CHAPTER 7

Problematic Provisions

Transfer of Rights

The object and purpose of a treaty usually entail regulating some aspect of state conduct, but a lease of territory goes further and tampers with the rights that form the foundations of sovereignty. If title to a leased territory occasionally passes to the lessee, it is because the lease agreement provides the legal framework in which political and administrative forces can develop and subsist to produce this result. Other consequences of a territorial lease may be equally dramatic, such as a shift in the leased zone's social or economic situation that occurs through the lessee's activity; at times this can transform the territory into something far different than what either state envisioned when entering into the agreement. A lease can change the quality of the relationship between the parties through the lessee's presence on more territory than it has under its sovereignty and the diminution of the lessor's operational authority in part of its geographic space. The conduct of third states toward both parties may adapt accordingly if the lease produces a tangible strengthening or weakening of either party.

The ample potential for a lease to have an impact beyond its objective suggests that lease agreements, perhaps more than most treaties, must be drafted with vision and managed carefully. State practice has shown this occurs sometimes, but not all the time. Many lease arrangements have an ad hoc nature and appear drafted to resolve an immediate territorial issue without much regard to other consequences that may directly result from its implementation. Some can rightly be criticized as instruments of dubious diplomatic quality. Often a lease will be negotiated with little or no reliance on, or detailed knowledge of, previous agreements of this type.621 Even when the negotiators are aware of other territorial leases (including those involving the same state in other circumstances), the fact that the practice has been widely ignored as a field of study has allowed lessons that might be gleaned from it to stay undetected.

As altering territorial rights can be both legally and politically sensitive, leases of territory can take several years to negotiate, and often do—and

sometimes they take much longer; the lease for Tin Bigha required 18 years of intermittent talks. But many other leases are rushed to completion in less-than-optimal circumstances or for reasons that transcend the specific goal of the lease itself. This occurred, for example, when the European states scrambled to conclude lease treaties with China at the end of the 19th century: obtaining control of parts of Chinese territory by this means was not a priority for any nation until it became one for Germany, and then it suddenly became a priority for other states that sought to maintain a balance of strategic and economic power which was, for the most part, manifest elsewhere. More recently, the twin leases in the Israel-Jordan Peace Treaty were negotiated and drafted in a single day amid pressure to resolve lingering issues that were holding up the treaty’s completion.622

Leases between states also vary enormously in detail; some are many pages long and take a wide range of situations into account; the U.S. lease of territory in the Bahamas from the United Kingdom for testing missiles, for example, contained 26 articles that appeared to cover every contingency its negotiators could think of.623 Other leases are extremely brief; when Austria-Hungary obtained rights from the Ottoman Empire to exercise authority in Bosnia and Herzegovina, the entire grant was contained in one paragraph of the Treaty of Berlin. Apart from mentioning one right that would be deferred for negotiation at a later time—that of maintaining garrisons and roads in Bosnia—the lease was compressed into a single sentence: “The provinces of Bosnia and Herzegovina shall be occupied and administered by Austria-Hungary.”624

While the amount of detail itself does not make for a “good” lease, it can impact the way the transferred rights are interpreted and exercised, and thus the disposition of the leased zone. When the rights are elaborated clearly, the chances improve for both states to implement the arrangement in accordance with a shared sense of each party’s limitations. The degree of clarity also is critical for determining how the rights are aligned with the municipal legal system of each state, an essential factor in the lease’s administration.

Problems can arise if the transferred rights are defined inadequately or too rigidly. A right that is elaborated in vague terms naturally introduces a greater risk of divergent interpretations. At times this may be the only way the lease’s negotiators can arrive at a commonly acceptable text, but it carries the prospect of generating future tensions between the parties. By contrast, a right that is described in very specific terms may protect the lessor to the extent that it

622    Haddadin, Diplomacy on the Jordan, 394–96.
624    Treaty of Berlin, July 13, 1878, art. XXV.