



1969

Procedures for Controlling Unilateral Treaty Termination

W. Michael Reisman
Yale Law School

Follow this and additional works at: https://digitalcommons.law.yale.edu/fss_papers

Recommended Citation

Reisman, W. Michael, "Procedures for Controlling Unilateral Treaty Termination" (1969). *Faculty Scholarship Series*. 668.
https://digitalcommons.law.yale.edu/fss_papers/668

This Response or Comment is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

Procedures for Controlling Unilateral Treaty Terminations

The absence of institutionalized procedures for resolving disputes about continuing treaty regimes has produced a number of practical problems for international lawyers. A treaty is a formalized reciprocally beneficial commitment to collaborative behavior, which is undertaken in a factual context.¹ If the factual context changes radically, the shared benefits of the treaty may shift and continued performance of its original terms may impose a severe deprivation on one party. When these circumstances arise, the deprived party lodges a claim to amend or terminate the treaty. It is at this point that the absence of procedures for dispute-resolution is sharply felt and the entire institution of treaties in international law is perceived as threatened. One consequence of this situation is the marked reluctance to acknowledge the right of unilateral emendation or termination; the entire institution of *clausula rebus sic stantibus* is by no means universally accepted.² But, in a changing world, a rigid doctrine of *pacta sunt servanda* itself impedes treaty-making and stable international relationships; its rigor deters responsible states from the broadest international agreements. Where treaty networks are threatened, a state wishing to protect itself must necessarily resort to more coercive strategies whose use can jeopardize general public order.

The International Law Commission's draft Convention on the Law of Treaties,³ which was reviewed by the Vienna Conference, has encountered the problem of dispute-resolution in exacerbated form. Due to the strong diplomatic pressure from certain quarters, the prescriptions for invalidating, terminating and suspending the operation of treaties have been spelled out in greater detail than usual.⁴ As a consequence, the need for establishing procedures for dispute-resolution has become ever more urgent. Articles 62 and 63⁵ of the draft introduce only the most

¹ The International Law Commission's draft defines a treaty in Article 2 (1) (a) as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." For other definitions in usage, see McNair, *The Law of Treaties* 1-34 (1961); 1 O'Connell, *International Law* 211, 264 (1965).

² For pertinent survey and evaluation of traditional sources, see Note: "Revolutions, Treaties, and State Succession," 76 *Yale Law J.* 1669 (1967). For a detailed appraisal of the Vienna Conference's approach to circumstantial change, see Schwelb, "Fundamental Change of Circumstances," 29 *Zeitschrift für Ausländisches Öffentliches Recht u. Völkerrecht* 39 (1969).

³ United Nations, Reports of the International Law Commission, General Assembly, 21st Sess., Official Records, Supp. No. 9 (A/6309/Rev. 1) at 10 (1966); 61 *A.J.I.L.* 263 (1967).

⁴ See Arts. 43 to 68, Doc. A/6309/Rev. 1, at 16-19 and commentary, *ibid.* at 69-94.

⁵ Art. 62, setting out procedures to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty, requires notification to other parties of the intended measures as well as the reasons adduced for them. If, within three months, there is no objection by the other party or parties, the claimant may proceed to carry out its intended measure. If an objection is lodged within this three-month period, the parties must resort to the modalities set out in Art. 33 of the

minimal procedures: notification and, in case of disagreement, reference to the modalities spelled out in Article 33 of the Charter.⁶ An alternative approach, Article 62 *bis*, establishes a series of compulsory sequential procedures, most of them institutionalized, which alone will authorize invalidation, termination or suspension of operation.⁷

Past state practice suggests that compulsory procedures will either be rejected by the Conference or, if accepted, be subjected to unilateral reservations at the later stage of ratification. As a result, treaty-making states will be required to devise their own procedures for dealing with the increased problem of invalidity, termination and suspension in a rapidly changing international context. Presumably the jurisdictional clause usage will continue.⁸ Its perfection will be more urgent.

The chief weakness of a jurisdictional clause is that it cannot assure initial constitution of the tribunal adverted to in the specific treaty.⁹ The jurisdictional clause itself is a reference to arbitration, and general arbitral law and procedure provide for the replenishment and/or opera-

Charter (see note 6 below). The notifications mentioned in Art. 62 must, according to Art. 63, be by written instruments with an indication of the full powers of the signatory if he does not fall in the category of officials deemed, under international law, to have full powers as set out in Art. 6 of the draft.

⁶ Charter Art. 33 (1) provides: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." Draft Art. 62 refers only to the modalities of Charter Art. 33; the *renvoi* does not include the peremptory obligation implied in the language "the parties . . . shall . . ." This peremptory obligation would come into operation, without reference to the draft convention on treaties, if the dispute were deemed by the Security Council to constitute a "threat to the peace" within the meaning of Art. 39 of the Charter.

⁷ The text of Art. 62 *bis* was circulated at the United Nations Conference on the Law of Treaties as A/Conf. 39/C.1/L.352/Rev.2, May 21, 1968; reprinted below, p. 690. It was apparently discussed at the recent Asian-African Consultative Committee meeting in Karachi. An eloquent defense of the principles set out in Art. 62 *bis* was delivered by the observer for the American Society of International Law, Professor McDougal; the text of his address is reprinted below, in the Documents section of this JOURNAL, p. 685. To my mind, the chief operational weakness of Art. 62 *bis* is found in the pivotal rôle assigned to the Secretary General. He is authorized to constitute the arbitral tribunal if the parties themselves are unable to reach agreement. Presumably, he will not appoint a tribunal if he deems it politically unwise from the perspective of his office's future activities. See, in this regard, the hesitations of the Secretary General in the Peace Treaties case, [1950] I.C.J. Rep. 65, 221. Nor is the President of the International Court of Justice, in a rôle as appointing authority, immune from such political considerations. See [1952] I.C.J. Rep. 93 and [1952-53] I.C.J. Yearbook 45.

⁸ For general survey, see United Nations, Systematic Survey of Treaties for the Pacific Settlement of International Disputes (1948); Jenks, 47 *Annuaire de l'Institut de Droit International* 54 (I).

⁹ See the Secretariat Commentary on the Draft Law of Treaties, A/CN.4/92 at 9-16, 26.

tion of a tribunal from which one national member has defected.¹⁰ But the operation of international arbitration law cannot come into effect until an arbitral tribunal has been initially constituted.¹¹ Because the state which does not wish arbitration can avoid this obligation, the tribunal may never be constituted and the jurisdictional clause will remain a dead letter.

The moment of formulation of a treaty between two parties represents a comparatively high level of consensus; the moment of dispute, thereafter, represents a high point of dissensus. And the disagreement that characterizes this latter point in time very obviously affects the willingness of at least one party to submit itself to an institutionalized decision process, which may in some way revise the substance of a treaty or a disputed section of it. When a dispute arises over a bilateral treaty, one party presumably demands a change in the treaty regime, whereas the other finds that it is to its advantage in terms of long-range value interest or short-range tactical position to stand upon a strict construction of the treaty.

The optimum moment to prescribe dispute-resolving procedures is clearly the moment of treaty formulation, the high point of agreement. Thus, the question of insertion of a jurisdictional clause into the body of the treaty is best introduced during this sequence. But unless the jurisdictional clause is directed at a standing tribunal, such as the International Court of Justice, the clause may not avail in a high-level dispute. The party which wishes continuation of the treaty as it has been can frustrate the formation of an arbitral tribunal simply by insisting that there is no legitimate dispute and then refusing to appoint its national member to the tribunal. As long as the arbitral tribunal has not been constituted in plenary, there is no means by which the party seeking arbitration can turn to some third party and secure initial arbitral constitution. In the *Peace Treaties* cases,¹² the International Court held, as a matter of general international law, that an authorized external agent could replenish a tribunal only after that tribunal had been initially constituted.¹³ The International Law Commission sought to remedy this defect, in its proposed Convention on Arbitral Procedure, by peremptory integration of the International Court in all arbitral regimes. The Court was to be authorized to appoint an arbitrator in lieu of a national member in order to complete the constitution of the tribunal, and, thereafter, to reappoint a panelist if a national member should defect from a functioning tribunal.¹⁴ The I.L.C. draft was not acceptable to the Member States of the United Nations.

¹⁰ See Reisman, "Revision of the South West Africa Cases," 7 Va. J. Int. Law 1, 31-32 (1966) and references there. But cf. De Visscher, "Reflections on the Present Prospects of International Adjudication," 50 A.J.I.L. 467 (1956).

¹¹ Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, [1950] I.C.J. Rep. 65, 221; 44 A.J.I.L. 742, 752 (1950).

¹² *Ibid.*

¹³ [1950] I.C.J. Rep. at 229.

¹⁴ See note 9 above; for text of I.L.C. draft, see 53 A.J.I.L. 239 at 241 (1959).

One way of avoiding at least this problem is to render the constitution of the arbitral tribunal envisaged in the jurisdictional clause as a component of and necessary condition for the entry into force of the treaty in question. The tribunal could be formed, declare itself in session, register the existence and operation of the treaty and then adjourn *sine die*. Once in existence, the tribunal cannot be disrupted by the defection of one state. Should a dispute arise and one state remove its panel member, general arbitration law authorizes the tribunal itself to replenish its personnel and, after following the proper default procedure, to render award.

One cannot quantify the political effect of such an *ex parte* award or, for that matter, even of an award rendered after real joinder by both parties. On the other hand, it is clear that even an *ex parte* award is more of an authority asset in subsequent negotiation than no award at all. This factor in itself may induce joint submission to arbitration rather than resort to coercive reprisals for alleged breach of treaty obligations. At the same time the integration of continuous arbitration in a treaty regime may render the latter more flexible and, through time and changing circumstances, more responsive to the genuine shared objectives of the parties.

W. M. REISMAN

United Nations Seminar in International Law for Latin America

In pursuance of the United Nations Program of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law set up by the General Assembly,¹ the United Nations Institute for Training and Research (UNITAR) undertook to conduct annually a series of regional seminars and training and refresher courses in international law to be held in rotation in Latin America, Asia and Africa. While refresher courses are designed to offer training to junior government officials and young teachers and research students,² the aim of seminars is to provide a forum for senior officials and scholars to discuss international legal problems of particular interest to the region concerned.

The first regional seminar in international law was held in Quito, Ecuador, from January 13 to 24, 1969.³ A number of international organizations co-operated with UNITAR at various stages in the planning and preparation of the seminar, including UNESCO, the Organization of American States, the International Bank for Reconstruction and Development and the Inter-American Development Bank. UNITAR also received the advice of an Advisory Panel of jurists and diplomats from the region.

The basic objective of the seminar, in accordance with the resolutions of the General Assembly, was to foster the rôle of international law as a means

¹ See General Assembly Res. 2099 (XX), 2204 (XXI), 2313 (XXII) and 2464 (XXIII). See also 60 A.J.I.L. 342, 526, 664 (1966).

² The first regional refresher course had taken place in Dar-es-Salaam from Aug. 14 to Sept. 7, 1967. See note by Herbert Briggs in 62 A.J.I.L. 454-456 (1968).

³ The Government of Ecuador offered host facilities at the Central University of Ecuador for the sessions of the seminar.