Treaties, Termination

Anthony Aust

Subject(s):
Unilateral acts — General principles of international law — Customary international law — Treaties, invalidity, termination, suspension, withdrawal — Vienna Convention on the Law of Treaties — Good faith — BITs (Bilateral Investment Treaties) — Treaties, effect for third states — Treaties, successive

Published under the auspices of the Max Planck Institute for Comparative Public Law and International Law under the direction of Professor Anne Peters (2021–) and Professor Rüdiger Wolfrum (2004–2020).
A. Introduction

1 Denunciation denotes a unilateral act by which a party seeks to terminate its participation in a treaty (→ Unilateral Acts of States in International Law). Lawful denunciation of a bilateral treaty (→ Treaties) terminates it. Although denunciation is also used in relation to a multilateral treaty, the better term is withdrawal. Withdrawal of a party from a multilateral treaty will not normally result in its termination. But, for simplicity, termination will here be used to describe both termination of a bilateral treaty and withdrawal from a multilateral treaty.

2 The termination of treaties is an immensely practical topic, though often neglected by writers. Part V, Arts 42 to 45 and 54 to 64, → Vienna Convention on the Law of Treaties (1969) (VCLT) set out the various circumstances in which a treaty can be denounced, terminated, or its operation suspended, other than on the ground of invalidity, which ground is very rarely invoked, and even more rarely successfully (→ Treaties, Validity). Arts 65 to 72 VCLT specify the procedures to be followed and the consequences of termination or suspension.

3 To be effective, termination or suspension may only take place as a result of the application of the provisions of the treaty itself or the VCLT (Art. 42 (2)). Unless the treaty provides otherwise, it is for the party claiming that a treaty has been terminated or suspended to establish that the necessary grounds exist. Most treaties contain provisions on termination, and termination provisions are usually closely linked to those on the duration of the treaty. The two matters must therefore be considered together.

B. Express Provisions

4 A treaty, whether bilateral or multilateral, may terminate, or a party may withdraw from it, in conformity with its provisions (Art. 54 (a) VCLT). The following few examples illustrate the great variety of clauses.

1. Indefinite Duration with Right to Terminate

5 Many bilateral treaties make no provision for duration but include a termination clause, which typically provides: ‘Either party may terminate this treaty by means of a written notice to the other party. Termination shall take effect X months following the date of notification.’ When, as in air services agreements, it is often necessary to take account of time zone differences, it is usual to provide that: ‘This Agreement shall terminate at midnight (at the place of receipt of the notice of termination) immediately before expiry of the X months’ notice of termination by the other Contracting Party.’

6 Most multilateral treaties of unlimited duration will allow a party an unconditional right to withdraw. Treaties adopted within the → United Nations (UN) (including most → human rights conventions) usually provide that:

   (1) Any State Party may denounce this Convention by written notification to the Secretary-General of the United Nations.

   (2) Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations.

Conventions adopted within the → International Labour Organization (ILO) often require a lengthy period of notice and impose strict conditions on when notice can be given. Typically a Member State cannot denounced an ILO convention until 10 years from the date on which the convention first enters into force; and if a Member State does not denounced it within 12 years, the treaty will terminate.
months of the expiration of the 10-year period, it may not then denounce until the expiration of a further 10-year period, and so on. (see also → Labour Law, International)

2. Indefinite Duration with Conditional Right to Withdraw

The Chemical Weapons Convention (1993) (→ Chemical Weapons and Warfare) is of unlimited duration, but Art. XVI provides for withdrawal, albeit subject to special conditions based closely on those of the → Non-Proliferation Treaty (1968) (NPT):

Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention if it decides that extraordinary events, related to the subject-matter of this Convention, have jeopardised the supreme interests of its country. It shall give notice of such withdrawal 90 days in advance to all other States Parties, the Executive Council, the Depositary and the United Nations Security Council. Such notice shall include a statement of the extraordinary events it regards as having jeopardised its supreme interests (emphasis added).

Given that a treaty must be performed in → good faith (bona fide), the party must have objective grounds for its decision. Furthermore, the extraordinary events must be ‘related to the subject-matter of this Convention’. The importance of these elements is reinforced by the requirement for the party to state the nature of the extraordinary events.

On 12 March 1993 the Democratic People’s Republic of Korea (‘DPRK’) (→ Korea), following a period of non-co-operation with the → International Atomic Energy Agency (IAEA) with regard to the safeguards agreement required by the NPT, gave 90 days’ notice of withdrawal from the NPT. It gave as the reason United States military exercises (which according to the DPRK threatened it with nuclear war) and the conduct of the IAEA. The three joint depositaries (→ Depositary) of the NPT issued a joint statement questioning whether the DPRK’s reasons were ‘extraordinary events related to the subject-matter’ of the NPT. Following DPRK/US talks, and just before the end of the 90 days, the DPRK and the US announced that the DPRK ‘had decided unilaterally to suspend as long as it considers necessary the effectuation of its withdrawal’. But, on 10 January 2003 the DPRK, referring to its previous notice of withdrawal, informed the Security Council (→ United Nations, Security Council) that it would withdraw immediately from the NPT because of the critical US-inspired IAEA resolution of 6 January 2003, which reflected the vicious, hostile policy of the US towards the DPRK.

3. Duration until a Specific Event

The Agreement between Egypt and the UN on the Status of the UN Emergency Force (1957) (‘UNEF’) provided for it to remain in force until the departure of UNEF from Egypt, the date to be determined by the UN Secretary-General (→ United Nations, Secretary-General) and the Government of Egypt.

4. Comprehensive Clauses

When the parties are not sure how long they envisage the treaty lasting, they will often include a clause which provides for an initial term which can be extended, either expressly or tacitly, as well as for withdrawal. Such flexible provisions enable the parties to keep their options open, and are normally found in bilateral treaties:

This Agreement shall remain in force for a period of five years and thereafter shall remain in force until the expiry of six months from the date on which either...
Contracting Party shall have given written notice of termination to the other through the diplomatic channel.

11 This typical example does not, however, make clear when notice of termination may be given. The placing of ‘thereafter’ after ‘period of five years’ might imply that it can be given only after five years have elapsed, but this would mean that the minimum term would be five and a half years, a rather curious result. Alternatively, one might argue that the notice may be given at any time before the end of the five years to take effect on or after the expiry of the five years.

12 A clause which puts the matter beyond doubt is:

This Agreement shall terminate on [date] upon notification by either party not less than six months before this date that it is opposed to renewal; otherwise its duration shall be extended automatically for periods of one year, subject to notification of opposition to renewal by either party not less than six months before the end of any one-year period.

13 Of course, even if a clause merely says that ‘X months’ notice must be given, the notice can be given more than X months before the date on which it is meant to take effect, provided that date is stated in the notice. It would therefore be better to provide something along the lines that the treaty will remain in force for X years and be automatically renewed for further periods of X (or Y) years, unless notice is given at least Z months prior to the expiration of the first or any succeeding period of X (or Y) years.

5. Transitional Provisions

14 A treaty concerning a co-operative project will usually contain a transitional provision which keeps the treaty alive until the project has been completed, and provides for certain obligations to continue indefinitely: ‘The termination of this Agreement shall not affect the carrying out of any project or programme undertaken under this Agreement and not fully executed at the time of termination of this Agreement’.

15 A bilateral investment treaty (→ Investments, Bilateral Treaties) will provide that, in respect of investments made while it is in force, certain of its provisions will continue in effect with respect to those investments for a certain period (usually ten or fifteen years) after the date of termination.

16 Sometimes the withdrawal of a party from a multilateral treaty may cause financial problems for the remaining parties. Some treaties anticipate this and provide for any such consequences. Since these can be complex, and will probably depend largely on the circumstances at the time of withdrawal, the clause will of necessity be in general terms.
C. No Provision for Termination or Withdrawal

17 Some universal law-making conventions are naturally silent as to their duration, but have provisions for withdrawal, eg the Convention on the Prevention and Punishment of Genocide (1948) (→ Genocide) and the → Geneva Conventions I-IV (1949). Does this mean that when other similar conventions (including the VCLT itself), or other treaties, bilateral or multilateral, are silent as to their duration and have no provision for withdrawal, one cannot imply such a right? Art. 56 (1) VCLT prohibits a party from denouncing or withdrawing unless:

(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

Since this is expressed as an exception, the onus is on the party wishing to invoke it. Unless another period is established, it must give the other party or parties at least 12 months’ notice of its intention (Art. 56 (2) VCLT).

18 Since it is now very common to include provisions on withdrawal (even for human rights treaties), when a treaty is silent it may be that much harder for a party to establish the grounds for the exception. A party will not be able to withdraw from a treaty transferring territory or establishing a boundary (cf Art. 62 (2) (a) VCLT), except in the (highly unlikely) event of the treaty allowing for this. The same may apply in the case of some codification conventions. Although Art. 317 (1) United Nations Convention on the Law of the Sea (1982) permits denunciation, its predecessors did not (see eg Multilateral Treaties Deposited with the Secretary-General, Ch. XXI.1, Convention on the Territorial Sea and the Contiguous Zone [1958], note 6 regarding the purported denunciation by Senegal). In any event, in many cases the rules in such conventions reflect, or have become accepted as, → customary international law, and so withdrawal may make little or no practical difference.

19 Other treaties which are unlikely to be capable of withdrawal are treaties of peace, disarmament treaties, and those establishing permanent regimes, such as for the → Suez Canal. Most universal human rights treaties do provide for withdrawal. In the case of the → International Covenant on Civil and Political Rights (1966) (’ICCPR’), the → Human Rights Committee (’the Committee’) established under it has expressed the view in its General Comment 26 that the omission in that case of such a right, as well as the nature of the ICCPR, precludes the existence of the right. In this case the Committee would seem to be right. In August 1997 the DPRK gave notice of withdrawal from the ICCPR. The UN Secretary-General thus informed the DPRK that it could not withdraw unless all the other parties consented. The DPRK appears to have accepted this.

20 Treaties which by their nature are more likely to fall within the exception in Art. 56 (1) VCLT are treaties of alliance, commercial or trading agreements, and cultural relations agreements. The commercial character of a treaty will, however, not be decisive, particularly when the treaty concerns a joint endeavour.

21 Although most of the constitutions of international organizations do not provide for a Member State to withdraw, the right is probably implicit. (see also → International Organizations or Institutions, Membership) It will usually be possible to withdraw from a general treaty for the settlement of disputes between the parties even when it has no withdrawal provision. This is consistent with the consensual nature of international jurisdiction: a State can be made subject to the jurisdiction of an international court or tribunal only if it consents, either in advance or ad hoc. (→ International Courts and Tribunals, Jurisdiction and Admissibility of Interstate Applications) Moreover, States have withdrawn from optional protocols on dispute settlement to several UN treaties (including
22 There may be an inherent time factor conditioning the application of the treaty. Thus, the ICJ rejected the contention of Iceland that it could denounce a treaty with the United Kingdom of 1961 which provided that either party could have recourse to the court if Iceland purported to extend her fishery limits (→ Fisheries Jurisdiction Cases [United Kingdom v Iceland; Federal Republic of Germany v Iceland]). Since the right to invoke the jurisdiction of the court was deferred until the occurrence of such a well-defined future event, the treaty could not be denounced by Iceland before that event had occurred. ([1973] ICJ Rep 15 paras 25–29)

D. Termination or Withdrawal by Consent

23 A treaty may of course be terminated, or a party withdraw from it, at any time by consent of all the parties (Art. 62 (2) (b) VCLT). The → International Law Commission (ILC) did not accept that the civil law principle of acte contraire (a rule can be altered only by a rule of the same legal nature) applied. The agreement of the parties does not have to be in the same form as the treaty. If the treaty creates rights for a third State in accordance with Art. 36 VCLT, or an obligation has arisen for a third State from the treaty in accordance with Art. 37 VCLT, the consent of the third State may also be needed (→ Treaties, Third-Party Effect).

24 The treaties between Norway and the UK relating to the exploitation of several oil and gas fields are of indefinite duration and each provide that the two governments ‘may amend or terminate this Agreement at any time by agreement’, so leaving the conditions to be agreed at the time and in the light of the situation then.

E. Termination or Suspension by Conclusion of a Later Treaty

25 Art. 59 (1) VCLT provides that if all the parties to an earlier treaty are also parties to a later one, and the two treaties relate to the same subject-matter, the earlier treaty will be terminated if:

(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

Although a later treaty for a fixed term will not necessarily abrogate an earlier treaty with a longer or indefinite duration, there is likely to be a presumption that the parties intended that effect. The earlier treaty will be considered as only suspended in operation if it appears from the later treaty, or it is otherwise established, that that was the intention of the parties (Art. 59 (2) VCLT).

26 Despite their apparent similarities, Art. 59 VCLT does not cover the same ground as Art. 30 VCLT on successive treaties (→ Treaties, Conflicts between). The latter is concerned with the application of two or more treaties relating to the same subject-matter, and deals only with the priority of inconsistent obligations in treaties when there is no doubt that both are in force. It therefore comes into play only once it has been determined, by the application of
the rules in Art. 59 VCLT, that the parties did not intend to abrogate or suspend the earlier treaty.

F. Termination or Suspension for Breach

27 Like the violation of any other international obligation, breach of a treaty obligation may entitle another party to terminate or withdraw from the treaty or suspend its operation (→ Treaties, Suspension). If it causes harm to another party or its nationals, that party may have the right to take reasonable → countermeasures, or to present an international claim for compensation or other relief, invoking → State responsibility.

1. Bilateral Treaties

28 A ‘material’ breach of a bilateral treaty by one party entitles the other to invoke it as a ground for terminating the treaty or suspending its operation in whole or in part (Art. 60 (1) VCLT) (see Sec. F.3 below for the definition of ‘material’). Subject to such rights as it may have to take countermeasures, it must seek a peaceful settlement of the dispute, as required by Art. 33 of the Charter of the United Nations (→ United Nations Charter), and, more particularly, follow the procedure in → Treaties, Validity Arts 65 to 68 VCLT. The breach must be of the treaty itself, not of another treaty or of rules of general international law. Nor can a party which is itself already in breach, and which has prevented the other party from complying with the treaty, invoke a breach by that other party.

2. Multilateral Treaties

29 Multilateral treaties pose different problems, since a material breach by one party may not necessarily affect all other parties, whose interests must also be taken into account. Art. 60 (2) VCLT therefore deals with three different situations:

a) The other parties, by unanimous agreement, are entitled to suspend the operation of the treaty in whole or in part, or to terminate it, in the relations between themselves and the defaulting State or to terminate or suspend the operation of the treaty completely.

b) A party ‘specially affected’ by the breach may invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State.

c) If the treaty is ‘of such a character’ that a material breach ‘radically changes the position of every party with respect to the further performance of its obligations under the treaty’, any party, other than the defaulting party, may invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself. This provision is designed to deal with certain special types of treaty, such as disarmament treaties, where breach by one party could well undermine the whole treaty regime. In such a case, the provisions in a) and b) above may not adequately protect the interests of an individual party, which could not suspend the performance of its own obligations in relation to the defaulting party without at the same time breaching its obligations to the other parties, yet if it does not do so it may be unable to protect itself against the threat resulting from, for example, rearming by the defaulting State.
3. Material Breach

30 Determining what is a ‘material breach’ depends on the precise facts and circumstances of each case. Art. 60 (3) VCLT defines it as:

(a) a repudiation of the treaty not sanctioned by the Convention; or

(b) the violation of a provision ‘essential to the accomplishment of the object and purpose of the treaty’.

This last-quoted phrase is not the same as ‘fundamental’ breach (see Sec. F.4 below). It can therefore be breach of an important ancillary provision. If a party to the Chemical Weapons Convention (1993) (CWC) obstructs the conduct on its territory of international inspections to verify that it is complying with the CWC, this could be a material breach since the inspection regime is a key means of monitoring compliance with the CWC.

31 Art. 60 (4) VCLT preserves the rights of the parties under any specific provisions of the treaty which would apply in the event of breach. Art. 60 (5) VCLT makes it clear that Art. 60 (1) to (3) VCLT does not apply to breach of provisions in treaties relating to the protection of the human person and, in particular, provisions prohibiting any form of reprisals against persons protected by such treaties. Although it was the Geneva Conventions I to IV (1949) which were in mind, the paragraph would apply equally to other conventions of a humanitarian character, or to human rights treaties, since they create rights intended to protect individuals irrespective of the conduct of the parties to each other.

4. Fundamental Breach

32 A fundamental breach is one which goes to the root of a treaty. Although it is not mentioned expressly in the VCLT, the concept is contained within that of a material breach. On 1 September 1983 Korean Airlines flight KAL 007 was unlawfully shot down by Soviet forces. (→ Korean Air Lines Incident [1983]) Several States with air services agreements with the Soviet Union, unilaterally and for varying periods, suspended them with immediate effect, so preventing Aeroflot from landing in their territory. They were entitled to do so because the Soviet action undermined the fundamental basis of all air services agreements: that each party will ensure the safety of the other party’s aircraft.

G. Supervening Impossibility of Performance

33 If an object which is ‘indispensable’ for the execution of a treaty disappears permanently or is destroyed, thereby making the performance of the treaty impossible, a party can invoke this as a ground for terminating or withdrawing from the treaty (Art. 61 (1) VCLT). The rule has been much criticized, and there are few precedents. In the Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Merits) (→ Gabčíkovo-Nagymaros Case [Hungary v Slovakia]), the ICJ held that the object of the treaty had not definitively ceased to exist, there being in the treaty means by which the parties could negotiate necessary adjustments ([1997] ICJ Rep 3 paras 102–103).

34 The ILC mentioned as possible examples of impossibility of performance the submergence of an island (which global warming may now make a practical possibility), the drying-up of a river (though it may not be permanent), or the destruction of a dam. Another example might be the loss by fire of national treasures which one State has agreed to loan to another. If the impossibility of performance is temporary, it is only ground for suspension.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2021. All Rights Reserved. date: 24 January 2021
At the end of the Falklands conflict in 1982 (Falkland Islands/Islas Malvinas), the complete loss by enemy action of the tents intended for the prisoners of war (‘POWs’) can be regarded as providing grounds for the temporary suspension of the provision in Art. 22 of the Geneva Convention III (1949) which prohibits the holding of POWs on ships, since that was then the only means of protecting POWs from the notorious Falklands weather.

Impossibility of performance may not be invoked by a party if it is the result of a breach by it either of an obligation under the treaty (as was the case with Hungary in the Gabčíkovo-Nagymaros Case) or of any other international obligation owed to any other party to the treaty (Art. 61 (2) VCLT). As the Gabčíkovo-Nagymaros Case made clear, serious financial difficulties would not be enough.

H. Fundamental Change of Circumstances (Rebus Sic Stantibus)

The principle, recognized by domestic law, that a person may no longer be bound by a contract if there has been a fundamental change in the circumstances which existed at the time it was signed (in common law, the doctrine of frustration), has been acknowledged to apply also to treaties (Treaties, Fundamental Change of Circumstances). Because the concept was abused in the past, particularly between the two World Wars, Art. 62 VCLT was drawn in restrictive terms. On the other hand, the ILC did not limit it to treaties with unlimited duration and no termination clause, though the Commission noted that, since most treaties now have either express duration or termination clauses, the scope for invoking the article is more limited.

Art. 61 (1) VCLT defines strictly the (cumulative) conditions under which a change of circumstances may be invoked:

a) the change must be of circumstances existing at the time of the conclusion of the treaty;

b) the change must be ‘fundamental’;

c) it must not have been foreseen by the parties (ie when they concluded the treaty);

d) the existence of the circumstances must have constituted ‘an essential basis of the consent of the parties to be bound by the treaty’; and

e) the effect of the change must be ‘radically to transform the extent of the obligations still to be performed under the treaty’.

The application of principle is thus strictly circumscribed. A State may not invoke its own conduct. A change of policy by the government of one party would not be enough unless the effect were to alter fundamentally a circumstance which constituted an essential basis of the consent of the parties to the treaty.

The principle has been invoked many times, and recognized by treaties. But so far it has not been applied by an international tribunal, though no tribunal has denied its existence. It was considered by the ICJ in the Fisheries Jurisdiction Case (United Kingdom v Iceland) (Jurisdiction) ([1973] ICJ Rep 3 para. 40), the Court finding the article declaratory of customary international law. In the Gabčíkovo-Nagymaros Case the ICJ rejected Hungary’s argument that profound political changes, diminishing economic viability of a project, progress in environmental knowledge, and the development of new norms of international environmental law, constituted a fundamental change of circumstances. The ICJ emphasized
that the stability of treaty relations requires that Art. 62 VCLT be applied only in exceptional cases ([1997] ICJ Rep 7 para. 104).

40 In addition to the strict conditions for the application of the principle, Art 62 (2) VCLT makes two exceptions. First, the principle cannot be invoked if the treaty ‘establishes’ a boundary, that term being used so as to include treaties which cede territory, not merely delimit a boundary. Secondly, the principle cannot be invoked if the fundamental change is the result of a breach by the party invoking it of either an obligation under the treaty or any other international obligation owed to any other party to the treaty. This is an application of the general principle of law (→ General Principles of Law) that a person cannot take advantage of his or her own wrongdoing, which is applicable to any of the grounds for termination which might be invoked. It is mentioned here, and in Art. 61 VCLT (impossibility of performance), because of the risk that the grounds dealt with by them might well result from a breach of treaty.

41 There is also a case for saying that a party to a human rights treaty, which does not have a right of denunciation provision, though its Optional Protocol on dispute settlement does, cannot withdraw from it unilaterally. In the case of the ICCPR, the Human Rights Committee established under it has expressed its view that the omission of such a right, as well as the nature of the Covenant, precludes the existence of the right (General Comment No 26 (61), [1995] ILM 839). Although the views of the Committee are not determinative of the matter, and sometimes must be treated with caution, in this case they would seem to be correct. Following the decision of the → Inter-American Court of Human Rights (IACtHR) in Baruch Ivcher-Bronstein v Peru (Case 11.76, judgment 20/98), Peru purported to denounce the → American Convention on Human Rights (1969), but later withdrew the denunciation.

I. Severance of Diplomatic or Consular Relations

42 The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty, except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty (Art. 63 VCLT). (→ Diplomatic Relations, Establishment and Severance) The rule applies both to bilateral and multilateral treaties. Diplomatic relations between Iraq and the UK were broken off in 1990 following the invasion of Kuwait. Nevertheless, between then and 2002 Iraq applied at least three times under the Iraq-UK Extradition Treaty 1932 for the → extradition of Iraqi nationals, the applications and responses being transmitted through third States. Each application was refused, but not on the basis that the Treaty was suspended. (See also → War, Effect on Treaties)

J. Other Grounds for Termination

43 The ILC has been criticized for excluding from the draft Convention other suggested grounds of termination. However, those usually mentioned may not really be grounds for termination. They include the following.

1. Execution

44 This may seem too obvious a case to need mention, but if all the provisions of a treaty have been carried out, and none of them has any residual purpose, then one may say that the treaty has terminated by its execution. The Egypt-UK treaty of 1971 (824 UNTS 71) for the loan for six months of the treasures of Tutankhamen could fall into this category. Once
there has been full repayment under a bilateral loan or debt agreement, all obligations have been fulfilled.

2. Desuetude (Disuse) or Obsolescence

45 Although the ILC did not dismiss these as grounds, since it saw the basis for them being the consent of the parties as evidenced by their conduct, it saw no need for separate treatment. In 1990 Austria declared that certain provisions of the Austrian State Treaty 1955 had become obsolete. There were no objections.

3. Extinction of the International Legal Personality of a Party

46 These days this is more likely to occur when two States join to form one State (Yemen), or a State splits into two or more new States (Yugoslavia). (→ Yugoslavia, Dissolution of) This could, of course, also amount to a supervening impossibility of performance or a fundamental change of circumstances, or, perhaps more likely, simply raise a question of succession to treaties. (→ State Succession in Treaties)

K. Procedure

47 The ILC was concerned that the grounds for termination or suspension might be invoked as a pretext for casting off inconvenient treaty obligations. The danger for the security of treaties is particularly great if the ground invoked is based on an alleged material breach or fundamental change of circumstances, both of which can produce a substantial degree of subjectivity. Art. 65 VCLT is thus a key provision, its procedural safeguards being designed to deter States from arbitrary action, though it is often ignored. In the Gabčíkovo-Nagymaros Case ([1997] ICJ Rep 7 paras 108–110) the ICJ recognized that → Treaties, Validity) Arts 65–67 VCLT generally reflected customary international law and contain certain procedural principles which are based on the obligation to act in good faith (bona fide).

L. Consequences of Termination, Withdrawal, or Suspension

48 Art. 70 VCLT does not deal with any question of State responsibility if, for example, a treaty has been terminated because of the breach of it by another party; and many treaties, including law-making treaties, do not contain provisions on the consequences of termination. But a treaty, whether bilateral or multilateral, pursuant to which acts are likely to be taking place at and after termination may, as the opening words of Art. 70 (1) VCLT recognize, have transitional provisions applying the treaty in whole or in part to such acts even after termination. Thus, Art. 65 → European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) provides that denunciation shall not release a party from its obligations in respect of any acts which, being capable of constituting a violation of those obligations, may have been done before the denunciation becomes effective. The same will apply to treaties on the settlement of disputes. Transitional provisions are especially important when the treaty deals with a project which involves joint financing. Such provisions have to be tailor-made to suit the circumstances of the particular treaty, and can be complex.

M. Miscellaneous
1. Obligations Imposed by International Law Independently of a Treaty

49 The termination or suspension of a treaty, or withdrawal of a party, does not affect the duty of a State to fulfil any obligation in the treaty to which it would be subject under general international law (Art. 43 VCLT). For example, the substantive provisions of the four Geneva Conventions of 1949 (‘the Conventions’) are now accepted as representing customary international law. Thus, if a party were to withdraw from the Conventions it would still be bound by customary law to respect the substantive rules set out in them. This is reflected in the → Martens’ Clause in each of the Conventions which provides that denunciation shall in no way impair the obligations of the parties to a conflict under general international law. (→ General International Law [Principles, Rules and Standards])


50 In the past it was thought that if one had the right to terminate a treaty on the ground that another party was in breach, one could do so only in respect of certain provisions, but not if termination was based on other grounds. Art. 44 (1) VCLT makes no such distinction. If a treaty provides a right to withdraw or to suspend its operation, this may be exercised only with respect to the whole treaty, unless the treaty provides or the parties agree otherwise. Art. 44 (2) VCLT provides that, where no such right is included, a party may invoke a ground recognized in the VCLT only with respect to the whole treaty, except as provided in Art. 44 (3) VCLT, or in Art. 60 VCLT (termination for breach). Art. 44 (3) VCLT permits separability if the ground relates solely to particular clauses. It may be invoked only with respect to those clauses if all three conditions are met:

a) ‘the ‘clauses are separable from the remainder of the treaty with regard to their application’, in that it must be possible to sever them without affecting the clauses which remain; and

b) ‘it appears from the treaty, or is otherwise established, that acceptance of the clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole’. (This condition is the most difficult to apply and would require an examination of the subject-matter of the clauses, their relationship to the other clauses, and perhaps also the travaux and the circumstances of the conclusion of the treaty); and

c) ‘continued performance of the remainder of the treaty would not be unjust’. Severance might affect the balance of the treaty; and an examination under condition b) would not necessarily take into account how the balance of interests might have changed over the years during which the treaty has been operated (Art. 44 (4) and Art. 44 (5) VCLT are relevant only to invalidity).

3. Loss of Rights by Acquiescence

51 A State may not invoke certain grounds for terminating, withdrawing from, or suspending the operation of a treaty if, after it had become aware of the facts, it either a) expressly agreed that the treaty remain in force or continue in operation, or b) by reason of its conduct it must be considered as having acquiesced in its maintenance in force or in operation (Art. 45 VCLT) (→ Acquiescence). The article applies to grounds under Arts 46 to 50, 60, and 62 VCLT.
4. Can One Validly Withdraw from a Treaty and then Immediately Rejoin?

One can envisage reasons why a State may wish to withdraw from a multilateral treaty and later rejoin it; the UK withdrew from the United Nations Educational, Scientific and Cultural Organization (UNESCO), only resuming its membership several years later. Similarly, Iceland withdrew from the International Whaling Convention (Whaling), only rejoining many years later. Probably the only reason a State would withdraw from a treaty and then immediately accede to it would be to make a reservation it had not made before. Although depositaries may allow a certain latitude to States which make late reservations, this particular stratagem does not seem to be permissible.

Trinidad and Tobago became a party to the ICCPR in 1978, and in 1980 to the (first) Optional Protocol (‘the Protocol’) to it. Parties to the Protocol agree to individuals communicating with (ie petitioning) the Human Rights Committee established by the ICCPR. By 1998 Trinidad and Tobago had decided that this procedure was being increasingly ‘abused’ by prisoners sentenced to death. It therefore gave the required three months’ notice to withdraw from the Protocol, but at the same time deposited an instrument of accession to it, to take effect three months later. The new instrument included a reservation that the Committee would not be competent to receive and consider communications from such prisoners. Although the withdrawal from the Protocol was in itself valid, the right to make the reservation in this way is highly questionable. For a party to withdraw and then ‘re-accede’ solely for the purpose of making a reservation which it did not make originally, and which if made as a late reservation is unlikely to have been accepted, is open to most serious objection. The stratagem may be seen as a single transaction, the only purpose of which is to enter a late reservation, the effectiveness of which can be defeated by a single objection. Following strong objections to its stratagem, Trinidad and Tobago withdrew from the Protocol in 2000. Guyana copied the stratagem in 1999. There were only three objections, and Guyana did not withdraw from the Protocol.

In 1967, Sweden ratified the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality (1963), but denounced it in 2002, re-acceding to it the next day with a declaration limiting its obligations to those of Chapter II Convention on Reduction of Cases of Multiple Nationality and Military Obligations. Art. 7 permits such a declaration (in practice, a reservation) to be made, but only when consenting to be bound. There were no objections from the other parties, who must be deemed to have acquiesced.

Select Bibliography

S Rosenne, Breach of Treaty (Grotius Cambridge 1985).
Select Documents