

Can two parties of a treaty terminate or withdraw from the treaty when the third state party intentionally refrains from obliging to the rules of the treaty?

Gondor, Rohan and Mirkwood – being three countries rich in natural resources – opted to construct a Fellowship of Recourses treaty to enhance their mutual benefit by exchanging a selected amount of their primary resources. Here, it is essential to emphasize that these states were at friendly terms when they voluntarily agreed to construct and ratify this multilateral treaty. Moreover, it is important to note that the treaty was constructed under the premises that it would be mutually beneficial for all states parties. Once ratified, the treaty rules are binding and it obliges the state parties to act in good faith with one another by *Pacta Sunt Servanda*, under art. 25 of the VCLT. The treaty essentially entails that: 1) Gondor must export 2000 tons of stone to the other two State parties; 2) Rohan must export 50 horses to the other two state parties, and; 3) Mirkwood must export 1000 trees to the other two state parties. However, due to contextual changes over time, the states parties cannot or do not wish to oblige anymore to the rules that they previously agreed to in the treaty. Therefore, it must be assessed to what extent Rohan and Mirkwood have any valid reasons to terminate or withdraw from the treaty, considering that breaches being; 1) Gondor intentionally refrains from obliging to the treaty provisions and is in violation with the fundamental provision of the treaty; 2) Rohan was beyond his own fault forced to reduce and/or cease his export of horses, because a rapidly expanding disease has reduced his primary export product substantially.

In the case of Rohan, the expansion of a disease resulted in a decrease of his horse. Therefore, it can be argued that Rohan cannot oblige to the treaty-rules anymore, for the disease expansion and consequent decrease of horses is beyond its control. Hence, Rohan may legitimately invoke the *Supervening Impossibility*, for the horses are “indispensable for the execution of the treaty”, as stated in art 61.1 of the VCLT. Accordingly, it can be argued that Rohan cannot be held accountable by the other states parties to not fulfil its obligations to the treaty anymore, for Rohan simply does not possess the means to oblige to the treaty. In parallel with the aforementioned reasons, art. 62 can also be legally invoked by Rohan, for his circumstances have changed so dramatically that he could not “consented to the performance of the treaty in those circumstances”. The combination of these two intrinsic articles, viz. related to the domestic issues of Rohan – provides a legitimate argument for Rohan to suspend its obligation to the treaty. In addition, the principle of “non-performance by the other state party” may be invoked under article 60.2-c of the VCLT, for it can be argued that the breach of Gondor “radically changed the position of every party with respect to further performance of its obligations under the treaty.” Furthermore, art. 60.3-b may also be invoked for the fact that breach of Gondor to the treaty counteracts against the very objective of the treaty – the objective that drove the parties to ratify the treaty. Confirmatory, it must be noted that the very essence of the treaty by the parties was to all exchange their primary recourse in order collectively benefit thereof. However, this mechanism does not function anymore on an equitable basis when one state refrains from contributing to this collective advantageous exchange framework.

In the case of Mirkwood, the demand for timber – hence the price – increases due to economic activities of other states. Therefore, it becomes financially ‘disadvantageous’ for Mirkwood to exchange his high-value timber for horses and stone quarries, in contrast to selling them to other countries. Now, first it is fundamental to define ‘disadvantageous’. By judicious interpretation within the context of economic market mechanisms, the disadvantageous consequence might deteriorate to more detrimental consequences for Mirkwood. Therefore, it may be a valid reason for Mirkwood to argue that due to the change in circumstances of the market he is forced to retreat from the treaty, in order to protect his own economic position and ensure its viability in the long term. Here, Mirkwood may invoke art. 62. of the VCLT, because 1) the previous beneficial circumstance – in relation with the other parties and their promised obligations – was a fundamental reason for Mirkwood to consent and ratify the treaty and; 2) the short term disadvantageous effect of the change in market position of timber is most likely to deteriorate the economic health of Mirkwood, which can have detrimental consequences in the long term. In fact, these consequences may even force Mirkwood in the long term to withdraw from the treaty to survive as a state, essentially creating the ‘necessity’ for Mirkwood to withdraw timely from the treaty. Now, despite that this first argument on its own may be susceptible to critique, the combination with the art. 60.2-c and 60.3-b empowers the legal basis for Mirkwood to withdraw from the treaty. This is because Gondor counteracts against the very objective of the treaty – which in this case, “radically changes” the position of every party –being Rohan and Mirkwood – and therefore, counteracts against the “accomplishment of the purpose of the treaty”, as stated in art. 60.3-b. In contrast, it must also be noted that whereas Rohan can legitimately invoke art.61 by the extreme reduction of his available horses, Mirkwood cannot invoke this article in his defense for suspending the treaty.

Now, before proceeding to come to a justification for a suspension of the treaty, the contextual and legal basis of Gondor must also be assessed. At the time when Gondor signed the treaty there was another government ruling over the country and its relations. However, the treaty is still binding for it is conducted by “full powers” of Gondor, stated in art. 7 of the VCLT, and the new nationalist political party in power of the government is susceptible to the very same rules that bind them to oblige to the treaty, e.g. under art. 24 of the VCLT. What makes the situation worse is that Gondor has ceased the exchange of the quarries immediately and without any cooperation and consent of Rohan and Mirkwood. In fact, Gondor does not have any valid argument for violating its obligation towards the treaty parties under the main provisions of the VCLT, being: 1) material breach by another party in art. 60; 2) supervening impossibility in art. 61; 3) fundamental change of circumstance in art. 62 and; 4) treaty conflicting with rules of Jus Cogens. Therefore, it can be concluded that Gondor is violating the obligations of the treaty once ratified with the other two states parties, which consequently, partly justify suspension by the other two state parties to the treaty.

Considering and weighing the collective interests of the state parties as well as premises upon which the treaty was constructed, ratified and executed by the state parties, it is argued that Rohan and Mirkwood have a viable legal basis to suspend from the treaty towards Gondor. Arguably, Rohan has the strongest point, because besides that he can invoke the violations of Gondor to the treaty by the principle of “non-performance by the other state party” under article 60.2-c of the VCLT, he has a firm point of *Supervening Impossibility*, for the horses are “indispensable for the execution of the treaty”, as stated in art 61.1 of the VCLT. Another viable and effective solution could be that all three states parties suspend or terminate the treaty by consent. Since Gondor’s new government decided to cease all stone exports, the remaining two states parties may propose to Gondor to collectively agree to terminate the treaty. This is allowed by art. 57b. of the VCLT. This will be satisfactory for all the parties, and prevent any further legal disputes. Gondor can keep its quarries within its own borders as it wishes so, Rohan has the time to recover his horse population and Mirkwood can prevent his financial

disadvantageous export of Timber. However, if Gondor is not willing to consent to this collective agreement, Rohan and Mirkwood may conclude to suspend the operation of the Fellowship Recourses Treaty under art. 58.1-b, because: 1) it does not affect the rights and obligations of the third party, especially when considering that in fact it is Gondor who is detracting the rights of Mirkwood and Rogan; 2) the violations of Gondor upsets the *synallagma* (reciprocity) of performance and return (*do ut des*) under art. 60 of the VCLT. This negative reciprocity is valid and confirmatory, the ICJ has stated that “the general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties”.¹ In fact, the suspension of the Fellowship of Recourses treaty by Rohan and Mirkwood may satisfy all parties considering the transformed environment in which they operate and the limitations that they face.

Bibliography

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¹ Dor, 2011. Article 60. Termination or suspension of the operation of a treaty as a consequence of its breach.