DOCTRINE OF REBUS SIC STANTIBUS

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1. Introduction

The phrase '*Rebus Sic Stantibus'* (things thus standing) is a Latin phrase that refers to a situationwhere a contract cannot be withdrawn from or terminated as long as the conditions and circumstances surrounding the contract have not fundamentally changed. This has often been used in the form of doctrine in international law, more specifically in treaty law, and has been a subject of debate and disputes. This doctrine is a part of customary international law but a provision for this doctrine has been provided in Article 62 of the Vienna Convention on the Law of Treaties 1969 as well.

Therefore an unforeseen fundamental change of circumstance which lead to impossibility to perform the treaty, is an essential condition where states seeks to terminated the implementation of the treaty in the territory, under the doctrine called *Rebus Sic Stantibus*, as per the provision of Article 62 of the Vienna Convention on the Treaties.

The doctrine of *Rebus Sic Stantibus* provides that a treaty or contract can be withdrawn or terminated, when there is any fundamental change in the circumstances. Under this doctrine a state can avoid the principle of *Pacta Sunt Servanda*, which aims that all the states should be abide by the terms of the agreement or contract between the states. Article 26 of the Vienna Convention, states that treaties between the states will be binding and to be implemented in a good faith.

The problem resulting from the right of State to cease or restrict its obligation in a treaty caused by a fundamental change of circumstances is an old and the most difficult issue to be solved by the law of international treaty.2 Before Vienna Convention on International Treaty 1969 is in force, international law can merely provide a vague and unsatisfactory answer in regards to the restriction of fundamental change of circumstances. International law authors have attempted to refer to national positive law to provide legal basis for the notion of fundamental change of circumstances, and it is said that as a general rule of positive law that all established international contracts also contain implicit requirements in addition to explicit requirements

set out in a treaty, and both of those requirements are inseparable part of a treaty. According to Roman law, each contract or treaty leads to the addition of *Rebus Sic Stantibus* provision. A firm scope will be harder to obtain, if the problem is ceded to the international law experts' opinions that vary in defining the meaning of *Rebus Sic Stantibus* or ceded to the State parties to the treaty because the divergence of interest will put restriction to *Rebus Sic Stantibus* in correspondence with their own interest. This condition may only be amended through International Legislative body that stands on the interest of States as members of international community. The efforts to unite all the perceptions on the definition of *Rebus Sic Stantibus* had been carried out by the International Law Commission in 1966, which had successfully formulated The Draft Articles on the Law of Treaties which contains several provisions relevant to the issue of *Rebus Sic Stantibus,* and Article 59 explicitly seeks to delimit the scope of fundamental change of circumstances.

2. Origin of the Rebus Sic Stantibus

Rebus Sic Stantibus doctrine becomes a dispute as a result from reckless application of States, started from the period towards 1914, to escape from burdensome treaties, and it continued to the period between the First and the Second World War. *Rebus Sic Stantibus* principle has been applied by many countries and it has been accepted by the majority of international law experts as part of international law. Even though there was a debate about the doctrine application. The first commentary said by applying negative form would make the fundamental change of circumstances principle. On the other hand, it is not the duty of legislation to define the scope of the fundamental change of circumstances principle, and this duty is granted to law. In the end it depends on the consideration of interested government body in terminating international treaties.

A key figure in the formulation of *clausula Rebus Sic Stantibus* was the Italian jurist Scipione Gentili (1563–1616), who is generally credited for coining the maxim *Omnis Conventio Intelligitur Rebus Sic Stantibus* ('every convention is understood with circumstances as they stand'). The Swiss legal expert Emer de Vattel (1714–1767) was the next key contributor. Vattel promoted the view that 'everybody bound himself for the future only on the stipulation of the presence of the actual conditions' and so 'with a change of the condition also the relations originating from the situation would undergo a change'. During the 19th century, civil law came to reject the doctrine of *clausula Rebus Sic Standibus*, but Vattel's thinking continued to influence international law, not least because it helped reconcile 'the antagonism between the

static nature of the law and the dynamism of international life'.7 While individual cases invoking the doctrine were much disputed, the doctrine itself was little questioned. Its provision in the 1969 Vienna Convention on the Law of Treaties established the doctrine firmly but not without dispute as 'a norm of international law'.

2.1 International Law Commission

International Law Commission (Commission) in carrying out its duties to make a codification of the law of international treaty realizes that *Rebus Sic Stantibus* doctrine, after the Second World War ended, has been accepted by the majority of international law experts as part of international law. However, international law experts also suggest that the application of *Rebus Sic Stantibus* doctrine is carried out with a strong caveat and the scope of its validity to be restricted, considering that international law does not have a compelling jurisdiction.

In the continuity of the validity of international law, change of circumstances often occurs and is easily stated that there has been a fundamental change of circumstances. In reality it does not cause the treaty to cease to be current. This change of circumstances is often used as a reason for escaping from burdensome treaties.

In paragraph (4) of the commentary, the International Law Commission had indicated that State practice showed " a wide acceptance of the view that a fundamental change of circumstances may justify a demand for the termination or revision of a treaty, but also shows a strong disposition to question the right of a party to denounce a treaty unilaterally on this ground ".No single case could be cited of a unilateral application of the *Rebus Sic Stantibus* doctrine. The denunciation by Russia in 1870 of the clauses of the Treaty of Paris of 1856, dealing with the status of the Black Sea, had been strongly resisted by the other European Powers; the dispute had been settled by the London Conference of 1871, which had replaced that status by a new agreed regime. In that same paragraph (4) of the commentary, it was recalled that " In the Free Zones case the French Government, the Government invoking the *Rebus Sic Stantibus* principle, itself emphasized that the principle does not allow unilateral denunciation of a treaty claimed to be out of date ". To its credit, that Government, although its interests would have been served by a unilateralist approach, argued that the *Rebus Sic Stantibus* doctrine would cause a treaty to lapse only where the change of circumstances had received legal recognition, either by agreement of the parties or by international adjudication.

Several theories were presented to meet the juridical basis of Rebus Sic Stantibus doctrine, and

three theories were chosen to be considered by the Commission, namely:-

 Under the theory the parties are presumed to have had in mind the continuance of certain circumstances of as the basis of their agreement and to have intended the treaty to besubject to an implied condition by which it is an essential change in those circumstances

 Under the second theory, international law is considered to impose upon the parties to a treaty an objective rule of law prescribing that an essential change of circumstances entitles any of the parties to require the termination of the treaty.

 Under the third theory, which is a mixture of the first two, the doctrine is considered to be an objective rule of law the operation of which is to import into the treaty, regardless of the intention of the parties, an implied condition that it will come to an end if there is an essential change of circumstances.

The distinction that determines between the second and third theory is that legal provision will prevail by inserting implicit requirements to the treaty, therefore if there is afundamental change, treaty will terminate automatically. Whereas according to the second theory, it merely grants rights to the parties to the treaty to terminate the treaty. However, if the termination of the treaty is not allowed to be carried out unilaterally if there is a fundamental change of circumstances, thus the distinction between both theories is not that different. The conclusion is that the third theory is not a supplementing of the second theory. The Commission, therefore, rejected the third theory and took the second theory as a legal basis of *Rebus Sic Stantibus* doctrine, is objective law provision than an assumption of the augment of implicit requirement in the treaty. If fundamental change occurs and radically influences the treaty, the parties therefore may terminate the treaty according to the doctrine as an objective law provision based on equity and justice.

The Commission filed a proposal regarding the draft article for the amendment of fundamental change of circumstances to the General Assembly of the United Nations which is contained in the draft article 44 of 1963 and article 59 of 1966. The Commission was no longer using the term *"Rebus Sic Stantibus*" as the title of the draft article, because it is closely related to implicit provision of a treaty, and was superseded with the term "Fundamental Change of Circumstances" as the title of the draft article.

3. Fundamental changes to the circumstance

Under Article 62 of the Vienna convention on the law of treaties 1969, explain what are the fundamental changes to the circumstances which lead to the implementation of the *Rebus SicStantibus*,

Which are subject to the following conditions:-

 There should be substantially and radically transforming change which result in the transforming the extent of the obligation of the members who are party under the treaty.

 Treaty should not form a boundary.

 Changes should be fundamental to the circumstances which were prevailing at point of time when treaty was formed. These fundamental changes should not be foreseen.

 When such fundamental changes were occurred by the act of the party to the treaty, this doctrine can't be implemented to escape the obligation of the treaty. This shall be considered as a breach of international obligations.

4. Purpose of the *Rebus Sic Stantibus.*

This doctrine is not specifically codified in any international instrument but it has found its place under Article 62 of the Vienna Convention which defines what the fundamental changes of circumstances are. This doctrine is used to withdraw from the international obligation by the parties.

Following are the conditions where this doctrine can be used by the states-

 During the span of time when a treaty is under the conclusion between the parties, some of the terms of the treaty seem to be beneficial but later they turn into harmful condition for the state welfare, due to some internal changes in the state. Under such situation state can withdraw, suspend or terminate the treaty or declare it to be invalid.

 When state's sovereignty and policy is effect than in such a situation state may declare a treaty to be invalid or opt to choose to withdraw it from the treaty.

 Hence it can be predicated that states often opt to cite its own reason to use this doctrine, for example may be for the national security. The doctrine purpose is to provide protection for the

state's interest and at same time make sure this doctrine is not misused by the parties under the treaty under the condition of fundamental changes of the circumstances.

5. Procedure to terminate the treaty

Procedure to be followed, when a treaty is to be terminated, render it invalid, to suspend its operation or to withdrawal from it, is provide under Article 65 of the Vienna Convention as *follow:-*

 The party must notify the other parties of its claim; be it withdrawal, termination, operations suspension or invalidity. This notification shall state the measure to be taken.

 There is an expiry period of three months after the receipt of the notification, during which parties to the treaty are allowed to raise objections against the actions of the claimant party. If after the expiry period, no party has raised an objection, the claimant party can proceed with its stipulated measure according to Article 67.

 In the event of an objection being raised by any other party, the parties shall together operate to get a solution.

6. International law with respect to termination or invalidity of the treaty.

Condition in which a treaty can be terminated or declared as invalid under international law is, provided by Article 42 and 43 of the Vienna Convention

Article 42 -states that the validity of a treaty and the consent of a party that binds it to the treaty can be impeached only through the application of the Vienna Convention.

Article 43 -states that invalidity, termination, denunciation, withdrawal, and suspension of operations, occurring through the application of the Vienna Convention or through the said treaty-

 Would not obstruct or impair the duty of a State which it owes under international law, independent of the treaty.

 A further simplification of this could be explained as: a State which withdraws from a treaty requiring the performance of a particular obligation would still be required to perform that obligation if other international law instruments to which it is a party, so dictate.

These provisions serve as a protection against the misuse of *Rebus Sic Stantibus* as the termination can be done only through the application of the Vienna Convention and a State would still need to perform any obligation under international law even if it withdraws from a treaty, assuming that is it also a party to that international law instrument which stipulates the performance of that duty.

7. Rebus Sic Stantibus with Pacta Sunt Servanda and International Law

Therefore the nature of the *Rebus Sic Stantibus*, *Pacta Sunt Servanda* and International Law differ which arises conflict which lead to subject of discussion and debate. Following are few contentions-

In favour

 Withdrawal from treaty can be considered to be valid by the state who is the party to it, when it found that the circumstances prevailing at the time of the conclusion of the treaty to be beneficial, but it later turn out be a harmful element in its welfare.

 When states finds out that the treaty to be an obstacle in the performance of its function and unbeneficial for the state interest.

In against

 The very purpose of the international law is to make sure that the law and order in the state are maintain but with availability of the doctrine will lead to distraction of such function.

 As every state under its sovereign power will misuse the doctrine by creating its own concept of the fundamental changes in the circumstances to get out of the treaty which is not beneficial to it.

 Hence ultimate power is with the state, which may lead to arbitrary actions and suppression of right and liberty of humans, irrespective of the international law and morality.

8. Case laws

Free Zones of Upper Savoy case

 In November 1923, France moved its customs office to Gex, Ain, provoking the'Freezones Controversy' with Switzerland. The matter was brought before the Permanent Court of

International Justice, and France invoked *Rebus Sic Stantibus*, but Switzerland argued that the doctrine did not apply in respect of territorial rights. In 1932, the court found in favour of Switzerland on the basis of fact, but it did not reject that *Rebus Sic Stantibus* might be a valid basis for France's argument. It was the second time *Rebus Sic Stantibus* had been argued before an international court.12

 There is no uniformity in the definition of the *Rebus Sic Stantibus* doctrine during the period before the First World War until the issuance of Permanent Court judgment in 1930 concerning the case of "the Free Zones of Upper Savoy and the District of GEX". In States practice towards the occurrence of the First World War in 1914, States unilaterally terminated a treaty using *Rebus Sic Stantibus* doctrine in order for escaping from burdensome treaties.

 During that time, *Rebus Sic Stantibus* doctrine was an implicit provision contained in the treaty. Practice of unilateral termination of a treaty was clearly ruining international law order. On the other hand, control for termination of treaty must be arranged and let the third party in, such as International Court, to provide legal certainty.

 However, Permanent Court in the previously discussed case precisely avoided the application of *Rebus Sic Stantibus* and settled the dispute through treaty interpretation as a basis for the Court judgment, without presenting any commentary on the validity of *Rebus Sic Stantibus* doctrine in international law.

The Fisheries Jurisdiction case14

 The most important case of the use of *Rebus Sic Stantibus* in recent times is that of the Fisheries Jurisdiction. In this case, the International Court of Justice judged a dispute wherein Iceland sought to extend its fisheries jurisdiction from 12 to 50 miles.

 In 1961, the United Kingdom reached a settlement with Iceland that there would be a 12-mile fishery zone around Iceland and in return, any dispute regarding the Icelandic fishing zones shall be referred to the International Court of Justice.

 However, in 1971, Iceland decided to extend the fishing zone to 50 miles and also decide that the 1961 settlement was no longer in effect. The United Kingdom thus approached the International Court of Justice.

 Iceland contended that there had been a change in the circumstances since the 12-mile limit was now recognized by both parties through the 1961 settlement and this change necessitated the extension of the zone.

 The main issue to be dealt with here by the Court was whether it was necessary that there be a transformation of the extent of the obligation to be performed by the party so that a change in circumstances may give rise to the termination of a treaty.

 The Court thus held that the 1978 Icelandic Regulations were a unilateral extension exercised by only Iceland and that it could not unilaterally exclude the United Kingdom from fishing in the areas agreed under the 1961 settlement. It was further held that in order to effect a change in circumstances for termination of a treaty, it is necessary that there has been a transformation of the extent of obligations yet to be performed. The change in the circumstances did not transform the extent of the jurisdictional obligation of Iceland to limit the fishery zone to 12 miles under the 1961 settlement.

9. Conclusion

The fundamental change of circumstances principle as set out in the Article 62 paragraph 1 of Vienna Convention can impair an abuse by applying negative form, because there is yet a dispute concerning the issue of fundamental change of circumstances in international forum. Notwithstanding the fact that the fundamental change of circumstances principle is yet discussed in a case and International Court has yet taken a stand, it needs to be cognized by the interested parties and to be taught in university. Not all States ratify Vienna Convention 1969, including Indonesia. However in the Indonesian Law No. 24 of 2000 (Undang-undang Republik Indonesia Nomor 24 Tahun 2000), dated on 23 October 2000, on International Treaties, in Chapter VI, about Termination of International Treaties in article 18 paragraph c, it is stated that termination of a treaty may occur when there is a fundamental change that influences the treaty execution. In the commentary of article 18, it is mentioned that an international treaty may cease when one of the points in this article has occurred. It is not the duty of legislation to define the scope of the fundamental change of circumstances principle, and this duty is granted to law. This writing is Doctrine of Rebus Sic Stantibus expected to be useful for the consideration of interested government body in terminating international treaties.