also "implicated" in such inequality, as its principles of "binding force" provided governments with the competence to conclude loan and concessionary agreements that bound the interests of their country and populations for decades.[298]

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292. *See* RUTSEL SILVESTRE J. MARTHA, THE FINANCIAL OBLIGATIONS IN INTERNATIONAL LAW 483 (Oxford Univ. Press 2015); TAN, *supra* note 273, at 107 ("Bank loan agreements are classified as international treaties between the borrowing member state and the World Bank and are registered as such with the secretary-general of the United Nations pursuant of Article 102 of the United Nations Charter."); Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986), Art. 26.

293. Ariel Buira, *An Analysis of IMF Conditionality* 4 (U.N. Conf. on Trade and Dev., G-24 Discussion Paper Series, Paper No. 22, 2003).

294. Kaushal, *supra* note 265, at 506.

295. Parfitt & Riley, *supra* note 272, at 5.

296. MARION PANIZZON, GOOD FAITH IN THE JURISPRUDENCE OF THE WTO THE PROTECTION OF LEGITIMATE EXPECTATIONS, GOOD FAITH INTERPRETATION AND FAIR DISPUTE SETTLEMENT 70 (Hart Publ'g 2006).

297. *See e.g.*, DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY (Crown Bus. 2012).

298. Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 CAMBRIDGE REV. INT'L AFF. 197, 213 (2004).

B. Second Aspect: Nineteenth Century Legacies of the Relationship Between Pacta Sunt Servanda and Informal Empire

In addition to how modern-day investment treaties constitute a "carry-over" from the internationalization theory mentioned in Part IV,[299] they continue to bear the nineteenth century legacies of the relationship between *pacta sunt servanda* and empire in two ways. First, similar to how *pacta sunt servanda* functioned as an argumentative tactic to maintain informal empire in the nineteenth century, *pacta sunt servanda* today functions as a legalized shield against postcolonial resistance in the form of investment protection standards.

As the foundational customary international law rule, *pacta sunt servanda* not only stabilizes and legitimizes the current economic system,[300] but is also the "one constant systemic implication in every application of international investment law."[301] Umbrella or *pacta sunt servanda* clauses in BITs are one example. Although the nature of protection conferred by umbrella clauses on investment contracts remains uncertain and umbrella clauses are omitted by newer BITs, umbrella clauses continue to exist in older treaties and their effects have been interpreted as transforming a contractual obligation into an international obligation by virtue of *pacta sunt servanda*.[302] In fact, umbrella clauses were originally formulated to "indicate" that the international law principle of *pacta sunt servanda* applied to investment contracts between states and foreign investors, thereby transforming an obligation under domestic law into an international obligation and countering the NIEO position of unfettered sovereignty.[303]

Another example is the fair and equitable treatment protection standard including legitimate expectations, which could be reduced to a broad interpretation of the *pacta sunt servanda* principle,[304] as *pacta sunt servanda*

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299. Prosper Weil, *The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a* Menage A Trois, 15(2) ICSID Rev. 401, 412 (2000); MUTHUCUMARASWAMY SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 378 (Cambridge Univ. Press 2021).

300. B. S. Chimni, *Customary International Law: A Third World Perspective*, 112 AM. J. INT'L L. 1, 5 (2018)

301. W. Michael Reisman, *Case Specific Mandates' versus 'Systemic Implications': How Should Investment Tribunals Decide?: The Freshfields Arbitration Lecture*, 29(2) Arb. Int'l 131, 151 (2013).

302. JEAN HO, STATE RESPONSIBILITY FOR BREACHES OF INVESTMENT CONTRACTS 274-75 and 212-14 (Cambridge Univ. Press 2018); RUDOLF DOLZER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 168 (Oxford Univ. Press 2012).

303. Thomas W. Wälde, *The Umbrella Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, J. World Inv. & Trade 183, 206 (2005); Antony C. Sinclair, *The Origins of the Umbrella Clause in International Law of Investment Protection*, 20(4) Arb. Int'l 411, 420-434 (2004).

304. Nicolás M. Perrone, *The International Investment Regime After the Global Crisis of Neoliberalism: Rupture or Continuity?*, 23(3) Ind. J. Global Legal Stud. 603, 618 (2016);

maintains the belief that investors' legitimate expectations arising from a state's legal commitments "are meaningful and will be enforced."[305] In totality, given how the investment regime and some of its protection standards are protected by and reducible to *pacta sunt servanda*, the argumentative structure of investment disputes oscillates between arguments stressing communitarian concerns about justice in defence of host states' sovereignty and arguments emphasizing the "non-consensually binding character of the *pacta sunt servanda* norm" in support of investors.[306]

Second, the modern-day global investment system, which comprises BITs, bears the legal legacies of civilizational standards in the nineteenth century treaty regime that were secured by the invocation and application of *pacta sunt servanda*. The civilizational standards formulated in the nineteenth century treaty regime protected foreign persons and property of the colonial powers through imposing obligations of conduct. For example, the Treaties of Nanking and Whampoa both stipulated that British and French subjects "shall enjoy full security and protection for their persons and property within the Dominions of the other."[307] The Treaty of Whampoa imposed obligations on China to send in its armed forces to dissipate any riots, seize culprits, and speedily punish any local Chinese who attempted to loot or destroy French houses.[308] Comparably, the Treaty of Wanghia stipulated that China "will immediately despatch [sic] a military force to disperse the rioters, and will apprehend the guilty individuals and punish them with the utmost rigour of the law" if the dwellings or property of American citizens were "threatened or attacked by mobs, incendiaries, or other violent or lawless persons."[309] These nineteenth century treaty provisions ensured that the domestic legal regime governing foreign property corresponded to the minimum requirements of Anglo-Saxon or Continental Rechtsstaat rule of law.[310]

Additionally, the treaties' extraterritoriality provisions not only granted certain rights and immunities to the subjects of one state within the territorial boundaries of another state, but also exempted subjects of a foreign state from local territorial jurisdiction by placing these foreign subjects under the

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ROLAND KLÄGER, 'FAIR AND EQUITABLE TREATMENT' IN INTERNATIONAL INVESTMENT LAW 278 (Cambridge Univ. Press 2011); DOLZER, *supra* note 302, at 152.

305. Reisman, *supra* note 301, at 151.

306. Martti Koskenniemi, *The Politics of International Law*, 1 Eur. J. Int'l L. 4, 30 (1990).

307. Treaty of Nanking, *supra* note 17, art. I.

308. Treaty of Whampoa, Fr.-China, art. XXVI, 1844, *reprinted in* TREATIES, CONVENTIONS, ETC. BETWEEN CHINA AND FOREIGN STATES 373 (Shanghai Inspectorate of Customs, 1887).

309. Treaty of Wanghia, *supra* note 17, art. XIX.

310. Georg Schwarzenberger, *The Protection of British Property Abroad*, 5 CURRENT LEGAL PROBS. 295, 298 (1952).

laws and judicial administration of their own state.[311] For example, the Treaty of Nanking introduced extraterritoriality by mandating the ceded island of Hong Kong be governed by any laws Britain saw fit.[312] The July 22, 1843 General Regulations, which supplemented the Treaty of Nanking, further specified that British subjects would only be criminally punished by British law.[313] Similarly, the Treaty of Wanghia stipulated that American citizens who committed any crime in China would only be tried and punished by a body authorized according to American law.[314]

These extraterritoriality treaty provisions also constituted a method to enable and secure informal empire. On the one hand, since the abolition of extraterritoriality required the institutionalization of a domestic legal system that enforced the legal and property rights of Western merchants, the periphery state wishing to abolish extraterritoriality had to reform its legal system.[315] Associated with the "achievement of civilized status", these reforms had the effect of legalizing and globalizing private property and contractual rights that were essential to the commercial activities of Western merchant capitalists abroad.[316] On the other hand, the extraterritorial regime constituted a "crude form of legal harmonization to facilitate the conduct of international trade and transactions in the early era of global commerce."[317] As noted by the British Supreme Court for China Chief Judge Turner in 1929, extraterritoriality offered a British subject in China "reasonable certainty as to the laws under which he is to come; some harmony between those laws and those of the Western world; an adequate supply of trained men to administer them and some assurance of their independence in the exercise of their judicial duties."[318]

Therefore, by establishing legal standards that supported the economic systems prevalent in Europe and the United States, the extraterritoriality treaty terms "represented the partial exportation of these legal systems to support commerce in the emerging markets of the uncivilized world."[319]

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311. WESLEY FISHEL, THE END OF EXTRATERRITORIALITY IN CHINA 2 (Univ. Cal. Press 1952); TRAVERS TWISS, THE LAW OF NATIONS CONSIDERED AS INDEPENDENT POLITICAL COMMUNITIES 223–24 (Longman, Green, Longman & Roberts 1861); PÄR KRISTOFFER CASSEL, GROUNDS OF JUDGMENT: EXTRATERRITORIALITY AND IMPERIAL POWER IN NINETEENTH-CENTURY CHINA AND JAPAN 8–10 (Oxford Univ. Press 2012).

312. Treaty of Nanking, *supra* note 17, art. III.

313. *Id.*, art. XIII.

314. Treaty of Wanghia, *supra* note 17, art. XXI.

315. TURAN KAYAOĞLU, LEGAL IMPERIALISM: SOVEREIGNTY AND EXTRATERRITORIALITY IN JAPAN, THE OTTOMAN EMPIRE, AND CHINA 34–35, 51 (Cambridge Univ. Press 2010).

316. NTINA TZOUVALA, CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW 45, 59–61 (Cambridge Univ. Press 2020).

317. David P. Fidler, *A Kinder, Gentler System of Capitulations—International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalized Civilization*, 35 TEX. INT'L L.J. 387, 391 (2000).

318. Skinner Turner, *Extraterritoriality in China*, 10 BRIT. Y.B. INT'L L. 56, 63 (1929).

319. Fidler, *supra* note 317, at 393.

Thus, the term "civilized nation" had acquired a meaning that was "identical with the maintenance of the rule of law in the Anglo-Saxon meaning of the term in favour of foreign nationals."[320]

While acknowledging that "every foreigner located in any country of Christendom is subject to the municipal law of that country," the American negotiator for the Treaty of Wanghia, Caleb Cushing, stated that the Christian foreigner was exempted from China's jurisdiction because American subjects were entitled to the protection of their government.[321] Similarly, British diplomats negotiating the Treaty of Nanking sought to obtain "security for British Subjects" who resided in China for trade purposes by securing a "cession to the British Crown of Insular Positions on the Coast of China," where "the persons and the property of British Subjects in China shall lie secure, and that their commercial dealings shall be free and unconstrained."[322] The treaty terms protecting foreign persons and property of the imperial powers were based on standards of Western civilization, which reflected the legal norms of Western states.[323]

The civilizational standards contained in the nineteenth century commercial treaties crystallized into minimum standards of customary international law, which in turn informed the substantive content of the modern-day investment treaties.[324] Although "international law lacked any settled principles for the protection of private property abroad" until the nineteenth century, the standards in the nineteenth century commercial treaties "hardened into general principles of law recognised by civilized nations and even came to be considered as rules of international customary law."[325]

Additionally, the Most-Favored-Nation ("MFN") standards contained in three of these four treaties[326] facilitated cooperative imperialism through the

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320. Schwarzenberger, *supra* note 66, at 227.

321. MACNAIR, *supra* note 13, at 60–61.

322. MORSE, *supra* note 16, at 657.

323. GONG, *supra* note 62, at 14–15; *see* Charles H. Alexandrowicz, *The Partition of Africa by Treaty (1974) in* THE LAW OF NATIONS IN GLOBAL HISTORY, *supra* note 68, at 255 ("At the end of the nineteenth century the protectorate deteriorated into a political regime carrying the label of colonial protectorate, and capitulations lost their function of balancing African legal tradition and custom against the encroachment of European law.").

324. Schwarzenberger, *supra* note 310, at 298.

325. *Id.*

326. Although Treaty of Nanking did not have any Most-Favored-Nation ("MFN") clauses, the Treaty of Bogue, which was a supplementary treaty to the Treaty of Nanking, required China to extend to British Subjects the same privileges and immunities that it granted to subjects of other foreign States (Art. VIII). Article VI of the Treaty of Whampoa and Article II of the Treaty of Wanghia also contained MFN obligations. Treaty of Nanking, *supra* note 17, art. VIII; Treaty of Wanghia, *supra* note 17, arts. II, VI; Treaty of the Bogue, U.K.-China, 1843 *reprinted in* TREATIES BETWEEN THE EMPIRE OF CHINA AND FOREIGN POWERS, TOGETHER WITH REGULATIONS FOR THE CONDUCT OF FOREIGN TRADE (William Frederick Mayers, ed. 1877).

sharing of privileges amongst colonial powers.[327] The standards also functioned to consolidate the minimum standards of international law by automatically generalizing the benefits obtained for British merchants and created a "network" of "declaratory treaties" that gave "greater precision" to these minimum standards.[328] Therefore, the standards of civilization that informed the legal standards in the nineteenth century commercial treaties persisted after the Second World War in another form, namely, investment protection standards in investment treaties.[329]

However, a difference between the nineteenth century commercial treaty and modern-day investment treaty regimes is that the latter no longer constitutes a treaty regime that merely protects the foreign property of Western states. Although it is now inaccurate to portray the international investment law regime as merely concerned with protecting Western capital,[330] *pacta sunt servanda* could continue to be invoked and applied to facilitate informal empire.

This note preliminarily suggests that the relationship between *pacta sunt servanda* and informal empire could persist despite a multipolar international order where capital-exporting states from the Global South build on, reproduce, and repurpose existing international economic norms and institutions.[331] Capital-exporting states from the Global South seem to be "largely making reforms within the existing framework" and are "becoming increasingly adept at using it for their own purposes."[332] Regarding the investment treaty regime, while these states have concerns about the limits it

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327. WILLIAM BEASLEY, JAPANESE IMPERIALISM: 1894–1945, at 71 (Clarendon Press 1987); *see also* John Fairbank, *The Creation of the Treaty System*, *in* 10 THE CAMBRIDGE HISTORY OF CHINA: LATE CH'ING 1800–1911, PART ONE 213, 224–25 (John Fairbank ed., Cambridge Univ. Press 1978) (With a succession of similar new treaties to follow, the Western States and Russia coordinated their negotiations with China to "ensure that each new negotiation held out the promise of additional concessions, which would automatically be extended to all other States enjoying an unconditional MFN clause").

328. Schwarzenberger, *supra* note 310, at 299; Georg Schwarzenberger, *The Most-Favored-Nation Standard in British State Practice*, 22 BRIT. Y.B. INT'L L. 96, 118–19 (1945).

329. KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL 22–23, 31–32 (Cambridge Univ. Press 2013).

330. José E. Alvarez, *Contemporary International Law: An 'Empire of Law' or the 'Law of Empire*,' 24 AM. U. INT'L L. REV. 811, 832 (2009).

331. *See* TOM GINSBURG, DEMOCRACIES AND INTERNATIONAL LAW 232 (Cambridge Univ. Press 2021); Muthucumaraswamy Sornarajah & Wang Jiangyu, *China, India, and International Law: A Justice Based Vision Between the Romantic and Realist Perceptions*, 9, ASIAN J. INT'L L. 217, 235, 249 (2019).

332. Antony Anghie, *Legal Aspects of the New International Economic Order*, 6 HUMANITY: INT'L J. HUM. RTS., HUMANITARIANISM, & DEV. 145, 155 (2015); Gregory Shaffer & Henry Gao, *New Chinese Economic Order?*, 23 J. INT'L ECON. L. 607, 609–14, 621–22, 625–27, 634–35 (2020); ANDREAS BUSER, EMERGING POWERS, GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW REFORMERS OF AN UNJUST ORDER? 417 (Springer 2021).

imposes on sovereign rights, they "benefit from and have increasingly supported legal regimes that protect the foreign investor," as they "are now both major exporters of foreign investors."[333]

For example, while "China's traditional investment treaties were very conservative," its "recent investment treaties have been oriented towards protecting its investments abroad."[334] Given that China is not only a major capital-importer but also a major capital-exporter, it increasingly takes a liberal approach to BITs, which include foreign investment protection standards such as substantial national treatment and full access to investment arbitration.[335] China's recent BITs resemble BITs that Western industrial states have signed.[336] To balance protection of outbound Chinese investments and safeguard Chinese sovereignty, it has been proposed that China should distinguish between North and South countries when concluding and revising its BITs. Specifically, China should conclude BITs with high investment protection standards and complete access to arbitration with the latter, but not necessarily with the former.[337] A "textual examination of China-Africa BITs yielded very little difference between China-Africa BITs

333. Anghie, *supra* note 332, at 155.

334. Congyan Cai, *New Great Powers and International Law in the 21st Century*, 24 EUR. J. INT'L L. 755, 790–91 (2013); Catherine Elkemann & Oliver C. Ruppel, *Chinese Foreign Direct Investment into Africa in the Context of BRICS and Sino-African Bilateral Investment Treaties*, 13 RICH. J. GLOBAL L. & BUS. 593, 607–11 (2015); AXEL BERGER, CHINA'S NEW BILATERAL INVESTMENT TREATY PROGRAMME: SUBSTANCE, RATIONAL AND IMPLICATIONS FOR INTERNATIONAL INVESTMENT LAW MAKING 10–13 (2018), https://www.die-gdi.de/uploads/media/Berger_ChineseBITs.pdf.

335. Wenhua Shan & Hongrui Chen, *China–US BIT Negotiation and the Emerging Chinese BIT 4.0*, *in* ALTERNATIVE VISIONS OF THE INTERNATIONAL LAW ON FOREIGN INVESTMENT: ESSAYS IN HONOUR OF MUTHUCUMARASWAMY SORNARAJAH 223, 225–26 (C.L. Lim ed., 2016); Heng Wang & Lu Wang, *China's Bilateral Investment Treaties*, *in* HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 2375, 2382 (Julien Chaisse, Leïla Choukroune, and Sufian Jusoh eds., Springer 2020); CONGYAN CAI, THE RISE OF CHINA AND INTERNATIONAL LAW: TAKING CHINESE EXCEPTIONALISM SERIOUSLY 134 (Oxford Univ. Press 2019); Ka Zeng & Yue Lu, *Variation in Bilateral Investment Treaty Provisions and Foreign Direct Investment Flows to China, 1997–2011*, 42 Int'l Interactions: Empirical and Theoretical Res. in Int'l Rel. 820, 820-824 (2016).

336. SHEN WEI, DECODING CHINESE BILATERAL INVESTMENT TREATIES 326–27 (Cambridge Univ. Press 2021).

337. An Chen, *Distinguishing Two Types of Countries and Properly Granting Differential Reciprocity Treatment: Re-comments on the Four Safeguards in Sino-Foreign BITs Not to Be Hastily and Completely Dismantled*, 8 J. WORLD INV. & TRADE 771, 772 & 781–82 (2007).

and BITs between Africa and other Western countries."[338] Therefore, although existing international economic rules and institutions are a reflection of power relationships, China "may itself turn out to be a beneficiary of the current global investment governance system," especially if it could "maximize its own interests relying on these rules and institutions when it pursues outbound investment."[339]

In addition to BITs, the Belt and Road Initiative ("BRI") raises issues regarding the applicability of *pacta sunt servanda* and its relationship to informal empire. Although arguments have been made that informality of agreements within the BRI avoid explicit concessions to sovereignty,[340] it is critical to distinguish between two types of agreements of which one could be subject to *pacta sunt servanda*. The two types of BRI agreements are: primary agreements, which are informal in nature, and secondary agreements.[341]

Primary agreements are "non-binding instruments concluded by China and other governments and international organizations," which "develop the framework for the BRI, and lay a foundation for secondary agreements implementing BRI projects."[342] These agreements are "pragmatic and flexible arrangements" consisting of soft law such as memorandum of understandings ("MOUs"), declarations and resolutions.[343] Although these non-binding agreements are not intended to create legal obligations under international law, they are not totally without legal implications.[344]

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338. Uché U. Ewelukwa, *South-South Trade and Investment: The Good, The Bad and The Ugly–African Perspectives*, 20 MINN. J. INT'L L. 513, 558 (2011) (Regarding loans, Chinese loans do not contain those conditionalities that are required by Western international financial institutions, but Professor Tukumbi Lumumba-Kasongo notes that "they do come with their own set of requirements or caveats", including stipulations that "Chinese goods and services be purchased as part of the infrastructure building" and repayment terms requiring "favorable preferences with oil or natural resource exports."); *see also* Tukumbi Lumumba-Kasongo, *China-Africa Relations: A Neo-Imperialism or a Neo-Colonialism? A Reflection*, 10 AFR. & ASIAN STUD. 234, 256–58 (2011); ANNA GELPERN, SEBASTIAN HORN, SCOTT MORRIS, BRAD PARKS & CHRISTOPH TREBESCH, HOW CHINA LENDS: A RARE LOOK INTO 100 DEBT CONTRACTS WITH FOREIGN GOVERNMENTS (Ctr. for Glob. Dev. 2021).

339. SHEN, *supra* note 336, at 325.

340. ANTHONY CARTY & JING GU, THEORY AND PRACTICE IN CHINA'S APPROACHES TO MULTILATERALISM AND CRITICAL REFLECTIONS ON THE WESTERN 'RULES-BASED INTERNATIONAL ORDER' 60-61 (Inst. Dev. Stud. 2021). Regarding the question of whether the law of treaties as embodied in the VCLT would apply to these informal BRI agreements, see also Ginsburg, *supra* note 331, at 271.

341. Wang Heng, *The Belt and Road Initiative Agreements: Characteristics, Rationale, and Challenges*, 20 WORLD TRADE REV. 282, 282 (2021).

342. *Id.* at 282-286.

343. Matthew S. Erie, *Chinese Law and Development*, 62 HARV. INT'L L.J. 51, 93 (2021); Wang Heng, *supra* note 341, 283-286.

344. Mohammed M. Gomaa, *Non-Binding Agreements in International Law*, *in* THE INTERNATIONAL LEGAL SYSTEM IN QUEST OF EQUITY AND UNIVERSALITY LIBER AMICORUM GOERGES ABI-SAAB 229, 243-250 (Laurence Boisson de Chazournes and Vera Gowland-

Primary agreements are "not devoid" of any disciplining power and "can be more coercive than might initially be assumed," as many BRI cooperation agreements provide that host states would take up the security responsibility.[345] Such provisions raise state responsibility questions in event of breach even though such agreements are not intended to be binding.[346] Additionally, MOUs may create indirect legal effects by means of estoppel.[347] Moreover, although *pacta sunt servanda* does not apply to MOUs *directly*, MOUs could still have interpretive effects on treaties pursuant to Article 31 of the VCLT.[348] In respect of primary agreements, their state responsibility consequences and their effects on the interpretation of other treaties such as binding secondary agreements remain to be seen.

Depending on the parties to these agreements, the second type of BRI agreements, namely, secondary agreements, could be subject to *pacta sunt servanda* in the law of treaties.[349] Secondary agreements are government-to-government, government-to-business, and business-to-business agreements concluded to implement BRI projects, which are "often hard law agreements" comprising performance agreements and concession agreements.[350]

Regarding interstate performance agreements, *pacta sunt servanda* would apply.[351] There are possible issues of power asymmetry in the negotiation of such agreements, in that weaker states have agency and influence but remain subject to overall power disparities.[352] Where agreements and contracts are government-to-business and where the business entity is a State-owned Enterprise ("SOE"), there are issues of whether and how *pacta sunt servanda* applies to these secondary agreements and contracts. One issue is the internationalization of such contracts between Chinese SOEs and BRI states. Another issue is whether such contracts or agreements could be subjected to *pacta sunt servanda* where the Chinese SOE's conduct of con-

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Debbas eds., Martinus Nijhoff Publishers 2001); Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71(2) AM. J. INT'L L. 296, 301 (1977).

345. Wang Heng, *China's Approach to the Belt and Road Initiative: Scope, Character and Sustainability*, 22 J. INT'L ECON. L. 29, 43, 54 (2019).

346. Under international law, where an instrument is a treaty and subject to *pacta sunt servanda*, its breach gives rise to state responsibility, which could in turn justify countermeasures per the Articles 49–52 of the 2001 Articles of State Responsibility. *See e.g.*, Rainbow Warrior Affair (N.Z. v. Fr.), France- New Zealand Arb. Trib., 20 R.I.A.A. 217, 251–52 (1990).

347. Andreas Zimmermann and Nora Jauer, *Possible indirect legal effects under international law of non-legally binding instruments*, KFG Working Paper Series, No. 48, 16-20 & 22 (2021).

348. *Id.* at 10-13 & 21-22.

349. *See* VCLT, *supra* note 151, art. 2(1)(a).

350. Wang, *supra* note 341, at 286–87.

351. VCLT, *supra* note 151, art. 1.

352. Yoon Ah Oh, *Power Asymmetry and Threat Points: Negotiating China's Infrastructure development in Southeast Asia*, 25 REV. INT'L POL. ECON., 530, 547–49 (2018).

cluding a contract or agreement with a state is attributable to China.[353] Indeed, certain secondary agreements or contracts between SOEs and BRI states have been perceived to be the "legal equivalent to a state-to-state agreement,"[354] which would be governed by *pacta sunt servanda*. In this respect, there is a concern of "onerous concession terms" in certain investor-state concession agreements.[355]

Regarding concession agreements, which "may involve exclusive concession rights,"[356] certain concession agreements involving territorial leases also raise issues of the relationship between *pacta sunt servanda* and informal empire. At a 2018 press conference, the Malaysian Prime Minister stated with regard to BRI contracts that Malaysia "do[es] not want a situation where there is a new version of colonialism happening because poor countries are unable to compete with rich countries, therefore we need fair trade."[357] While stating that Malaysia would "respect all agreements," the Prime Minister said on another occasion that Malaysia "made it clear that we are going to look into all these contracts again because they are very costly for the government and will incur huge debts which we cannot pay."[358] Malaysia's finance minister also stated that Malaysia did not "want a situation like Sri Lanka where they couldn't pay and the Chinese ended up taking over the project."[359]

In 2017, Sri Lanka signed a Concession Agreement with the state-controlled China Merchants Port Holdings ("CMPort"), whereby CMPort

353. Attribution issues have been analyzed in the context of investment arbitral tribunals determining whether a SOE qualifies as "a national of another Contracting State" under Article 25(1) of the ICSID Convention. *See e.g.*, Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30, Decision on Jurisdiction (May 31, 2017); Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Award (December 29, 2004). Similarly, the WTO Appellate Body has faced attribution issues when interpreting "public body" in Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures. *See e.g.*, Appellate Body Report, *United States — Countervailing Duty Measures on Certain Products from China*, WTO Doc. WT/DS437/AB/RW (adopted July 16, 2019); Appellate Body Report, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO Doc. WT/DS379/AB/R (adopted March 11, 2011).

354. Erie, *supra* note 343, at 58.

355. Hanim Hamzah, *Legal Issues and Implications of the BRI*, *in* CHINA'S BELT AND ROAD INITIATIVE (BRI) AND SOUTHEAST ASIA 19, 19–23 (CIMB ASEAN Rsch. Inst. 2018).

356. Wang, *supra* note 341, at 287.

357. Lucy Hornby, *Mahathir Mohamad Warns Against "New Colonialism" During China Visit*, FIN. TIMES (Aug. 20, 2018), https://www.ft.com/content/7566599e-a443-11e8-8ecf-a7ae1beff35b.

358. Bhavan Jaipragas, *Malaysia's Chinese Projects: Mahathir to Respect All Agreements*, S. CHINA MORNING POST (May 17, 2018), https://www.scmp.com/week-asia/politics/article/2146629/malaysias-chinese-projects-mahathir-respect-all-agreements.

359. Hannah Beech, *"We Cannot Afford This": Malaysia Pushes Back Against China's Vision*, N.Y. TIMES (Aug. 20, 2018) https://www.nytimes.com/2018/08/20/world/asia/china-malaysia.html.

through two joint-venture companies would be granted "the sole and exclusive right to plan, finance, develop, operate, maintain and manage the Hambantota Port" and "the sole and exclusive right to develop, operate and manage the Common User Facilities for the operation of the Hambantota Port" for a period of ninety-nine years.[360]

This lease raises the question of the relationship between *pacta sunt servanda* and informal empire. The connection between the two arises because this lease is "allowed under international law"[361] and governed by *pacta sunt servanda*[362] even though the "difference in the contracting power of China and Sri Lanka is substantial."[363] At the same time, this lease constitutes "a grey area" in which "fundamental sovereign rights of the state are exceptionally suspended" and there remains uncertainty "as to where ultimate sovereignty resides and whether Sri Lanka will become dependent on China to act as sovereign in its territory" even if Sri Lanka preserves its *de jure* sovereignty over the port.[364] Therefore, despite the extra-legal justifications of 'win-win' and the 'community of common destiny' used to justify the BRI agreements, there remains the possibility that the BRI agreements constitute a realist means "to 'lure' other countries to support China's hidden agenda of pursuing dominance in the disguise of equal cooperation and mutual benefits".[365]

The relationship between *pacta sunt servanda* and informal empire challenges the idea of the "Third World" as a static category comprising the same states from the non-Western hemisphere.[366] The colonial encounter in nineteenth century East Asia shows that a state belonging to the "Third World" could end up as an informal empire. Although Japan was previously subjected to commercial treaties akin to those imposed on China, it imposed the very same kind of commercial treaties on China and Korea in the late-

360. CHINA MERCH. PORT HOLDINGS CO. LTD., POTENTIAL DISCLOSEABLE TRANSACTION CONCESSION AGREEMENT IN RELATION TO HAMBANTOTA PORT, SRI LANKA 3 (July 25, 2017), http://www.cmport.com.hk/UpFiles/bpic/2017-07/20170725061311456.pdf (last visited Mar. 11, 2022).

361. Maria Adele Carrai, *China's Malleable Sovereignty Along the Belt and Road Initiative: The Case of the 99-Year Chinese Lease of Hambantota Port*, 51 N.Y.U. J. INT'L L. & POL. 1061, 1098 (2019).

362. MICHAEL J. STRAUSS, TERRITORIAL LEASING IN DIPLOMACY AND INTERNATIONAL LAW, 95–96, 114, 120, 132–33 & 153 (Brill 2015).

363. Carrai, *supra* note 361, at 1086.

364. *Id.* at 1098.

365. Wang Jiangyu, *China's Governance Approach to the Belt and Road Initiative (BRI): Relations, Partnership, and Law*, 14(5) Global Trade & Customs J. 222, 228 (2019).

366. The category of the "Third World," however, has been defended as a "contingent" and "crucial analytic category," which refers to "the existence of a group of states and populations that have tended to *self-identify* as such-coalescing around a historical and continuing experience of subordination at the global level that they feel they share." *See* Obiora Chinedu Okafor, *Newness, Imperialism, and International Legal Reform in Our Time: A Twail Perspective*, 43 OSGOODE HALL L.J. 171, 174–76 (2005).

nineteenth and early twentieth centuries after it "escaped Asia"[367] by joining the civilized society of Western states. For example, the 1895 Sino-Japanese Treaty of Shimonoseki concluded after the first Sino-Japanese War bore some structural similarities to the commercial treaties concluded between China and the colonial powers, such as the Treaty of Nanking.[368]

VI. CONCLUSION

Through a critical historical analysis of the role played by *pacta sunt servanda* in organizing the international legal order in the face of global developments and theoretical contestations, this note shows how an international law axiom has been applied as a basis and invoked as an argumentative strategy for the formation and maintenance of empire despite its conceptual evolution across time. This note concludes with three further implications that arise from its historical tracing of the conceptual evolution, invocation, and application of *pacta sunt servanda* and its relation to informal empire.

First, this historical examination of *pacta sunt servanda* partially differs from, but is not mutually exclusive with, the "unequal treaties" literature. While the "unequal treaties" concept highlights the inequality of international law through an examination of how particular treaties subordinate state sovereignty and unfairly create non-reciprocal obligations,[369] this note instead focuses on *pacta sunt servanda* as an evolving legal concept that was applied to enable and maintain informal empire, and used as an argumentative strategy that thwarted resistances to imperialism. While this international law axiom evolved through changing times, it remained an important instrument of assuring privileges in asymmetrical power relationships. This dynamic understanding of *pacta sunt servanda* does not merely explain what the rule means, but also "how it lives and works, how it adapts itself to the different relations of life, how it is being circumvented and how it succeeds in frustrating circumvention."[370]

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367. Fukuzawa Yukichi, *"Datsu-A ron" (Escape Asia Debate)*, *in* 2 JAPAN: A DOCUMENTARY HISTORY: THE LATE TOKUGAWA PERIOD TO THE PRESENT 351, 351–3 (David John Lu ed., 1885).

368. The Treaty of Shimonoseki, which ended the first Sino-Japanese War and which superseded the 1871 Sino-Japanese Friendship and Trade Treaty, imposed obligations of territorial cession (Articles II and III), compensation (Article IV), trade liberalization (Article V), and MFN (Article VI). *See* Treaty of Shimonoseki, China-Japan, Apr. 17, 1895, *reprinted in* 1 TREATIES AND AGREEMENTS WITH AND CONCERNING CHINA 1894–1919 (John V. A. MacMurray ed., 1929).

369. *See, e.g.,* Craven, *supra* note 157, at 380–82; *see also* Anne Peters, *Unequal Treaties*, *in* MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (Rüdiger Wolfrum, Max Planck Inst. for Compar. Pub. L. & Int'l L. 2018).

370. Eugen Ehrlich, *Judicial Freedom of Decision: Its Principles and Objects*, *in* SCIENCE OF LEGAL METHOD: SELECT ESSAYS BY VARIOUS AUTHORS 48, 78 (Ernest Bruncken & Layton B. Register eds., Boston Book Co. 1917).

While it must be acknowledged that respecting *pacta sunt servanda* in treaty relations is in various circumstances instrumental to protecting weaker states,[371] such an understanding of *pacta sunt servanda* is incomplete. This note showed how *pacta sunt servanda* had been and could be applied and invoked to protect treaty regimes that do not serve the interests of weaker states. Although economic treaty regimes and the international law rules contained therein constitute means of solving coordination problems in international relations, these legal rules and the equilibriums (for example, between stability and state sovereignty) struck by them could instead reflect the preferences of the powerful.[372] Apart from how *pacta sunt servanda* gives legal effect to preferences of the powerful, international law rules including *pacta sunt servanda* are themselves used by great powers to camouflage their dominance, institutionalize their powers, and reduce the political costs of their hegemony because the legitimizing function of law secures more voluntary submission from those who are ruled.[373]

Nevertheless, at the same time, this historical account of the evolution of a legal rule and the attempts by various actors to shape it enables us to appreciate how "determination and freedom go together" in shaping the international legal order, and thus contributes to the task of reconciling the forces of powerful structures and the contingent alternatives they allow.[374] This critical process of looking for "ruptures, discontinuities and the uniqueness" also provides a re-interpretation of legal developments "not as manifestations of continuity and historical necessity, but rather as contingent."[375]

Second, this historical analysis shows that *pacta sunt servanda* could not be adequately understood as merely an issue of sovereign consent or autonomy, where states constrain the exercise of their sovereign rights through treaty relations with other states or contractual relations with private actors. The rule of *pacta sunt servanda* is instead situated in the tension between sovereign autonomy and international community. On the one hand, an absolutist conception of sovereignty would negate international society and

371. *See e.g.*, MIEKE VAN DER LINDEN, THE ACQUISITION OF AFRICA (1870-1914): THE NATURE OF INTERNATIONAL LAW 236-238 (Brill 2017).

372. Stephen D. Krasner, *Realist Views of International Law*, 96 PROC. AM. SOC'Y INT'L L. 265, 266–68 (2002).

373. Yasuaki Onuma, *International Law and Power in the Multipolar and Multicivilizational World of the Twenty-first Century*, *in* LEGALITY AND LEGITIMACY IN GLOBAL AFFAIRS 150, 152–53 (Richard Falk, Mark Juergensmeyer & Vesselin Popovski eds., Oxford Univ. Press 2012); ANNE-MARIE SLAUGHTER, INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 199 (Collected Courses Hague Acad. Int'l L. 2000).

374. Samuel Moyn, *From Situated Freedom to Plausible Worlds*, *in* CONTINGENCY IN INTERNATIONAL LAW: ON THE POSSIBILITY OF DIFFERENT LEGAL HISTORIES 517, 524 (Ingo Venzke & Kevin Jon Heller eds., Oxford Univ. Press 2021).

375. Thomas Skouteris, *Engaging History in International Law*, *in* NEW APPROACHES TO INTERNATIONAL LAW: THE EUROPEAN AND THE AMERICAN EXPERIENCES 116 (José María Beneyto & David Kennedy eds., Springer 2012).

render it difficult to imagine any role for international law,[376] especially when coercion is a fact of international relations and no state's will can be entirely free.[377]

On the other hand, while *pacta sunt servanda* is necessary for the existence of an international legal order, it presumes a particular normative conception of the international community. Regarding the problem of why treaties are binding, the theoretical solution that has attracted the most support is that "all States together have agreed to constitute a community," which is the "source and guarantor of the basic rules, in particular of the rule *pacta sunt servanda*."[378] Thus, *pacta sunt servanda* presumes and is derived from some normative notion of a community, which could itself be normatively contested.

As values are subjective, conceptions of the community based on natural justice, common interests, or nature could appear as imperialism in disguise.[379] For example, international law's promised universality of values and world community "served to constrain, and ultimately to undermine the radical potential" of the Global South by claiming the universality of particular values such as the twin concepts of development and economic growth.[380] As argued, conceptions of international community, welfare, and stability underpinning and justifying *pacta sunt servanda* are not politically neutral in their consequences because they could instead legitimize and perpetuate imperialism. Indeed, imperial powers have resorted to these extralegal conceptions, as the respect for the sanctity of treaties is most firmly insisted upon by those "having most to gain from the maintenance of the existing order."[381] Accordingly, the evolution, invocation, and application of *pacta sunt servanda* belie particular notions of international community, welfare, and stability, which could at the same time enable, conceal, and maintain informal empire.

Lastly, this critical historical analysis suggests that the rule of *pacta sunt servanda*, however fundamental and essential it is to public international law, is not politically neutral in terms of its applications, extralegal justifications, and legal consequences. International law is "not just the neu-

376. R.P. ANAND, SOVEREIGN EQUALITY OF STATES IN INTERNATIONAL LAW 26–27 (Collected Courses Hague Acad. Int'l L. 1986); David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335, 364 (2000).

377. Alain Pellet, *The Normative Dilemma: Will and Consent in International Law-Making*, 12 AUSTL. Y.B. INT'L L. 22, 44–45 (1989).

378. GEORG NOLTE, TREATIES AND THEIR PRACTICE – SYMPTOMS OF THEIR RISE OR DECLINE 233 (Collected Courses Hague Acad. Int'l L. 2019).

379. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA 479–81 (Cambridge Univ. Press 2005).

380. SUNDHYA PAHUJA, DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY 2 (Cambridge Univ. Press 2011)

381. EDWARD HALLETT CARR, THE TWENTY YEARS' CRISIS: 1919–1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS 176 (Palgrave Macmillan 2016).

tral application of rules."[382] If international law is a comprehensive process of authoritative and controlling decisions, whereby decision-makers use legal doctrines to clarify, justify, and implement common values and shared interests of the world community,[383] the invocation and application of *pacta sunt servanda* is a value-laden process that presumes a particular conception of community interest. While international legal rules including *pacta sunt servanda* could conceivably play a role in the process of formalizing power positions,[384] a critique of international law must not lead to legal nihilism because international law despite its fragility offers a protective shield for weaker states.[385]

That the invocation and application of *pacta sunt servanda* is a value-laden process does not mean that states could and should abandon *pacta sunt servanda*.[386] It instead calls for critical attentiveness and engagement with the normative underpinnings of the legal orders and economic regimes whose stability and legitimacy *pacta sunt servanda* is applied, employed, and invoked to secure. After all, the purpose of international law is not merely to regulate relationships between states in the abstract, but also between the persons who belong to them.[387]

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382. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 267 (Oxford Univ. Press 2010).

383. Myres S. McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community*, 56 YALE L.J. 1345, 1345 (1947); Myres S. McDougal, *Some Basic Theoretical Concepts About International Law: A Policy-Oriented Framework of Inquiry*, 4 J. CONFLICT RESOL. 337, 350 (1960); Eisuke Suzuki, *The New Haven School of International Law: An Invitation to A Policy-Oriented Jurisprudence*, 1 YALE J. WORLD PUB. ORD. 1, 30–34 (1974); W. Michael Reisman, *The View from the New Haven School of International Law*, 86 PROC. AM. SOC'Y INT'L L. 118, 121 (1992); Harold Hongju Koh, *Is There a "New" New Haven School of International Law?*, 32 YALE J. INT'L. L. 559, 561–63 (2007)

384. Charles H. Alexandrowicz, *The Role of Treaties in the European–African Confrontation in the Nineteenth Century (1975) in* THE LAW OF NATIONS IN GLOBAL HISTORY, *supra* note 68, at 271.

385. B. S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT'L. CMTY L. REV. 3, 26.

386. *See* JAMES CRAWFORD, CHANCE, ORDER, CHANGE: THE COURSE OF INTERNATIONAL LAW 142 (Collected Courses Hague Acad. Int'l L. 1986); Chimni, *supra* note 385, at 26–27 ("we need to guard against the trap of legal nihilism through indulging in a general and complete condemnation of contemporary international law. Certainly, only a comprehensive and sustained critique of present-day international law can dispel the illusion that it is an instrument for establishing a just world order. But it needs to be recognized that contemporary international law also offers a protective shield, however fragile, to the less powerful States in the international system.").

387. U.N. GAOR, Sixth Comm., 18th Sess., 791st mtg. at 53, ¶ 42, U.N. Doc. A/C.6 /SR.791 (Oct. 14, 1963). *See also* JOHN RAWLS, THE LAW OF PEOPLES WITH "THE IDEA OF PUBLIC REASON REVISITED" 23-30 (Harvard Univ. Press. 1999).