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Neglected Riches: Exposing China's Selective Default on the Hukuang Railway Bonds and the Avenue for Financial Accountability Under the Successor Government Doctrine

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COMMENTS

NEGLECTED RICHES: EXPOSING CHINA'S SELECTIVE DEFAULT ON THE HUKUANG RAILWAY BONDS AND THE AVENUE FOR FINANCIAL ACCOUNTABILITY UNDER THE SUCCESSOR GOVERNMENT DOCTRINE

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The People's Republic of China ("P.R.C.") is in selective default for refusing to pay back private investors from the Hukuang Railway Bond default of 1911. The P.R.C. is the successor government to the Republic of China ("R.O.C.") and Qing Dynasty. This Comment argues that though it is the successor government, the P.R.C. retains the legal rights and obligations of the former government and is the legal inheritor of these debts. This Comment takes this syllogism one step further and argues that the successor government doctrine is customary international law—applying the lessons from the Russian bond default of 1918. Finally, this comment argues that because the successor government doctrine is customary international law, the P.R.C. is in violation of the 1980 U.S.-Sino investment treaty. This

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Comment recommends that the U.S. government purchase the debt from private investors and force the P.R.C. to arbitration.

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I. INTRODUCTION

In 1911, on the eve of the Qing Dynasty's collapse, the final hereditary monarchical Chinese government issued the Hukuang Railway Bonds.[1] Foreign creditors from Western nations invested large sums into this project.[2] Nonetheless, in 1911, revolution caused by decades of unequal economic treaties with imperialist countries toppled the Qing Dynasty.[3] In the Qing's stead the Republic of China ("R.O.C.") rose and inherited these debts; only to be ousted in 1949 by the People's Republic of China ("P.R.C.").[4] Since coming to power, the P.R.C. has refused its financial duty to pay back the Hukuang Railway Bonds.[5] This default violates the US-Sino 1980 investment treaty: Agreement on Investment Guaranties ("U.S.-China Investment Guaranties Agreement").[6]

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1. *See* Manman Huang, *Hukuang Ry. Bonds of 1911*, 108 FIN. HIST. 8, 8–9 (stating that the Hukuang Railway Bonds were ordered on May 9, 1911 by the Imperial Government's Minister of Post and Communications).

2. *See id.* (stating that banks from France, Germany, the U.K., and the U.S. shared equally in the £6 million bond issue).

3. WU YUZHANG, RECOLLECTIONS OF THE REVOLUTION OF 1911: A GREAT DEMOCRATIC REVOLUTION OF CHINA 1, 84 (2001).

4. Hungdah Chiu, *Recent Legal Issues Between the U.S. and the People's Republic of China*, 12 MD. J. INT'L L. 1, 26–27 (1987) (stating that "[a]fter the abdication of the Imperial Government on February 12, 1912, the Republic of China government continued to pay interest and principal in installments until 1939 when it was preoccupied with resisting Japanese aggression").

5. *See* Tracy Alloway, *Trump's New Trade War Tool Might Just Be Antique China Debt*, BLOOMBERG NEWS (Aug. 29, 2019), https://www.bloomberg.com/news/articles/2019-08-29/trump-s-new-trade-war-weapon-might-just-be-antique-china-debt (reporting that the People's Republic of China has not paid any interest or principal on the loan).

6. *See generally* Agreement on Investment Guaranties, Oct. 30, 1980, U.S.-

Section II of this Comment begins by providing an overview of China's history in the context of the Hukuang Railway Bonds.[7] Then, it explains customary international law and its legal elements.[8] This section continues by highlighting the difference between the successor state doctrine and successor government doctrine through a discussion about continuity.[9] The section will then apply these elements to explore how the P.R.C. is liable for the Hukuang Bond debt even though it was issued by the Qing government.[10] Finally, this section discusses how customary international law is implied in contract.[11]

Section III argues that the successor government doctrine is customary international law.[12] It then contends that the P.R.C.'s default on the Hukuang Bonds of 1911 violates the U.S.-China Investment Guaranties Agreement because the successor government doctrine holds China liable for customary international law that is implied in contract.[13]

Section IV of this paper gives three recommendations for how the U.S. can attempt to call in the debt from the P.R.C.[14] First, the U.S. should purchase all the Bonds from private American investors and invoke the U.S.-China Investment Guaranties Agreement's arbitration clause.[15] Second, the U.S. should use the outstanding debt from the Hukuang Bonds to offset national debt.[16] Finally, the U.S. should use economic sanctions against China if it refuses to repay the bonds.[17]

II. BACKGROUND

Western imperialism during the late Qing dynasty deeply afflicted

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China, art. 6(a), 32 U.S.T. 4010, effected by Exchange of Notes [hereinafter U.S.-China Investment Guaranties Agreement].

7. *See* discussion *infra* Part II.A.
8. *See infra* Part II.B.
9. *See infra* Part II.C.1.
10. *See infra* Part II.C.2.
11. *See infra* Part II.D.
12. *See infra* Part III.A, B, C.
13. *See infra* Part III.D.
14. *See* discussion *infra* Part IV.
15. *See infra* Part IV.A.
16. *See infra* Part IV.B.
17. *See infra* Part IV.C.

Chinese consciousness, setting the stage for rebellion.[18] Events starting a century of humiliation began with the First Opium War in 1839, leading to a series of unequal treaties allowing Western powers to manipulate the Chinese economy.[19] In the early 1900s, the Qing hoped that modernization through an expansive railway system would ultimately lead to the expulsion of imperial invaders.[20] In 1905, regional provincial authorities authorized the sale of railway shares exclusively to China to construct the Sichuan-Hankou Railway.[21] Funds were poorly allocated, and rampant corruption destabilized the project.[22] Consequently, in 1911, the Qing government took over the project, nationalizing the railway and opening it to foreign investment.[23] Swiftly, British, German, French, and American banks agreed to issue $40 million in railway bonds to incentivize construction.[24] The move to incorporate western investment fomented rebellion in southern China as disgruntled Chinese investors perceived westernization as a method to give imperialists control over the railway.[25] This revolution, called the "railroad protection movement," ultimately gripped China, overthrowing the Qing dynasty in 1911 and creating the R.O.C.[26]

A. SHIFT TO COMMUNISM

Following the railway protection movement[27] the Xinhai

18. *See* Yang Li, The Change of Diplomatic Ideas in the Late Qing Dynasty (1840–1914) 1, 75 (Dec. 5, 2023) (Ph.D. dissertation, Ghent University) (discussing the impact of Western imperialism, as presented through wars and unequal treaties, on the Chinese national consciousness).

19. *See* Chen Ching-Jen, *Opium and Anglo-Chinese Relations*, 19 CHINESE SOC. & POL. SCI. REV. 386, 412 (1935) (discussing the First Opium War and treaties negotiated afterwards).

20. *See* YUZHANG, *supra* note 3, at 83.

21. *See id.* at 84.

22. *See* Patrick Chovanec, *Pieces of China (Episode 9): Economist Patrick Chovanec on the 1911 Hukuang Railway Bond*, YOUTUBE (July 30, 2020), *https://www.youtube.com/watch?v=GWDWotOuyho&t=431s* (discussing the history behind the Hukuang Railway Bond).

23. *See* YUZHANG, *supra* note 3, at 84.

24. Chovanec, *supra* note 22.

25. *Id.*

26. *Id.*

27. *See* Rana Mitter, *1911: The Unanchored Chinese Revolution*, 2011 CHINA

Revolution led to the foundation of the R.O.C., which placed Sun-Yat Sen in power.[28] Meanwhile, the country fractured, breaking into zones where regional warlords ruled unfettered.[29] Hoping to reunify China, the Kuomintang ("K.M.T.")[30] rose to prominence and began governing the country, launching the Northern Expedition.[31] This led to relative peace despite war with the growing Communist threat led by Mao Zedong.[32] Although the Imperial Qing Government had abdicated in 1912, the country still lacked unity.[33] The R.O.C. became the successor government[34] and inherited the Hukuang Railway Bond debt.[35] The R.O.C. continued to pay interest and principal on the debt until 1939 when Japanese aggression plunged China back into steady conflict.[36]

However, throughout the 1920s, the R.O.C. endeavored to

Q. 1009, 1010 (2011) (discussing major revolutions and rebellions in modern Chinese history).

28. Bui Ngoc Son, *Sun Yat-Sen's Constitutionalism*, 32 GIORNALE DI STORIA COSTITUZIONALE 157, 162–63 (2016) (stating that Sun Yat-sen was selected as the temporary president of the R.O.C. on December 19, 1911).

29. *See* Charles C. Plambeck, *A King's Word: Pre-1949 Chinese Bonds and a Framework for Pursuing Claims on "Classically" Time-Barred Bonds*, 46 N.C. J. INT'L L. 389, 398 (2021) (describing how the Xinhai Revolution ended with provinces declaring their independence, and power fractured between Sun Yat-sen's Nationalist Party and the leader of the leftover Qing army, Yuan Shikai).

30. *Id.*

31. *Id.* (citing *The Generalissimo: Chiang Kai-Shek and the Struggle for Modern China* 54–63, 77–105 (Jay Taylor ed., Harv. Univ. Press 2009) (1931)) (stating that the Nationalist government established significant unification in 1928 through a military campaign known as the Northern Expedition).

32. *See id.* (stating that the period following the Northern Expedition saw "a degree of relative stability under the Nationalists").

33. *Id.*

34. *See* Eugene Theroux & B. T. Peele, *China & Sovereign Immunity: The Huguang Railway Bonds Case*, 2 CHINA L. REP. 129, 130 (1983) (quoting Jackson v. People's Republic of China, 550 F. Supp. 869, 872 (N.D. Ala. 1982)) (stating that the court concluded that "the People's Republic of China is the successor government to the Imperial Chinese Government and, therefore, the successor to its obligations").

35. *See* Chiu, *supra* note 4, at 26 ("After the abdication of the Imperial Government on February 12, 1912, the Republic of China government continued to pay interest and principal in installments until 1939 when it was preoccupied with resisting Japanese aggression.").

36. *Id.*

reorganize its debt to build the R.O.C.'s national credit to western powers.[37] Nonetheless, in 1928, the R.O.C. was in nearly complete default on all its foreign debt.[38] This pushed the R.O.C. to make bold efforts to restore assurance in the government so that the R.O.C. could continue accessing international capital markets.[39] The R.O.C. was initially denied access, but in 1937, it regained entry to the markets because of the K.M.T.'s successful debt reorganization.[40]

Japan's invasion of China in the 1930s united the Nationalists and Communists[41] until Japan was forced out of China in 1945, causing conflict to resume between the R.O.C. and the Communists.[42] Weakened by decades of conflict, the K.M.T. were forced to retreat to the island of Taiwan.[43] Consequently, in 1949, the Communists occupied all of mainland China and proclaimed their position as the successor to the R.O.C.[44] Throughout the 1960s and 70s, the

37. *See* Brenda Luo & Alex Xiao, *Confirming the Obvious: Why Antique Chinese Bonds Should Remain Antique*, 16 U. PA. ASIAN L. REV. 472, 508 (2021) ("Historians of Chinese public debt have long observed that the R.O.C.'s effort to reorganize debt purported to build the R.O.C.'s national credit to the colonial Western powers, as evidenced by countless statements made by the R.O.C. statemen and commentators.").

38. *Id.*

39. *See id.* (citing Arthur N. Young, CHINA'S NATION-BUILDING EFFORT, 1927–1937: THE FINANCIAL AND ECONOMIC RECORD 23–25 (1971)) (noting that the R.O.C. was almost completely in default, but reorganization efforts restored international confidence in China's market).

40. *See id.* (citing Xu Yi, *From a Century of Humiliation to National Resurgence—Foreign Debt & State Capital of the Nationalist Government of the Republic of China*, 157, 279–80 (2004)) (stating that the R.O.C. was officially incorporated into the international capital market in 1937 after its credibility was restored in the international finance market).

41. *See* Zhimin Lei, *Reconsideration of the Huangpu Military Academy & the Huangpu Spirit*, 6 J. POL. & L. 163, 165 (2013) (discussing the cooperation between the Communist Party and the Nationalist Party in training forces to fight against Japanese invasion).

42. *See Who Lost China?*, HARRY S. TRUMAN MUSEUM AND LIBRARY, *https://www.trumanlibrary.gov/education/presidential-inquiries/who-lost-china* (stating that "on September 2, 1945 the two groups were ready to resume a full-scale civil war").

43. *See id.* (detailing a timeline of events, including the move of the KMT to Taiwan in 1947).

44. *See* Lung-chu Chen & W. M. Reisman, *Who Owns Taiwan: A Search for International Title*, 81 YALE L.J. 599, 613 (1972) (discussing the end of the Chinese

international community began recognizing the P.R.C.[45] In 1971, the United Nations ("U.N.") passed *Resolution 2758*, which removed the R.O.C. from the U.N. and recognized the P.R.C. as the lawful representative of China.[46] During the 1970s, the U.S. normalized diplomatic relations with the P.R.C. ultimately allowing Washington to benefit both politically and economically.[47] Today, the P.R.C. is internationally recognized as the legitimate successor to the R.O.C. and maintains claims over mainland China,[48] while asserting that Taiwan is a renegade province.[49]

Today, the Bonds are in default.[50] Although the R.O.C. made payments on the Hukuang Railway Bonds throughout the 1920s and 30s, the P.R.C. stopped maintaining debt obligations in 1949.[51] Taiwan has rejected responsibility for the debt because it is not a

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Civil War and the establishment of the P.R.C.).

45. *See* Erin Hale, *Taiwan taps on United Nations' door, 50 years after departure*, AL JAZEERA (Oct. 25, 2021), https://www.aljazeera.com/news/2021/10/25/chinas-un-seat-50-years-on (stating that countries gradually started recognizing the P.R.C. as the government of China and by October 1971, the R.O.C. was out of the United Nations).

46. *See* G.A. Res. 2758 (XXVI), U.N. Doc. A/RES/2758 (Oct. 25, 1971) (clarifying when the U.N. General Assembly officially admitted the P.R.C. as a member of the United Nations).

47. *See* Andrew Glass, *U.S. Recognizes Communist China, Dec. 15, 1978*, POLITICO (Dec. 15, 2018), https://www.politico.com/story/2018/12/15/us-recognizes-communist-china-dec-15-1978-1060168 (explaining that the policy change was initiated in 1972 when President Richard Nixon traveled to China and met Chairman Mao Zedong. Additionally, in 1978 President Jimmy Carter announced that the United States would formally recognize the P.R.C. and sever diplomatic relations with Taiwan).

48. *See* Chen & Reisman, *supra* note 44, at 618 (stating that the U.N. General Assembly has recognized the P.R.C. as the governing body of China since 1971).

49. Lindsay Maizland, *Why China-Taiwan Relations Are So Tense*, COUNCIL ON FOREIGN RELS. (Apr. 18, 2023), https://www.cfr.org/backgrounder/china-taiwan-relations-tension-us-policy-biden (explaining that currently Taiwan is an autonomous democracy although the P.R.C. vows to eventually "unify" Taiwan with the mainland).

50. Jonathan Garber, *$1.6T in Century-Old Chinese Bonds Offer Trump Unique Leverage Against Beijing*, FOX BUSINESS (May 14, 2020), https://www.foxbusiness.com/markets/historic-chinese-bonds-trump-leverage-beijing.

51. Chovanec, *supra* note 22; *see also* Chiu, *supra* note 4, at 26–27 (stating that the bonds were in default before the Chinese Communist Party took control and that the PRC continued to fail to pay on the bonds).

recognized country, and the P.R.C. never formally withdrew diplomatic recognition from the debt.[52] In the 1980s U.S. investors sued the P.R.C. in *Jackson v. People's Republic of China* for refusing to pay back the Hukuang Railway Bonds.[53] The P.R.C. argued "[t]he Chinese government recognizes no external debts incurred by the defunct Chinese governments and has no obligation to repay them."[54] Presently, the Bonds are still held by private investors throughout the U.S. and Europe collectively valued at $1.6 trillion after a century of neglect.[55]

B. CUSTOMARY INTERNATIONAL LAW GENERALLY

Customary international law constitutes unwritten rules that have developed over time because of states' repeated acts.[56] It is a set of international obligations arising from these established international practices rather than obligations arising out of written agreements like treaties.[57] Two elements that are necessary to make customary international law are *state practice* and *opinio juris*.[58]

State practice refers to the factual formal acts that a country makes, such as *inter alia* its diplomatic statements, treaties, legislation, and

52. *See* Izabella Kaminska, *Antique Chinese Bonds Are Now in Play*, FIN. TIMES (July 29, 2020), https://www.ft.com/content/7a65b99c-e419-49da-bf47-33acb91ed4a3 (stating that the P.R.C. never formally de-recognized the debt and the bonds went into default).

53. 550 F. Supp. 869 (N.D. Ala. 1982).

54. Morris v. People's Republic of China, 478 F. Supp. 2d 561, 565 (S.D.N.Y. 2007) (citing *Jackson*, 550 F. Supp. 869 (N.D. Ala. 1982)).

55. Kaminska, *supra* note 52 (estimating the current value of the debt at $1.6 trillion).

56. *See* Statute of the International Court of Justice, art. 38 ¶ 1, 1946 U.N.T.S. 993 (defining international customary law as the acts of states' taken out of a sense of legal duty).

57. *Customary International Law*, CORNELL L. LEGAL INFO. INST. (July 2022), https://www.law.cornell.edu/wex/customary_international_law.

58. *See* Patrick Dumberry, *Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law?*, 8 J. OF INT'L DISP. SETTLEMENT 155, 157 (2016) (stating, "[r]ules of customary international law develop over time based on the uniform and consistent practice of a large number of representative States, which have the conviction (or the belief) that such practice is required by law (opinion juris)").

state activities.[59] State practice is an objective criterion that arises from a pattern of actual state behavior that reflects conformity with a rule.[60] State rhetoric (like statements made before international bodies) does not completely determine state practice. The state's actual conduct is more determinative of what constitutes state practice.[61] The International Court of Justice ("I.C.J.")[62] specified three elements of state practice: (i) generally recognized, (ii) extensive and uniform, (iii) of a certain duration.[63]

Additionally, *opinio juris* is a subjective element, meaning states must be convinced that a practice is required or permitted under international law.[64] In the traditional view, *opinio juris* is "when a pattern of state behavior generates a certain threshold of understanding about the content of a rule, along with widespread manifestations of consent to be bound to the rule, this sense of obligation."[65] Therefore, customary international law is created when a state behaves in a

59. *See* Hesham Elrafei, Lex Animata Law Visualized, *Customary International Law Customs Opino Juris State Practice*, YOUTUBE (Apr. 5, 2021), https://www.youtube.com/watch?v=xvrYYRoqHBI (stating that state practice can be expressed through public statements, physical actions, diplomatic communications, treaties, national legislation, and a state's activities in international organizations).

60. *See* S. James Anaya, *Customary International Law*, 92 AM. SOC'Y INT'L L. PROC. 41, 41 (1998) ("A rule of customary international law is deemed to arise as a result of a pattern of actual behavior on the part of the states that reflects conformity with the rule.").

61. *See id.* at 41–42 ("What counts fundamentally is not rhetoric, such as statements made before international bodies, but state practice in the form of actual conduct on the part of states in their international relations.").

62. *See* North Sea Continental Shelf (Fed. Republic of Ger. v. Den.; Fed. Republic of Ger. v. Neth.), Judgment, 1969 I.C.J. 3, ¶ 73 (Feb. 20) (explaining that the I.C.J. did not set a time limit to define "certain duration").

63. *See* G.A. Res. 73/203, ¶¶ 4–8 (Dec. 20, 2018) (stating, "[t]he relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent [. . .] [p]rovided that the practice is general, no particular duration is required").

64. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 207 (June 27) (quoting 1969 I.C.J. Rep. ¶ 77) (explaining that for a customary rule to form, "[states] must have behaved so that their conduct is 'evidence of a belief that [a] practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinion *juris sive necessitatis*.'").

65. Anaya, *supra* note 60, at 42.

manner consistent with a widely followed rule and subjectively appears to comply with the rule because it believes there is an obligation.[66]

C. THE DIFFERENCE BETWEEN THE SUCCESSOR STATE DOCTRINE AND SUCCESSOR GOVERNMENT DOCTRINE

Within international jurisprudence, there is a distinction between a successor state and a successor government,[67] and this Comment applies the successor government doctrine. The successor state doctrine refers to when a state succeeds another with respect to its particular territory, capacities, rights, and duties of the predecessor state.[68] These rights and duties appertain to the state, not the government that represents the state.[69] Therefore, a state's former obligations are not affected by a mere change in government[70] or ideology.[71] Instead, a state's entire "personality" must change to terminate prior obligations.[72]

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66. *Id.*

67. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 208 (A.L.I. 1987) ("When a state succeeds another state with respect to particular territory, the capacities, rights, and duties of the predecessor state with respect to that territory terminate and are assumed by the successor state. . . .").

68. *Id.*

69. *See id.* ("Under international law, the capacities, rights, and duties set forth in § 206 appertain to the state, not to the government which represents it. When the state ceases to exist, its capacities, rights, and duties terminate."); *see also* Karen S. Openshaw, *Zimbabwe's Odious Inheritance: Debt and Unequal Land Distribution*, 11 MCGILL INT'L J. SUST. DEV. L. & POL'Y 39, 53 (2015) (explaining that decolonization in the Global South is regarded as a distinct form of state succession because the former colony is deserving of exemption from the duty to take responsibility incurred by its one-time ruler).

70. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 208(a)(b) (exemplifying debts—like the Hukuang Rail bonds—are an obligation that the state retains; though the government within a state may change, that change alone does not terminate the new government's responsibilities to state debts).

71. *See id.* ("When the state ceases to exist, its capacities, rights, and duties terminate. They are not affected by a mere change in the regime or in the form of government or its ideology.").

72. *See id.* ("[T]he term "successor state" as used in this Restatement includes a state that wholly absorbs another state, that takes over part of the territory of another state, that becomes independent of another state of which it had formed a part, or

The symbolic phraseology denoting a state's "personality" is synonymous with the notion of "identity of states" or "continuity of states."[73] Discontinuity of states addresses whether a state that changes its international constitutional structure, territory, population, or is occupied by another state loses its identity under international law.[74] If so, then the successor state doctrine is applied.[75] However, if a state maintains its legal identity, then there is State continuity:[76] meaning all the state's former rights and obligations under international law remain.[77]

In the instance of revolution or coup d'état it is possible that the internal legal order of a state changes.[78] Nonetheless, during the London Protocol of 1831, the European powers concluded that "such changes [to the internal legal order] are irrelevant in relation to the said State being bound by treaties previously entered into [. . .] [t]he same holds true [. . .] for debts incurred by the previous regime."[79] Therefore, there is an assumption—supported by decades of state practice precedent[80]—that the State maintains continuity in the wake

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that arises because of the dismemberment of the states of which it had been a part."); *see also* GUENTER WEISSBERG, INTERNATIONAL STATUS OF THE UNITED NATIONS 21 (1961) (explaining that legal personality is the "means by which a particular legal system attributes rights and obligations. . . .").

73. *See* Andreas Zimmerman, *Continuity of States*, MAX PLANCK ENCYCS. INT'L L. ¶ 1 (explaining "State continuity and State succession are mutually exclusive concepts since the latter 'means the replacement of one State by another in the responsibility for the international relations of territory' while the former presupposes that the same State continues to exist. Accordingly, where there is State continuity the State that continues the international legal personality at the same time automatically remains a contracting party of all treaties previously entered. . . .").

74. *Id.*

75. *See id.*

76. *See* Plambeck *supra* note 29, at 416 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 208 n.2 (A.L.I. 1987)) ("A succession of state may create a discontinuity in statehood [whereas] a succession of government [] leaves statehood unaffected.").

77. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 208 n.2 (A.L.I. 1987) (articulating that if there is State continuity, the State has not changed, so the regime is subject to the rules of government succession).

78. *See* Zimmerman, *supra* note 73, ¶¶ 1, 9.

79. *See id.* (citing G.F. de Martens F. Murhard et al. eds., *Nouveau Receuil des Traités*, 10 LIBRAIRIE DE DIETERICH GOETTINGUE 197 (1836)).

80. *See id.* (explaining that developing countries, post-war WWII states, and the

of a revolution.[81] This assumption establishes that coups d'état is generally recognized within state practice as insufficient for regime change to absolve a new government from the obligations of the former.[82]

1. Example of How Obligations Transfer Between Successor Governments

Developments in customary international law within human rights provide articulable examples of how obligations are transferable between successor governments.[83] Scholars have argued that customary international law requires a successor government to prosecute individuals from a former government who are guilty of human rights violations.[84] For example, in the wake of the Rwandan genocide in 1994, the new Rwandan government announced its desire to prosecute 30,000 people.[85] The Rwandan government pushed to have the crimes adjudicated by domestic courts to establish confidence in the new government and judiciary.[86] However, given the enormity of the task, the government worked with the U.N. to set up an international tribunal for Rwanda.[87] The new Rwandan government's intentions demonstrate a subjective belief that a successive government inherits the obligation or duty of the former government.[88] In the case of Rwanda that duty or obligation is upholding human

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Soviet Union after the Bolshevik revolution have unsuccessfully challenged the precedent that there is state continuity).

81. *See id.*

82. *See id.*; *see also* G.A. Res. 73/203, *supra* note 63, ¶¶ 4–8.

83. John Dugard, *International Law and the South African Constitution*, 8 EUR. J. INT'L L. 77, 88 (1997).

84. *See id.* (citing Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537 (1991); Kader Asmal, *Victims, Survivors, and Citizens—Human Rights, Reparations and Reconciliation*, 8 S. AFR. J. ON HUM. RTS. 491 (1992); M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW 503–08 (1992).

85. *See*, *e.g.*, Jaana Karhilo, *The Establishment of the International Tribunal for Rwanda*, 64 NORDIC J. INT'L L. 683, 683 (1995).

86. *See id.* at 694.

87. *See id.*

88. *See* Dugard, *supra* note 83, at 88 (prosecuting former Ethiopian and Rwandan government officials support the notion that customary international law requires a successor regime to prosecute human rights violators).

rights; in the case of Hukuang Railway Bonds, that duty is to pay back debt.[89]

2. The Soviet Union and P.R.C. are Successor Governments

In 1918, the Soviet government repudiated foreign debt, which exemplifies how the international community viewed the successor government doctrine as a form of customary international law.[90] After the Bolshevik revolution in 1917, the Soviet Union claimed that it was not a successor government.[91] The Soviets argued that the United Soviet Socialist Republic ("U.S.S.R.") was a new state because its socialist ideology was antithetical to the Czarist regime.[92] This rationale provided a legal justification, albeit a weak one, to refuse the former regime's international obligations and effectively repudiate the Czarist debts.[93] The international community resoundingly rejected the U.S.S.R.'s position and pushed for the Soviets to pay back their debts.[94]

Even though the Soviet Union remained stubbornly recalcitrant—maintaining it was a successor state—scholars and courts have nonetheless held that the Soviet Union was a successor government.[95] This conclusion was affirmed in the 1927 case *Lehigh Valley R. Co. v. State of Russia*,[96] where the Russian Provisional Government sued to recover for the loss of goods purchased by the

89. *See id.*

90. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 208 n.2 (A.L.I. 1987).

91. *See* Zimmerman, *supra* note 73, ¶¶ 1, 2.

92. *See id.*

93. N. D. Houghton, *Policy of the United States and Other Nations with Respect to the Recognition of the Russian Soviet Government, 1917-1929*, 12 INT'L CONCILIATION 85, 88–89 (1929).

94. *See id.* at 90–95.

95. *See* Carsten Thomas Ebenroth & Matthew James Kemner, *The Enduring Political Nature of Questions of State Succession and Secession and the Quest for Objective Standards*, 17 U. PENN. J. INT'L. ECON. L. 753, 757 (1996) (citing United States v. Nat'l City Bank of N.Y., 90 F. Supp. 448, 452 (S.D.N.Y. 1950) (it is outside of the scope of this comment to argue why the Soviet Union was a successor government).

96. 21 F.2d 396, 401 (2d Cir. 1927).

Russian Imperial Government.[97] In affirming the provincial government's right to the goods, the Second Circuit acknowledged former regime obligations are inherited through the successor government doctrine.[98] The Soviet bond repudiation demonstrates that the successor government doctrine is customary international law because *state practice*[99] and *opinio juris*[100] are satisfied.

History demonstrates that when the P.R.C. took over mainland China, the power shift that occurred was government succession not state succession.[101] Because revolution was the driving force[102] for the Qing abdication, the Nationalist government (R.O.C.) subjectively believed that repaying debt to foreign investors would enhance their international standing.[103] The Communist Revolution may have asserted a new government, yet, because the identity of the state remained, the P.R.C. cannot claim discontinuity.[104] Hence, because revolution does not terminate the rights and obligations of the former regime,[105] the state continues to exist subject to the successor

97. *See* Jill A. Sgro, *China's Stance on Sovereign Immunity: A Critical Perspective on Jackson v. People's Republic of China*, 22 COLUM. J. TRANSNAT'L L. 101, 108 (1983).

98. *Id.* at 108 (quoting 1 Moore, DIGEST OF INTERNATIONAL LAW 249 (1906)) ("Changes in the government or the internal polity of a state do not as a rule affect its position in international law. A monarchy may be transformed into a republic, or a republic into a monarchy . . . but, though the government changes, the nation remains, with rights and obligations unimpaired.").

99. *See* G.A. Res. 73/203, ¶¶ 4–8 (Dec. 20, 2018) (noting that State practice is an objective criterion, which must be: (i) generally recognized, (ii) extensive and uniform, (iii) of a certain duration).

100. *See Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 ¶ 207 (explaining that *opinio juris* is the subjective element, meaning states must be convinced that a practice is required under international law).

101. *See* Theroux et al., *supra* note 34, at 130 (citing *Jackson v. People's Republic of China*, 550 F. Supp. 869 (N.D. Ala. 1982)).

102. *See* Zimmerman, *supra* note 73, ¶¶ 1, 2 (explaining revolution is not considered a sufficient justification for discontinuity).

103. *See* Chiu, *supra* note 4, at 1, 26–27 (providing further evidence that the R.O.C. willfully and knowingly inherited the Qing's debt).

104. *See* Plambeck, *supra* note 29, at 417 (highlighting that the P.R.C. cannot claim discontinuity even though the communist revolution established a new government).

105. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED

government doctrine.[106] Thus, the P.R.C. is the successor government (not successor state) to the R.O.C., so the rights, duties, and obligations of the former regime remain.[107]

D. CUSTOMARY INTERNATIONAL LAW IMPLIED IN CONTRACT

Legal scholars widely accept that contractual obligations are a method of developing customary international law.[108] In accordance with state obligation, this Comment adopts the "positivist"[109] approach, which postulates that "nothing can be law unless states have consented."[110] The idea of consent is also described as an "international social contract."[111] Professor Hans Kelsen, the author of the Austrian Constitution, argued that customary international law is valid because it is based on the consent of the states which are bound by its norms.[112] If a state believes in a rule (or custom), then that state would not dispute that rule in a contract or bilateral investment treaty[113] as uncustomary.[114] In essence, a state that believes an obligation is owed (as a matter of custom) would not dispute such an

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STATES § 208 n.2 (A.L.I. 1987).

106. *See* Ebenroth & Kemner, *supra* note 95; *see*, *e.g.,* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 208 n.2 (A.L.I. 1987).

107. *See* Ebenroth & Kemner, *supra* note 95, at 757.

108. *See* John J. Chung, *Customary International Law as Explained by Status Instead of Contract*, 37 N.C.J. INT'L L. & COM. REG. 609, 620 (2012) ("State obligation is that no State is bound by any international obligation except for those obligations that it has voluntarily agreed to through (CIL) [Customary International Law] or in treaties.").

109. *See id.* at 620 n.50 (as cited in HENRY J. STEINER ET AL., TRANSITIONAL LEGAL PROBLEMS, MATERIALS AND TEXT 232, 241 (4th ed. 1994) (explaining "[t]he positivist approach views international law as the result of the practice of states as evidenced by customs or treaties (what states actually do [state practice]), as opposed to the natural law approach, which is 'the derivation of norms from basic metaphysical principles' such as divine authority or universal reason.").

110. *See id.* (as cited in LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW, CASES AND MATERIALS, at XXIV (5th ed. 2009).

111. *See id.* at 620–21.

112. *See id.* at 621–22 (quoting HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 304 (1952)).

113. U.S.-China Investment Guaranties Agreement, *supra* note 6, art. 6(a).

114. *See* TODD WEILER, THE INTERPRETATION OF INTERNATIONAL INVESTMENT LAW: EQUALITY, DISCRIMINATION AND MINIMUM STANDARDS OF TREATMENT IN HISTORICAL CONTEXT 237 (Eduardo Valencia-Ospina et al. eds., 1st ed. 2013).

obligation in a treaty because the state *already* considers the custom compulsory.[115]

International arbitration case law lends support to this assertion. For example, the International Centre for Settlement of Investment Disputes ("ICSID") tribunal concluded that the agreed scope of the language in a contract determines whether customary international law is implied.[116] Two cases exemplify how that scope is determined. In *Cambodia Power Co., v. Cambodia*, breach of contract and for violating mutually agreed principles of international law sufficiently invoked customary international. Whereas in, *Emmis v. Hungary*, the tribunal found that it did not have jurisdiction over the customary international law claim because a party's consent to arbitration is controlling.[117] These cases demonstrate that broad consensual arbitration clauses signify an intent to be bound by customary international law, whereas narrower non-consensual arbitration clauses do not.[118]

III. ANALYSIS

In order to establish why the P.R.C. should be held liable for the Hukuang Bond debt, it is important to analyze the patterns of prior bond default to show the development of customary international law.[119] First, this section will analyze the Soviet Union bond default of

115. *See id.*

116. *See* Cambodia Power Co. v. Kingdom of Cambodia & Electricité du Cambodge, ICSID Case No. ARB/09/18, Decision on Jurisdiction, ¶¶ 46, 57, 60–63 (Mar. 22, 2011); *see also* Emmis Int'l. Holding, B.V. et al. v. Rep. of Hungary, ICSID Case No. ARB/12/2, Decision on Respondent's Objection Under ICSID Arbitration Rule 41(5), ¶ 1 (Mar. 11, 2013) (as cited in Aceris Law LLC, *Customary Int'l. L. & Inv. Arb.* (Mar. 6, 2022)).

117. Kate Parllet, *Claims under Customary International Law in ICSID Arbitration*, 31 ICSID Rev. 434, 454 (2016) (as cited in Aceris Law LLC, *Customary Int'l. L. & Inv. Arb.* (Mar. 6, 2022)).

118. *See id.* ("If the arbitration clause specifically refers to disputes concerning the treaty, . . . it is likely that the parties' consent is limited to claims under the treaty[.] . . . Where an arbitration clause is cast in broad terms, covering any dispute relating to the investment or any dispute between the investor and the host State, then it is arguable that the parties have consented to arbitrate claims based on customary international law.").

119. *See* Jose A. Cabranes, *Customary International Law: What It Is and What It Is Not*, 22 DUKE J. COMPAR. & INT'L L. 143, 148 (2011).

1918 to conceptualize the successor government doctrine as customary international law. Next, it will build on patterns analyzed in the first argument to establish that the Hukuang Bond default is consistent with customary international law. Finally, this section will assert that because customary international law is implied in contract, the P.R.C.'s failure to repay the Hukuang Bond debt violates the arbitration clause in a U.S.-Chinese bilateral investment treaty from 1980.

A. THE SOVIET UNION'S BOND DEFAULT IS PRECEDENT FOR THE SUCCESSOR GOVERNMENT DOCTRINE AS CUSTOMARY INTERNATIONAL LAW

The following subsection argues that the successor government doctrine is customary international law because, during the Soviet bond default, both *state practice* and *opinio juris* were satisfied.[120]

1. Evidence of State Practice for the Successor Government Doctrine

A new custom in international law is formed when there is *state practice*[121] and *opinio juris*.[122] State practice in the Soviet Union demonstrated that a major ideological shift was insufficient to claim discontinuity.[123] France, Britain, and the United States[124] *inter alia* condemned the Soviet's justification that it did not have to pay back

120. *See infra* Part III.B.1.

121. *See* Statute of the International Court of Justice, art. 38 ¶ 1; G.A. Res. 73/203, *supra* note 63, ¶¶ 4–8; Anaya, *supra* note 60, at 41; *see also* North Sea Continental Shelf, Judgment, 1969 I.C.J. Rep. 52, ¶¶ 74, 77 (Feb. 20) (explaining that state practice is (i) generally recognized, (ii) extensive and uniform, (iii) of a certain duration).

122. *See Nicar. v. U.S.*, I.C.J. 14, ¶ 207 (explaining *opinio juris* is the subjective element, meaning states must be convinced that a practice is required or permitted under international law).

123. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 208 cmt. 2 (A.L.I. 1987) (discussing factors that are relevant in order to claim discontinuity).

124. *See* Sapphire, 78 U.S. 164, 168 (1870) (explaining that there has been a legal precedent for the successor government doctrine by the U.S. Supreme Court which has been in force for approximately 150 years).

debts because it was a new state.[125] These nations resisted recognizing the Soviet Union until the Soviets provided assurance that debts would be repaid.[126] In October 1924, France agreed to recognize the Soviet Union as the official government successor of the former Russian Empire.[127] Recognition was expressly predicated on the fact that Russia would honor the international contractual obligations of the former regime.[128] In response, the Soviets accepted the French proposal for negotiation.[129] Therefore, the Soviet Union's willingness to negotiate, and accept its status as the successor government to the Russian Empire, is action that is sufficiently widespread and consistent (or extensive and uniform) to establish state practice towards the successor government doctrine.[130]

Moreover, the Soviets demonstrated *state practice* through official diplomatic statements that verified their intent to act as a successor government rather than a successor state.[131] In April 1924, at the *Institute Intermediare International*, the Soviet Union announced that it never claimed discontinuity.[132] The Soviets claimed that former statements about repudiating treaties and replacing agreements were a consequence of the nationalistic fervor that accompanied the 1917 revolution.[133] Such comments support the assertion that Soviet state

125. *See* Houghton, *supra* note 93, at 91.

126. *See id.*

127. *See id.* at 92–93 (quoting that France recognizes the U.S.S.R. "as the Government of the territories of the former Russian Empire where its authority is accepted by the inhabitants, and in these territories as successor to the preceding Russian Governments").

128. *See id.* (showing direct evidence of the U.S.S.R.'s agreement to uphold international law).

129. *See id.* at 93 ("The Soviet reply to the French note accepted the proposal for negotiation for the settlement of pending questions between the two governments, agreeing to 'open negotiations without delay and conduct them towards a friendly solution of the problems interesting the two States.'").

130. G.A. Res. 73/203, ¶¶ 4–8 (Dec. 20, 2018).

131. *See* KAZIMIERZ GRYZBOWSKI, SOVIET PUBLIC INTERNATIONAL LAW: DOCTRINES AND DIPLOMATIC PRACTICE 94 (1970) (showing Soviet state practice to support argument they considered themselves the successor state).

132. *See id.* ("[The Soviet Union never] contemplated the repeal of all international agreements entered into by the former Russian regimes.").

133. *See id.* (indicating isolation from the rest of the world also contributed).

practice was consistent with the successor government doctrine.[134] This was reaffirmed in *Lehigh Valley R. Co. v. State of Russia*,[135] where the Second Circuit acknowledged the generally recognized significance of inherited obligations under the successor government doctrine.[136] Therefore, the Soviet Union's actual conduct is akin to the P.R.C.'s because the Soviets acted like a new government and not as a new state, which is consistent with the successor government doctrine.[137]

2. Evidence of Opinio Juris for the Successor Government Doctrine

Furthermore, the Soviet Union showed *opinio juris* because its actions manifested consent to be bound to the rule of law through legal obligation.[138] The Soviet government itself frequently claimed the rights and obligations that belonged to the Russian Empire,[139] thus recognizing the doctrine of government succession.[140] For example, Article I of the 1922 Protocol between the Soviet Union and Mongolia stated: "[. . .] housing and property on the territory of the Outer Mongolia which were the property of the former Russian Empire which were controlled by its former consuls, by the right of succession

134. *See supra* Part II.B (explaining the formation of customary law through state practice and *opinio juris*).

135. Lehigh Valley R. Co. v. State of Russia, 21 F.2d 396, 401 (2d Cir. 1927).

136. *See* Jackson v. People's Republic of China, 550 F. Supp. 869, 872 (N.D. Ala. 1982) ("Changes in the government or the internal polity of a state do not as a rule affect its position in international law. A monarchy may be transformed into a republic, or a republic into a monarchy . . . but, though the government changes, the nation remains, with rights and obligations unimpaired."); *see also* Sgro, *supra* note 97, at 108 (pointing to author's assertion based on a case in the Northern District of Alabama).

137. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 208 cmt. 2 (A.L.I. 1987) (explaining law surrounding actions of new government versus a new state and such implications under the law).

138. *See* Anaya, *supra* note 60, at 42 (explaining the legal notion of *opinio juris* and a state's manifestation of consent to be bound).

139. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 208 cmt. 2 (showing direct evidence of inconsistent positions taken by the Soviets on discontinuity).

140. *See* GRYZBOWSKI, *supra* note 131, at 94 (indicating the Soviet Union considered itself the successor state and claiming rights regarding the status of the Chinese-Eastern Railway, The Åland Islands, and Spitzbergen).

are considered property of the [Soviet Union]."[141] In Article I, the Soviets usurped the legal legitimacy that existed under the Russian Empire to then qualify its own legitimate claims to the Outer Mongolian territories.[142] Had the Soviet Union not, itself, felt compelled to use the former regime's legal claims to justify its own claims, then *opinio juris* would not be satisfied. However, the Soviet Union invoked the Russian Empire's right to Outer Mongolian territory because the Soviets understood that without using the proper legal channels, the international community would not respect its claims to the land.[143] Therefore, like the P.R.C., the Soviets felt a legal obligation to use the Russian Empire's legal status as the former government to justify its own successor government claims to the Mongolian territories.[144]

Moreover, the Soviets proved *opinio juris* towards government succession when they claimed discontinuity in 1918 in a resolution regarding Poland.[145] On August 29, 1918, the Soviets declared that all agreements made by the former Russian Empire regarding the partition of Poland were nullified because they were contrary to the principle of self-determination and "revolutionary legal conception of the Russian nation. . . ."[146] The resolution stressed the revolutionary conception of Russia, ultimately touting the principle of discontinuity.[147] By stating that the resolution was anti-revolutionary and should be abolished, the Soviets were articulating discontinuity from the Russian Empire.[148] This means that the Soviets were claiming

141. *See id.*

142. *See id.* (indicating state practice through Protocol I between RSFSR and Mongolia in May 1922).

143. *See*, *e.g.*, *id.* (exemplifying the Soviet Union's need to be seen as legitimate by other States is why such action was taken).

144. *See* discussion *infra* Part III.A.2 (explaining elements for identifying state practice and *opinio juris* for customary international law and its application to the P.R.C.).

145. *See* GRYZBOWSKI, *supra* note 131, at 93 (quoting language from the resolution declaring the agreement for the partition of Poland was annulled forever).

146. *See id.*

147. *See id.* (noting the resolution also announced their right to denounce other treaties from the former regime).

148. *See id.* (explaining how articulating anti-revolutionary sentiments and discontinuity from the Russian empire were synonymous).

to be a new state, and not a successor government.[149] However, by claiming to have the power to denounce treaties signed by the former government (the Russian Empire), the Soviet government was also indicating it adhered to the principle of government succession simply because it had the power to exercise the right of discontinuity.[150]

B. THE P.R.C. DEFAULT IS LIKE THE SOVIET DEFAULT BECAUSE STATE PRACTICE AND *OPINIO JURIS* ARE MET

Applying the analysis of the Soviet Union's default to the P.R.C.'s Hukuang Bond default demonstrates that the successor government doctrine is supported by state practice and *opinio juris*.[151] First, the P.R.C.'s repudiation was *generally recognized*.[152] Second, the successor government doctrine is *extensive and uniform* because there is a repeated pattern of behavior recognizing former government debts.[153] Third, there is sufficient *duration* to establish consistent adherence to the successor government doctrine.[154] Additionally, the P.R.C. satisfies *opinio juris* because it subjectively complies with legal mandates to the successor government doctrine; therefore, the P.R.C. is responsible for the Hukuang Bond debt.[155]

149. *See id.* (hinting at different legal standards applying to the Soviets depending on how they labeled themselves, either as a new state or a successor state from the Russian empire).

150. *See id.* (showing the inconsistencies with the Soviet Union's position on whether they were a new state or successor state).

151. *See* Dumberry, *supra* note 58 (expanding on the discussion that customary international law is formed by a pattern of accepted practices).

152. *See* Plambeck, *supra* note 29, at 416 (indicating two types of succession under customary international law and why the argument by the P.R.C. as not being a successor state does not succeed under these theories); *see also* Zimmerman, *supra* note 73, ¶ 1 (remarking upon the London Protocol as an expression of the successor state doctrine's general recognition).

153. *See infra* Part III.B.1.i (analyzing the P.R.C.'s extensive and uniform actions to show state practice).

154. *See infra* Part III.B.1.ii (analyzing the P.R.C.'s actions and arguing they satisfied the duration requirement).

155. *See infra* Part III.C.1–2 (analyzing the P.R.C.'s adherence to arbitration and application of the U.S.-China Investment Guaranties Agreement).

1. State Practice, Evidence of the People's Republic of China's Support for the Successor Government Doctrine

i. P.R.C. Actions are Extensive and Uniform

The P.R.C.'s refusal to repay the Hukuang Bonds emphasizes how the international community values *consistent* and *uniform* state practice of squaring government debts.[156] As early as the 18th century, international bodies have distinguished between certain types of debts.[157] For example, at the Peace Treaty of Campo Formio in 1797 between France and the Holy German Empire, the treaty exempted all war debts while enforcing other debts not relating to war.[158] These actions display extensive and uniform state practice towards the successor government doctrine well before the Hukuang Bonds were issued in 1911.[159] Just as the United States, France, and the United Kingdom denounced the Soviet Union's debt repudiation in 1918;[160] the same nations equally condemned the P.R.C.'s denial of the Hukuang debt in 1949.[161] This global trend of acknowledging

156. *See* Hans J. Cahn, *The Responsibility of the Successor State for War Debts*, 44 AM. J. INT'L L. 477, 477–79 (1950) (explaining that when a debtor state fails and a new state is formed, the new state may reject debts and cancel the obligations. "[However] [t]he countries affected by this policy continue to protest the rejection of their claims." For example, Germany after World War II rejected pay back the war debts of the former regime and was not held wholly accountable as a new state. However, where the state remains, debts and obligations endure.).

157. *See id.* (indicating the first time debts of annexed or ceded states was mentioned in a peace treaty was between France and the Holy German Empire in 1797).

158. *See id.* (Other examples of military treaties demonstrate how the international community has extensively viewed debts from a former regime as obligatory. For example, the Franco-Prussian Peace Treaty of Tilsit of 1809; the Final Peace Treaty of Vienna of 1864 between Denmark, Prussia, and Austria, Article 8 of the Treaty of Zurich in 1859 where the Sardinian Government "was to succeed to the rights and obligations resulting from contracts which has been regularly made by the Austrian administration. . . .").

159. *See id.* at 480–82 (explaining the state practice of Denmark, Prussia, and Germany in the 1860s).

160. *See* Houghton, *supra* note 93, at 92–94 (showing powerful states' disagreement with the Soviet Unions debt repudiation).

161. *See* Jackson v. People's Republic of China, 550 F. Supp. 869, 872 (N.D. Ala. 1982); *see also* Morris v. People's Republic of China, 478 F. Supp. 2d 561 (S.D.N.Y. 2007); Andrew Hale, *China is in default on a trillion dollars in debt to US*

government debt reflects a consistent and uniform practice of repaying government debts.

Additionally, the P.R.C.'s actions align with the successor government doctrine because its diplomatic actions further satisfy the *extensive* and *uniform* prongs of *state practice*.[162] The P.R.C. has never claimed discontinuity from the Nationalist government because the P.R.C. insists it is the rightful government of China.[163] Inversely, the Soviets claimed discontinuity,[164] but its actions showed conformity to the successor government doctrine.[165] Therefore, the P.R.C. and the Soviets acknowledged that they are a successor government and acting consistently with state practice.[166] In *Jackson v. People's Republic of China*,[167] where U.S. investors sued the P.R.C. for denying responsibility to pay back the Hukuang Railway Bonds, the P.R.C. stated that it did not recognize debts incurred by "the defunct Chinese government."[168] The statements imply that the P.R.C. is not claiming to be a new state but rather a successor government while blatantly denying its obligations to the former government.[169] The P.C.R. maintains that position and made similar comments in 2022.[170] These

bondholders. Will the US force repayment?, THE HILL (July 4, 2023), https://thehill.com/opinion/international/4075341-china-is-in-default-on-a-trillion-dollars-in-debt-to-us-bondholders-will-the-us-force-repayment (explaining the history between the US and China regarding the P.R.C.'s denial of debt).

162. *See* discussion *supra* Part III.B.1.i (explaining the concept of extensive and uniform as applied to the P.R.C.).

163. *See* Steven M. Goldstein, *Understanding the One China Policy*, BROOKINGS INST. (Aug. 31, 2023), https://www.brookings.edu/articles/understanding-the-one-china-policy (explaining the "One China" policy recognized by the United States).

164. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 208 n.2 (noting the Soviet Union insisted it was a new state, thus not responsible for international obligations assumed by the previous regime).

165. *See supra* Part III (analysis of the P.R.C.'s debt obligations under international law).

166. *See* GRYZBOWSKI, *supra* note 131, at 94 ("[The Soviet Union never] contemplated the repeal of all international agreements entered into by the former Russian regime.").

167. 550 F. Supp. 869, 872 (N.D. Ala. 1982).

168. *See* Morris v. People's Republic of China, 478 F. Supp. 2d 561 (S.D.N.Y. 2007); *see also Jackson*, 550 F. Supp. at 872.

169. *Morris*, 478 F. Supp. 2d 561.

170. *See White Paper: The Taiwan Questions and China's Reunification in the New Era*, TAIWAN AFFS. OFF. OF THE STATE COUNCIL AND THE STATE COUNCIL

statements are comparable to the P.R.C.'s foreign policy of recognizing new governments rather than new states in the wake of revolution or coup d'état.[171] These extensive and repetitious proclamations failing to claim discontinuity and recognizing successor governments demonstrate that the P.R.C. satisfies the element of state practice within customary international law.

ii. P.R.C. Actions Satisfy "Duration"

Moreover, the third element of state practice, "duration" based on the passage of time, satisfies state practice.[172] Two examples illustrate how contemporary governments resolve long-standing bond debts inherited from previous administrations. In 1987, the United Kingdom's Prime Minister, Margaret Thatcher, negotiated an agreement with the P.R.C. to return Hong Kong to China in exchange for repayment of the 1911 Hukuang Railway Bonds.[173] The P.R.C.

INFO. OFF. OF THE PEOPLE'S REPUBLIC OF CHINA (2022) ("As a result of the civil war in China in the late 1940s and the interference of external forces, the two sides of the Taiwan Straits have fallen into a state of protracted political confrontation. But the sovereignty and territory of China have never been divided and will never be divided, and Taiwan's status as part of China's territory has never changed and will never be allowed to change.").

171. *See* James C. Hsiung, *China's Recognition Practice and International Law*, *in* CHINA'S PRACTICE OF INTERNATIONAL LAW: SOME CASE STUDIES 36–37 (Jerome A. Cohen ed., 1972) (The P.R.C. used the "cloak of continuity . . . to back its claims to China's membership in the United Nations. Nevertheless, the P.R.C. follows the practice of extending recognition anew to a new government in an already recognized state if that government has drastically changed its organizational and/or ideological complexion." For example, in 1956 the P.R.C. recognized the Kingdom of Yemen, but in 1962 upon Imam's death, a republic of Yemen was proclaimed which the P.R.C. recognized. The P.R.C. recognized the government of Burma in 1949, then recognized the new government after a coup d'état in 1962. The Republic of Zanzibar was recognized in 1963, months later there was a coup, creating a new government which the P.R.C. recognized in 1964.).

172. *See* North Sea Continental Shelf, Judgment, 1969 I.C.J. Rep. 52, ¶ 73 (Feb. 20) ("A conventional rule can be considered to have become a general rule of international law . . . without the passage of any considerable period of time . . . widespread and representative participation in the convention might suffice of itself.").

173. *See* Andrew Hale, *supra* note 161 (explaining Thatcher's tough negotiation stance with China as well as the conditions for allowing the Chinese access to British markets).

agreed after Thatcher threatened to lock the P.R.C. out of U.K. capital markets.[174] Additionally, in 1997, the Russian government agreed to repay debt to French citizens for outstanding obligations dating back to the Czarist-era.[175] This demonstrated pattern of repaying debts from former regimes satisfies the "duration" element of state practice and binds the P.R.C. to the outstanding Hukuang Bond debt.

2. P.R.C. Evidence of Opinio Juris for the Successor Government Doctrine

The P.R.C. is in violation of customary international law because the successor government doctrine satisfies the second element, *opinio juris*.[176] In *Jackson v. People's Republic of China* the P.R.C. argued that it was not obligated to repay the Hukuang Railway Bonds because it was "odious debt."[177] The mere fact that the P.R.C. made a legal argument implies its conformity to the successor government doctrine.[178] Nations, including the U.S.,[179] have made this argument throughout history to exempt their financial duties to former governments. Although this has occasionally been a winning

174. *See id.* (showing the US position towards China's debts).

175. *See* Jocelyn Gecker, *Russia Pays Old Czarist Bond Debts in France*, WASH. POST (May 6, 2001), https://www.washingtonpost.com/archive/politics/2001/05/06/russia-pays-old-czarist-bond-debts-in-france/130dc88d-0fc4-4e7b-8323-b72e5b80780d (indicating although Russia paid French who held Russian bons in 1997, the amount was not as generous as holders anticipated).

176. *See supra* Part III.B.1 (explaining why the P.R.C. violated customary international law); *see also* Dumberry, *supra* note 58, at 3 (explaining customary international law requires uniform and consistent state practice and belief such practice is required by law); North Sea Continental Shelf, Judgment, 1969 I.C.J. Rep. 52, ¶ 77 (Feb. 20) (explaining *opinio juris* reflects the states belief and legal consent to be bound by a rule. States must "feel that they are conforming to what amounts to a legal obligation.").

177. *See* Jackson v. People's Republic of China, 550 F. Supp. 869, 872 (N.D. Ala. 1982); *see also* Mike Chen et al., *The Emperor's Old Bonds*, 31 DUKE J. OF COMP. & INT'L L. 425, 434–35 (2021) (pointing to other scholarly work on the topic); James V. Feinerman, *Odious Debt, Old and New: The Legal Intellectual History of an Idea*, 70 L. & CONTEMP. PROBS. 193 (2007) (explaining odious debts are "debts incurred in opposition to a revolution or for other oppressive purposes").

178. *See* discussion *infra* Part III.B.2 (pointing to Russia and China as examples of successor government doctrine).

179. *See* Sgro, *supra* note 91, at 110 n.62 (showing examples of the US refusing to assume debts incurred by Cuba to indicate the burden and benefit theory).

argument, scholars reason that making such a legal argument is fundamentally an acknowledgment that the successor government doctrine is customary international law.[180] In *Jackson*, the fact that the P.R.C. made a legal argument in Court demonstrates that the P.R.C. respected the credibility of the plaintiff's legal accusation.[181] Because the P.R.C. took this claim seriously, the P.R.C. demonstrated a subjective belief that the plaintiff's legal allegations were justified. Had the accusation lacked international standing, the P.R.C. would have no reason to respond because any final judgement would have been ignored by international governments.[182] This reasoning aligns with Mark Villiger's definition of *opinio juris*.[183] By claiming odious debt (which is an exception to government succession under the state succession doctrine),[184] the P.R.C. is implying that it is a successor

180. *See* Michael Wood & Omri Sender, *State Practice*, MAX PLANCK ENCYCS. OF PUB. INT'L L. ¶ 6 (2020) (quoting, "if a state acts unlawfully but nevertheless seeks to justify what it has done (or omitted to do) with legal argument, the justification may have more legal significance (in terms of preserving or reinforcing the law) than the action itself. . . ."); *see also* Anne Peters, *Treaties, Unequal*, MAX PLANCK ENCYCS. OF PUB. INT'L L. ¶ 34 (2018) (quoting, "Statements by State . . . officials denouncing unequal treaties have obviously been governed by political considerations. This fact in itself does not rule out the possibility of an *opinio juris* but suggests close scrutiny."); Jo Lynn Slama, *Opinio Juris in Customary International Law*, 15 OKLA. CITY U. L. REV. 603, 638 n.283 (1990) (explaining how state action shows their beliefs); Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1, 9 (1988) ("It would appear . . . the only way to determine whether states see a particular rule as legal is to determine their belief as to the consequence that ought to follow from a breach of the rule.").

181. *See* Wood & Sender, *supra* note 180, ¶ 6 (explaining how state actions paired with justification for such action has great legal significance).

182. *See* Jack McNally, *Representation, Recognition, Resistance: Rival Governments before the International Court of Justice*, 61 COLUM. J. TRANSNAT'L L. 267, 315–16 (2023) (showing the P.R.C.'s response indicates their understanding of obligations under international law).

183. *See* Slama, *supra* note 180, at 638 ("Mark Villiger argues *opinio juris* is the 'conviction of a state that it is following a certain practice as a matter of law and that, were it to depart from the practice, some form of sanction would, or ought to, fall on it.'").

184. *See* Lee C. Buchheit et al., *The Dilemma of Odious Debts*, 56 DUKE L.J. 1201, 1203 (2007) (stating, "among the purported exceptions to the general rule of state succession are what have been labeled 'odious debts'").

government.[185] Similarly, the Soviet Union implied it was a successor state by asserting it had the power to nullify all agreements regarding the partition of Poland.[186] In the context of the P.R.C., by claiming to have the power to denounce treaties signed by the former government (the R.O.C.), the P.R.C. is giving credence to the principle of government succession simply because it had the power to exercise the right of discontinuity through odious debt.[187] Therefore, the P.R.C. demonstrates *opinio juris* because its intent to conform with legal obligations implies that it recognizes the credibility of the accusation invoking the successor government doctrine.[188]

The communist revolutions in Russia and China clearly show how the successor government doctrine is integrated into customary international law.[189] Although both the Soviet Union and the P.R.C. disputed international claims on former regime debts, these communist governments' respective responses demonstrate consistent *state practice* and *opinio juris*.[190] For example, the Soviets and P.R.C. satisfy *state practice* through diplomatic statements, such as recognizing new governments, rather than new states, after a coup d'état.[191] Additionally, the Soviets and P.R.C. both demonstrate *opinio juris* because their legal arguments imply the subjective contention that the valid power to dispute is derived from the legitimacy of the

185. *See* GRYZBOWSKI, *supra* note 131, at 93 (supporting the notion that when a claimant asserts the authority to make a legal argument under the state succession doctrine, that power impliedly is derived from the government succession doctrine).

186. *See id.* (noting the Soviets also adhered to international treaties from past regime).

187. *See id.* (analyzing successor state theory in the context of the P.R.C.'s actions).

188. *See*, *e.g.*, Agreement *concerning the Settlement of Mutual Historical Property Claims*, China-U.K., Jun. 5, 1987, 1656 U.N.T.S. 77, 79 art. 4 (explaining that in 1987, the United Kingdom made the P.R.C. repay the Hukuang Bond debts to British citizens or else face exclusion from British capital markets. Although politically motivated, the P.R.C. capitulated, providing an inference of *opinio juris* because the P.R.C. would not have agreed if it subjectively believed that the U.K.'s demands had no international legal standing.).

189. *See supra* discussion Part III.B–C (comparing the P.R.C.'s default to the Soviet Union's).

190. *See id.*

191. *See* Hsiung, *supra* note 171, at 36–37 (showing examples of the P.R.C. recognizing Iraq after Kassem's coup and the Kingdom of Yemen in 1956).

former government.[192] Therefore, the successor government doctrine is a rule of customary international law.

C. CONTRACTUAL IMPLICATIONS IN INTERNATIONAL ARBITRATION

Furthermore, the successor government doctrine constitutes customary international law because the rights, duties, and obligations of the Qing and Nationalist governments are implied in contract.[193] The October 7, 1980, bilateral investment treaty (B.I.T.), "Agreement on Investment Guaranties"[194] ("U.S.-China Investment Guaranties Agreement") between the United States and the P.R.C. demonstrates that the P.R.C. is liable for debt accrued from the 1911 Hukuang Bonds.[195] The P.R.C. is contractually bound to the Hukuang Bond debt because the scope of "state obligation" implies that the P.R.C. acknowledges the successor government doctrine.[196] Accordingly, this subsection makes two arguments: first, international arbitration case law shows that customary international law is implied in a contract; second, analyzing contractual language in the U.S.-China Investment Guaranties Agreement demonstrates how applying the successor government doctrine as customary international law holds the P.R.C. responsible for the 1911 Hukuang Bond debt.[197]

1. The P.R.C.'s Implicit Adherence to Arbitration

The P.R.C. is obligated to the Hukuang Bond debt through contractual agreements because the scope of consent may imply acquiesce to the successor government doctrine.[198] In *Cambodia*

192. *See* GRYZBOWSKI, *supra* note 131, at 93 (supporting the argument that the Soviet Union's actions proved *opinio juris*); *see also supra* discussion Part III.B–C (comparing P.R.C. and the Soviet Union).

193. *See supra* discussion Part II.C (analyzing contractual obligations).

194. *See* U.S.-China Investment Guaranties Agreement, *supra* note 6, art. 6(a).

195. The scope of this comment is limited to the 1911 Hukuang Bonds. However, the argument that the successor government doctrine is customary international law implied in BITs is a floodgate argument that could be directly applied to other similar circumstances.

196. *See supra* Part II.D (providing a background discussion of the scope of "state obligation" within bilateral investment treaties).

197. *See infra* Part III.D.1–2.

198. *See* Slama, *supra* note 180, at 611 n.53, 627–631 n.203 (discussing

Power Co., v. Cambodia, investors sued Cambodia *inter alia* for violating mutually agreed principles of international law relating to the construction of a power plant in Phenom Penh.[199] The tribunal found the claim sufficiently invoked customary international law because "[c]ustomary [i]nternational [l]aw is inevitably relevant [. . .] [and] comprises a body of norms that establish minimum standards of protection in [foreign investment]."[200] *Cambodia* demonstrates that customary international law is directly applicable to foreign investment, like the Hukuang Bonds.[201] Whereas in *Emmis v. Hungary*, investors in Hungarian radio stations brought an expropriation claim based on customary international law.[202] Hungary responded, stating that the claim was baseless because Hungary had not agreed to arbitration of claims arising under customary international law.[203] The tribunal found that the court did not have jurisdiction over the customary international law claim because a party's consent to arbitration was controlling.[204] *Emmis* highlights that

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Blackstone's theory of peaceable acquiescence to form custom in and explaining how custom may evolve through inaction).

199. Cambodia Power Co. v. Kingdom of Cambodia & Electricité du Cambodge, ICSID Case No. ARB/09/18, Decision on Jurisdiction, ¶¶ 46, 57, 60–63 (Mar. 22, 2011); *see also* Aceris Law LLC, *Customary Int'l. L. & Inv. Arb.* (Mar. 6, 2022), https://www.acerislaw.com/customary-international-law-and-investment-arbitration (explaining Cambodia Power in the context of customary international law for investment arbitration).

200. Cambodia Power Co. v. Kingdom of Cambodia & Electricité du Cambodge, ICSID Case No. ARB/09/18, Decision on Jurisdiction, ¶ 334 (Mar. 22, 2011) (noting that it would be unrealistic to assume that parties to a foreign investment would have chosen to exclude the protections of customary international law).

201. *See id.* (applying customary international law in the context of foreign investment).

202. *See* Emmis Int'l. Holding, B.V. et al. v. Rep. of Hungary, ICSID Case No. ARB/12/2, Decision on Respondent's Objection Under ICSID Arbitration Rule 41(5), ¶¶ 27–34 (Mar. 11, 2013) (alleging that Respondent's violations of customary international law include "the expropriation without compensation of Claimant's investments without observance of due process and payment of prompt, adequate and effective compensation equal to the fair market value of the investments"); Aceris, *supra* note 199 (explaining that claimants based their claims on international law).

203. *See Emmis Int'l. Holding et al.*, ICSID Case No. ARB/12/2, ¶¶ 26, 38 (discussing the scope of the Tribunal's jurisdiction *ratione materiae* by virtue of the instruments of consent).

204. *See* Parllet, *supra* note 117, at 454 (finding that ultimately consent to

a party that does not consent to arbitrate over customary international law claims cannot be liable.[205] Here, the P.R.C. can be found liable for the Hukuang Bond default because it did consent to customary international law within the broad arbitration clause in the U.S.-China Investment Guaranties Agreement.[206]

Cambodia and *Emmis* highlight that the extent of a party's consent to arbitrate plays a crucial role in invoking customary international law.[207] Specifically, concerning the successor government doctrine, consent suggests that if a succeeding regime does not explicitly disclaim responsibility for its predecessor's obligations in a contract, then such a failure implies adherence to the capacities, rights, and duties[208] (the successor government doctrine) because it is an obligatory rule of customary international law.[209] This is a critical aspect of the Hukuang Bonds case.[210] Because the P.R.C. never claimed discontinuity and asserts itself as the successor to the R.O.C., the P.R.C. must assert in contracts that it is not responsible for the capacities, rights, and duties of the former regime.[211] In other words,

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arbitration limits a tribunal's jurisdiction); *see also* Aceris, *supra* note 199.

205. *See Emmis Int'l. Holding et. al.*, ICSID Case No. ARB/12/2, ¶ 26 (finding that the legal question of a tribunal's jurisdiction is determined by the consent to arbitrate).

206. *See infra* discussion Part III.D.3 (discussing the details of the U.S.-China Investment Guaranties Agreement).

207. *See* Cambodia Power Co. v. Kingdom of Cambodia & Electricité du Cambodge, ICSID Case No. ARB/09/18, Decision on Jurisdiction, ¶ 334 (Mar. 22, 2011) (deciding that the Tribunal does have jurisdiction to hear claims against KOC based on customary international law); *Emmis Int'l. Holding et al.*, ICSID Case No. ARB/12/2, ¶¶ 26, 38 (deciding that the customary international law expropriation claim is not manifestly without legal merit).

208. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 208(a) (explaining when a state ceases to exist, its capacities, rights, and duties terminate and that when a state does not cease to exist, and a successor government takes over, then the capacities, rights, and duties do not terminate).

209. *See* Weiler, *supra* note 114, at 237 (arguing that because BITs "typically contain dispute settlement provisions capable of sustaining damages claims under CIL in addition to substantive treaty provisions, the argument that a State would not agree to a BIT obligation if it already believed such obligation was owed as a matter of custom collapse").

210. *See* discussion *infra* Part III.D.2.

211. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 208 (noting that the successor states assume the capacities, rights and

if the P.R.C. maintains broad language within an arbitration clause, it is impliedly agreeing to customary international law's continually developing rules.[212] Therefore, state obligation to customary international law is voluntarily agreed upon by implied acquiescence[213] within a bilateral investment treaty unless the state expressly conditions otherwise.[214]

2. *APPLICATION OF THE U.S.-China Investment Guaranties Agreement TO THE P.R.C.*

The P.R.C. is in violation of the U.S.-China Investment Guaranties Agreement for failing to repay the 1911 Hukuang Bonds because the bilateral investment treaty's broad arbitration clause holds the P.R.C. liable for customary international law.[215] The arbitration clause states:

> Any dispute between the [U.S. and P.R.C.] regarding the interpretation of this Agreement or which, in the opinion of one of the Governments, involves a question of public international law arising out of any investment or project or activity relating to such investment for which Coverage has been issued shall be resolved, insofar as possible, through negotiations [arbitration] between the two Governments.[216]

In this clause, the parties agreed to international arbitration under any violation of public international law.[217] This broad language

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duties of the predecessor state); *see, e.g.*, *Cambodia Power Co.*, ICSID Case No. ARB/09/18, ¶ 334; *Emmis Int'l. Holding et al.*, ICSID Case No. ARB/12/2, ¶¶ 26, 38; Parllet, *supra* note 117, at 454.

212. *See* Patrick Fox & Alexey Vyalkov, *Customary International Law Claims in Contract-based Arbitration*, WOLTERS KLUWER BLOG (June 26, 2018), https://arbitrationblog.kluwerarbitration.com/2018/06/26/human-rights-arbitration (citing Cambodia Power and Article 42 of the ICSID Convention).

213. *See* Slama, *supra* note 180, at 627–31 (providing arguments and examples from scholars that acquiescence to legal obligations leads to the formation of customary international law).

214. *See* Chung, *supra* note 108, at 622 (equating customary international law with contract law); Weiler, *supra* note 114, at 237 (pointing to routine acquiescence by states in arbitration decisions that result in them owing damages for violation of a BIT and a customary international legal obligation as evidence of *opinio juris*).

215. U.S.-China Investment Guaranties Agreement, *supra* note 6, art. 6(a).

216. *Id.*

217. *See* Statute of the International Court of Justice, art. 38 ¶ 1(b) (listing sources of public international law as, *inter alia*, international custom).

implies that the P.R.C. has agreed to conform to customary international law.[218] The P.R.C. may make a counterargument that under Article 2 of the U.S.-China Investment Guaranties Agreement, it did not "approve" the issuance of the Hukuang Railway Bonds.[219] However, that argument is weak because it does not consider that the Hukuang Bonds were approved by former governments.[220] Under customary international law (which the broad arbitration clause includes), the P.R.C. is held to the obligations of the former Qing and Nationalist governments.[221] In other words, because the P.R.C. succeeded the former Chinese governments that approved the Hukuang Bonds, those duties and obligations are required of the P.R.C. as a matter of customary international law.[222] Failing to pay back those bonds would violate the arbitration clause within the U.S.-China Investment Guaranties Agreement.[223] Therefore, if the P.R.C. did not intend to be held liable for the Hukuang Bonds it needed to explicitly state it did not adhere to the successor government doctrine.[224] Yet, throughout the U.S.-China Investment Guaranties Agreement, the P.R.C. made no such stipulation, ultimately

218. *See* Cambodia Power Co. v. Kingdom of Cambodia & Electricité du Cambodge, ICSID Case No. ARB/09/18, Decision on Jurisdiction, ¶ 334 (Mar. 22, 2011) (explaining that broad treaty provisions in arbitration clauses include customary international law).

219. *See* U.S.-China Investment Guaranties Agreement, *supra* note 6, art. 6(a) ("[P]rocedures set forth in this agreement shall apply only with respect to coverage of investments relating to projects or activities approved by the Government of the [P.R.C.].").

220. *See* discussion *supra* Part II.A; *see also* discussion *supra* Part II.C.1.

221. *See* discussion *supra* Part II.C.1.

222. *See* JAMES CRAWFORD, THE CREATION OF STATES IN INT'L LAW 678 (2nd ed. 2007) (quoting the late I.C.J. Judge James Crawford, "It has long been established that in the case of an 'internal revolution, merely altering the municipal constitution and form of government, the State remains the same; it neither loses any of its rights, nor is discharged from any of its obligations.").

223. *See* U.S.-China Investment Guaranties Agreement, *supra* note 6, art. 6(a).

224. *Compare* Cambodia Power Co. v. Kingdom of Cambodia & Electricité du Cambodge, ICSID Case No. ARB/09/18, Decision on Jurisdiction, ¶ 334 (Mar. 22, 2011) *with* Emmis Int'l. Holding, B.V. et al. v. Rep. of Hungary, ICSID Case No. ARB/12/2, Decision on Respondent's Objection Under ICSID Arbitration Rule 41(5), ¶¶ 27–34 (Mar. 11, 2013) (explaining that broad consensual arbitration clauses signify an intent to be bound by customary international law, whereas narrower non-consensual arbitration clauses do not).

suggesting acquiescence to customary international law.[225]

IV. RECOMMENDATIONS

A. THE U.S. SHOULD ARGUE THE P.R.C. IS VIOLATING CUSTOMARY INTERNATIONAL LAW

The U.S. should purchase all outstanding Hukuang Bonds from private American investors and invoke the arbitration clause in the U.S.-China Investment Guaranties Agreement.[226] Consolidating the Bonds through the U.S. government would reduce risk for investors and give the U.S. government political leverage over China.[227] The U.S. should argue that the P.R.C. is in violation of customary international law.[228] Since *Cambodia* and *Emmis* explain that a party's stated scope of consent to arbitrate determines whether customary international law is invoked in a treaty,[229] it follows that the P.R.C. would be unable to argue it did not contract for the Hukuang retroactive debt in the U.S.-China Investment Guaranties Agreement.[230]

The P.R.C. would make a counterargument citing the U.S.-China Investment Guaranties Agreement provision that says the P.R.C. is not responsible for losses resulting from "war, revolution, and insurrection."[231] However, the U.S. should argue that the Belated

225. *See* Slama, *supra* note 180, at 628 (finding that the failure to protest against a practice results in the necessary *opinio* in customary norm creation).

226. *See generally* U.S.-China Investment Guaranties Agreement, *supra* note 6, art. 6(a).

227. *See* Garber, *supra* note 50 (suggesting that the U.S Treasury could take the bonds in and use them to offset the nation's debt with China).

228. *See generally* U.S.-China Investment Guaranties Agreement, *supra* note 6, art. 6(a).

229. *See Cambodia Power Co.*, ICSID Case No. ARB/09/18, ¶ 334 (holding that the parties were bound by customary international law); *Emmis Int'l. Holding et al.*, ICSID Case No. ARB/12/2, ¶¶ 26, 38 (holding that the parties were not liable under customary international law because their consent to arbitrate controlled).

230. *See* Parllet, *supra* note 117, at 454 (arguing that broad arbitration clauses necessarily include customary international law).

231. *See* U.S.-China Investment Guaranties Agreement, *supra* note 6, at 17 (quoting the Related Letter, "I wish to inform you that the issuance of such coverage would not obligate the Government of the People's Republic of China to reimburse the insured investor or OPIC [Overseas Private Investment Corporation] for losses

Letter to the U.S.-China Investment Guaranties Agreement was a contract modification unsupported by consideration.[232] Although both parties agreed to the U.S.-China Investment Guaranties Agreement, the Belated Letter undermines the treaty's legitimacy.[233] The purpose of creating an investment treaty (known here as the U.S.-China Investment Guaranties Agreement) aims to build confidence in international markets and protect investors.[234] From the U.S. perspective, investing in China was dangerous because it had been prone to volatile revolutions and conflicts for decades.[235] An American investor would purchase investment insurance to protect against that political risk.[236] Here, the Belated Letter in the U.S.-China Investment Guaranties Agreement that states investment losses from war or revolution are not protected fundamentally defeats the core purpose of investor protection.[237] Thus, the U.S. should argue that the redundancy in the Related Letter undermines the contract and should be excluded from judicial consideration.

In formulating the legal argument, the U.S. should contend that the P.R.C.'s default was not a consequence of war or revolution. After the Qing fell, the Nationalists continued to repay the Bonds as a good-faith effort to build rapport with the international community.[238] Then,

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resulting from war, revolution, or insurrection.").

232. RANDY E. BARNETT & NATHAN B. OMAN, CONTRACTS: CASES & DOCTRINE 600–02 (7th ed. 2021) (explaining consideration is a requirement of contract formation known as "bargained-for exchange").

233. *See generally* U.S.-China Investment Guaranties Agreement, *supra* note 6, at 17; Christoph Schreuer, *Investment Protection in Times of Armed Conflict*, 23 J. of World Investment & Trade 702, 702 (2022) (stating that bilateral investment treaties continue to operate even during times of armed conflict).

234. *See* Nathalie Bernasconi-Osterwalder et al., *Investment Treaties & Why They Matter to Sustainable Development*, INT'L INST. SUSTAINABLE DEV. 11 (2012) (providing that most recent treaties grant investors the right to bring arbitration claims against host governments).

235. *See* discussion *supra* notes 17–38 and accompanying text.

236. *See* Schreuer, *supra* note 233, at 702 (explaining BITs are intended to protect investments during periods of armed conflict).

237. *See* Nathalie Bernasconi-Osterwalder et al., *supra* note 234, at 11 (summarizing the guarantees that investment treaties provide to investors).

238. *See* Huang, *supra* note 1, at 8 (noting that France, Germany, Britain and the United States were to share equally in the $6 million bond issue of the Hukuang Railways).

the P.R.C. took power and repudiated the debt, claiming, "odious debt."[239] This invoked the exception to the successor state doctrine and further cemented the P.R.C. as a successor government.[240] This position bolsters the argument that the P.R.C. would accept the prior regimes' obligations under customary international law.

Additionally, "odious debt" is a fallible argument because it assumes that debts created by the prior regime were not intended to benefit the nation as a whole.[241] Here, the Hukuang bonds were issued for the purpose of building a national railway that would benefit the nation as a whole.[242] Therefore, the P.R.C. did not repudiate the Hukuang Bonds and claim odious debt because the debt was a consequence of revolution; rather, the repudiation was a self-interested decision intending to impede western investors.

Finally, the U.S. should argue that the Chinese have violated the terms of the U.S.-China Investment Guaranties Agreement by going into selective default.[243] Here, under the doctrine of "pacta sunt servanda,"[244] the U.S. should argue that claiming selective default on the Hukuang Bonds is a violation of the U.S.-China Investment Guaranties Agreement. The U.S. should explain that under the successor government doctrine, the P.R.C.'s refusal to repay the Hukuang Bonds implies that the P.R.C. is not fulfilling its contractual

239. *See White Paper: The Taiwan Questions and China's Reunification in the New Era*, *supra* note 170 (explaining that starting in 1949 the P.R.C. shall enjoy and exercise China's full sovereignty, which includes its sovereignty over Taiwan); Buchheit et al., *supra* note 184, at 1203 (stating, "among the purported exceptions to the general rule of state succession are what have been labeled 'odious debts'").

240. *See* Buchheit et al., *supra* note 184, at 1203 (defining odious debts as part of the exceptions to the general rule of state succession).

241. *See id.* (suggesting that a successor government could legally reject the loans incurred by the previous regime).

242. *See* Huang, *supra* note 1, at 8 (noting that the Hukuang Railways consisted of two railway routes uniting central China with its coasts).

243. *See* Gilles de Margerie & Hubert de Vauplane, *A Defective Default: Keys to Understanding the Sovereign Debt Crisis - Part 1*, 6 L. & FIN. MKT. REV. 114, 121 (2012) (defining selective default as "a situation where an issue is in default as regards some but not all instruments issued by it").

244. *See* Hans Wehberg, *Pacta Sunt Servanda*, 53 AM. J. INT'L L. 775, 775 (1959) (explaining that *Pacta Sunt Servanda* is the moral sanctity of contracts meaning agreements must be kept).

responsibility.[245]

B. THE U.S. SHOULD REQUEST THE P.R.C. FOR A DEBT SWAP

Second, the U.S. should attempt to offset existing U.S. treasury debt to China by arguing a debt swap.[246] The Hukuang Bond debt has appreciated to USD $1.6 trillion in value.[247] Here, the U.S. should purchase the Bonds from private Americans and use it to reduce outstanding U.S. debt held by China. For example, if China does not have $1.6 in cash to pay off the Hukuang Bonds directly, then the U.S. should issue a debt-equity swap.

C. THREATEN ECONOMIC DECOUPLING

As a final option, the U.S. should follow Margaret Thatcher's example and threaten economic sanctions if the P.R.C. refuses to repay the Hukuang Bonds.[248] Margaret Thatcher was successful because she claimed the U.K. would cease all trading activity with the P.R.C. unless it complied with the U.K.'s demands.[249] Although the U.K. was able to get China to cooperate, this recommendation is unlikely to succeed today for two reasons. First, when Margaret Thatcher did this in the 1980s China was a much weaker economic player, so cutting off relations with China was more economically feasible.[250] China is currently the world's second-largest economy, and cutting off relations with China could lead to war, or a major shift in the global order.[251] Second, economic decoupling would have significant

245. *See id.* (explaining that without the principle of good faith and the binding force of contracts, international law would be entirely destroyed).

246. James Chen, *What Is a Debt/Equity Swap?*, INVESTOPEDIA (June 30, 2021), https://www.investopedia.com/terms/d/debtequityswap.asp (explaining a debt swap is a transaction in which the obligations or debts of the individual are exchanged for something of value, namely equity).

247. *See* Kaminska, *supra* note 52 (citing to Tennessee-based Jonna Bianco who heads the American Bondholders Foundation).

248. *See* Hale, *supra* note 161 (noting that for China to have access to U.K. capital markets, Thatcher said it had to honor the defaulted Chinese sovereign debt held by British subjects).

249. *See id.* (noting that China agreed when faced with Thatcher's ultimatum).

250. *See id.* (citing to the year 1987 when China was in a different economic position).

251. *See* David Laufman et al., *Where We Are in the US Trade Secret Crackdown*

repercussions on the U.S. economy.[252] The U.S. relies on China for a wealth of goods and services, and without access to the Chinese market, the U.S. could damage itself more than punish China.[253]

V. CONCLUSION

The People's Republic of China (P.R.C.) is in selective default for refusing to repay private investors from the Hukuang Railway Bond default of 1911. As the successor government, the P.R.C. retains the legal rights and obligations of the preceding government and is the legal inheritor of these debts. Because the successor government doctrine is customary international law, the P.R.C. is in violation of customary international law and should be forced into arbitration through the U.S.-China Investment Guaranties Agreement arbitration clause from 1980. This would provide a peaceful mechanism for American investors or the U.S. government to recoup decade-old losses.

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on China, LAW 360 (May 29, 2020), https://www.law360.com/articles/1275219 (stating that China is the world's second largest economy and one of the US' largest trading partners); Hugo Dixon, *Economic War with China would be MAD*, REUTERS (Feb 14, 2023), https://www.reuters.com/breakingviews/economic-war-with-china-would-be-mad-2023-02-14 (explaining that China could confiscate $1.9 trillion of Chinese assets and $1.2 trillion of portfolio investments held by foreigners).

252. *See* Dixon, *supra* note 251 (stating that trade in goods between China and the US reached $691 billion).

253. *See id.* (stating that China could even cut off non-strategic trade between America's allies and China with exception of oil).