Arms-control treaties: Review & revision

by Georges Delcoigne, Christopher Rossi, and Barthold Veenendaal

Editor's note: The Non-Proliferation Treaty, which currently has 121 States as parties and comes up for review in 1985, stands among modern arms-control agreements that increasingly incorporate special legal clauses to facilitate their future adaptation to changing circumstances, conditions, and developments. This article examines, from legal and historical perspectives, what the concept of "review" entails and how it differs from "revision" as a legal instrument for peaceful change.

The distinction between review and revision clauses, as embodied in treaties and reflected in international law, seems as close as it is confusing.

While both serve a modernizing purpose, the relationship between the two and the instances in which each takes on important rôles in the modification of treaties remains unclear. Because the subject matter of treaties may be substantially affected by technological developments, and because such developments may materially effect the original expectations of the parties, review and revision clauses are inserted to bring a treaty more in line with evolving conditions. In this way, they forestall politically cumbersome, lengthy, and not always successful treaty-making conferences.

Legal principles: a delicate balance

The revision of treaties in international law is dependent upon a delicate balance struck between two generally recognized but countervailing principles. The first, *pacta sunt servanda,* emphasizes stability and continuity; the second, *rebus sic stantibus,* stresses change.

Pacta sunt servanda mandates that States are duty bound to perform in good faith the obligations to which they have consented.* Consequently, the unilateral revision of any terms of a treaty is prohibited.

The International Court of Justice, in its Advisory Opinion on *Reservations to the Genocide Convention* (I.C.J. Reports, 1951), has supported this view when it stated that: "... a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'être* of the Convention."

This rule additionally denies to any claimant a legal right to demand the alteration of a treaty unless there is an explicit provision to this effect.* This is not a rule without exception, however.

International law contemplates situations in which a treaty, having lost its *raison d'être* due to a fundamental change in one or more of its basic assumptions, is rendered null and void. This is what is covered by the maxim *Omnis conventio intellegitur rebus sic stantibus,* one legal defense available to States for the non-performance of treaties.** But, as a defense, it therefore necessarily presupposes the existence of a treaty. (The circumstances in which this principle may be invoked are stipulated in Articles 61 and 62 of the Vienna Convention on the Law of Treaties.)

One can thus conclude that treaties must be performed in good faith, although performance is not mandated by international law when, through no fault of the parties, fundamental changes in circumstances occur subsequent to the conclusion of the treaty itself. Such changes must relate to events or conditions that were not considered by the parties and must be of an exceptional nature. This condition deprives a State of a general excuse exculpating it from treaty obligations it finds inconvenient.***

According to the International Court of Justice in the *Fisheries Jurisdiction Case* (I.C.J. Reports, 1973), Article 62 of the Vienna Convention on the Law of Treaties represents "in many respects" the codification

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* See also Article 26 of the Vienna Convention on the Law of Treaties, 23 May 1969, UN Doc. A/Conf. 39/11 and Add. 1; and A.J.I.L., Vol. 65 (1967) pp. 334–6.

* Lord McNair, *The Law of Treaties,* Oxford (1961), p. 535.

** Schwarzenberger, G., *International Law,* Vol. I, London (1957), p. 535.

*** Cavare, L., *Le droit international publique positif,* Paris (1969), p. 208.

of the maxim *rebus sic stantibus.* From the Article's wording, it is clear that the requisite preconditions for invocation of the doctrine remain exacting.

Unless there is an express provision to the contrary, only two grounds are accepted for terminating or withdrawing from a treaty: (1) When the change in fundamental circumstances constitutes an "essential basis of the consent of the parties...," and (2) Where the effect of the change is "radically to transform the extent of obligations still to be performed."

Because of this somewhat high and inflexible standard – and because the political ramifications associated with unilateral abrogations of contractual obligations may be costly as well – revision (and review) clauses increasingly have been inserted in treaties and seem to serve as a middle ground for adapting them to changing circumstances.

Distinction between review and revision

The distinction between review and revision clauses has been somewhat obfuscated by the use of these terms in relation to their respective purposes and effects.

Whereas ordinary interpretations of the differences between review and revision clauses might settle upon the distinction that review involves merely a reconsideration of the treaty while revision in most instances imports a notion of change or modification, the legal distinction is not so clear.

As an example, Article XII of the Antarctic Treaty provides, after the expiration of 30 years and upon petition, for a conference "to review the operation of the Treaty." The subsequent practice of the parties reveals, however, that this review clause is, for all practical purposes, indistinguishable from a revision clause.*

It would be illusory to include a review clause in a treaty and then interpret it in such a way as to deprive it of any effect other than providing a mechanism through which parties could discuss that which they could not change.

Recalling the general principle of treaty interpretation – that provisions should not be interpreted so as to render them meaningless** – one could consider review clauses as merely existing for the removal of editorial shortcomings that could hamper the implementation of a treaty and veil its real sense.***

An example of this can be found in the 1960 Montevideo Treaty, which established a free-trade area in Latin America. (See GATT document L/1157/Rev.1). Articles 60 and 61 contain both a revision and a review clause. Article 61, the review clause, commands the contracting parties to "review the results of the operation of the Treaty and initiate the necessary joint negotiations with a view to ensuring the most effective attainment of the purposes of the Treaty and, if desirable, to *adapting* it to a new stage of economic integration." (Emphasis added).

This then provides a specific instance in which a middle ground between *pacta sunt servanda* (stability) and *rebus sic stantibus* (change) is reached. Within the review clause, or more importantly, outside of the revision process, the possibility exists of "adapting" the treaty as created.

Obviously "adaptation" is to be regarded as something not quite as drastic as revision. In this way, the review clause can be seen as a conduit through which a treaty can adapt itself to new demands without fundamentally changing any of its original dispositions. Another example of this approach is the recent United Nations Convention on the Law of the Sea (UN Doc. A/Conf. 62/122), which deals with such a distinction in Articles 154 and 155 (review) and Articles 312 and 313 (revision).

Historical perspectives

From an historical perspective, the rise of the nation-state in the 17th century and the development of a burgeoning merchant class structure greatly precipitated the incorporation of revision clauses into trade clauses and treaties.

To facilitate the performance of commercial commitments, revision clauses were inserted as a means of providing flexibility in cases where strict adherence to the terms was not possible. An Anglo-Portugese treaty of 1654 already contained the following clause: "... and if it shall happen that the price of commodities shall fall, the value or rate shall, in like manner, from time to time be abated according to the said rule of law."*

Such a technique, usually with the assistance of the most interested parties clause, was frequently used in commercial treaties and is commonly found in many major 20th-century commercial conventions.** The

* UNTS, Vol. 402 (1 December 1959). For the history of Article XII, see Auburn, F.M., *Antarctic Law and Politics,* London (1982), p. 143.

** Oppenheim, L., *International Law, A Treatise,* 8th edition, Vol. 1, by H. Lauterpacht, London (1955), p. 955.

*** Kelsen, *Contribution à l'étude de la révision juridico-technique du Pacte de la S.D.N.,* R.G.D.I.P. (1937), p. 634; also Declave, "Osservazioni sulle Clausole di Revisione," Jus. (1951), p. 90.

* Anglo-Portugese Treaty of 10 July 1654; also see "Commercial Treaties", *Herselt,* Vol. 2 (1890), p. 19.

** For discussion and examples, see Leca, J., *Les techniques de revision des conventions,* Paris (1961), p. 34; Keeton, G.W., "The Revision of Certain Chinese Treaties", B.Y.B.I.L. (1929), p. 129; Article 236 of the EEC, UNTS, [No. 4300, Vol. 295, p. 2; Article 27 of the International Wheat Agreement of 20 February 1971, TD/Wheat 5/7, UN Wheat Conferences; Chapter XIII of the International Agreement on Olive Oil, UN Doc. E/Conf. 19/9, 15 May 1958.

appearance of revision clauses in non-commercial treaties comes only later.

It seems that one of the first non-commercial uses of revision clauses was the 1878 Universal Post Convention (B.F.S.P., Vol. 69, June 1878, p. 210), which fully described the procedural process through which revisions could be made. Other conventions establishing administrative unions also made explicit reference to revision clauses.* Nevertheless, the use of such clauses in non-commercial treaties remained exceptional during the 19th century.

In the field of multilateral peace settlements, the use and inclusion of revision clauses has been somewhat uneven. As victors have historically tended to impose their own peace settlements, the issue of revision clauses has been somewhat moot.

While it is true that the 1815 Treaty of Vienna contains the provision that eventual revision of clauses relating to international rivers could be achieved with unanimous approval of other riparian States, this merely codified the pre-existing rule that parties to an agreement were entitled at any time, upon unanimous consent, to alter the provisions to which they had previously agreed. Neither the 1856 Treaty of Paris nor the 1878 Treaty of Berlin contained such a revision clause.**

A precedent is established by the 1868 Declaration of St. Petersburg, which opens the road for the incorporation of revision clauses into peace and arms-control agreements in the 20th century.*** In that treaty, parties agreed "to reserve to themselves the right to come to an understanding, hereafter, whenever a precise proposition shall be drawn up, in view of future improvements which may be effected in the armament of troops, in order to maintain the principles which they have established."

Interestingly though, it was not settled, nor probably contemplated, whether a "proposition for future improvement" in line with established principles actually amounted to a revision or some derivative form of review.

However, many and varied agreements in the 20th century relating to arms control and peace include revision clauses. The Treaty of Versailles represented one of the first major peace treaties to contain explicit revision clauses. (B.F.S.P. Vol. 112, p. 10).

The 1919 League of Nations Covenant, in theory, was to have crafted an arms-control regime reducing "national armaments to the lowest point consistent with national safety ..." After the Council formulated such plans they were to "be subject to reconsideration and revision at least every ten years." Additionally, the Covenant empowered the Assembly to "advise the reconsideration" of treaties no longer applicable and "whose continuance might endanger the peace of the world."

The 1922 Washington Naval Agreement, more specifically geared toward the regulation of armaments than the League Covenant, also included an explicit revision clause.*

Modern arms-control agreements

In recent arms-control and disarmament agreements, the post-World War II tendency has been to couple revision clauses with review clauses. In this way, an intermediate level of adaptation in the implementation of the treaty is made available.

The Non-Proliferation Treaty (UNTS, Vol. 729, 8 July 1968) is one of the first in a series of multilateral arms-control agreements to treat as separate the concepts of revision and review.

Subsequent treaties – such as the Sea Bed Treaty, the Biological Weapons Convention, and the Environmental Modification Convention – also have drawn such distinctions. Of the many bilateral arms-control agreements, none separate more clearly the concepts than the Anti-Ballistic Missile Treaty of 1972.** Other such agreements seem to make the distinction as well.***

Legal tools for peaceful change

History and law, therefore, have shown that alternatives exist to the enforcement of treaty obligations that – in line with the legal maxim *pacta sunt servanda* (emphasizing stability) – may present undue and unreasonable hardships for the parties. At the same time, these alternatives are directed toward protecting the expectations of the parties against spurious

* For a table, see Hoyt, E., *The Unanimity Rule in the Revision of Treaties, a Re-examination,* Leyden (1959), p. 18.

** For Treaty of Vienna provision, see Annex XVI of the General Act of the Treaty; for provisions on Treaties of Paris and Berlin, see Martens, G.F., "Nouveau recueil de traités", 1817–1841, Vol. 2 and 1843–1875, Vol. 15, Goettingue.

*** Declaration of St. Petersburg, 17 December 1868, official documents, *Supplement of the American Journal of International Law,* Vol. 1, New York (1907).

* For references and discussion of the Covenant and agreements, see British & Foreign State Papers (B.F.S.P.) Vol. 112; Articles 8.1 and 8.2 in *Essential Facts about the League of Nations,* 9th edition, rev., Geneva (1938); Article 19 of the Covenant; and *League of Nations Treaties,* Vol. 25, No. 609, Washington, D.C.

** To reference the four foregoing agreements, see G.A./RES/2660 (XXV), Annex (11 February 1971); G.A./RES/31/72, Annex (18 May 1977); Article XIV, 1, UNTS, Vol. 944 (26 May 1972).

*** See, for instance, Article V (1) of the Threshold Test Ban Treaty, UN Doc. A/9698, Annexes I and II; Article VIII (1) of the Peaceful Nuclear Explosion Treaty and the Protocol, Article X, Disarmament Conference documents CCD/490, and CCD/496/Corr. 1, 5.

Review and revision clauses in modern arms-control agreements

Treaty	Depository	Entry into force	Duration	Revision	Review
Treaty on the Non-Proliferation of Nuclear Weapons (NPT)	UK, USA, USSR	5 March 1970	25 years with possibility of extension	Yes (Art. 8,1.2)	Five years after entry into force in Geneva. Thereafter at 5-year intervals as determined by simple majority (Art. 8.3)
Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea Bed and the Ocean Floor and in the Subsoil Thereof. (Sea Bed Treaty)	UK, USA, USSR	18 May 1972	unlimited duration	Yes (Art. 6)	Five years after entry into force in Geneva, thereafter at time and place determined by simple majority (Art. 7)
Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction (B.W. Convention)	UK, USA, USSR	26 March 1975	unlimited duration	Yes (Art. 11)	Five years after entry into force in Geneva or earlier if requested by a majority of parties to the Convention (Art. 12)
Convention on the Prohibition of any Military or Other Hostile Use of Environmental Techniques (ENMOD)	UN Secretary-General	5 Oct. 1978	unlimited duration	Yes (Art. 6)	Five years after entry into force in Geneva. Thereafter, on request of a majority of States Party to the Convention (Art. 8)
Treaty (bilateral) between the USA and the USSR on the limitation of Anti-Ballistic Missile system (ABM Treaty)		3 Oct. 1972	unlimited duration	Yes (Art. 14.1)	Five years after entry into force and at 5-year intervals thereafter (Art. 14.2)

and frivolous resort to the legal maxim *rebus sic stantibus* (stressing change).

These alternatives – namely, review and revision clauses – increasingly have been used in arms-control and disarmament agreements, not only as bulwarks against the frustration of terms of an agreement, but also as tools through which the spirit and intent of a treaty can be preserved or updated.

The practice of States seems to have shown that the distinction between review and revision is primarily one of degree. Review relates to securing more readily the agreed objectives of a treaty. Revision, on the other hand, involves the creation of procedural standards through which the actual objectives can be modified.

Present day circumstances impose great pressure on treaties. If they are to be reflective of ongoing technological developments in the subject matter they purport to regulate; if they are to fulfill their function as instruments of peaceful change; and if they are to gain wider acceptance by attracting new signatories, then intermediary measures of adaptation – as suggested by review and revision clauses – should be incorporated into future treaties.