

EXCEPTIO NON ADIMPLETI CONTRACTUS AND A PROBLEM OF OVERINCLUSIVENESS IN INTERNATIONAL LAW

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Abstract

This article discusses the problem of diversification of grounds for treaty suspension in international law, focusing specifically on *exceptio non adimpleti contractus* (exception of non-performance), which is a defence allowing the party to refuse the performance of an obligation under the legal instrument if the other party has not performed its respective reciprocal obligation. In contrast to the leading opinion, *exceptio non adimpleti contractus* not only exists in public international law but also creates a tangible problem of its overinclusiveness. In conjunction with clearly formulated grounds for treaty suspension in treaty law and the law of state responsibility, *exceptio non adimpleti contractus* enables States to extricate themselves from inconvenient treaty obligations without the burden of stiff limitations of binding rules of international law. The fluidity of *exceptio non adimpleti contractus* is aggravated by the fact that very few cases of its application by States have been evaluated by international tribunals. This allows States to overindulge in applying it as an unjustified means of last resort. A commonly used normative approach will not help in treating legal loopholes like the one represented by *exceptio non adimpleti contractus*. This article posits that the most practical strategy to tackle the problem of overinclusiveness of international law is to rely on 'reversible rewards' or 'sticks and carrots' found at the intersection of international law and behavioural economics.

Key words

exceptio non adimpleti contractus, treaty suspension, overinclusiveness, behavioural approach

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Introduction

The stability of treaty relationships is the core of the international legal order because it directly influences the readiness of States to cooperate more in pursuing international peace and security. Not only termination but even a suspension of a treaty partly or in entirety can damage a fragile equilibrium of treaty powers.

The wide range of lawful reactions to the non-performance of treaties includes not only treaty termination and suspension under the law of treaties but also countermeasures under the law of State responsibility. Despite the existing delineation of treaty law responses and countermeasures in the practice of international courts and legal literature, States still mix them to justify their non-performance. Beyond that, they also can apply *exceptio non adimpleti contractus* or the exception of non-performance (hereinafter — *exceptio*). In public international law, it is a defence that allows to refuse the performance of an obligation under the treaty if the other party has not performed its respective reciprocal obligation. *Exceptio* is so unclear that some even deny its existence.¹ Often used as a defence of last resort *exceptio* vividly illustrates why such diversification of grounds for lawful reactions to non-performance of treaties poses a problem in international law.² Thus, the issue of overinclusiveness³ of international law is the primary focus of attention of the authors of this article.

¹ Miron A. *Courses of the Summer School on Public International Law. Vol. 10: Countermeasures and Sanctions*. Moscow : International and Comparative Law Research Center, 2022. P. 24; ICJ. *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece*. Judgment of 5 December 2011, Separate Opinion of Judge Simma // I.C.J. Reports. 2011. P. 708.

² Xiouri M. *The Breach of a Treaty: State Responses in International Law*. Leiden : Koninklijke Brill NV, 2021. P. 276.

³ Overinclusiveness is a feature of international law which owes to the existence of overlapping concepts coming from different sources of international law. Here, overinclusiveness refers to the existence of a wide range of grounds for suspending international treaties, indicating a failure to maintain conceptual boundaries for the suspension grounds.

The authors tackle it in three main sections. The first one focuses on the theoretical approaches to the problem of the variety of grounds for the suspension of treaties, which include the treaty law mechanism of suspension and countermeasures, which belong to the law of state responsibility, the relationship between them and how they overlap with the *exceptio non adimpleti contractus* principle. Here, the authors deliberate whether *exceptio* plays an independent role in justifying lawful non-compliance with treaties whenever reciprocal obligations are affected.

As illustrated in Section II, although it was not mentioned in the final text, *exceptio* has been in the background since the adoption of the Vienna Convention on the Law of Treaties⁴ (hereinafter — VCLT) and the formulation of rules on countermeasures. Yet, as illustrated further, States invoke *exceptio* as a defence of last resort, which demonstrates the problem of the variety of grounds for lawful reactions to the non-performance of treaties under international law. Instead of being descriptive, the authors attempt to provide a critical analysis of the effect of the highlighted problem in the first two sections.

Section III shifts from the critical analysis and digs deeper into the motives of States' compliance with international law. In this regard, the present work is different from other works which examined *exceptio* and the variety of grounds for the suspension of treaties since the authors suggest looking at this problem from the perspective of behavioural international law and economics. This perspective is relatively new and has not yet become as popular as, for example, the rational choice theory; yet, in the authors' view, it correctly reflects the reasons for States' cooperation with each other, including under the framework of international treaties. As concisely put by John Locke: "Good and evil, reward and punishment, are the only motives to a rational creature: these are the spur and reins whereby all mankind are set on work, and guided"⁵. Following the same logic, the authors suggest a solution to the abuse of the overinclusiveness of international law — the 'sticks and carrots' approach. Although it has not been fully formed yet, the authors demonstrate that its progressiveness has a potential for resolving the issue at hand.

1. Suspension of treaty obligations: abundance of grounds

States may rely on different grounds to respond to the other States' breaches. Under the law of treaties, States may respond to prior infringements by suspending international treaties.⁶ Under the custom-based Article 60 of the VCLT, the party may suspend its treaty provisions wholly or partially due to a material breach of its counterparty.⁷ Under the law of State responsibility, States may equally respond by using countermeasures in conformity with limitations set in Articles 49–54 of Articles on Responsibility of States for Internationally Wrongful Acts⁸ (hereinafter — ARSIWA) prepared by the International Law Commission (hereinafter — ILC).

Treaty responses and countermeasures might appear similar since they both are reactions to a breach by another state under certain conditions. Although the International Court of Justice (hereinafter — ICJ) and the ILC came to distinguish countermeasures from treaty law responses, the substantive and procedural limitations of their application overlap, creating a gateway for using whichever is more convenient to justify the suspension of a particular obligation.

Even though the interrelationship between the introduced grounds for treaty suspension is already perplexing, they also can be confused with *exceptio* whose application rules are even less comprehensible. Hence, it deserves special mention for its controversial place and role in international law. Despite its long-term presence in the legal literature, it has been codified neither in the VCLT nor in the ARSIWA. This fact might owe to the continuing uncertainty about the area of international law to which it belongs and its legal nature.

⁴ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331.

⁵ Locke J. *Some Thoughts Concerning Education*. London : Printed for A. and J. Churchill, 1693. Sec. 54.

⁶ Sec. 3 of the VCLT.

⁷ ICJ. *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*. Judgment of 25 September 1997 // I.C.J. Reports. 1997. P. 38.

⁸ *Responsibility for Internationally Wrongful Acts*. Resolution 56/83 of 12 December 2001 adopted by the UN General Assembly at its fifty-sixth session. URL: https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf (accessed: 13.09.2022).

1.1. The origins of the *exceptio non adimpleti contractus* principle

Exceptio is not a rule of international law *per se*—it derives from the civil law system.⁹ Its word-to-word translation is “defence [in the case of] an unfulfilled contract”.¹⁰ Some¹¹ see its roots in Roman law, where it was just and equitable to disregard the claims of a plaintiff who had not performed until such a plaintiff proved that the initial agreement was different.¹² Others sceptically argue that *exceptio* was a creation of postglassators reliant on the canonical maxim of *non servanti fidem non est fides servanta* (eng.: one does not need to hold to his word vis-à-vis those who do not).¹³ Despite the perplexity of these origin-related conundrums, the principle of *exceptio* is still applied in private law.

Under continental contract law, the application of *exceptio* relies on the existence of a synallagmatic agreement. The agreement builds upon the reciprocal obligations of each party. In French law, for instance, it is perceived as the Civil Code’s interpretation of the Law of Talion from the Hammurabi Code: “*droit pour droit’ et ’trait pour trait*”¹⁴ and since 2016 is set in the French Civil Code.¹⁵ In some States, like Romania, *exceptio* is used likewise despite the absence of the rule in written law due to its fundamentality.¹⁶ Finally, *exceptio* is present in Article 71(1) of the 1980 Convention on the International Sale of Goods¹⁷ and Article 7.1.3(1) of the International Institute for the Unification of Private Law (hereinafter—UNIDROIT) Principles.¹⁸ These examples and the Roman formula demonstrate that *exceptio* is more than alive in both national and international private law and mostly remains unchanged.

Similarly, in public international law *exceptio* allows a non-performance of a party to a treaty due to a prior non-performance of a synallagmatic obligation by another contracting State.¹⁹ It flows from a broader principle of *inadimplenti non est adimplendum* that translates “there is no need to perform for one who has not performed”.²⁰ Nonetheless, they are both considered to be the ‘crystallisation’ of the universal principle of reciprocity.²¹ *Exceptio* in public international law is not that different from its private law prototype from private law since treaty-based relations are nothing but a trade of promises. Consequently, a non-performance of a treaty by a party gives rise to a simultaneous right of their counterparty to postpone their performance until primary obligations are respected. As this rule has not been formulated definitively by the international community, there are no additional requirements for its application.

1.2. Debates over the legal nature of *exceptio*

The legal nature of *exceptio* has equally been a matter of controversy for more than a century. Scholars debate whether it is a general principle of law or customary law that forms part of either international law of treaties or state responsibility. The Permanent Court of International Justice (hereinafter—PCIJ) in *Diversion of Water from the Meuse (Netherlands v. Belgium)* was the first to classify it as a general principle of law.²² Dissenting opinions to this judgment were the first to use *exceptio* as an autonomous argument. Judge Anzilotti upheld the Belgian submission that the Netherlands had been the first to breach the treaty and, thus, had lost their right to bring a claim. He was adamant that *exceptio*, being inherently equitable and universally recognised, constitutes a general principle of law recognised by civilised nations in the meaning of

⁹ Fitzmaurice M. *Angst of the Exceptio Inadimplenti Non Est Adimplendum* in *International Law // Exceptions in International Law* ed. by L. Bartels, F. Paddeu. Oxford : Oxford University Press, 2020. P. 286–288.

¹⁰ Fellmeth A.X., Horwitz M. *Guide to Latin in International Law*. Oxford : Oxford University Press, 2022. URL: <https://www.oxfordreference.com/display/10.1093/acref/9780197583104.001.0001/acref-9780197583104-e-747?rskey=BbfMJK&result=674> (accessed: 10.05.2022).

¹¹ Mackeldey F., Dropsie M.A. *Handbook of the Roman Law*. Philadelphia : T. & J.W. Johnson, 1883. P. 313.

¹² Gaius. *Four Commentaries of Gaius on the Institutes of Civil Law*, Commentary IV // *The Civil Law*, I, Cincinnati, 1932. §126, §126a.

¹³ Carbonnier J. *Droit Civil, T. II: les Biens, les Obligations*. Paris : Presses Universitaires de France, 2004. P. 2247.

¹⁴ Ghestin J. *L’exception d’Inexécution: Rapport Français* // Fontaine M., Viney G. *Les Sanctions de l’inexécution des Obligations Contractuelles*. Paris : Bruselas y Paris, 2001. P. 3.

¹⁵ *Code Civil: Version en Vigueur au 26 Septembre 2022*. Articles 1219 and 1220. <https://www.legifrance.gouv.fr/codes/id/LEG-ITEXT000006070721/> (accessed: 10.05.2022).

¹⁶ Căzănel M. *The Functions of the Exception for the Non-performance of the Civil Contract* // *Ovidius University Annals, Economic Sciences Series*. 2014. Vol. 14. № 1. P. 276

¹⁷ *UN Convention on Contracts for the International Sale of Goods*, 11 April 1980, 1489 U.N.T.C. 72.

¹⁸ *UNIDROIT Principles of International Commercial Contracts 2016*. URL: <https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-bl.pdf> (accessed: 13.09.2022).

¹⁹ Xiouri M. *The Exceptio Non Adimpleti Contractus in Public International Law* // *International Community Law Review*. 2019. Vol. 21. № 1. P. 58.

²⁰ Fellmeth A. X., Horwitz M. *Op. cit.*

²¹ Xiouri M. *The Exceptio Non Adimpleti Contractus in Public International Law...* P. 59.

²² PCIJ. *Diversion of Water from the Meuse (Netherlands v. Belgium)*. Judgment of 28 June 1937. Individual Opinion by Mr. Hudson // *P.C.I.J. Series A/B, No. 70*. 1937. P. 77.

Article 38(4) of the PCIJ Statute.²³ The *Meuse* case, thus, indirectly, through its dissenting opinions, was the first to call *exceptio* a general principle of law, which was followed by Judge de Castro in the *South West Africa* case²⁴ and by Sir Gerald Fitzmaurice, the Special Rapporteur on the Law of Treaties, who qualified *exceptio* as a “general international law rule of reciprocity”.²⁵

As *exceptio* has not found its way into either the codified rules of international law or the customs, it is still questionable whether it is a general principle of law. As stated by T. Holland, international law is “private law writ large”.²⁶ Some national legal principles shared by many nations transfer to international law via judges’ *dictum*²⁷ and, thus, become general principles of law in the language of Article 38(1)(c) of the ICJ Statute. Drafting history of the PCIJ Statute reveals their definition. Lord Phillimore defined “general principles” as ones which “were accepted by all nations in *foro domestic*, such as certain principles of procedure, the principle of good faith, and the principle of *res judicata*, etc”.²⁸ Assuming that *exceptio* is indeed a general principle of law due to its origin and applicability around the world, another question persists. Does *exceptio* apply in terms of countermeasures, treaty law responses, or has its own role?

Special Rapporteur Crawford, who, following his predecessors, rejected the possibility of codification of *exceptio* as a reciprocal countermeasure, still labelled it as a part of the law of responsibility. Nonetheless, he refused to mention it at all due to the rising concerns about the risks of the “escalating non-compliance” after giving States an opportunity to breach treaty obligations responsively without the constraints set for countermeasures.²⁹ In other words, drafters of the ARSIWA had an opportunity to qualify *exceptio* as related to State responsibility but they simply chose not to.

One year later, in his third report, Crawford changed his opinion to treating *exceptio* as a primary rule of treaty law.³⁰ In his article of the same year, he elucidated that treaty law is more applicable to *exceptio* as it is *lex specialis* for all questions concerning the non-performance of treaty obligations.³¹ In 2013 he added, after quoting Judge Simma’s dissenting opinion from the *former Yugoslav Republic of Macedonia v. Greece* (hereinafter—*FYROM* case), that “there is no room for recognition of *exceptio* outside the exhaustive provisions on the consequences of a breach in the VCLT Article 60”.³²

The 2011 *FYROM* case is curious due to the line of defence of Greece. It presented three alternatives relying on the law of treaties, the law of international responsibility, and *exceptio*. Arguably, Greece merely played the “pick and choose” game, thus, any reference to autonomous *exceptio* cannot be taken as a rational commitment to a certain theory.³³ Nonetheless, Greece actually was not wrong insisting that there must be something in-between strict options of termination, suspension, and countermeasures.³⁴ It considered it “paradoxical that the victim of a treaty breach has no choice but to suspend or terminate it”.³⁵

To summarise, there are three basic concepts of the nature of *exceptio*: (1) it is a general principle; (2) it is a countermeasure; (3) it is a part of treaty law. The debate is far from being settled but, surprisingly, it rarely includes a discussion on the autonomous place of *exceptio*, like Greece did, as the arguments mostly revolve around its place in either treaty law or the law of state responsibility.

Exceptio’s attribution to the realm of countermeasures is contestable. Under Article 49(1) of the ARSIWA, countermeasures aim to induce compliance of a violating State. *Exceptio* is not used to pressure

²³ PCIJ. *Diversion of Water from the Meuse (Netherlands v. Belgium)*. Judgment of 28 June 1937. Dissenting Opinion of M. Anzilotti // P.C.I.J. Series A/B, No. 70. 1937. P. 50.

²⁴ ICJ. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*. Advisory Opinion of 21 June 1971. Separate opinion of Judge De Castro // I.C.J. Reports, 1971. P. 201.

²⁵ Fourth Report on the Law of Treaties, by Sir Gerald Fitzmaurice, Special Rapporteur, 1959 (A/CN.4/120). P. 70. §102. URL: https://legal.un.org/ilc/documentation/english/a_cn4_120.pdf (accessed: 13.09.2022).

²⁶ Holland T. *Studies in International Law and Diplomacy*. Oxford : Clarendon, 1898. P. 152.

²⁷ ICJ. *International Status of South West Africa*. Advisory Opinion of 11 July 1950. Separate Opinion by Sir Arnold McNair // I.C.J. Reports, 1950. P. 148.

²⁸ League of Nations. *Procès-verbaux of the Proceedings of the Committee: June 16th-July 24th 1920*. The Hague : Van Langenhuyzen Brothers, 1929. P. 335.

²⁹ *Second Report on State Responsibility by Mr. J. Crawford, Special Rapporteur*, 1999 (A/CN.4/498). P. 82. §331. URL: https://legal.un.org/ilc/documentation/english/a_cn4_498.pdf (accessed: 13.09.2022).

³⁰ *Third Report on State responsibility, by Mr. James Crawford, Special Rapporteur*, 2000 (A/CN.4/507). P. 95. URL: https://legal.un.org/ilc/documentation/english/a_cn4_507.pdf (accessed: 14.09.2022).

³¹ Crawford J., Olleson S. *The Exception of Non-performance: Links Between the Law of Treaties and the Law of State Responsibility* // Australian Year Book of International Law. 2000. Vol. 21. P. 74.

³² Crawford J. *State Responsibility: The General Part*. Cambridge : Cambridge University Press, 2014. P. 681.

³³ Fitzmaurice M. *Op. cit.* P. 297.

³⁴ ICJ. *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*. Counter-Memorial of Greece of 19 January 2010. URL: <https://www.icj-cij.org/public/files/case-related/142/16356.pdf> (accessed: 12.09.2022). § 8.7.

³⁵ *Ibid.*, § 8.11.

a counterparty into law abidance. Rather, it is a response that ultimately protects an injured State from the consequences of the initial non-performance on behalf of a breaching State. Thus, its only purpose is to release the injured party from an obligation to perform without receiving its part of a deal. This purpose might be regarded as highlighting the synallagmatic nature of *exceptio*, and, therefore, proving *exceptio*'s relation to treaty law. If each party's rights depend on the fulfilment of the obligation of their counterparty in the framework of treaties, it seems absurd to dispute the interrelationship of the law of treaties and *exceptio*. Nonetheless, other two questions arise: what form does this relationship take? Do treaty law and Article 60 of the VCLT in particular, that contains the principle of reciprocity, subsume *exceptio* or does the latter stand alone?

An answer might be in the existence of procedural conditions for the invocation of the VCLT responses. *Exceptio*, on the other hand, does not demand a prior material breach of a synallagmatic obligation because it is a product of the *quid pro quo* relationship established between parties to a treaty.³⁶ In *FYROM*, Greece referred to it as a "defence against a claim of non-performance of conventional obligation".³⁷ This approach echoes the original margins of application of *exceptio* in national law: it provides a defence against a potential claim.³⁸

Furthermore, *exceptio* must not be mistaken for other forms of contract suspension because it is a "temporary defence" that does not annul a contract or suspend its operation but creates a provisory situation in which an original non-performing party cannot sue its counterparty for doing the same in response.³⁹ It is a contractual self-defence mechanism used by an injured party to fend off claims regarding the mirroring non-performance.⁴⁰ S. Forlati followed the same idea comparing *exceptio* and the content of Article 60 of the VCLT.⁴¹ Unsurprisingly for an Italian scholar familiar with *exceptio* from private law, she draws a bold line between the legal effects of the two. While treaty law on suspension stops the operation of a treaty, *exceptio* leaves treaty obligations in force. Such a view on *exceptio* in public international law is not common, which might owe to the fact that most works on the topic were written by American or British scholars.

It has been established that *exceptio* should be differentiated from its perceived *doppelgängers* from the VCLT and the ARSIWA but its role in international affairs still requires clarification. *Exceptio*, as a defence, does not make part of substantive provisions on the operation of treaties. By its nature, it is not a sword to fight for the integrity of a treaty but a shield to protect a defendant in dispute resolution after it chooses to avoid suffering even more damage than already incurred by the infringement of a treaty by their counterparty. Unfortunately, such conclusions are not easily inferred from the present state of international law. International practice, both judicial and diplomatic, is still choosing to overlook the issue as if it is insignificant or even uncomfortable.

At the same time, States can benefit from the concept of *exceptio* by using it in circumvention of much stricter rules stemming from the VCLT and the ARSIWA. The latter considerably circumscribe States' opportunities to overcome the binding effect of treaty obligations. They are aimed at securing international predictability and cooperation. *Exceptio* exists to protect a non-breaching party to a treaty and does not encroach on the effectiveness of treaties. At the same time, when States impliedly apply *exceptio*, they do not perform their treaty obligations which renders treaty obligations suspended until the initial violator finally performs his part. As *exceptio* does not have any procedural conditions of application, it can be invoked *ad hoc*, i. e. whenever a State needs to address claims but its non-performance does not meet considerably higher thresholds of the VCLT and the ARSIWA. Additionally, as demonstrated further, suspension on the *exceptio* ground may result in the *de facto* termination when the initial wrongful non-performance and the defensive non-performance under *exceptio* bring the treaty relations to a deadlock.

For these reasons, in the circumstances of the absence of a clear demarcation between grounds to suspend treaty obligations *exceptio* certainly should be considered as an alarming addition to possible grounds of suspension of treaty obligations. As it is said, two is a company and three is a crowd. *Exceptio*

³⁶ *Ibid.*, 8.18; Forlati Picchio M.L. *La Sanzione nel Diritto Internazionale*. Padova : Casa Editrice Dott Antonio Milani, 1974. P. 92.

³⁷ *The former Yugoslav Republic of Macedonia v. Greece*, §8.6.

³⁸ Office Notarial de Baillargues. *Exceptio non adimpleti contractus ou exception d'inexécution: dans un contrat synallagmatique, moyen de défense de l'une des parties qui consiste à ne pas exécuter son obligation tant que l'autre contractant n'a pas effectué sa prestation*, 30 July 2019.

URL: <https://www.onb-france.com/actualites/exceptio-non-adimpleti-contractus-ou-exception-dinexecution> (accessed: 14.05.2022).

³⁹ Arnaud L. *Fiches de Droit des Obligations - 6e édition*. Paris : Ellipses, 2019. P. 236.

⁴⁰ Rowan S. *The New French Law of Contract*. Oxford : Oxford University Press, 2022. P. 195.

⁴¹ Forlati S. *Reactions to Non-Performance of Treaties in International Law // Leiden Journal of International Law*. 2012. Vol. 25. № 3. P. 766.

creates a pressing problem of overinclusiveness of grounds to suspend treaty obligations and can be misused with ulterior motives, as demonstrated in Section II.

2. Grounds used by States for responses to prior infringements by others

Although the distinction between the responses to a breach of treaty stem from the clarifications of international bodies, in practice the abundance of grounds to respond to the breaches of treaties leads to their extensive use and even misuse. In this regard, this Section will focus on the representative case law to illustrate the gravity of the problem of overinclusiveness of grounds to suspend treaty provisions.

Prior to the conclusion of the VCLT, States seemed to rely more frequently on *exceptio* as a separate excuse for non-performance. For instance, in 1876, the US president suspended the extradition clause of the 1842 Webster-Ashburton Treaty between the US and Great Britain on the basis that the latter released two fugitives whose extradition was sought by the US.⁴² The suspension was noted in a US Secretary's letter to the UK Secretary of Treasury which mentioned that "a continued violation of a treaty provision by one of the contracting parties will justify the other in regarding the provision as temporarily suspended"⁴³. The US suspended its synallagmatic obligations concerning extradition for almost six months until Great Britain performed and thus resumed the extradition clause in December 1876.⁴⁴

Similarly, in 1957, in response to China and North Korea's breaches of the 1953 Korean Armistice Agreement,⁴⁵ the UN Command declared that it was relieved of its corresponding obligations until China and North Korea would demonstrate their willingness to comply.⁴⁶ These two cases are just two examples of many instances where injured States unequivocally benefited from *exceptio*.

With the emergence of the VCLT and the ARSIWA the application of treaty law responses and countermeasures became widespread due to their clear formulation and limits. Nonetheless, States still keep applying *exceptio* as a defence either explicitly, or it can be inferred from their conduct. Since States tend to recall *exceptio* at the last moment, when a dispute reaches courts, the authors believe that to date *exceptio* is used as a last-resort defence.

In *Air Service Agreement*, while the US did not explicitly rely on *exceptio* in its memorandum, its response was described as "a limited withdrawal of rights of French carriers corresponding to the rights denied the [US] carrier," which resembled the invocation of *exceptio* as the synallagmatic obligations were suspended.⁴⁷ Furthermore, in 1986, the US suspended its security treaty obligations towards New Zealand, under the Australia, New Zealand, United States Security Treaty of 1951 (hereinafter — ANZUS), since the latter had initiated a nuclear-free zone in its territorial waters, which the US claimed was a breach of the alliance.⁴⁸ The US must have applied *exceptio* since both the US and Australia refused to fulfil their synallagmatic obligations due to New Zealand's prior breach.

Taxation of Foreign Cigarettes in Uruguay was brought up by Paraguay and concerned the issue of Uruguay charging a Specific Internal Tax on cigarettes. Uruguay directly invoked *exceptio* and argued that Paraguay itself applied discriminatory rules and therefore could not demand that discriminatory rules not be applied to it.⁴⁹

Additionally, in the World Trade Organisation case of *Canada — Certain Measures Affecting the Automotive Industry*, the European Communities claimed that "it is implicit in any agreement <...> that if one of the parties fails to fulfil its obligations, the other party is released from complying with its own".⁵⁰ Therefore, it expressly referred to the synallagmatic obligations and *exceptio* principle.

⁴² Memorandum of the office of the U.S. Department of Justice' Authority of the President to Suspend Certain Provisions of the ABM Treaty of 15 November 2001. P. 17.

URL: <https://www.justice.gov/sites/default/files/opa/legacy/2009/03/09/memoabmtreaty11152001.pdf> (accessed: 20.09.2022).

⁴³ Xiouri M. *Op. cit.* P. 16.

⁴⁴ Hoy B. *A Line of Blood and Dirt*, New York : Oxford University Press, 2021. P. 69.

⁴⁵ *Agreement between the Commander-in-Chief, UN Command, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, Concerning a Military Armistice in Korea* of 27 July 1953, UN Doc. S/3079. Annex A. P. 20.

⁴⁶ *Communication dated 9 August 1957 from the representative of the United States of America to the United Nations, addressed to the Secretary-General*. UN Doc. A/3631. P. 4.

⁴⁷ Ad-hoc Arbitral Tribunal. *Air Service Agreement case (France v. US)*, Award of an Ad-hoc Arbitral Tribunal of 9 December 1978, § 17.

⁴⁸ Catalinac A.L. *Why New Zealand took itself out of ANZUS: Observing "Opposition for Autonomy" in Asymmetric Alliances* // Foreign Policy Analysis. 2010. Vol. 6. № 4. P. 368.

⁴⁹ MERCOSUR Ad hoc Arbitral Tribunal. *Dispute between Paraguay and Uruguay concerning the Application of Impuesto Especifico Interno to the Commerce of Cigarettes (Paraguay v. Uruguay)*. Award VIII of Ad hoc Arbitral Tribunal of 21 May 2002.

⁵⁰ Panel report, *Canada — Certain Measures Affecting the Automotive Industry (Japan v. Canada)*. WT/DS139/R and WT/DS142/R11. Adopted 11 February 2000. § 7.187.

Another example, from the field of investment protection, is the case of *Klöckner v. Cameroon* where *exceptio* was expressly applied in favour of the respondent State as a ground for extinguishing its obligations.⁵¹ Although the decision mainly involved the law of a State, and the award was later annulled by the *ad hoc* Committee,⁵² this example demonstrates that a State used *exceptio* as a defence against an investor's claims under the investment treaty, "the only one it thought could be invoked without prior notice and without respecting any deadline".⁵³ Similarly, in *Vivendi v. Argentina (I)*, Argentina also relied on the *exceptio* defence as a ground for non-performance of its investment obligations.⁵⁴

Additionally, State practice demonstrates that even certain non-proliferation obligations may be suspended under the *exceptio* mechanism. In 2000, Russia and the US concluded the 2000 Plutonium Management and Disposition Agreement (hereinafter — PMDA),⁵⁵ under which they undertook to dispose of plutonium by a certain method. In 2016, Russia suspended this Agreement due to the inability of the US to ensure the disposal of surplus weapons-grade plutonium.⁵⁶ Although the main reason to suspend the PMDA was a fundamental change of circumstances, Russia decided not to perform its side of the treaty, referring to the breach by the US of synallagmatic obligations under the Agreement, which more resembles *exceptio*.

A suspension of bilateral treaties may lead indirectly to the treaty termination because if one party to the treaty suspends its obligations then there is only one party left in it. The object and purpose of the treaty is no longer beneficial when only one party is performing its obligations and not receiving the promised obligations in return.

The recent example is the suspension of the Strategic Arms Reduction Treaty of 2010⁵⁷ (hereinafter — START III). In the report of the international affairs committee of the Federation Council of the Federal Assembly of the Russian Federation stated that "Russia has strictly complied with [START III] provisions", however, since "the US purposefully fails to fulfil its obligations under the treaty, committing material violations"⁵⁸ Russia suspended the treaty. It is worth noting that the US disagrees with Russia's position and declares that it will continue to implement the treaty.⁵⁹ A closer look at the wording of the report suggests that Russia relied on *exceptio*, since it argued that the suspension of START III was a consequence of the US' prior non-compliance with its synallagmatic obligations. Since START III is a bilateral treaty, the US single-handed compliance still cannot be considered as a full performance of the treaty. Thus, its value has been lost, leading effectively to the same consequences as a termination.

The next example of bilateral treaty suspension is Switzerland's suspension of its agreement normalising the ties with Libya in 2009. Switzerland justified its action on the grounds of a breach by Libya after the latter refused to cooperate with Switzerland when two Swiss businessmen were abducted and prevented from leaving Libya for more than a year.⁶⁰ As can be seen from this example, Switzerland also used *exceptio* when alleged that it would not fulfil its synallagmatic obligations under the treaty after Libya's refusal to fulfil its treaty obligations. The treaty remains suspended up to date, and thus such suspension effectively constitutes the termination of the treaty.

⁵¹ ICSID. *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais (Netherlands, Belgium, Germany v. Cameroon)*. Case No. ARB/81/2. Award of 21 October 1983. § 210-212.

⁵² ICSID. *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais (Netherlands, Belgium, Germany v. Cameroon)*. Case No. ARB/81/2. Ad hoc Committee Decision on Annulment of 3 May 1985. § 170-171.

⁵³ *Ibid.*, § 165.

⁵⁴ ICSID. *Compañía de Aguas del Aconquija S.A. (formerly Aguas del Aconquija) and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic (I) (France v. Argentina)*. Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award of 20 August 2007, § 243.

⁵⁵ *2000 Agreement between the Government of the United States of America and the Government of the Russian Federation Concerning the Management and Disposition of Plutonium Designated as no Longer Required for Defence Purposes and Related Cooperation*. 1 September 2000. URL: <https://2009-2017.state.gov/documents/organization/213493.pdf> (accessed: 14.09.2022).

⁵⁶ Decree of the President of the Russian Federation of 3 March 2016 No. 511 "On the Suspension by the Russian Federation of the Agreement between the Russian Federation and the United States of America Concerning the Management and Disposition of Plutonium Designated as no Longer Required for Defense Purposes and Related Cooperation".

⁵⁷ Federal Law № 38-FZ "On the suspension by the Russian Federation of the Treaty between the Russian Federation and the United States of America on Measures for the Further Reduction and Limitation on Strategic Offensive Arms" dated 28 February 2023.

⁵⁸ Report of the Committee on the International Affairs of the Federation Council of the Federal Assembly of the Russian Federation "On the draft of the Federal Law № 301204-8 "On the suspension by the Russian Federation of the Treaty between the Russian Federation and the United States of America on Measures for the Further Reduction and Limitation on Strategic Offensive Arms" dated 22 February 2023.

⁵⁹ Transcript of "CNN This Morning", 21 February 2023. URL: <https://transcripts.cnn.com/show/ctmo/date/2023-02-21/segment/06> (accessed: 10.03.2023).

⁶⁰ France 24: *Switzerland suspends normalisation deal with Libya*. URL: <https://www.france24.com/en/20091104-switzerland-suspends-libya-normalisation-deal-gaddafi-diplomacy> (accessed 22.09.2022).

Although, in many cases, if States referred to the specific grounds for suspension, they relied on the VCLT or the ARSIWA as a justification, in reality their course of action more resembles the application of the *exceptio* principle. This extensive number of cases demonstrates that the distinction between the treaty law responses and other responses is vague, and States may recourse to them in response to any unfriendly actions of other states parties to a certain treaty. Such misuse by States of different grounds in international law for suspension creates a dangerous situation for international relations, making them unstable. Accordingly, the invocation of many grounds in response to the breaches of treaties may constitute the abuse of the concepts of treaty suspension.

3. Overinclusiveness of the grounds to suspend the treaties: an appraisal

Overinclusiveness of grounds for the suspension of treaty obligations is not given enough attention in legal doctrine despite its critical importance in practice, especially at times of division in the international community. States facing a conflict are naturally prompted to escape some treaty obligations they deem inconvenient. As it was demonstrated in Section II, the application of *exceptio* as an autonomous ground for the non-performance of treaties is not as infrequent as some suppose. Consequently, as *exceptio* in international law is used obscurely and unsystematically it is almost impossible to predict when and how it will be invoked. As the application is not limited by any coherent norms of international law, it gives a *carte blanche* to anyone willing to misuse it to suspend or de facto terminate treaty obligations. The key source of the issue lies with the overinclusiveness of international law, but are there any ways to resolve the problem? Will the formalisation of international law and stricter rules accurately demarcating the lines between the VCLT, the ARSIWA, and *exceptio* help? This section provides an alternative to the exacerbation of international relations after the misuses of the overinclusiveness through establishing stricter rules. It throws light on a more flexible method of approaching the visible issue of all these concepts overlapping and providing a room for manoeuvre by turning to positive and negative incentives for disobeying States to return to compliance.

Reinforcement of regulation does not harmonise with the nature of international law as the order built by consent of sovereign States. This brings the discussion to the selection of appropriate incentives for rule abidance, States are the most susceptible to misusing loopholes of international law when they are in despair internally or internationally. Suspending treaties by means that are not conventionally allowable is usually an indicator of a State being burdened by its international commitments during a challenging period of its development. Even though suspension can lead to a *de facto* termination of treaties, there is still a chance to help the State to regain a sense of international stability and resume its cooperation.

Conventionally, in any legal system, non-compliance is treated as an abomination. A law that permits or tolerates disobedience is meaningless. Hence, stable domestic legal systems rely on conformity to their internal law and attempt to punish all deviations. They are still far from being infallible but with checks and balances working as they are supposed to, the systems evolve and eventually benefit from the general patterns of compliance perceived as a 'good' standard of behaviour.

International law is different. It lacks the sophisticated level of both law-making and law enforcement. As previously demonstrated, there are certain loopholes in international law that endanger the stability of its principal areas: treaty law and law on state responsibility. States have an opportunity to misuse the mechanisms of treaty suspension, and they do misuse them as an ace up their sleeve when national interests overweight international commitments. It turns international law into international diplomacy with States acting as if international treaties, especially the most vital ones for the world's well-being (human rights treaties, non-proliferation treaties, bilateral investment treaties, etc.), are instruments of manipulation, which can be put at stake whenever it is necessary. While both advantages and disadvantages of such a state of affairs are numerous, it seems unproductive to enlist them all. Thereby, this article will mention only the most obvious but still significant advantages and disadvantages with the end goal of introducing a way of treating both.

First, for the sake of not being disappointed with public international law, one should not demand from it what it simply cannot deliver. International law, especially its treaty-related part, is always a product of a compromise. An ambiguous and contestable language of treaties, as primary sources of international obligations, makes for their ability to function. If treaties were straightforward and unrelenting, a State's entry

into them would be unlikely. Furthermore, treaties are not that different from non-legal agreements.⁶¹ Their 'normative pull' is not strong enough to effectively restrain states from non-compliance if, for instance, security interests are at stake. According to H. Koh, obedience in general and in international law, in particular, does not emanate solely from coercion, or rather does not emanate from it at all — but it derives from "patterns of obedience".⁶² Therefore, H. Koh suggests, contrary to the Austinian thesis,⁶³ that law is not defined by coercion. Most people choose to stop for a red light on an empty morning road or not to steal from others not because they fear retribution — but rather because it just feels right due to the internalised rules learnt at school, home, or anywhere else. It is surprisingly difficult to break such patterns. The same is true for States' behaviour. They will comply with international law because such conduct conforms to common sense and ethical norms. States also tend to follow an "international law as a smart power" approach.⁶⁴ It favours the engagement of each State with other members of the international community over unilateralism. Accordingly, States, as actors in international relations, form bonds by backing each other up, which undoubtedly involves respecting treaties.

Compliance is equally analogous to the prisoner's dilemma theory. States cooperate because they understand that otherwise, their counterparties will respond to a breach of a treaty, which will affect the well-being of the nonconforming State or, at least, its reputation. Following the prisoner's dilemma theory, States benefit from their treaty-abiding conduct since it makes them full members of the international community with full access to all privileges of international cooperation. In contrast, violations like abuses of the ambiguous overinclusiveness of international law usually entail negative repercussions.

On the other hand, "[t]he deficiencies of international law are no excuse for its violation"⁶⁵. A former ICJ judge argues that any State's action must comply with international law as it is the underlying condition for the legality of such an action.⁶⁶ Even though international law is generally respected,⁶⁷ times of non-compliance undermine both the rule of law on the international level and the peaceful coexistence among nations.⁶⁸

Thus, the international community ought to find a balance between the necessity to maintain the willingness of States to continue to enter into treaties and the inevitability of measures taken to induce offenders to comply with their obligations. The *status quo* with the plethora of responses to a breach of treaty, half of which leads not to a mere non-performance but to a *de facto* termination of international obligations, adds up to certain scepticism about the effectiveness of international law overall. The concept of States having a range of opportunities to violate international law is undeniably dangerous for the whole international legal order, so it is not surprising that legal literature on compliance has been dedicated to the search for solutions to the issue. An intuitive response of a continental lawyer would lead to an elaboration of a more restrictive framework of regulations with a comprehensible delineation between treaty law responses, countermeasures, and *exceptio*. In the paradigm of today's world, rules set in stone imply an application of negative incentives to misbehaving States. Nonetheless, it is questionable whether such an approach is effective enough to induce compliance amongst States as sovereign actors in the international arena. Not to say that it disregards the mentioned nature of international legal order based on the voluntarism of sovereign States.

The application of negative incentives alone has considerable shortcomings. However effective they are as mechanisms of inducing an individual's rule-abiding behaviour, States are more complex actors — regulation of their conduct requires a different approach. Again, States comply with international law more often than they violate it. Thus, nonconformity is an irregular behaviour that points at certain underlying issues that governments cannot overcome. Such situations are so perplexing, that, for some, going rogue against the whole international order is a lesser evil. A treaty becomes not worth the paper it is printed on, as a State simply cannot comply with it anymore. Any negative incentives, while having a long-term detrimental effect on a State, will cause harm to the international community as well. Punishments allow States'

⁶¹ Posner E., Goldsmith J. L. *International Agreements: A Rational Choice Approach* // Virginia Journal of International Law. 2003. Vol. 44. № 1. P. 122–134.

⁶² Koh H. *The Trump Administration and International Law*. New York : Oxford University Press, 2019. P. 7.

⁶³ See Austin J., Rumble W. *Austin: The Province of Jurisprudence Determined*. Cambridge : Cambridge University Press, 1995.

⁶⁴ See Koh H. *Op. cit.* P. 9–10.

⁶⁵ Weil P. *Towards Relative Normativity in International Law?* // American Journal of International Law. 1983. Vol. 77. № 3. P. 413, 433.

⁶⁶ Guillaume G. *Terrorism and International Law* // International and Comparative Law Quarterly. 2004. Vol. 53. № 3. P. 537–548.

⁶⁷ Koh H. *Review of "Why Do Nations Obey International Law?" by A. Chayes., A. Chayes, T. Franck* // Yale Law Journal. 1997. Vol. 106. № 8. P. 2599–2659.

⁶⁸ *UN Press, States Not Adhering to International Obligations Undermine Rule of Law, Sixth Committee Delegates Say, as Debate on Principle Concludes*. URL: <https://press.un.org/en/2019/gal3597.doc.htm>.

authorities to benefit from rallying around a flag while indulging in an 'us-against-them' rhetoric. These are the most common consequences of external coercion which involves sparks of nationalism among the population of concerned States and a growing support of nonconformity to the international rule of law.⁶⁹ Moreover, negative incentives equally intensify the overall hostility and anxiety of a nation.⁷⁰

On the other hand, international legal history knows positive incentives, too. They can be either internal and emanate from the treaty itself or they can be set by the international organisation administering the treaty, or external — supplementary or out-of-treaty means of rewarding.⁷¹ Generally, the mechanism of rewards has been applied to 'bribe' a State into international cooperation.⁷² For example, China was incentivised to enter into the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer.⁷³ Similarly, Egypt and Israel received billions of dollars for signing a peace treaty in 1979.⁷⁴ Interestingly, the cooperation-inducing rewards so far have been used mostly by the US.⁷⁵

Types of rewards are unlimited as they can be set after negotiations, or a giving partner can just deduce a potentially desired reward from circumstances. They can include reputational rewards like positive and/or encouraging feedback on certain changes of behaviour of a State, monetary rewards, trade-facilitating rewards, and even an absence of punishment can be considered as a reward. It seems viable to consider possible rewards with regard to Maslow's hierarchy of needs, after making the following alterations to make it fit for a State. Starting from the bottom, the least developed States that are fighting famine and high mortality rates are less likely to be incentivised by strong international ties and reputation. Probably, the most thoughtful reward would be humanitarian aid or financial support. Then, the same is true for governments that are focused on increasing their security. Such actors will not be perceptive to international cooperation or reputational rewards until they fulfil their security needs. In a similar vein, the international community should adjust their potential rewards to more developed States that might prefer fulfilling reputational or even transcendent needs of serving international well-being.

At the same time, applying positive incentives only also has a number of significant shortcomings.⁷⁶ First, a State, as a sovereign and autonomous entity, can refuse to accept a reward and, consequently, continue non-compliance. Second, there is a chance that a non-complying State will continue its infringements after receiving a reward. Lastly, a receiving State can opt to follow the strategy of opportunistic demands and bluffing their counterparts into spending more resources for appeasing and cooperation.

One of potential alternatives to the application of the negative or positive incentives alone is a theory of 'reversible rewards' or 'sticks and carrots'.⁷⁷ It narrows down to mixing positive and negative incentives. The 'carrot approach' of rewarding States for compliance or returning to compliance has a psychological factor that helps to incline a nation and its government towards adherence to the international rule of law. Positive incentives please a targeted state and make it more prone to cooperate and generally transform the relationships between givers and receivers in a way that cannot be reached by any negative incentives.⁷⁸ They constitute rewards that are transferred in form of certain material or immaterial goods like social approval, economic aid, etc.⁷⁹

The research of E. Filmus revealed the data on the most prominent cases of the application of either sticks, or both sticks and carrots in international diplomacy.⁸⁰ In the research Filmus analysed 24 cases and concluded that out of 14 cases that used exclusively negative incentives, 10 of them resulted in failure to make a state comply with international law. On the other hand, out of ten successful cases eight involved the mix of sticks and carrots. Hence, the approach of mixing positive and negative incentives has a potential

⁶⁹ Cortright D. *The Price of Peace: Incentives and International Conflict Prevention*. New York : Rowman & Littlefield Publishers, Inc., 1997. P. 10; Dorussen H. *Mixing Carrots with Sticks: Evaluating the Effectiveness of Positive Incentives* // Journal of Peace Research. 2001. Vol. 38. № 2. P. 252.

⁷⁰ Filmus E. *Sticks and Carrots in Coercive Diplomacy: Toward a Theory of Inducements* // University of Chicago. 2015. P. 15.

⁷¹ Aaken A. van, Simsek B. *Rewarding in International Law* // American Journal of International Law. 2021. Vol. 115. № 2. P. 211, 297.

⁷² Ben-Shahar O., Bradford A. *Efficient Enforcement in International Law* // Chicago Journal of International Law. 2012. Vol. 12. № 2. P. 382.

⁷³ It received financial aid under Article 5 of the Montreal Protocol.

⁷⁴ Drezner D. W. *The Trouble with Carrots: Transaction Costs, Conflict Expectations, and Economic Inducements* // Security Studies. 1999. Vol. 9. № 1–2.

⁷⁵ Long W. J. *Trade and Technology Incentives and Bilateral Cooperation* // International Studies Quarterly. 1996. Vol. 40. № 1. P. 188–214.

⁷⁶ Guzman A., Raustiala K. *The Rarity of Rewarding* // American Journal of International Law Unbound. 2021. Vol. 115. P. 223–225.

⁷⁷ *Ibid.* P. 393–399.

⁷⁸ Baldwin D. A. *The Power of Positive Sanctions* // Johns Hopkins University Press. 1971. Vol. 24. № 1. P. 19.

⁷⁹ Aaken A. van, Simsek B. *Op. cit.* P. 196.

⁸⁰ Filmus E. *Op. cit.* P. 23–26.

to be commonly applied in international law in contrast to the paradigm of treating all nonconforming States with coercion.

The authors suppose that the application of reversible rewards would be the most practical way to address the issue of overinclusiveness in international law, which leads to the abundance of grounds for treaty suspension. The first two sections of this article have already analysed in theoretical and practical detail what has created the overinclusiveness concerning the grounds for suspending treaties. *Exceptio* is a principle that is indigenous to private law. Although it is unambiguous in terms of contractual relationships, it is eminently fluid in international law. This fluidity created an elusive aura of *exceptio* that attracts States when they cannot substantiate their desire to withdraw from an inconvenient undertaking by using the rules of the VCLT and the ARSIWA. As can be witnessed in Section II, such situations are inherently political, and it is impossible to decide whether a suspension was legal without referring the dispute to an international tribunal. Nonetheless, few made it to adversarial proceedings, where *exceptio* as a defence was measured against existing rules of international law. As a result, a significant number of treaties have been suspended unilaterally against the background of declarations formulated like a defence of *exceptio*, which remain unevaluated. This situation is dangerous for the stability of international legal order as it *de facto* allows States to extricate themselves from treaty obligations and to disregard binding rules of international law. Consequently, the international community should ponder the methods of dealing with this issue. Using the same metaphor of carrots and sticks, it is always preferable to start with a carrot to reduce tension and make room for negotiation. If negative incentives are indispensable, they must be abated by pertinent rewards. Negative incentives alone might cause heightened rebellion, self-isolation, rallies around the flag which will not benefit neither the nation nor the international community as a whole in the era of globalization.

To summarise, this Section introduced a different view on how the international community should approach States' ability to pick and choose the ground for treaty suspension and, hence, non-performance. This issue is inherent to international treaty law which proves to be full of loopholes. The authors argue that this porous substance of the treaty law should not be approached legalistically. Instead, it is suggested to implement practices from behavioural economics and rational legal theory to induce international cooperation rather than deteriorating disobedience and antagonism.

Conclusion

Critical examination of diverse grounds for the suspension of treaty obligations revealed that, along with the conventional the VCLT and the ARSIWA responses to a breach of treaties, States might apply *exceptio* as a defence mechanism of an injured party that allows to suspend an obligation for an indeterminable amount of time. Contrary to the popular belief of legal scholars, *exceptio* not only exists but also has an autonomous status in international law.

Unfortunately, this exact autonomous place, specific role of *exceptio*, and its vague conditions of application contributed significantly to the issue of overinclusiveness of international law that creates loopholes that malevolent States can use to avoid performance of their international obligations. Section II demonstrated not only the real cases of application of *exceptio* and its practical usability in cases of disputes but, most importantly, the fact that the misuse of *exceptio* can lead to a *de facto* termination of bilateral treaties. On the other hand, the *FYROM* case pointed out another alarming opportunity presented by the overinclusiveness, i.e. the ability of States to put forward all grounds for the suspension and non-performance of treaty obligations at the same time. In this way, States have more chances to impair the core sources of international law, treaties.

The knowledge about such an unconcealed window of opportunity for any State that, being in a conflict, can attempt to or successfully justify its non-performance is unsettling and urges to find a solution. The authors are adamant that overregulation of international law will damage its essence. Thereby, the daunting overinclusiveness cannot be managed by the black letter of law. Present article suggests a more flexible approach: a method of combining both positive and negative incentives, 'sticks and carrots'. Even though this unconventional perspective on international disobedience is only rising in the domain of international law, it has a colossal potential due to its inherent connection to real decision-making processes by State actors. Moreover, it establishes the foundation for the future cooperation, whereas the reinforcement of normativity in international law would inevitably lead to an imminent repudiation of any future treaties.

EXCEPTIO NON ADIMPLETI CONTRACTUS И ПРОБЛЕМА ЧРЕЗМЕРНОЙ ИНКЛЮЗИВНОСТИ МЕЖДУНАРОДНОГО ПРАВА

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Аннотация

В статье рассматривается проблема диверсификации оснований приостановления действия международных договоров. Особое внимание уделяется приостановлению встречного исполнения — *exceptio non adimpleti contractus* — защитному механизму, позволяющему стороне отказаться от исполнения обязательства по договору, если другая сторона не исполнила соответствующее синаллагматическое обязательство. Вопреки устоявшемуся мнению, разделяемому большинством специалистов по международному праву, *exceptio non adimpleti contractus* не только существует в пространстве международного публичного права, но и обостряет проблему его чрезмерной инклюзивности. В сочетании с четко сформулированными основаниями приостановления действия договора в праве международных договоров и праве международной ответственности государств *exceptio non adimpleti contractus* позволяет государствам уклоняться от исполнения от неудобных договорных обязательств, избегая при этом бремени жестких ограничений императивных норм международного права. Кроме того, присущая *exceptio non adimpleti contractus* аморфность усугубляется тем, что применение этого механизма, за некоторыми исключениями, остается вне поля зрения и вне практики международных судов, что создает возможность для злоупотреблений со стороны государств. Общепринятый нормативный подход не способен устранить лазейки и изъяны в международном праве, обусловленные *exceptio non adimpleti contractus*. Для этого в настоящей статье предлагается использовать метод обратимых вознаграждений (англ. reversible rewards) или «кнута и пряника», находящийся на стыке международного права и поведенческой экономики, как наиболее действенный инструмент решения проблемы чрезмерной инклюзивности.

Ключевые слова

exceptio non adimpleti contractus, приостановление действия международного договора, инклюзивность международного права, поведенческий подход

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