ESSAY

THE VIENNA CONVENTION ON THE LAW OF TREATIES AND THE NOTION OF HARDSHIP

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I. INTRODUCTION

International Treaty Law is based on the cements of the formal promise: the *Pacta Sunt Servanda*. Once given the promise to fulfill the convened obligation, there is no way back. Nor can the consent be withdrawn unilaterally, neither can the object of the promise be changed without the consent of the other party. Yet, modern contract Law is based on the economical/commercial operation that is covered by the contract. One party may change the agreed terms if the purpose is to save the operation. Treatises are 19th century formalistic creatures; contracts are 21st century functional operations. This clash between "old" Law and "modern" Law has been emphasized during the Covid-19 pandemic.[3] There has been a lot of debate about the consequences of the crisis on the enforcement of commercial contractual obligations. The typical case is in which the debtor can no longer meet his payment obligation. In

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[3] We are going to use the terms of Corona virus and Covid-19 indistinctly. The Corona virus is the agent that causes the disease called Covid-19 (Corona Virus Disease; and 19 for the year it emerged (2019).

this context, various concepts have been invoked such as *force majeure*, the theory of unforeseen circumstances, or hardship. The foregoing can be reflected in the field of International Law, with the situation in which a State can no longer comply with what has been agreed with another State. Common examples of such non-compliance include, but are not limited to, loans, compensation, payment of quotas to international organizations, or an enforcement of an arbitration award.[4] Indeed, due to the unforeseen epidemic, the State had to restructure its budget. Not only did it have to inject money into hospitals, health security materials, medical stuff wages, etc., but it also had to implement financial packages to relaunch the economy, and support companies in the interim. In the same way, an ever-increasing number of unemployed workers had to be financially supported, in addition to various other expenses. Under these conditions, the State can decide that it prefers not to pay back its debts with the other State, and take that money for the safeguarding of its citizens. This "unforeseen" budget can be fatal for countries that have a high level of debt.[5] For instance, Sri Lanka's external debt constitutes 48% of its budget; 41% for Lebanon; 43% for Angola; 38% for El Salvador.[6]

Now, let us take as a premise that the State, in good faith, does not have the position of not fulfilling its obligation anymore, but that for the moment it simply cannot. The State does not know from when it will be again able to comply, and is aware that the delay in payment can

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[4] *Cf* G20 agrees debt relief for low income nations, Financial Times, 04/15/2020, https://www.ft.com/content/5f296d54-d29e-4e87-ae7d-95ca6c0598d5.

[5] *From the Great Lockdown to the Great Meltdown: Developing Country Debt in the Time of Covid-19*, UNCTAD, 2020, https://unctad.org/en/PublicationsLibrary/gdsinf2020d3_en.pdf.

[6] https://www.voanews.com/economy-business/coronavirus-crisis-fuels-push-forgive-poor-countries-debts, https://www.voanews.com/economy-business/coronavirus-crisis-fuels-push-forgive-poor-countries-debts

generate interest. For these reasons, the State will attempt to renegotiate its treaties with other States to more precisely adapt its obligations to the current and future circumstances. It should be noted such a hypothesis does not include the conclusion of a new treaty. The bases are firm and immovable by the will of the parties. It is more the enforcement terms and the interest rates that have to be reviewed. Therefore, it is not about a modification of the treaty, but rather its adaptation to the new realities. Such a situation is commonly called "hardship". The best example is art. 6.2.2 of the Unidroit Principles of International Commercial Contracts ("Unidroit Principles"), which establish that a fundamental change in circumstances that causes an imbalance in the contract and generates an excessive financial burden for one of the parties, obliges both parties to renegotiate the contract.[7]

However, we consider hardship much more broadly, eliminating the concept of excessive onerousity from the Unidroit Principles' definition, to consider hardship as an imbalance of the contract caused by a fundamental change in circumstances. The definition adopted corresponds

[7] "There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party."

to the general principle of international trade as attested by Trans-lex Principle No. IV.6.7[8] and which implies a positive renegotiation obligation.

Now, it is obvious that if both parties agree to simply temporarily suspend the treaty, or to renegotiate the conventional terms, [9] there is no legal problem. But what if, for example, the counterpart refuses to renegotiate? Or simply does consider that there is no "fundamental" change in circumstances? Can a renegotiation obligation be imposed on the creditor, if the circumstances have in fact changed? If not, can the International Court of Justice ("ICJ") adapt the treaty to the new realities? Is there such a principle or rule also for international treaties? In order to give the right answers, we will analyze the pertinent regulation, namely, the Vienna Convention on the Law of Treaties ("VC"), [10] international customary rules, and the draft

[8] https://www.trans-lex.org/935000/_/duty-to-renegotiate/: "Each party has a good faith obligation to renegotiate the contract if there is a need to adapt the contract to changed circumstances and the continuation of performance can reasonably be expected from the parties." See also in the framework of the Vienna Convention on the International Sale of Goods, the Belgian decision which establishes, although said international instrument does not explicitly foresee it, in the case of hardship there is an obligation to renegotiate, since it is a general principle of international trade (art. 79 y 7): Cour de cassation, *Scafom International*, 19 June 2009. See also: Julie Dewez *et al*., *The Duty to Renegotiate an International Sales Contract under CISG in Case of Hardship and the Use of the Unidroit Principle*, European Review of Private Law, 19 (2011) 101 ; Mauricio Almeida Prado. *Le hardship dans le droit du commerce international* (2003).

[9] See the decision to suspend payment obligations of the G20, 15 Abril 2020; o China's June 8, 2020 decision to bilaterally suspend reimbursement due from 77 countries.

[10]We will continue to refer to VC, without invoking the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, insofar as the provisions are identical for our topic.

Articles on State Responsibility for Internationally Wrongful Acts ("the ILC Articles") [11] (III). However, first we will eliminate all the mechanisms that seem similar to a hardship, but are not, such as *force majeure* (II).

II - INOPERANT MECHANISMS

The Vienna Convention does not expressly speak about *force majeure* or hardship, but the provisions of art. 61 and 62 VC are similar concepts. Even so, neither the *force majeure* provided by the first mentioned article (A) nor the "false" hardship established in the second cited article (B) are applicable to our hypothesis.

A. Force majeure

[11] Text adopted by the International Law Commission at its fifty-third session in 2001.

In the Vienna Convention there is no such thing as a pure concept of *force majeure* as we usually know. [12] Art. 61 VC speaks of an impossibility of execution of the object. It is a restrictive *force majeure*, because its definition does not cover all possible cases, given that it is only a question of the "permanent disappearance or destruction of an object indispensable for the execution of the treaty." [13] Therefore, in the hypothesis of a financial obligation impossible to fulfill due to the Covid-19 crisis, one cannot speak of the disappearance or destruction of the money. The financial capacity itself continues to exist, but due to circumstances, the money has to go to the Health sector, for example, instead of repaying the amounts owed.

However, the concept of *force majeure* is also recognized by Customary International Law, and codified in art. 23 of the ILC Articles in a broader way. Now, there is no place to analyze its dispositions since, according to the *Rapporteur* of the ILC Articles, James Crawford, *force majeure* is not applicable just because compliance with the obligation is more difficult due to the economic crisis:

> force majeure does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis. Nor does it cover situations

[12] For a detailed study of the concept of *force majeure*, see: *"Force majeure" and "Fortuitous event" as circumstances precluding wrongfulness: Survey of State practice, international judicial decisions and doctrine - study prepared by the Secretariat*, Yearbook of the International Law Commission, Vol. II, Part 1 (1978) 69, #13.

[13] It is worth to mention that a Mexican proposal to expand art. 61 VC to extend it to all cases of *force majeure* was ruled out at the Vienna Conference for fear of seriously compromising the security of conventional relations between States (Yearbook of the International Law Commission, Vol. II, Part 1 (1978) 88).

> brought about by the neglect or default of the State concerned, even if the resulting injury itself was accidental and unintended.[14]

And international case law goes in the same direction. In the matters of the *Serbian*[15] and *Brazilian Loans*, [16] the Permanent Court of International Justice ("PCJI") considered that no matter how serious the financial situation of a State is, there is no "material" impossibility of complying with a financial obligation. Thus, in the *Brazilian* case, the Court said:

> The economic dislocation caused by the Great War has not, in legal principle, released the Brazilian Government from its obligations. As for gold payments, there is no impossibility because of inability to obtain gold coins, if the promise be regarded as one for the payment of gold value. The equivalent in gold value is obtainable.[17]

In the same way, the Rainbow Warrior Tribunal set forth:

> New Zealand is right in asserting that the excuse of force majeure is not of relevance in this case because the test of its applicability is of absolute and material impossibility, and because a circumstance rendering performance more difficult or burdensome does not constitute a case of force majeure.[18]

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[14] ILC Commentary, Art.23, #3

[15] PCIJ, *Payment of Various Serbian Loans Issued in France*, 12 July 1929.

[16] PCIJ, *Payment in Gold of Brazilian Federal Loans Contracted in France*, 12 July 1929.

[17] #66.

[18] Ad hoc, *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, 30 Abril 1990, #77.

We do not agree with such interpretations. Actually, we must start with the general principle of Law *ubi lex non distinguit nec nos distinguuere debemus*, and consider that there is not really an argument to consider that monetary obligations do not fall within the assumptions of the Vienna Convention on the suspension of compliance. If it is true that art. 32 of the Vienna Convention stipulates that the preparatory work for the interpretation of a convention can be taken into consideration, which indicates that the proposal to expressly include the hypothesis of monetary obligations was rejected, [19] it is also a fact that the means of interpretation of the *travaux préparatoires* are only complementary, if the sense of the disposition is "ambiguous" or "obscure". An interpretation in good faith, ordered by art. 31 VC, cannot claim that the term "obligation" is obscure. This is any international treaty obligation. Nevertheless, even if *force majeure* is applied to financial obligations, it remains to define the distinction between impossibility and difficulty of fulfilling the obligation. Thus, in the matter of the *Russian Compensations*, the PCA judged:

> It is indisputable that the Sublime Porte proves, by means of the exception of force majeure that Turkey was, from 1881 to 1902, in the midst of financial difficulties of the utmost seriousness, combined with domestic and foreign events (insurrections, wars) which forced it to make special disposition of a large part of its revenues, to submit to foreign control of a part of its finances, to even grant a delay in payment to the Ottoman Bank, and, generally, it could satisfy its obligations only through delay and postponements, and even then at great sacrifice. But it is asserted, on the other hand, that during this same period and especially following the establishment of the Ottoman Bank, Turkey was able to obtain some loans at favorable rates, to redeem other loans, and, finally, to pay off a large part of its public debt, estimated at 350,000,000 francs. It would clearly be exaggeration to allow that the payment (or the securing of a loan for the payment) of the comparatively small sum of about six million francs due the Russian claimants **would imperil**

[19] *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26/03-24/05/1968*, doc. A/CONF.39/11, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, 62nd Meeting of the Committee of the Whole, pp. 361-365.

> **the existence of the Ottoman Empire or seriously compromise its internal or external situation. The exception of force majeure cannot, therefore, be accepted[20].**

The coronavirus crisis probably does not make it impossible to pay the contracted debts, but it renders the payment obligation more difficult. That is why *force majeure* does not allow us to solve our hypothesis. Hence, we have to think of another concept like hardship, which is foreseen by the Vienna Convention but in an erroneous way.

B. The "hardship" of the Vienna Convention

Art. 62 VC provides as a cause of termination or suspension of the treaty if there is a "fundamental" change of circumstances, which was not "foreseen" at the time of the conclusion of the treaty, and that those circumstances now changed, and had constituted "an essential basis of the consent" of the parties to be bound by the treaty, and that change has the effect of modifying "radically" the scope of the obligations that still have to be fulfilled under the treaty.[21] The suspension of a payment obligation can help the debtor State, however, it does not solve the many problems such as the suspension period, late payment interests, among others. And the Vienna Convention does not provide for any obligation to renegotiate the terms of the treaty. The ICJ confirmed in its *Gabcikovo* ruling that art. 62 VC is a very limited exception to the *pacta sunt servanda* principle, which continues to be the fundamental axiom of the Law of Treaties:

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[20] *Russia vs Turkey*, Award, 11 November 1912 (the emphasis is our).

[21] Heche, Aymeric, *Les conditions d'appication de la clausula rebus sic stantibus*, RBDI (2014) 322.

> The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.[22]

Bottom line, it seems clear that our idea of hardship does not fit into the Vienna Convention. That does not mean, though, that in positive Law there is no other mechanism that allows to introduce our proposal.

III - THE OPERATING MECHANISM

The cornerstone of the Law of treaties is the *pacta sunt servanda*, a maxim attributed to Hostiensis, a thirteenth-century Catholic cardinal. 700 years later, it is to be considered that contracts and treaties are no longer morally binding acts. They are operations that have to be carried out, no matter the circumstances. Or rather, if there is a change in circumstances that alters the content of the agreed obligations, it is necessary to be able to adapt these terms to the new realities. As Éric Fokou writes, the contract-obligation is today the contract-operation. [23] Indeed, the purpose of the contract is to make it operational, to adapt it to the socioeconomic objective pursued by the parties, which is done by going beyond the abstract legal reality that constitutes the pact of wills. In other words, what counts is that the economy of the contract, which represents the material and non-psychological content of the contract. So, contrary to the *pacta sunt servanda* postulate of the Vienna Convention, it is not about focusing on the execution of the agreed obligation in the treaty, but rather, what matters is the realization of the projected

[22] #104.

[23] Fokou, *L'apport épistémologique de la notion d'économie du contrat en matière d'interprétation*, Les Cahiers de Droit (2016) 715.

socioeconomic operation. Embodied in our hypothesis at the beginning, it is then not so much that on that agreed date the State reimburses the credit, but that the credit is reimbursed. That is why the solution to our problem seems to lie in the doctrinal principle elaborated by Gentilis in the 16th century, *omnis conventio intelligitur rebus sic stantibus*. Supposing that such a principle exists in positive Law (A), the problem of identifying a rule of International Law that forces the parties to renegotiate the treaty would still remain (B).

A. The affirmation of the rebus sic stantibus

The *rebus sic stantibus* is considered complementary to the principle of the *pacta sunt servanda*. Each treaty includes an implicit *rebus sic stantibus* clause, as Oppenheim wrote:

> every treaty implied a condition that, if by any unforeseen change of circumstances an obligation provided for in the treaty would imperil the existence or vital development of one of the parties, it should have a right to demand to be released from the obligation concerned.[24]

Professor Kiss, too, argued that an express clause of *rebus sic stantibus* is not required in treaties because it is understood. [25] To support his claim, he adds a *dictum* from a French commercial court:

> In any international treaty, the resolutory condition is always implied in the event that the essential conditions of the treaty could no longer be performed by one of the contracting parties.[26]

[24] *International Law*, 8va ed,, 1955, #53.

[25] Alexandre Kiss, *L'extinction des traités dans la pratique française*, AFDI (1959) 784, 798.

[26] Revue critique (1937) 95; RGDIP (1938) 497.

In turn, Basdevant in his arguments before the PCIJ in the *Zones franches* case established it without any doubt:

> *C'est une règle reconnue du droit international que les obligations internationales résultant d'un traité sont rendues caduques par le changement des circonstances, lorsque, du moins, ce changement a un caractère suffisamment important*.[27]

However, in our opinion we are talking about apples and oranges. Basdevant speaks of a "rule", which therefore always applies; Kiss speaks of an implicit *rebus sic stantibus* clause, which then is a reversible contractual presumption; and the French Commercial Court speaks of an implicit termination clause; the latter being the most common understanding of the concept.[28] In reality, the idea of *rebus sic stantibus* is not necessarily to terminate the contract or treaty, but to be able to change the terms of the contract to adapt it to new circumstances.[29] The hardship in our conception.

That said, it remains to be clarified whether it is then a customary rule or a contractual presumption. The Special *Rapporteur* for the project of the Vienna Convention opted for a rule.[30] If it were a rule, it would be a customary rule, which would imply the need for the *opinio juris* of

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[27] Exposé de M. J. Basdevant, représentant le Gouvernement français à la séance publique du 20 avril 1932 de la Cour permanente de Justice internationale (*Affaire des zones franches*), C.P.J.I., Série C, n° 58, p. 405.

[28] Cf the numerous examples quoted by: Julian Kulaga, *A Renaissance of the Doctrine of Rebus Sic Stantibus?*, International and Comparative Law Quarterly, (2020)*69*(2), 477.

[29] David J. Bederman, *The 1871 London Declaration, Rebus Sic Stantibus and a Primitivist View of the Law of Nations*, AJIL (1988) 1, 29.

[30] Summary record of the 694th meeting, *op. cit*., #11.

the States. The CJEC expressly recognized the customary nature of the *rebus sic stantibus*,[31] as well as the ILC. [32] As for the ICJ, it is oddly that it seems to be custom:

> The Court has no need to dwell upon the question of the applicability in the present case of the Vienna Convention of 1969 on the Law of Treaties. It needs only to be mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention **might be** considered as a codification of existing customary law. The Court takes the view that in many respects this applies to the provisions of the Vienna Convention concerning the termination and the suspension of the operation of treaties, set forth in Articles 60 to 62;[33]

and adds:

> The Court recalls that, in the *Fisheries Jurisdiction* case, it stated that "Article 62 of the Vienna Convention on the Law of Treaties, . . . may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances".[34]

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[31]CJEC, *A. Racke GmbH & Co. contre Hauptzollamt Mainz*, 16 June 1998, #53.

[32] *Fisheries Jurisdiction (United Kingdom v Iceland), Jurisdiction,* 02 February 1973*, #36; Fisheries Jurisdiction (Federal Republic of Germany v Iceland), Jurisdiction,* 02 February 1973*, #36; Gabčikovo-Nagymaros Project (Hungary/Slovakia), 25* September1997*, # 46, 99, y 104.*

[33] *Gabcikovo*, #46 (the emphasis is our).

[34] *Gabcikovo*, #104 (the emphasis is ours).

Lately, the government of the United Kingdom also considered about the Brexit that the *rebus sic stantibus* is a rule of general International Law. [35]

This having said, it is not enough to state that the *rebus sic stantibus* rule exists. It is necessary to see how this clause entails an obligation to renegotiate in order to modify some clauses of the treaty, without terminating it.

B. The obligation to renegotiate

Paul Reuter in his time considered that the VC can give way to a negotiation obligation within the framework of art. 61:

> Rather than saying that the fundamental change in circumstances means that the treaty becomes null and void, it would be more truthful to say that it entails an obligation on the parties to negotiate. [36]

In other words, the *rebus sic stantibus* is a rule, and should result in a renegotiation, and not simply in a termination. Good faith dictates renegotiation. Nonetheless, it must first be emphasized that there is no *a priori* general obligation to negotiate in International Law,[37] as the

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[35] *Exclusive: The Geoffrey Cox legal advice that Theresa May hopes will save her Brexit deal*, The Telegraph, 18 March 2019, https://www.telegraph.co.uk/politics/2019/03/14/exclusive-geoffrey-cox-legal-advice-theresa-may-hopes-will-save/.

[36] Paul Reuter, *Introduction au droit des traités (*1985) #293.

[37] Jean Combacau & Serge Sur, *Droit international public* (13 ed., 2019) 604.

ICJ said in the case of Bolivia against Chile on *the Obligation to Negotiate Access to the Pacific Ocean*.[38] In addition, art. 33 of the United Nations Charter is not applicable in our hypothesis, unless there is an endangerment of the maintenance of international peace,[39] which is hardly imaginable in our case. And even so, if there is a risk of conflict, there is no obligation to negotiate as is, but only an obligation to peacefully resolve the dispute*:*

> The obligation imposed by the UN Charter is to settle disputes by "peaceful means". One such means is negotiation, but there are many others, and there is no obligation to negotiate in preference to pursuing other means of peaceful settlement of disputes.[40]

However, the principle of good faith exists in a general way: [41]

> One of the basic principles governing the creation and performance of legal obligations... is good faith. Trust and confidence are inherent in international cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential. Just as the very rule of pacta sunt servanda in the law of treaties is based on good faith…;[42]

and especially in the Vienna Convention:

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[38] 01 October 2018, #165.

[39] "Furthermore, any obligation arising under Article 33 of the UN Charter applies to disputes "likely to endanger the maintenance of international peace and security", a condition which is plainly not met in this case"; *Obligation to negotiate access to the Pacific Ocean (Bolivia vs Chile)*, Rejoinder of Chile, 15 September 2017, #2.7.

[40] *Idem*, #2.5.

[41] Robert Kolb, *Good Faith in International Law* (2017).

[42] *Nuclear Tests Case,* 20 December 74, # 46.

> *Noting* that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized.[43]

In the matter of the *Access to the Pacific Ocean*, the international Court established:

> 91. In international law, the existence of an obligation to negotiate has to be ascertained in the same way as that of any other legal obligation. Negotiation is part of the usual practice of States in their bilateral and multilateral relations. However, the fact that a given issue is negotiated at a given time is not sufficient to give rise to an obligation to negotiate. In particular, for there to be an obligation to negotiate on the basis of an agreement, the terms used by the parties, the subject-matter and the conditions of the negotiations must demonstrate an intention of the parties to be legally bound. This intention, in the absence of express terms indicating the existence of a legal commitment, may be established on the basis of *an objective examination of all the evidence*.

We do not think that the existence of a good faith obligation could be denied in our hypothesis. In effect, what the Court says is that an alleged obligation must have a source, and that source must be proven. This gives us, in our case study, first, the existence of a treaty, second the principle of good faith, third the customary rule of *rebus sic stantibus*, and finally, the necessary and corollary *bona fide* principle that gives rise to the obligation to renegotiate if the circumstances have fundamentally changed. The Hague Court does not say otherwise, when it decrees in its *Gabcikovo* judgment:

> 142. What is required in the present case by the rule pacta sunt servanda, as reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties, is that the Parties find an agreed solution within the cooperative context of the Treaty.

[43] Third Consideration VC.

The aforementioned duty of cooperation is also inherent in the *pacta sunt servanda*, as repeated by the World Court in the *Whaling* case:

> 240. The Court observes that paragraph 30 and the related Guidelines regarding the submission of proposed permits and the review by the Scientific Committee (currently, Annex P) must be appreciated in light of **the duty of cooperation** with the IWC and its Scientific Committee that is incumbent upon all States parties to the Convention, which was recognized by both Parties and the intervening State[44];

And when a treaty is no longer functional under the new circumstances, the duty of cooperation strongly implies the obligation to sit at the table and discuss the new modalities of the treaty. That in particular that the vast majority of the treaties are relational and non-transactional.[45] As Macneil says, in the former, instead of competing, the contractors seek to cooperate for mutual benefit.[46] And that cooperation is not only a practical way to move forward, it is also a legal obligation inherent in the *pacta sunt servanda* doctrine. The same applies to treaties, since the

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[44] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening),* 31 March 2014 (the emphasize is our).

[45] Corinne Boismain, *Les contrats relationnels* (2005).

[46] *The New Social Contract: An Inquiry into Modern Contractual Relations* (1980).

ICJ recognized in its *Advisory opinion on Namibia* that treaties are "living instruments";[47] position confirmed by the *Whaling* ruling.[48]

Overall, good faith and the subsequent principle of the duty of cooperation require that, if the requirements of art. 62 VC as international custom, and instead of suspending or terminating the treaty, there is an international obligation for the parties to renegotiate the treaty to adapt it to new circumstances. The foregoing does not contradict the position taken by the International Court in the matter of *Access to the Pacific Ocean*, which denies the existence of a general obligation to negotiate. "Our" obligation to renegotiate has a specific source, the treaty itself.

With regard to the ICJ's faculty to adapt the treaty, the route that seems to us the most appropriate is that of an *ex aequo et bono* action, as provided by art. 38.2 of the Statute of the International Court, requesting the Court to review and adapt the treaty. [49]

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[47] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* 21 June 1971. See: Daniel Moeckli & Nigel White, *Treaties as "living instruments"*, *in*: Dino Kritsiotis & Michael Bowman, Conceptual and contextual perspectives on the modern law of treaties (2018) 136.

[48] *Whaling…, op. cit*., #83 y 240. For a study how interpretative rules permit to "read" a treaty as a living instrument: Linderfalk, *On The Interpretation of Treaties.The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007).

[49] *Contra*: The seized court could not in any case decide itself what modifications should be made to the treaty, since such a power clearly exceeds the scope of the judicial function, but it could, on the other hand, decide that the treaty lapses in the case where it would be the State concerned with the maintenance of the old treaty which would not have satisfied the obligation to negotiate, or, on the contrary, decide to maintain the treaty when it would be the State requesting the modification which had not exhausted his duties to negotiate(Reuter, *op. cit*., #295).

IV. CONCLUSION

It cannot be established in a general and abstract way in which case a non-compliant State would have an excuse with regard to the Covid-19 crisis. Indeed, in the first place, the reactions of the States to the crisis were and are too different. Between efficiency and a relatively quick control of the situation,[50] and an attitude that ignores the seriousness of the situation;[51] between small countries and large countries;[52] between the general age of the population[53] and the diet;[54] etc., it is very difficult to predict which State can deviate from its conventional obligation without responsibility. To that is added, that each one can interpret the facts from different angles. Thus, with respect to the "bankruptcy" of Argentina, two arbitral tribunals had an oppositional view on the same facts. In 2005, the *CMS* Tribunal considered that Argentina did contribute to the

[50] Following the information available in the press: Taiwan, New Zeeland, etc. (The Best Global Responses to the COVID-19 Pandemic, 1 Year Later, Time, 23 February 2021, https://time.com/5851633/best-global-responses-covid-19/).

[51] US, Mexico, Brazil.

[52] Uruguay has a controlled situation with an approximative population of 3,5M, meanwhile the US have, for instance, a population of 328M habitants.

[53] Like for example Florida with some 20% of the population above 65 years. (https://www.prb.org/which-us-states-are-the-oldest/).

[54] A 10 % of Mexico's population has diabetes (http://www.pmfarma.com.mx/noticias/1359-los-numeros-de-la-diabetes-en-mexico.html).

financial crisis that it had, [55] while 18 months later, the *LG&E* Tribunal, on the same facts, considered that Argentina did not contribute to said crisis.[56]

If we eliminate all the justifying causes for the termination of the treaty, we are left with the assumption of the *rebus sic stantibus*. There is no doubt that there is a "fundamental" change in circumstances due to the coronavirus crisis, which in a certain way was not "foreseen" at the time the treaty was signed (in the event that it intervened before the crisis), and that those circumstances have now changed dramatically. If it is a treaty involving a monetary obligation, there is no doubt that under Customary Law the circumstances constitute "an essential basis for the consent" of the parties to be bound by the treaty, and that change has the effect of modifying "radically" the scope of obligations still to be fulfilled under the treaty. The problem consists of measuring the financial impact of the crisis on the payment capacity of the Debtor State. In fact, if in theory a State always has money, its distribution is a different matter. If governments have to choose between meeting a payment obligation by virtue of a financing reimbursement, or directing that money to the protection of the health of citizens, it is understandable that the latter has to prevail. If the evidentiary material is sufficient, the State can invoke the obligation of good faith of the other State to renegotiate the terms to pay. However, if the counterpart objects and considers that there was no fundamental change in circumstances,[57] the ICJ could be requested to

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[55] *CMS Gas Transmission Company v. Argentina*, Award, 12 May 2005.

[56] *LG&E Energy Corp, LG&E Capital Corp, and LG&E International Inc v. Argentina*, 3 October 2006.

[57] *Fisheries Jurisdiction (United Kingdom v. Iceland), op.cit.* Notwithstanding fundamental change of circumstances, a unilateral act is not opposable to the others. It means in our hypothesis two options are possible. The State notifies its suspension of payment explaining the fundamental change of circumstances and the Creditor accepts: we would

acknowledge such change, and order the counterpart to open negotiations. In the event that the negotiations were not successful, it would be the ICJ that could have the power, under the customary rule of *rebus sic stantibus*, to adapt the treaty to the new circumstances. It should be noted, though, that given the World Court's procedural times, such legal action is not the best solution. Ideally, the parties could accept arbitration, which, within reasonable time limits, could order the adaptation of the treaty to current and future circumstances.[58] Thus, the "economic operation" covered by the treaty would be saved, and both parties would be able to obtain the expected benefits, but not in the expected terms of origin. However, as the saying goes, a bad settlement is better than a good lawsuit.

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then have a mutual agreement. Or the creditor State rejects that the change of circumstances was fundamental, and then only a judge or an arbitrator will be able to decide whether or not there is such a change.

[58] An arbitral tribunal has, at least, the power to adapt a contract if there is the consent of the parties to do so (Ad hoc, *Kuwait v. The American Independent Oil Company (AMINOIL)*, 24 march 1982, 21 ILM 976.