

PROJECTS OF THE AMERICAN INSTITUTE OF INTERNATIONAL LAW ON TREATIES,  
DIPLOMATIC AGENTS, AND CONSULS

Project No. 21 of the American Institute of International Law relating to Treaties would from the brief preamble indicate it to contain "the principles and rules of international law applicable to treaties," but it will cause little surprise to find that the provisions of the project do not cover so wide a field. Instead, the six articles do no more than formulate a few of the rules relative to the negotiation and interpretation of treaties. It would therefore be more appropriate to include in this preamble a statement to the effect that the enumeration of the particular rules included in the project should not be understood to exclude others as evidenced in the practice of states.

Article 1 declares the capacity of the contracting nations to negotiate treaties, but if they were to sign the project it might not be necessary to make a declaration so obvious from the very act of signature. Nor is it quite correct to state that "All the contracting nations have complete capacity to negotiate treaties and conventions of all kinds soever," since some of these states expected to sign may not enter into certain treaties because of special circumstances and peculiar relationship to the United States. The remaining portion of Article 1 states that these treaties may be negotiated "according to the form and conditions contained in their respective national laws." Either this is too obvious a truth to state, or it is intended to bring into international consideration the constitutional provisions of each state. Even in the latter case it should not be made a ground for captious criticism, since there is a tendency all along the line for international law to take into account the constitutional aspects of governmental action. The latest manifestation is the sending to Washington and elsewhere of representatives of certain of the component parts of the British Empire.

Article 2, codifying the customary provisions relative to the appointment and credentials of negotiators, requires no particular comment. The same is true of Article 3 relative to ratification, except that the concluding paragraph, which declares that "the treaty is binding for each of the contracting parties" from the date of the exchange of ratifications, leaves it a little doubtful whether this means that after ratification treaties retroactively take effect from the date of the signature. A treaty, like a contract between private individuals, is intended to give evidence of the meeting of the minds. The minds of the two governments acting for the respective states meet through the negotiators at the moment when they set their signatures to the final articles of the treaty. Ratification is merely a delay agreed to in order to permit the governments or states concerned to examine the acts of their agents and to decide whether they will approve or reject them.

Article 4 is of value in that it declares that "Every amendment, modification, or addition to the text of a treaty is a new proposal," and in consequence

recognizes the right of the other party to withhold its consent to such alteration. It might, however, have been better, instead of declaring the right of refusal, to indicate that the other party might declare such alteration equivalent to a refusal to ratify, since no state likes to accept the odium of responsibility for a failure to ratify. The concluding paragraph of Article 4 correctly states the law that a failure to ratify a treaty "must not be considered as an unfriendly act." It is, nevertheless, an act which, when without substantial reasons, may justly cause the other state to feel that there has been a lack of what Franklin, in answering the complaint of Vergennes, called "bienséance."

Article 5 does no more than codify the fundamental obligation to observe good faith in fulfilling a treaty. Article 6 deals with the termination of treaties. It would seem important also to include among the causes of their obsolescence such a radical change in circumstances as to cause the treaty no longer to apply to the same subject matter as that which the contracting parties originally had in mind. This rule is generally expressed by the Latin phrase *rebus sic stantibus*, and is understood as tacitly included in every treaty. Treaties are, nevertheless, presumed to be valid and to endure so that a state alleging a fundamental change in circumstances as a cause of abrogation of a particular treaty should indicate beyond every reasonable doubt that such a modification has taken place; otherwise the failure to fulfil the treaty will be justly regarded as a violation of the obligation to observe good faith.

Project No. 22, relative to Diplomatic Agents, follows appropriately after the consideration of treaties which it is often the important function of diplomats to negotiate. This project contains thirty-two articles relative to the accrediting, reception and rights of diplomatic representatives and of agents sent on special missions. It is not necessary to go into any detailed discussion of these provisions. They will for the most part be found to conform to the principles generally recognized by the states in their practice.

Article 10 declares that when there is objection to the reception of a particular diplomatic representative, the objecting nation "is not obligated to state reasons therefor." This is correct, since it is necessary that every government reserve the right to refuse to receive any person with whom it does not feel that it can successfully carry on diplomatic negotiations. To state the grounds of its objection might lead to recriminations and endanger the maintenance of cordial if not of peaceful relations. No state will, however, lightly refuse to receive the diplomatic representative which a friendly state proposes to dispatch.

Article 22 is of particular interest in some of the states whose jurists participated in the elaboration of this project of a code. It provides that "The diplomatic agent is obliged to surrender to the competent local authority any individual pursued for crime or misdemeanor under the law of the country to which he is accredited, who may have taken refuge in the

house occupied by the agent or in that of the legation. Should the agent refuse to surrender him, the local authority has the right to guard the house of the agent or of the legation until the government of the agent decides upon the attitude which he will take." Spain did not follow this course in 1726 when the Duke of Ripperda, who took refuge in the British Embassy, was seized therein. The relations between the two states became strained, and this disregard of diplomatic immunities was one of the contributing causes of the subsequent rupture of peaceful relations.

By limiting its denial of the right of asylum to the case of individuals pursued for crime or misdemeanor, the project avoids the controversial question of the right of "temporary refuge" in time of political disorder. In many states of South America such "temporary refuge" has not infrequently been afforded to unfortunate politicians who have been caught unawares by a sudden revolution.

Article 27 enumerates certain matters in regard to which the project would have it that diplomatic agents are not exempt from the local jurisdiction, and raises many interesting questions. If this article were adopted, the power of the local tribunal to accept jurisdiction in the enumerated cases affecting foreign representatives might make it possible for the authorities of the receiving state to harass a diplomatic representative and virtually to destroy that complete freedom from local control which is essential to the fulfillment of his office.

The concluding paragraph of Article 30, which extends the exemption of local jurisdiction to the servants of diplomatic representatives, adds a clause to the effect that if they "belong to the country where the mission resides, they shall not enjoy such privilege except when they are in the legation building." This obviously raises a very important and most difficult question and one which is not likely soon to be settled.

The preamble of Project No. 23 relating to Consuls refers to the American Republics formulating these rules as "considering it well in conformity with the requirements of economic life, to regulate the questions relating to consular agents. . . ." Exception should be taken to this undue emphasis on the commercial nature of the consuls' duties. It is true that consuls are in first instance the agents of the government entrusted with the protection of the economic interests of their states. Nevertheless, these officers have other important duties to perform. Within the limits of the consular district they protect nationals from arbitrary imprisonment or from other disregard of their rights. They transmit to their government important political information relative to the matters which come under their observation. Locally they are considered to represent the state from which they come. Unfortunately for the consuls, it is generally the diplomats who write about their immunities and draw up projects of codification.

The eleven articles of the project under consideration, relative to consular rights and duties, are in general conformity with the practice of states and

are not likely to give rise to controversy. They are not, however, to be considered as a comprehensive regulation of consuls in their relations with the receiving state. In this respect Project 23 is much less complete than its predecessor which relates to the other branch of the foreign service.

From the viewpoint of style the projects are rather uneven and the rules relative to treaties are less precisely defined than are those relating to diplomats and consuls. The language of the latter project seems of the three to be the one most clearly and juridically formulated. Taken as a whole, these projects relative to the rights and duties of diplomats and consuls and the provisions governing the negotiation and termination of treaties should be of service as indicating certain general principles which have received the support of a large number of distinguished jurists and statesmen from the states of this continent.

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