Third Parties and the Law of Treaties

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Part I — Theoretical

1. General Introduction: Some Definitional and Doctrinal Issues

   a. The Basic, Classical Rule

   The relationship between third parties and treaties is defined by a general formula pacta tertiis nec nocent nec prosunt. This principle has been recognised in states’ practice as fundamental, and its existence has never been questioned.¹ For states non-parties to the treaty, the treaty is res inter alios acta. It has been reflected in numerous cases before the World Court. For example, in the German Interests in Polish Upper

¹ See e.g., Lord McNair, The Law of Treaties, 1961, 309; Harvard Research article 18: “(a) a treaty may not impose obligations upon a State which is not party thereto; (b) if a treaty contains a stipulation which is expressly for the benefit of a State which is not a party or a signatory to the treaty, such a State is entitled to claim the benefit of the stipulation so long as the stipulation remains in force between the parties to the treaty”; see also R. Roxbourgh, International Conventions and Third States, 1917, 453.
Silesia Case, the PCIJ observed that: “[a] treaty only creates law between States which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States.”

b. What is Meant by a Third State in the 1969 and the 1986 Vienna Conventions

There are certain preliminary considerations, such as what constitutes a third party. The point of departure will be the definitions of the 1969 and 1986 Vienna Conventions on the Law of Treaties (as imprecise as they may be). The 1969 Vienna Convention defines “third State” as a state not a party to the treaty (article 2 para. 1 lit.(h)); and the 1986 Convention defines “third State” and “third organisation” as a state or an international organisation not a party to a treaty (article 2 para. 1 lit.(h)). A party to a treaty, according to the 1969 Vienna Convention is “a State which expressed its consent to be bound ... and for which the treaty is in force” (article 2 para. 1 lit.(g)); in the text of the 1986 Vienna Convention this is expressed as follows: “a party means a State or an international organisation which has consented to be bound by a treaty and for which the treaty is in force” (article 2 para. 1 lit.(g)).

The question may be posed what is the position of “a contracting state” as defined by the 1969 Vienna Convention as a “State which has consented to be bound by the treaty, whether or not the treaty has entered into force” (article 2 para. 1 lit.(f)). It was phrased in the following manner by the 1986 Convention: “contracting State” and “contracting organisation” mean respectively a state or an international organisation “which has consented to be bound by a treaty, whether or not the treaty has entered into force” (article 2 para. 1 lit.(f) (ii)).

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2 PCIJ Ser. A, No. 7, 28; see also Chorzow Factory Case, PCIJ Ser. A, No. 17, 45; Austro-German Customs Union Case, PCIJ Ser. A/B, No. 41, 48.

3 On this notion see in detail C. Chinkin, Third Parties in International Law, 1993, 7 et seq.

4 A “negotiating state” and a “contracting state” were viewed as third state by Fitzmaurice which is obvious from the definition in Draft article 1: “1. For the purposes of the present articles, the term “third State” in relation to any treaty, denotes any state not actually a party to a treaty, irrespective of whether or not such State is entitled to become a party, by signature, ratification ... etc. so long as such faculty, ..., has not yet been exercised”, Sir G. Fitzmaurice 5th Report, 1960/1961.
The above definitions, therefore, relate to two different situations: one concerns the status of a state or an international organisation which has expressed its concern to be bound and for which the treaty has come in force ("party" to a treaty) and the second covers the situation in which a treaty is not yet in force for a state or an international organisation ("contracting" state or organisation). Under this provision a state in relation to which a treaty is not yet in force is a third state. In fact, both Conventions state explicitly that according to the 1969 Vienna Convention (article 2 para. 1 lit.(h)) third state is "a State not party to a treaty"; similarly the 1986 Vienna Convention understands that 'third State' or 'third organisation' respectively is not a party to a treaty (article 2 para. 1 lit.(h)).

A negotiating state is defined in the following manner by the 1969 Vienna Convention: it is a "State which took part in drawing up and adoption of the text of the treaty" (article 2 para. 1 lit.(e)). The 1986 Convention reads as follows: "negotiating State" and "negotiating organisation" means respectively a state or an international organisation, "which took part in the drawing up and adoption of the text of a treaty" (article 2 para. 1 lit.(e)). Thus a negotiating state (and negotiating organisation) is a third party with regard to the treaty. Common article 26 of the Vienna Conventions is not applicable to the situations as above described. Article 26 reads as follows: "[e]very treaty in force is binding upon parties to it and must be performed by them in good faith." Therefore, only a state for which a treaty entered into force is a party to a treaty.

The negotiating state and the contracting state, although third states towards the parties to a treaty, enjoy certain rights (or prerogatives) in relation to the parties to the treaty and the treaty itself. Article 24 para. 4 of the 1969 Convention reads as follows:

"[t]he provisions of a treaty regulating authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner and date of its entry into force, reservations, the function of the depository and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text."\(^5\)

\(^5\) It is without any doubt that the provisions regarding procedural matters provided for in a proposed treaty are binding on any state which took part in its adoption, (Lord McNair, see note 1, 203, Harvard's Draft Convention on the Law of Treaties, Commentary on article 9, see note 1). There are, however, different doctrinal justifications for this rule. Sinclair, for exam-
Article 77 (Functions of Depositaries) para. 1 lit.(b), (e) and (f) of the 1969 Convention must be also mentioned. These paras read as follows:

"1. the functions of a depository, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:

(b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;

(e) informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(f) informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty had been received or deposited."

If a negotiating-state fails to become a party to a treaty, it would not be responsible under the rules of state responsibility.

It may be said that a contracting state, during the period of entry into force of a treaty, enjoys all the rights and obligations that characterise a negotiating state. In addition there are several provisions of the 1969 VCLT that specifically refer to a contracting state. Article 40 (amendment of multilateral treaties) para. 2 states that:

"[a]ny proposal to amend a multilateral treaty as between all the parties must be notified to all contracting States, each one of which shall have the right to take part in: (a) the decision as to the action to be taken in regard to such proposal; (b) the negotiation and conclusion of any agreement for the amendment of a treaty."

A very important (but controversial) article 18 (obligation not to defeat the object and purpose of a treaty), imposes on the contracting parties a duty to "refrain from acts which would defeat the object and purpose of the treaty."

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ple, is of the view that the prior application of final clauses is based on a tacit assumption of the negotiating states that these provisions were applicable from that date. Sir I. Sinclair, The Vienna Convention on the Law of Treaties, 1984, 99; for similar view see P. Reuter, "The Operational and Normative Aspects of Treaties", Isr. L. R. 20 (1985), 123 et seq., (126); The Chairman of the Drafting Committee, was of the view that the basis of the binding force of this rule was customary law, 26th Mtg. as a Whole, UNCLT Off. Rec., 140 para. 17, Vol. I.
It is not clear what is the legal basis for this legal obligation and what are the legal effects of non-compliance with it. Good faith is often assumed to be its legal basis and obligations therefore stemming from article 18 are assumed to have a legal character. Finally, there may be a question of "a state entitled" to become a party. Although the 1969 VCLT does not include a definition of such a state, such a category may be inferred from article 77 para 1 lit.(b); (e); and (f) (see above). This article also lists certain entitlements which such states have. Usually, under this notion there is understood a state which participated in negotiations. According to article 15 of the Convention, however, a state which did not participate in negotiations also may become a party to it if the treaty so provides; if the negotiating parties so agreed prior to the entry into force of a treaty; or the parties to a treaty subsequent to its entry into force have agreed that such a state could become a party to it by the way of accession.

The whole article reads as follows: "[a] State is obliged to refrain from acts which would defeat that object and purpose of a treaty when: (a) it has signed a treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed it consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed." On article 18 see in particular: J. Charme, "The Interim Obligation of article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma", Geo. Wash. J. Int'l L. & Econ. 25 (1991), 71 et seq.

All Rapporteurs of the ILC were of the view that the good faith was the source of this obligation and that states were legally bound to refrain from anything which may affect the provisions of a treaty before it entered into force. See also B. Cheng, General Principles of Law as Applied before International Courts and Tribunals, 1987, 11 et seq.; D.P. O'Connell, International Law, 1970, 222-224; Harvard Draft, see note 1, 783.

Article 77 (Functions and Depositaries); para. 1 lit.(b) "preparing certified copies of the original text and preparing any further text of the treaty in such original languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty"; lit.(e) "informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty"; lit.(f) "informing the States entitled to become parties to the treaty when a number of signatures or of instruments of ratification, acceptance, approval or accession required for entry into force of the treaty has been received or deposited."
There are doctrinal problems on how to reconcile the above-described with article 34 of the Convention (see below). On the one hand, there is a strict rule *pacta tertiis nec nocent nec prosunt*, on the other, there are some rights and obligations stemming from treaties to states which are in fact the third parties. Upon closer scrutiny, however, it is clear that the manner of formulation of article 34, indicates that it is drafted in less absolute terms; it only stipulates that a treaty does not create rights and obligations for a third state without its consent. Thus, there is an explanation that a treaty may create rights and obligations for a third state but under the condition of the consent of the third state. A different argument that may be submitted is that rights and obligations that arise for a third state, do not relate to the substantive provisions of a treaty itself but rather stem from the procedural rights. This was suggested by *P. Reuter* who said as follows:

“...on the one hand, [a treaty] constitutes a procedure, an operation whereby several minds meet and, if necessary, meet again to review, amend or even abolish the commitments contained in the treaty; on the other hand, it describes and establishes rights and duties, defines individual situations, or lays down general rules.”

It appears that under the Conventions, in consideration of the legal effect of treaties on the third states, we have three categories of states: parties to the treaty; states totally extraneous to the treaty; and the third intermediate category which consists of the “negotiating states”; “contracting states” and “states entitled to become a party.” Even if the

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9 Article 34 of the 1969 VCLT (General Rule Regarding Third States): “A treaty does not create either obligations or rights for a third State without its consent.” Article 34 of the 1986 Convention on the Law of Treaties between States and International Organisations or between International Organisations reads as follows: “A treaty does not create either obligations or rights for a third State or a third organisation without the consent of that State or that organisation.”

10 See Reuter, see note 5, 124-125. He distinguishes clauses of treaties into two groups: the first group which contains provisions which are connected with mechanisms of the legal transaction (or operational rules); and those which may be called rules of substantive law. The first category of rules is related to e.g., the conclusion of the treaty; and deals in principle with applicability to states, various stages of conclusion, instruments, depository, date of entry into force, registration, amendment procedure, period of application, withdrawal. The category of substantive rules consists of the rest of the treaty provisions; clauses which are aimed at securing the purposes for which negotiating states concluded the treaty.
rights and obligations of the third category are of a purely procedural nature and do not relate to the substance of the treaty, nonetheless, there are certain effects emanating from the treaty on third states that expressed intentions to become parties to it. This intention to become a party to a treaty (before it enters into force or afterwards) distinguishes this group from totally extraneous states.

c. Objective Régimes

A further issue which is also related to the issue of the effect of treaties on third states is the legal status of so-called objective régimes. In fact, these issues are very often considered together, without doctrinal separation; it even may be that they cannot be sufficiently distinguished. Lord McNair, however, did separate these issues and analysed the effect of treaties on third parties within Part III on the scope of operation of treaties, as an exception from the general rule pacta tertiis nec nocent nec prosunt (Chapter XVI), whilst the theoretical and practical problems relating to objective régimes and their effect erga omnes, are discussed in Part II on certain type of treaties (Chapter XIV on Dispositive and Constitutive treaties). Even those authors, such as McNair, who strictly separate the two régimes, observe the possibility of a theoretical and practical overlap between them, as illustrated by the Free Zones Case (see below). Another writer, however, de Arechaga, in his important article “Treaty Stipulations in Favour of Third States”, did not draw any doctrinal distinction between treaties which are in favour of third states and treaties which purport to set up objective régimes.

2. Third States and Treaties


The starting point of the discussion are the relevant provisions of the 1969 Vienna Convention in regard to third states, i.e., arts 34–38. The main principle is codified in article 34 that a treaty does not create ei-

11 McNair, see note 1, 311.
12 J. de Arechaga, “Treaty Stipulations in Favour of Third States,” AJIL 50 (1956), 339 et seq.
Fitzmaurice, Third Parties and the Law of Treaties

ther obligations or rights for a third state without its consent. The Convention deals separately with obligations (article 35) and rights (article 36). Article 37 is devoted to the revocation or modification of obligations or rights of third states. Although, article 34 sets up the main common principle there are, however, differences in the regulation of the provision of rights and the provision of obligations by treaties on third parties. The view has been expressed by the majority of writers that an exception to this principle is contained in article 75 of the Convention which reads as follows:

"The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression."14

A first difference is that whilst article 35 provides for the creation of obligations both in relation to states and international organizations, article 36 provides that a beneficiary of rights may be either a state, a group of states, or an international organization (1969 Convention and 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, hereinafter the “1986 Vienna Convention”) or a group of them, or all of them. As Professor Reuter puts it:

"It is not apparent why obligations might not be established with regard to a group of States or organisations, not why rights or obligations might not be established with regard to a group of States or organisations, not why rights or obligations might not be established with regard to a group comprising both States and organisations."15

As stated above article 36 is based as a general rule on the principle of consent. The article differentiates the means of expression of this consent. The provision "... unless the treaty otherwise provides", means that if the treaty provides that a state should express its consent in some particular form, the legal effect will only arise if this condition has been

13 The same principle is applicable to international organisations as expounded in the 1986 Vienna Convention.


fulfilled. When the treaty is silent as to the particular conditions, the as­sent may be presumed, providing there is no evidence to the contrary.

A second difference is that obligations must be accepted expressly in writing. As to the provision of rights it is sufficient for a state or an in­ternational organisation to assent to rights granted by a treaty. The “as­sent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.” It must be mentioned that under the 1986 Convention, the assent given by the organisation is “governed by the rules of the organisation.” The difference between states and or­ganizations, it was explained by the ILC, results, firstly, from the spe­cial character of the organisation whose capacity is limited. From this follows that it is impossible in general to presume a general assent; and secondly, the rights of international organisations are conditioned by its special functions, unlike states, and for that reason, extension of its functions should be in accordance with the rules of an organisation.

Although article 38 of both Vienna Conventions, belongs to the same section as the above-mentioned articles, substantively it deals with a different subject-matter. Thus, in a case of an obligation arising from a treaty, three conditions must be fulfilled: the assent of the third state; the express recognition by a state of its obligations; the written form of an assent. Arts 34–37 (article 37 belongs to the same category as arts 35–36, as it namely concerns revocation or modification of obligations or rights of third states, or organizations arising under arts 35 and 36) con­cern the situation where, parties to a treaty express their will to create either a right or an obligation vis-à-vis a state (or an organisation) which is not a party to a treaty; whilst, article 38 deals with a legally different situation, when a treaty becomes binding on third states through the workings of customary rule of international law. Thus, these two groups of situations beg for a different approach.

b. The Views of the ILC; the Views of Doctrine; and the 1932 Free Zones of Upper Savoy and the District of Gex Case

The Commission was adamant from the very beginning that “the pri­mary rule ... is that the parties to a treaty cannot impose an obligation on a third State without its consent. The rule is one of the bulwarks of the independence and equality of States.” As to the creation of an ob-

16 ILCYB Part Two, 1966, Draft articles on the Law of Treaties, 227, Com­mentary on Draft article 30; it was stated as follows: “the rule underlying the present article appears originally to have been derived from Roman law
ligation for a third state, the Commission explained that two conditions must be fulfilled before a non-party can be considered to be bound by a provision of a treaty to which it is not a party: first, the parties to the treaty must have had intended the provision in question to be the means establishing an obligation for a state not a party to the treaty; and secondly, the third state must have expressly agreed to be bound by the obligation in writing. The Commission came to the conclusion that when these two conditions were fulfilled, for all purposes there has been created a second collateral agreement between the parties to the treaty, on the one hand, and the third state on the other. Furthermore, the legal basis for the third state's obligation is not the treaty itself, but the collateral agreement. The Commission stated, however, that:

“... even if the matter is viewed in this way, the case remains one where a provision of a treaty concluded between certain States becomes directly binding upon another State which is not and does not become a party to the treaty.”

The above-mentioned agreement is collateral to a main treaty between the parties to that treaty as offerors, on the one hand, and the third state as offeree, on the other.

As to the creation of rights, the Commission also envisaged two conditions to be fulfilled in order for a right to arise for a state from a provision of a treaty to which it is not a party. In a similar manner for the creation of an obligation, parties must intend a provision to accord a right to a state in question or to a group of states to which it belongs, or

in the form of the well-known maxim pacta tertiis ... In international law, however, the justification for the rule does not rest simply on the general concept of the law of contract but on sovereignty and independence of States”; Fitzmaurice in his Draft on article 3 (pacta tertiis nec nocent nec prosumt) said as follows: “1. By virtue of the principles pacta tertiis nec nocent nec prosumt and res inter alios acta, and also of the principle of the legal equality of all sovereign independent States, ... a State can not in respect of a treaty to which it is not a party: (a) incur obligations or enjoy rights under the treaty ..., Fitzmaurice’s 5th Report. This view is also shared in the literature on the subject. See e.g., P. Cahier, “Le problème des effets des traités a l’égard des Etats tiers,” RdC 143 (1974), 589 et seq.; C. Tomuschat “Treaties under International Law and Third States,” Law and State, 1990, 2 et seq., (12); G. Schwarzenberger, International Law as Applied by International Courts and Tribunals, 1957, 458-461; O. Elias, The Modern Law of Treaties, 1974, 60.

18 ILCYB ibid., 227.
to states generally. In fact, the intention is of pivotal importance, since it is the intention that distinguishes a right from a mere benefit.\textsuperscript{19} The second condition is the assent of the beneficiary state. The question may be posed whether the right is created by the treaty or by the beneficiary state’s act of acceptance.

There are two views as to the legal status of the assent. In one view, the assent (even given implicitly by the exercise of the right) constitutes an acceptance of an offer made by the parties; in the other view, the assent is only legally significant as an indication that the right is not going to be disclaimed by the beneficiary. The last sentence of article 36 para. 1 of the Conventions, which provides that “[i]ts assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides”, was considered by the Commission as desirable in order to secure flexibility to the operation of the rule in cases where the right is expressed in favour of states generally or of a large group of states.\textsuperscript{20}

There were two theories as to the creation of rights which respectively underlie these two theories. The first one was based on the concept of a collateral agreement (as in the event of a third-party obligation), and the second one on the concept of \textit{stipulation pour autrui} (see below). The gist of such stipulation is that third party beneficiaries would enjoy rights, these with an immediate effect, irrespective of their acceptance. The Commission opted for the theory of collateral agreement which, unlike \textit{stipulation pour autrui}, is based on a strict premise that treaties do not have any effect at all on third parties. The same view was expressed by Judge Negulesco in his Separate Opinion in the 1932 Free Zones Case\textsuperscript{21} (see below). He wrote as follows:

"[i]t is possible, in an international convention, to stipulate a right in favour of a third State. But whereas, according to such municipal law as allows of such stipulation, the third party has a right by virtue of the stipulation itself, in international law the States having made

\textsuperscript{19} The question arises how to interpret the intention of parties to the treaty. Should we recourse to the canons on interpretation of treaties as enshrined in arts 31-33 of the 1969 VCLT or is it rather the problem of interpretation of the intention of parties, not of treaties. See on this subject: C.L. Rozakis, “Treaties and Third States: a Study in the Reinforcement of the Consensual Standards in International Law,” ZaöRV 35 (1975), 1 et seq., (9 et seq.); C. Chinkin, see note 3, 33.

\textsuperscript{20} ILCYB 1966, Part Two, 229.

\textsuperscript{21} PCIJ Series A, No. 22, 36-37.
such a stipulation mutually undertake to conclude together with the third State — a supplementary agreement which will be appended to the agreement originally made. With this object, the treaty may provide for the right of adherence by third Parties interested therein, and failing a stipulation of this nature, an agreement between the signatory states and the third State must be concluded.”

The assent that is a necessary condition for the operation of arts 34 and 36 was translated into a tacit agreement expressed by a beneficiary. Reuter, for example, explained that:

“[t]he commentary on the draft articles and the provision adopted for the creation of rights shows that the texts predominately refer to the collateral theory. Indeed, the beneficiary’s assent exists even for a creation of rights, although such is presumed, involving therefore a presumed tacit agreement. As soon as the beneficiary State takes a position on the effects of the stipulation, the presumed agreement becomes an explicit one if the effects are accepted, or disappear if they are rejected (retroactively it would seem, although the Vienna Conventions do not clarify the point).”22

It has to be noted, however, that the theory of the collateral agreement was considered to be without any merit by de Arechaga in his important essay on treaty stipulations in favour of third states.23 It is worth perhaps presenting a detailed overview of de Arechaga’s arguments, since he submits an interesting analysis of why the theory of the collateral agreement is incorrect. This writer in no uncertain terms considers this theory obsolete:

“[t]his offer theory reproduces in international law, with delay of fifty years, the first attitude of some civil-law writers who tried to explain the stipulation “in favorem tertiui” in municipal law through the concept of two successive contracts.”24

This theory has been abandoned, he claims, altogether in civil law due to its inability to explain certain most important consequences of the stipulations pour autrui, such as a life insurance contract, under which the third party beneficiary may accept the stipulation after the death of the insured party who made the original statement. Accordingly, if we follow up this theory, we would have a contract between a living person and a dead one. In international law, however, de Aréchaga, postulates,

22 Reuter, see note 15, 104.
23 de Arechaga, see note 12, 351-354.
24 de Aréchaga, ibid., 352.
this theory should be rejected, because the acceptance of the benefit cannot be deemed to constitute the consent to a second agreement. He further proceeds to analyse the legal nature of an acceptance both in domestic and international law. He points out that the term “acceptance” in municipal systems of law has two meanings: one which relates for example to an acceptance of a contractual offer and the other which concerns an acceptance of an inheritance. The first of these examples relates to the rights that are acquired after the acceptance is performed. In the second of these examples, however, we have a different situation, i.e., the act of acceptance refers only to the confirmation of already existing rights. The acceptance of a stipulation “in favorem tertii” belongs to the second group. The acceptance may be expressed by explicit acceptance, by tacit acceptance, or by conduct. The possibility of expression of acceptance by conduct is the proof that stipulations in favour of third parties belong to the second group. Thus, de Arechaga claims:

“[i]t would be an extremely overdrawn fiction to pretend that the exercise of a right by the third party constitutes an acceptance of an offer and the consent to a second agreement from which the very right is being exercised. It is not conceivable how the second agreement would come into being at the precise moment in which the right is exercised. The situation ... really shows that the third party is exercising a pre-existing right, and not acquiring it. The exercise of a right implies a previously effected acquisition, since the cause must precede the effect.”

Yet another indication, according to this writer, that there is no second agreement, or that a collateral agreement does not exist, is the fact of its non-registration with the Secretary-General of the United Nations, under Article 102 of the United Nations Charter. The same writer submits that there is even a physical impossibility of such a registration, since:

“[h]ow would the Secretary-General be able to register, for instance, an international agreement between signatories of the Suez Canal Convention and a third State, arising from the fact that a ship of the State has passed through the Canal?”

De Arechaga concludes that:

“... so-called acceptance is not the expression of consent to a second agreement but is an act appropriating of rights derived from the treaty which contains stipulation in favour of third states. The third

25 de Arechaga, ibid., 353.
26 de Arechaga, ibid., 353.
party beneficiary is not supposed to ratify, adhere or accede to the treaty, but merely to appropriate or renounce the rights stipulated in its favour." 27

The reasoning presented by de Aréchaga, although very forceful, suffers from some flaws. He relies indiscriminately on analogies with municipal law systems and therefore rules out from the start the possibility of the consent of a state, even a theoretical one, to a collateral agreement under international law, as opposed to, municipal law. Furthermore, the example of the Suez Canal is not really illuminating, since he equates rights arising under a stipulation pour autrui with those which may arise under the controversial so-called “objective régime” (something which has been the subject of much discussion within the ILC, see below) — a form of régime to which, in the view of some lawyers, canals and international waterways may belong. Under a stipulation pour autrui, the role of the assent of the third state has been downplayed, if not altogether eliminated, and has been replaced by the will of the parties to a treaty to vest such a right in a third state, until that state decides to refuse or disclaim it. This approach may be disputed, as it does not take into account the text of arts 34 and 36. Be that as it may, the ILC, considered the differences between these two theories of a primarily doctrinal character and was of the view that they would lead to an identical result in almost every case. 28

The Free Zones of Upper Savoy and the District of Gex Case 29 has often been erroneously cited as an example of an in favorem tertii agreement. Switzerland was a beneficiary of a free customs zone in French territory since 1815, in accordance with a stipulation made in its favour by certain multilateral treaties to which France was a party and which was accepted by Switzerland. (On the case at length, see below). The Court, however, said:

“[i]t follows from all the foregoing that the creation of the Gex zone forms part of the territorial arrangement in favour of Switzerland, made as a result of an agreement between that ... country and the Powers, including France, which agreement confers on this zone the character of a contract to which Switzerland is a Party. The Court ... need not consider the legal nature of the Gex zone from the point of

27 de Aréchaga, ibid., 353.
28 See for example, ILC, Fitzmaurice 5th Report, see note 4, 81 and 104.
view of whether it constitutes a stipulation in favour of a third Party.”

The pronouncement of the Court on a stipulation in favour of a third party is only an obiter dictum, that did not contribute in any way to the merits of the Judgment. The Court explained that:

“[i]t cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour. There is however nothing to prevent the will of sovereign States from having this object and this effect. The question of existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case: it must be ascertained whether the States meant to create for that State an actual right which the latter has accepted as such.”

This statement of the Court is often cited out of the context of the case, therefore, giving the erroneous impression that it was applicable to this particular instance. However, it may be inferred from the cited obiter that firstly, a stipulation in favour of a third party cannot be lightly presumed; secondly, that it has to be decided in each and every case separately (therefore no general, “ready to apply rules” exist); thirdly, that it must be an intention of states to create such a right; and fourthly, that the third state must accept it.

c. Some Other Legal Issues Concerning Articles 35 and 36

As Napoletano points out, a treaty may make effective rights and obligations under certain conditions which define the behaviour of the parties and of a third state. As an example, he refers to the situation where a third state’s obligation is conditional upon some action of the parties, perhaps to the advantage of the third state. The same writer is, however, of the view that this condition is a purely factual one and that the parties have no legal duty to fulfil the condition itself. “If so,” he says “the third State would be granted a right, for which the treaty does not provide”; and he continues:

“Contracting parties are legally free toward the third State to abstain from the aforementioned behaviour. In that case, however, the third

30 See note 29.
31 See note 29.
32 Napoletano, see note 14, 77-78.
In a similar manner, the same author gives yet another hypothetical example of a situation in which a third state is granted a right to do something specific, but subject to certain conditions. The third state will have no obligation to comply with such conditions since no obligation was provided for in the treaty. The third state has a legal right to abstain from the fulfilment of the conditions. However, in the event of such non-compliance, the parties would be released from the duty to discharge their own obligations and further, being unwilling to fulfil the conditions, the third state would lose its entitlement to exercise the right conferred on it. This situation is provided for in article 36 para. 2 of the 1969 Convention, which reads as follows:

“A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty”.

Fitzmaurice proposed this provision as a general principle that involves the “automatic entitlement” of rights and obligations. It was formulated as follows:

“The lawful use of a territory of another State for a specific purpose entails conformity with the conditions of such use, and reciprocally, conformity, or readiness to conform, entails a corresponding right of the user in the manner provided for by the treaty.”

If a treaty creates both rights and obligations, it may condition the fulfilment of the right on the exercise of the obligation. Some authors are of the view that in such an event the form in which the consent is given by the third state is of paramount importance, i.e., whether it is expressed in writing or not. It appears, however, that in order to answer this, we first have to decide which provisions are applicable in such a situation, those contained in article 35 (consent in writing), or those contained in article 36 (consent may be presumed). The straightforward situation exists in cases in which two states wish to grant a right of passage across their territory to a third state — in which case the third state must comply with the conditions for the exercise of the right which is stipulated in the treaty. Its assent will be presumed if it exercises the right in accordance with the conditions stipulated. If, on the other hand, a treaty between two states purports to establish a right of passage over the territory of a third state which is conditional upon the

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33 Napoletano, ibid., 77.
payment of dues by the third state, this is a situation covered by article 35 and the third state must accept the obligation in writing.

The legal situation is more complicated when a treaty establishes for a third state independent rights and obligations simultaneously. As an example, one may take the situation where two states grant a right to a third state to use ports situated in their own territory in return for a right of passage by them over the territory of the third state. As Sinclair puts it:

“[w]here, as in this case, both rights and obligations arise for the third State from the provisions of a treaty to which it is not a party, it is suggested that the stricter rule — that related to obligations — should apply, so that the third State must give its consent in writing.”

The manner in which articles of the Conventions distinguish between rights and obligations provokes a more general question whether such a strict division within the treaty system is actually at all possible. As Professor Chinkin rightly observes:

“The interlocking of rights and duties within a single treaty may make this impracticable. Parties and non-parties may not concur in what constitutes a right and what an obligation. Conditions may be attached to the bestowal of rights on third parties; onerous conditions, could in the opinion of a third party, transform such a right into an obligation. In any case the inclusion of conditions tightens the interconnection between rights and obligations. No linkage is provided in the Convention between two sets of rights and obligations that are created; those between the parties inter se and those between the parties and any third party.”

In this context, the formulation of Article 2 para. 6 of the UN Charter has been the subject of consideration, which may be viewed in the context of article 35 of the 1969 Convention. Article 2 para. 6 reads as follows:

“The organisation shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far...”

34 Sinclair, see note 5, 103, and 102.
35 Chinkin, see note 3, 40.
36 Some authors maintained that as the expression of the will of the majority of the international community to maintain the world peace, there is an obligation imposed on third states, which are non-members of the UN. H. Kelsen, “The Law of the United Nations”, in: G.Keaton/ G. Schwarzen-
as may be necessary for the maintenance of international peace and security."

Chinkin, submits that this article is a substantive provision which has its procedural counterparts in Article 35 para. 2 of the United Nations Charter which allows a non-member state to bring a dispute to which it is a party to the attention of the Security Council or the General Assembly, if it accepts in advance, for the purpose of the dispute, the obligation of pacific settlement. Under Arts 34 and 35 para. 1 of the United Nations Charter, however, the Security Council may investigate any dispute which may lead to international friction — not just disputes between Member States; and any member state may bring such a situation or dispute to its attention. Chapter VII of the UN Charter does not limit the scope of the Security Council’s powers to Member States. Only Member States, however, have the duty to comply with a decision of the Security Council, but, as Chinkin says:

"... the maintenance of global peace and security and the peaceful settlement of international disputes would be prejudiced if non-members were excluded from the dispute resolution processes of the United Nations."37

Thus, if a non-member State challenges the obligation set out in article 2 para. 6 of the United Nations Charter, "a dispute would arise which could then be investigated by the Security Council."38

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37 Chinkin, see note 3, 108.
38 Chinkin, see note 3, 108.
d. Revocation or Termination of Obligations or Rights of Third States

This is the subject-matter of article 37 of the 1969 Convention. The wording of article 37 para. 1, where it says "... the obligation may be revoked ..., only with the consent of the parties to the treaty and of the third State unless it is established that they had otherwise agreed", indicates that the treaty may not provide for the termination of a state's obligation without consideration of the consent of the third state and of the contracting parties.

The situation is different when the third state's rights or obligations have been created for an open period of time or for a limited period of time or where a right may be revoked after a certain condition has been fulfilled. In the first instance, it appears that the consent of all the parties is necessary. The situation is different, however, if the legal position is that provided for in article 37 para. 2 "... if it is established that the right was intended not be revocable ... ". The question, thus may be asked whether the lack of the specific clause on the subject indicates that the right is revocable. There are two approaches; the first one which professes the revocability of rights unless they are expressly defined as irrevocable; and the second one which, at least in relation to treaties that do not impose time limitation, claims the irrevocability of rights.

Article 37 provides for revocation or modification of rights or obligations. Revocation of rights or obligations terminates them. Close analysis, however, of modification indicates that what in fact happens to involve a revocation. Previous rights and obligations are terminated and they are replaced with new ones. Therefore, article 37 para. 2 provides

39 Article 37 para. 1. "[w]hen an obligation has arisen for a third State in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties of the treaty and of the third State, unless it is established that they have otherwise agreed; paragraph 2. When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State." Article 37 of the 1986 VCLT has an additional para. 3 "[t]he consent of an international organisation party to the treaty or of a third organisation, as provided for in foregoing paragraphs, shall be governed by the rules of that organisation."

40 Reuter, see note 15, 105.
41 Napoleitano, see note 14, 82.
that: "When a right has arisen for a third State in conformity with article 36, the right may not be ... modified by the parties ... without the consent of the third State." The same applies to obligations. Thus, according to article 37 para. 1 that establishes the general principle according to which, "(W)hen an obligation has arisen for a third State ... the obligation may be revoked ... only with the consent of the parties." As in relation to modification of rights, modification of obligations equals revocation and substitution with different obligations. Thus, as according to the general article 34, "A treaty does not create ... obligations ... for a third State without its consent", the consent of the third state is necessary (coupled with the consent of the contracting parties) to effect a modification.

Thus, "[t]he third State could either give an assent only to the rights and obligations arising from the treaty, or it could give an assent, right from the beginning, also to their subsequent modifications. Treaty provisions, therefore, could establish some procedure through which the rights and obligations of the third State may be modified. The previous consent to this procedure would be the legal basis to establish different rights and obligations for the third State itself." It may be said that the rules set up in article 37 are only applicable when the obligations and rights have been established. A state, in order to rely on them has therefore to prove that obligations and rights have been validly created and still exist at the time of invocation.

The provisions of article 37 (as well as provisions of other articles in this section of the Vienna Convention) give rise, however, to one observation of a general nature, namely, that it is not entirely clear whether the provisions of article 37 relate exclusively to revocation or modification of rights and obligations of the third state, or whether they also relate to the very treaty which established them. In the latter case, special rules concerning termination and modification of treaties are applicable, both procedural and substantive. Thus rules on jus cogens, material breach, error and corruption may be applicable.

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42 Napoletano, see note 14, 82 and 81.
43 Rozakis, see note 19, 23.
44 Chinkin, see note 3, 42.
Article 38 — Treaty-Rules Becoming Binding on Third States through International Custom

Article 38 reads as follows: “Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognised as such.” It is an uncontested fact, both confirmed in theory and in the ICJ jurisprudence that treaties influence the formation of customary international law. The relationship between customary international law and treaties is multifaceted. Treaties can be an evidence of pre-existing customary law; multilateral treaties can provide the impulse for the formation of new customary law through state practice; multilateral treaties can assist in the crystallisation of emerging rules of customary international law (but there is no presumption that they do so).

According to the standards adopted by the ICJ in the 1969 North Sea Continental Shelf Case, in order to become norms of customary international law, provisions of a treaty would have to fulfil the following conditions: be of a fundamentally norm-creating character, such as could be regarded as forming the basis of a general rule of law; have passed into the general corpus of international law; and be accepted as such by the opinio juris as have become binding even for the countries


See e.g., North Sea Continental Shelf Case, ICJ Reports 1969, 3 et seq., (38-39); Fisheries Jurisdiction Case, Merits, ICJ Reports 1974, 3 et seq., (23-26); Continental Shelf Case (Libyan Arab Jamahiriya/ Malta), ICJ Reports 1985, 13 et seq., (39-39); Military and Paramilitary Activities in and against Nicaragua, ICJ Reports 1984, 392 et seq., (424, para. 73, 93-98).


For a more in-depth study see, The London Principles, above, 760.
which have never become, and do not become parties to the Convention.”

It may be added that what:

“... States do in pursuance of their treaty obligations is *prima facie* referable only to the treaty, and therefore does not count towards the formation of a customary rule .... But the conduct of parties to a treaty in relation to non-parties is not practice under the treaty, and therefore counts towards the formation of customary law.”

Furthermore, the practice of states *au dehors* a treaty also counts towards the formation of customary law. The ICJ, however, took a cautious approach to this process and stated that “[a]t the same time this result is not lightly to be regarded as having been attained.”

There is no definition of what constitutes a norm-creating provision of a treaty. According to the ICJ, such a norm at least should have the capacity to be transformed into a general rule of law. The problem of norm creating treaty provisions may be linked to the classical distinction between law-making treaties and contracts, or “*traité-loi*” and “*traité-contrat*. This distinction is also far from clear. Some authors adopt the distinction based on the criteria of its abstract character in relation to the number of subjects (non-defined) and the number of situations (general). No agreement has been reached, however, in doctrine as to what norms may be law-creating. As Degan, explains, “[e]ven bilateral contract-treaties are law-making for their parties as long as they are in force.”

It may be said that the ICJ, in the *North Sea Continental Shelf Case*, has cast doubt on the possibility of reservations in relation to provisions of a treaty which embody norms of customary international law, and explained as follows:

“[a]rticle 6 (delimitation) appears to the Court to be related to a different position. It does directly relate to continental shelf rights as such, rather than to matters incidental to these; and since it was not, as were articles 1 to 3, excluded from the faculty of reservation, it is legitimate inference that it was considered to have a different and

49 *North Sea Continental Shelf Case*, see note 46, para. 71; also, the Report of the Seventy- Ninth Conference, London.

50 The London Principles, see note 47, 758.

51 Villiger, see note 45, 190.

less fundamental status and not, like those articles, to reflect pre-existing or emerging customary law."\(^{53}\)

This pronouncement of the Court was the subject of much criticism in numerous Dissenting Opinions of the judges who were of the general view that reservations are only effective in relation to the contractual sphere and have no influence on the creation of customary norms.\(^{54}\)

\(^{53}\) North Sea Continental Shelf Case, see note 46, 40

\(^{54}\) See e.g., Judge Morelli, 198, Dissenting Opinion, who said as follows: "[f]or the power to make reservations it is entirely compatible with the codification character of a convention or of a particular rule contained in a convention. Naturally the power to make reservations affects only the contractual obligations flowing from the convention; that obligation, that is to say an obligation vis-à-vis the other contracting parties to consider the rule in question as a customary rule, is excluded in the case of a State making a reservation .... It goes without saying that a reservation has nothing to do with the customary rule as such - The inadmissibility of the reservation is not to be deduced from this, seeing that the reservation is intended to operate solely in the contractual field, i.e., in relation to the obligation. Arising out of the convention, to recognise the rule in question"; Sørensen, Dissenting Opinion, 248, who said as follows: "[a]s a more general point, I wish to state that, in my view, the faculty of making reservations to a treaty provision has no necessary connection with the question whether or not the provision can be considered as expressing a generally recognised rule of law - The acceptance, whether tacit or express, of a reservation made by a contracting party does not have an effect of depriving the Convention as a whole, or of the relevant articles in particular, of its declaratory character. It only has an effect establishing a special contractual relationship between the parties concerned within the general framework of the customary law embodied in the Convention," and Lachs, Dissenting Opinion, 223, who stated as follows: "[h]ere we touch the very essence of the institutions of reservations. There can be little doubt that its birth and development have been closely linked with the change in the process of elaboration of multilateral treaties, the transition from the unanimity to the majority rule at international conferences. This new institution reflected a new historical tendency towards great rapprochement and co-operation of States and it was intended to serve this purpose by opening the door to the participation in treaties of the greatest possible number of States. Within this process, reservations were not to undermine well-established and existing principles and rules on international law, nor jeopardise the object of a treaty in question. Thus they could not imply an unlimited right to exclude or to vary essential provisions of that treaty. Otherwise instead of serving international co-operation the new institution would hamper it reducing the substance of some treaties to a mere formality."
The most common interrelationship between a treaty and customary law is codification of already existing norms of customary law in a treaty;55 but a treaty may also crystallise an emerging rule of customary law, a rule which is “in statu nascendi.”56 The treaty provision may constitute:

“... a focal point for a consistent subsequent practice of States in harmony with that provision to such an extent that the provision may in due course generate or become a rule of customary law.”57

Article 37 describes the situation where a rule that is contained in a treaty binds third states since at the same time it is also a rule of international customary law. The condition is that this rule has to be recognised as a rule of customary law. According to Baxter, States parties to a treaty, are doubly bound — by the treaty and by custom; whilst third states are only bound by custom.58 It was stated both in doctrine,59 as well as in the ICJ jurisprudence,60 that a rule of international customary law and treaty law may exist in parallel.

Some problems of interpretation may be caused by the expression “recognised” as a rule of customary international law. This question was a subject of heated discussion during the Vienna Conference. There are two approaches to this problem; the first one was expressed by the ICJ in the North Sea Continental Shelf Case where the Court explained as follows:

“[w]ith respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the Convention might suffice of itself,

55 See ILCYB 1950, Part II, 368; and North Sea Continental Shelf Case, see note 46, and Nicaragua case, see note 46.
56 See North Sea Continental Shelf Case, see note 46, 38 para. 61, in relation to article 6 of the 1958 Convention on the Continental Shelf; see also Fisheries Jurisdiction Case, see note 46, 23 and 52.
57 North Sea Continental Shelf Case, see note 46, 41.
58 Baxter, see note 45, 32.
59 Villiger, see note 45, 237 et seq.
60 Nicaragua Case, Jurisdiction, see note 46, 422-424; as well as ICJ Reports 1986, 14 et seq., (93-97).
provided it included that of States whose interests were specifically affected."61

The question of interpretation (unresolved as yet) is related to the issue whether it is sufficient for the rule to be recognised by a majority of states (including "specially interested states"); or the rule in question has to be specifically recognised by a third state to have a binding effect on it.

f. General Provisions of the 1969 Convention that Have Bearing on Articles 34–38

There are a number of articles in the Convention which, although of a general character, have an important connection with a position of third states.

Firstly, article 43 has to be mentioned. It has been designed to preserve the duties and obligations embodied in a treaty, as well as those originating from independent sources (customary law), in cases when the treaty becomes inactive. These provisions are linked directly with article 38. Article 43 ("Obligations imposed by International Law independently of a Treaty") reads as follows:

"The invalidity, termination or denunciation of a treaty, the withdrawal of a part from it, or the suspension of its operation, as a result of the application of the present Convention or the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty."

Secondly, there is article 75, which reads as follows:

"The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression."

This article was proposed to reflect the legal situation, which encompassed both the position of the aggressor state (Germany) which was not a party to agreements concluded by the Allied Powers at the end of World War II, and the position of Italy, Bulgaria, Hungary and Romania on whom the peace treaties were imposed, providing that they would enter into force exclusively upon ratification by victorious

61 North Sea Continental Shelf Case, see note 46, 42 para. 73.
states. Some opposition within the ILC against the inclusion at all of this article in the Convention, which was overruled, originated in the conviction that legally it belonged to the field of state responsibility and/or had its roots in the United Nations Charter, not in the law of treaties.

g. Certain Unresolved Issues

The formulation of the above mentioned articles in both Vienna Conventions leave many questions unanswered. One of them is related to the interpretation of the ambiguous expression formulation of article 36 para. 1: “its assent shall be presumed” if “the contrary is not indicated.” In general the assent or dissent of the third state may be expressed in the following ways: a.) by a declaration or unmistakable behaviour or; b.) by silence, taking an attitude of neutrality. It is the variant b.) which is the subject of divergent opinions and interpretations. First of all if “the contrary is not indicated” but the state behaves in a manner which does not leave any doubt as to its intentions (“the unmistakable behaviour”), can it be taken as an assent? And further, what is the role of silence as the means of expression of state’s assent or dissent? These questions have not been solved. Further, if we accept the presumed assent theory, the collateral agreement (again if we adhere to this concept as opposed to the concept of stipulation pour autrui), will also acquire the form of a presumed tacit agreement.

Yet another issue which there is much disagreement about was the whole rationale of the existence of article 37, which was the subject of much discussion during the 1986 Vienna Diplomatic Conference. It was assumed that it was almost impossible to establish a general residual rule. For that reason, the ILC had adopted the very controversial article

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63 See in particular statements of Briggs, ILCYB 1964, Vol. I, 61, para. 67; and statements of Castren, Verdross, Yaseen, Bartos and de Luna, ILCYB 1966, Vol. I, 268, para. 4, who said as follows: “[f]rom the doctrinal and the legal point of view, the obligation in question and penalty applicable, if it was not fulfilled, derived not from the treaty itself but from other norms of international law, such as the United Nations Charter or the pax est servanda principle, which was a rule of jus cogens.”
64 Elias, see note 16, 66.
that derogated from the general rule. Only a broad outline of the problems involved will be presented, since the general legal issues of the Draft article exceed the problem of third parties and international organisations, but rather relate to the core of the relationship between states and international organisations, especially with such distinct and wide powers as the European Communities. Professor Riphagen, noted that in the context of an international organisation Member States were third states, thus the legal situation envisaged by article 36 bis, covered two sets of relations: an internal set (organisation and its Member States); and an external set (the international organisation and its co-contractors). As Brölmann observes:

"[t]his 'dualist' view is reminiscent of the construction of a 'collateral agreement' between member states and co-contractors of the organisation, which was advanced by the Special Rapporteur at an early stage but which never caught in the subsequent drafting process."

The controversy that surrounded article 36 bis concerned the question whether members of the organisation could be formally bound by a treaty concluded by the organisation. It was presumed that the creation of rights and duties for Member States — which were not themselves parties to the treaty concluded by the organisation — was conditioned by the intention of the parties to the treaty and the consent of the Member States. The difficult relationship between an organisation and

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65 The final version adopted by the Drafting Committee reads as follows: "[o]bligations and rights arise for States members of an international organisation from the provisions of a treaty to which that organisation is a party when the parties to the treaty intend those provisions to be means of establishing such obligations and according such rights and have defined their conditions and effects in the treaty or have otherwise agreed thereon; (a) the States members of the organisation, by virtue of the constituent instrument of the organisation or otherwise, have unanimously agreed to be bound by the said provisions of the treaty, and (b) the assent of the States members of the organisation to be bound by the relevant provisions of the treaty has been duly brought to the knowledge of the negotiating States and the negotiating organisations."


67 On the drafting history in depth see: H. Isakl/ G. Loibl. “United Nations Conference on the Law of Treaties between States and International Or-
its Member States gave rise to many comments on article 36 bis. One argument was that agreements concluded by an international organisation would be of a limited legal effect, unless they were at the same time binding on the individual Member States. Such a broad scope of powers bestowed upon an international organisation was met with scepticism, although, the European Communities have exactly such powers (article 228 para. 2 of the Treaty of Rome) and the members of the European Communities saw this article as applicable to them. Nonetheless, this article was seen as not representative of international law at this stage of development and as being too advanced to be applicable globally to all organisations, with the exception of the European Communities.

The Headquarters agreement is another example of a treaty between an organisation and a state under which a state claims rights. Rights that are the subject matter of an agreement concern privileges and immunities for officials of Member States. It was argued that having accepted such rights, Member States lost their position as third states with respect to any obligation of such a treaty. As Chinkin observes, alternatively, it may be argued that the individuals in question are simply employees or representatives of the organisation, and implementing the rights which an organisation has received for them under the treaty, independent from their Member States. As Chinkin notes, article 36 bis if enacted, would have many advantages, such as the clarification of the position of both the third party with whom an organisation entered into an agreement and the Member States; it would have ensured that all Member States were in the same legal position which would eradicate the situation in which some Member States, but not all, might be separate parties to the particular treaty. The disadvantages of the article were that it placed excessive emphasis on the exceptional situation of the European Communities.

In the end, this Draft article was not included in the final text and was replaced by a simple article 74 para. 3, which operates in conjunction with the preambular para. 13. It may be said that:

organisations or between International Organisations", ÖZöRV 38 (1987), 49 et seq., (69-70).

Chinkin, see note 3, 93.

Chinkin, see note 3, 94.

"... the provisions of the present Convention shall not prejudge any question that may arise in regard to the establishment of obligations and rights for States members of an international organisation under a treaty to which that organisation is a party."
"[i]ndeed article 74 para. 3 and preambular paragraph 13 do not solve the problem of treaties concluded by international organisations which establish rights and obligations for the member states of the organisation, but they leave the problem to the internal law of each organisation concerned. Perhaps by this solution States have unintentionally transferred the competence to decide on this matter to international organisations."  

In conclusion it may be said that the 1986 VCLT has adopted a narrow approach to the regulation of the law of treaties. It has excluded from its scope many issues, as for example, the legal status of objective régimes (see below); and the most-favoured nation clause.

3. Objective Régimes — Theory and Practice

a. Theory

The preceding sections dealt with the general issues of treaties that make provisions in favour of the third states and the theoretical background of the possibility of vesting these rights in the third states, which are not parties to such treaties. As indicated above, there are two underlying theories to this effect: of collateral agreement and of stipulation pour autrui. There is also a third theory that applies to a particular type of treaties such as establishing freedom of navigation in international rivers and in maritime waterways; treaties which provide for neutralisation or demilitarisation of particular territories or areas; or possibly the Antarctic Treaty. This category is considered by some lawyers as belonging to a special category of so-called "objective régimes."

The objective régimes doctrine is not without controversy and as such was not acknowledged by the ILC. This possible variation of third-party rights will be considered below. The doctrinal explanation of the possibility of the existence of treaties establishing certain régimes which have an erga omnes effect has been a subject of in-depth consid-

71 "... affirming that nothing in the present Convention should be interpreted as affecting those relations between an international organisation and its members which are regulated by the rules of the organisation."
72 Isak/Loibl, see note 67, 72.
eration by the ILC\textsuperscript{74} and many writers.\textsuperscript{75} The curious phenomenon of certain international arrangements (or settlements, to use Waldock’s expression) which effect \textit{au dehors} the treaty régime, was very difficult to explain, especially in the view of the principle \textit{pacta tertiis nec nocent nec prosunt}.\textsuperscript{76} The practice and doctrine of international law and political science have known the notion of objective régime long before the ILC has taken this subject on its agenda. It would be impossible to present all pertaining practice, theory, whole discussion and reports within the framework of the ILC, and the relevant case-law, nonetheless, the most important practice and doctrinal consideration will be included.

In classical writings, however, the problem of the third-party rights is analysed in a general and common category of \textit{stipulations pour autrui}, the term that denominates a general category.\textsuperscript{77} Historically, the rise of legal considerations as the nature of the rights deriving from a treaty for the third states, may be traced back to the treaties which established international canals (such as the Panama Canal); demilitarisation of certain areas (the Åaland islands); or the Peace Trearies.\textsuperscript{78} There have been many learned opinions expressed in order to explain the phenomenon that certain treaties produce effects on the third parties. \textit{Lord McNair}, for example, stated as follows:

\begin{quote}
“[t]hat certain kinds of treaties produce effects beyond the parties to those treaties is recognised, but it cannot be said that they have finally found a place in any well-recognized juridical category.”
\end{quote}

He further presents the possible legal grounds why certain categories of treaties produce legal effects in relation to third states. Thus, some explanation may be found on the following grounds: a.) that the parties to these treaties intend to offer contractual rights to third states, which may be accepted by them tacitly or expressly; or b.) that third states acquire rights under these treaties by virtue of the operation of custom

\textsuperscript{75} McNair, see note 1, Chapter XIV, “Dispositive and Constitutive Treaties.”
\textsuperscript{76} See S. Subedi, “The Doctrine of Objective Régimes in International Law and the Competence of the United Nations to Impose Territorial or Peace Settlements on States,” \textit{GYIL} 37 (1994), 162 et seq.
\textsuperscript{78} Waldock, see note 74.
\textsuperscript{79} McNair, see note 1, 255.
(treaties, for example, concerning navigation on rivers or through canals). Rights of this type were known in municipal English law and this supplied international lawyers with a legal ground to explain the existence of certain rights connected to certain international territories. These views were also prompted by the Judgment in the 1923 Wimbledon Case (see below). In this argument, the English law institutions such as easement and profits were translated, on the international plane, into servitudes.\textsuperscript{80} Similar views as those of McNair's were held by Briery who said as follows:

"[i]t's [a servitude] essential characteristic is that it is a right \textit{in rem}, that is to say, it is exercisable not only against a particular owner of tenement but against any successor to him in title and not only by a particular owner of the dominant tenement but also by his successors in title. It is, of course, quite common that a state should acquire rights of one kind or another over the territory of another state, the right, for example, to have an airfield or free port facilities, but ordinarily at least such rights are merely rights in \textit{persona}m like any other treaty-created right; they do not in any way resemble servitudes. The test of an international servitude can only be, on the analogy of private law, that the right should be one that will survive a change in the sovereignty of either of the two states concerned in the transaction. There is no real evidence that any such right exists in the international system."\textsuperscript{81}

Mention must also be made of the so-called "international settlements" theory, which related to:

"those multilateral treaties which from time to time settle political affairs of a group of countries in particularly solemn and semi-dictatorial fashion which likens the arrangement to a governmental act imposed upon parties affected, rather than to a voluntary bargain between them."

The applicability of the concept of "real" rights to the objective \textit{régimes} is not accepted universally. It was well explained by Reuter, who said as follows:

"[h]owever, the suggestion that some situations could be treated as if they involved "real" rights, i.e. rights \textit{in rem} goes beyond the minor problems bearing a close resemblance with private law cases; it tends

\textsuperscript{80} McNair, "So-called State Servitudes", \textit{BYIL} 6 (1925), 111 et seq.

to cover relationships presenting considerable political and economic importance such as: delimitation of all bound-areas, neutrality or demilitarisation, international waterways and other aspects of the territorial basis of international communications. At this level analogy loses its relevance and other explanations must be sought to justify the fact that régimes instituted by such treaties can be invoked against non-parties ... The concept of rights *ad rem* is certainly familiar to all jurists ... However, there are no rights ‘in things,’ for rights merely govern relations between subjects of law, and it is difficult to introduce such concepts in a legal order as ‘decentralized’ as international legal order.”

The 1950 *South-West Africa* Case (see below) prompted McNair to come up with the theory (see below) which reflected more precisely the *erga omnes* character of certain treaties, and which he later developed in his book. He observed:

“[t]hat certain kinds of treaties produce effects beyond the parties to those treaties is recognised, but it cannot be said that they finally found a place in any well-recognised juridical category. There has been a tendency to regard them as explicable of the grounds either (a) that the parties to them intend to offer contractual rights to ‘third States’, which may in course of time be willing to accept them by express or implied assent, or (b) that, ‘third States’ acquire rights under them (for instance, in case of treaties concerning navigation on rivers or through canals) by virtue of the operation of custom.”

*Lord McNair* explains, however, that the effects of certain types of treaties of *erga omnes* character, are better explained if attributed to some inherent and distinctive juridical elements in those treaties, in some cases to the “dispositive” or “real” character of the transactions resulting from the treaty and based on the permanence of the rights established by or in pursuance of the treaty; in others to the semi-legislative authority of groups of states particularly interested in the settlement or arrangement made. Thus, *Lord McNair* has examined from the point of view of the position of the third states two different types of treaties: “dispositive” or “real” treaties, i.e., the treaties creating or affecting territorial rights, and resembling the “conveyance” of English and American private law and the *acte translatif de propriété* in civil law countries; and constitutive or semi-legislative treaties. The same writer explained

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82 McNair, “The Functions and Differing Legal Character of Treaties”, *BYIL* 11 (1930) 100 et seq., (112); and Reuter, see note 15, 125-126.

83 McNair, see note 1, 255.
that these two types of treaties have a lot in common. Both are designed
to produce effects that usually presuppose certain permanence (cession
of territory or a guarantee of neutrality, Mandate agreements), and
although stemming from the agreements of two or more states, estab-
lished to operate in rem, erga omnes. The first group of treaties is dis-
tinguished by the feature that they recognise or transfer "real" rights —
i.e., rights in rem, such as a treaty of cession, a boundary treaty or a
treaty of peace. The treaties of this type in their legal effects are differ-
ent from treaties of e.g., commerce, or extradition. According to Lord
McNair the difference between the general type of treaties and treaties
of dispositive character is the nature of the rights that they establish.
The treaties of this category create or transfer or recognise the existence
of certain permanent rights, which acquire or retain an existence and
validity independent of treaties that created or transferred them. This
category of treaties generates a type of rights for individuals that are
different from the rights acquired under the other general type of treaty.
These rights are not in their origin necessarily rights in rem, but are like
them due to the fact that they are characterised by an objective exis-
tence that enables them to survive even when the treaty which gener-
ated them became extinct.

The other type of agreement are constitutive or semi-legislative
treaties of a public law character, and which may represent the decisions
of powerful states which assume the role of acting in the public interest.
Lord McNair observes that a treaty of this type at first binds only the
parties to it and no other states. After a certain period of time and ac-
quiescence of other states to the conditions of the treaty its status is
converted from de facto into de jure. Examples of such treaties are the
1815 Treaty on the neutralisation of Switzerland; the 1856 Conven-
tion on the Åland Islands and 1919 Treaty of Versailles (article 380) on the
status of the Kiel Canal.

The views of Lord McNair have been presented in detail, since he is
the proponent of one of the main theories which substantiate the bind-
ing force of objective régimes on third states. This is what has become
to be known as the "public law theory." As seen from the above, this
theory derives the binding force of objective régimes from the existence
of a general interest in the subject of the régime, coupled with some
particular competence of the parties to the treaty which set it up. The second main theory, which tends to deny the existence of objective régimes in general, holds that the effectiveness erga omnes of the treaties purportedly setting them up is really dependent upon the agreement of third states. This fairly simple statement of the position, however, requires some comments or qualifications:

(i) The second theory is really not a single theory, but a group of theories applying to different circumstances or types of a treaty, and involving rather different views as to the nature of the agreement of the third states concerned.

(ii) while having a continuing influence on the formation of a number of the second group of theories, the public law theory on its own is not really upheld at all in modern jurisprudence. The current controversies are between the various theories based one way or another on the agreement of third states, or, to a lesser extent, between the two main theories of groups-theories which allow some degree of erga omnes effect without agreement of the third states concerned, but which base that effect on other principles than the direct legislative capacity of the parties to the treaty or some direct legislative effect of certain types of a treaty.

Proponents in a more recent doctrine concerning objective régimes (of which Klein is the main one) may be said to combine some of the characteristics of both main theories. They stress the territorial character of the treaty setting up the régime, rather than some special quasi-legislative characteristics of the treaty itself or some special features of the parties to it. The proponents of this view limit the theory to treaties which establish territorial régimes in the interest of some or all states. Such so-called “status-treaty” may create only a potential objective régime (there are not, according to this theory, any a priori objective régimes), and then only subject to certain stringent conditions such as that the treaty must relate to a particular territory; the parties to it must have the intention of creating a régime in the general interest which is effective erga omnes; and that parties to the treaty must have the legal capacity to establish such a régime, normally in the sense of having territorial rights over the territory. Fulfilment of the two last conditions — i.e., acting in the general interest and the parties’ territorial competence in relation to the subject-matter of the treaty — creates a claim which has a legal effect vis-à-vis third states which does not protest against
The juridical theory on which this effect is based by Klein is that, by their acquiescence to the treaty, third states affirm the legislative competence of the parties to the treaty. It thus appears that under this theory, contrary to Klein’s assertions, the erga omnes effectiveness of an objective régime still derives, if only partly, from quasi-legislative powers of the parties to it. Thus, it appears that Klein did not present a totally persuasive case in favour of a purely territorial basis for the effectiveness of objective régimes.

b. The ILC and Objective Régimes

Between McNair’s formulation of the public law theory and the emergence of the theories of Klein, it was the ILC that was the main setting for the development of the theories concerning objective régimes. However, two Special Rapporteurs who were involved in the production of the Draft articles, Fitzmaurice and Waldock differed substantially in their approach to the subject, and submitted fundamentally divergent drafts. Fitzmaurice had a rather restrictive view on the effectiveness of objective régimes in the sense that he effectively rejected the concept of binding erga omnes effects arising directly from a treaty, by reason of its nature, or of the nature of the parties to it, as supported by McNair (“public law” theory), or, as he phrased it, by reason of “some mystique attaching to certain types of treaties.” He postulated as regards the principle pacta tertiis nee nocent nee prosunt, as having an absolute character, which does not allow for exceptions. He observed, however, that “… few authorities actually leave it at that. All or most admit in a varying degree that in practice there are, if not strictly exceptions, at any rate qualifications …” Fitzmaurice did accept that “in the result” a number of types of treaties do have an effect erga omnes, at least de facto, but he postulated alternative principles to those embodied in the public law theory from which he thought that effect derived. These principles were, firstly, that an act of the user implies consent to conditions of use; and secondly, that states have a general duty to respect, recognise, and accept the effects and consequences of lawful

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88 Fitzmaurice 5th Report, see note 4, 98 para. 71.
89 Ibid.
and valid international acts entered into between other states. Both of these principles were, according to Fitzmaurice, general, applying to all treaties; and as such were the subject of Draft articles 13 and 17 of his Fifth Report. As regards, each of them, however, he added the more specific articles (Draft articles 14 and 18, of his Fifth Report), that were intended, at least, to describe the types of cases that have been regarded as having erga omnes effect under the old public law theory, but which Fitzmaurice preferred to base on the above-described principles. These two particular Draft articles covered treaties concerning the user of maritime or land territory — including, in particular, the classic case of treaties setting up régimes governing the use of international waterways, or setting up an international régime of common user; and, in the case of article 18, treaties, such as peace treaties, creating a status of neutrality or demilitarisation, or of a dispositive character, such as treaties of cession or frontier demarcation.

Fitzmaurice's proposed Draft articles on this subject were not considered by the ILC. They were analysed by Waldock, the next Special Rapporteur, who rejected them on the grounds (generally) that Fitzmaurice was not right to distinguish between cases of the use of maritime and land territory and other treaties; and further that he was wrong, according to Waldock, as regards the type of treaties, specified in Draft article 18. He also considered that certain types of treaties, had or could have, some effect erga omnes, with respect to which he introduced Draft article 63.90 Waldock's theoretical approach may be summarised as follows:

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90 The article reads as follows: “1. A treaty establishes an objective régime when it appears from its terms and from the circumstances of its conclusion that the intention of the parties is to create in the general interest general obligations and rights relating to a particular region, State, territory, locality, river, waterway, or to a particular area of sea, sea-bed, or air-space; provided that the parties include among their number any State having territorial competence with reference to the subject-matter of the treaty, or that any such State has consented to the provision in question.

2. (a) A State not a party to a treaty, which expressly or impliedly consents to the creation or an objective régime, shall be considered to have accepted it.

(b) A State not a party to the treaty, which does not protest against or manifest its opposition to the régime within a period of X years of the registration of the treaty with the Secretary-General of the United Nations, shall be considered to have impliedly accepted the régime.
(i) An objective régime exists on the basis of the intention of parties to act in the general interest and to establish general rights and obligations;

(ii) All states with competence over the territory in question should be included among parties to the treaty;

(iii) The effectiveness of an objective régime on third states is conditioned upon their consent, which may be express, or may be implied through acquiescence by its refraining to manifest its opposition within a specified period from the deposit of a treaty with the Secretary-General of the United Nations;

(iv) Third states are bound by the régime and are entitled to invoke its provisions and exercise of any right conferred upon them;

(v) The revocation of an objective régime can be only effected with the agreement of all parties which consented to the régime and which have substantial interest in its functioning.

It is thus characteristic, both of Waldock's proposed Draft article as well as of Klein's theory, that they propound for treaties which have certain special characteristics (that are to some extent developed along the lines of the characteristics required under the old public law theory of objective régimes), a special form of expression of consent by acquiescence — in the case of Waldock's Draft article, consent to the binding effect of the provisions of the treaty; and in case of Klein's theory, owing its special character to the legislative competence of the parties to the treaty.

In fact, the ILC rejected Waldock's proposal on a number of grounds. Thus (generally) the members of the ILC rejected almost unanimously, as contrary to international law the possibility of imposing obligations on third states by an entity external to them; and there was, further, a difference of opinion in relation to the mode of confer-

3. A State which has accepted a régime of the kind referred to in paragraph 1 shall be

(a) bound by a general obligation which it contains; and

(b) entitled to invoke the provisions of the régime and to exercise any general right which it may confer, subject to the terms and conditions of the treaty.

4. Unless the treaty otherwise provides, a régime of the kind referred to in paragraph 1 may be amended or revoked by the parties to the treaty only with the concurrence of those States which have expressly or impliedly accepted this régime and have a substantial interest in its functioning," Third Report on the Law of Treaties ILCYB, 1964, Part II, 5 et seq., (26).
ring rights on third states — i.e., can it be an automatic process which may be effected without an additional agreement, or is a collateral treaty embodying the consent of third states necessary. The members of the ILC also failed to reach an agreement on other elements of putative objective régimes, such as what constitutes an implied consent and the question of revocability or modification of rights conferred. In fact, they rejected Waldock’s concept of an agreement by tacit acquiescence on the basis that it would impose an intolerable burden on many states (for example the duty to review every treaty entered into by other states and to place on record their disapproval of any treaty that they thought might fall within the category described in para. 1 of the Draft article), and would tend to set up a system which in effect, the Great Powers would be able to legislate. It is apparent from the discussion of the ILC in this latter respect that old style public law concepts espoused by McNair, and to a large extent based on the 19th century examples of purported “legislation” by the Great European Powers, was itself — a fortiori — rejected. In the end, the ILC did not include any separate article on objective régimes, which were regarded as being the general heading of treaties and third states; and this position was followed by the Diplomatic Conference and incorporated into the 1969 VCLT.

The ILC expressed the conviction that in particular arts 36 and 38 of the VCLT provide a satisfactory mechanism to explain the legal nature of objective régimes, in a particular alleged automatic objective effect of certain types of treaties. Article 36 para. 1 defines a situation in which the parties to a treaty intend to confer a right on a third state or on a group of states or on third states in general. This right can be exercised by third states without prior acceptance of this right. Para. 2 of the same article, envisages a situation when, a conferment of a right is accompanied by a certain obligation, which does not need to be accepted in writing by third states. Thus we are faced with the following legal situations: there has to be an intention to confer a right on third states; the right may be conferred on its own; or it may be conferred with an duty to exercise a certain obligation, which is a condition for the exercise of this right.

It appears that the mechanism envisaged in article 36 cannot fully cover all legal variations under treaties establishing so-called objective

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91 Chinkin, see note 3, 32.
92 On the drafting history of arts 34-38 of the 1969 VCLT and the analysis of these articles see Chinkin, see note 3, 26-36.
régimes — which as pointed out above, includes a great wealth of existing and potential situations.\textsuperscript{93}

If we examine situations which are created by treaties that amount to what may be named an objective régime, there is only a limited category (if at all) that can be covered by the provisions of the 1969 VCLT. As regards article 36, situations that may be considered to be covered by this article relate to, for example, the régimes of Turkish Straits or of the Kiel Canal that exemplify a general category of treaties providing for an establishment of land or maritime territory utilisation by third states and may be said to create automatic legal effects in relation to third states (effective without any express agreement). These régimes are mostly aimed at the establishment of rights and are accompanied by the exercise of certain obligations by third states as a condition to exercise these rights. The situation, however, envisaged in article 35 of the 1969 VCLT, cannot be said to create any automatic effect, since it presupposes an acceptance of an obligation in writing by a third state. The other category of treaties that are also excluded from the workings of the 1969 VCLT are those conferring any rights onto third states (such as the status of the Åland Islands that was created by the Convention on Non-Fortification and Neutralisation of the Åland Islands, see below) and permanent neutrality régimes. Outside the scope of the VCLT are also treaties that are of a mixed type: of conferment of rights and obligations, the type that differs from a treaty where obligations serve as a condition to exercise a right, as provided for by article 35 para. 1.

As to the workings of article 37 as a method explaining the effects of objective régimes on third states, certain members of the ILC rejected this possibility on the ground that these legal effects were rooted in custom rather than deriving from the treaty. The Commission did not dwell further on this problem. The Court in its jurisprudence, however, (especially in the North Sea Continental Shelf Case) explained the creation of customary international law in general and deriving from a treaty and set very high standards (see above). The Court did stress the "extensive and virtually uniform" practice, the passage of a certain period of time and "a general recognition" of a norm contained in a treaty norm by the opinio juris (see above).\textsuperscript{94}

If, however, we admit the possibility of the creation of objective régimes on the basis of the workings of international customary law, the

\textsuperscript{93} We also have to keep in mind that strictly speaking we should only analyse post 1969 VCLT treaties.

\textsuperscript{94} See Danilenko, see note 36, 158-159 and Jennings, see note 45, 167.
same high standards would be applicable in the case of the treaty that created so-called objective régimes. Another point which may be raised is that any change to a treaty establishing a régime would only be effective among the parties to a treaty (not among third states-bound by the customary norm). Until a treaty norm is transformed into a customary norm it would remain res inter alios acta for third states, and vice versa, it may be that a customary norm has been established between third states, participating in the régime, which is different from a treaty, but parties to a treaty may choose not to be bound by it. Then a subject of an objective régime would be regulated by a dual system: that set by the treaty and that developed by customary law. Thus, it appears that the usefulness of article 37 in relation to justification of general and automatic effects of objective régimes is not very probable.

The legal nature of dispositive treaties and rights in rem (and perhaps the existence of objective régimes) was acknowledged by the ILC in a different legal context than the law of treaties, i.e., within the context of the law of state succession in relation to treaties. Objective régimes are the subject of arts 11 and 12 of the 1978 Vienna Convention on Succession of States in Respect of Treaties.

Article 11 (Boundary Régimes), establishes that a succession of states does not affect: “(a) a boundary established by a treaty; or (b) obligations and rights established by a treaty and relating to the régime of a boundary.” Article 12 (Other Territorial Régimes) says that a succession of states does not affect the territorial rights and obligations relating to the use of any territory created by a treaty for the benefit of any group of states or all states if such rights and obligations are considered as attaching to that territory. A successor state is precluded from relying on the pacta tertiis principio. The rights and obligations established under these régimes would not be affected by a succession of states in respect to the territory concerned. The ILC observed, however, that due to the “legal nexus which existed between the treaty and the territory prior to the date of succession of States” the successor state “is not properly speaking a “third State” in relation to the treaty” and “it is not open to the successor State simply to invoke article 35 of the Vienna Convention under which a treaty cannot impose obligations upon third States with-

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95 Through the working, for example of the persistent objector, J. Charney, “The Persistent Objector Rule and the Development of Customary International Law,” BYIL 56 (1985), 1 et seq.
96 Reuter, see note 15, Introduction, 128.
out its consent." The 1978 Convention is not widely ratified; nonetheless, it is broadly accepted that the above articles have acquired the status of norms of international customary law.

Arts 11 and 12 of the 1978 Convention, formed part of arguments both by Hungary and Slovakia in the Case Concerning the Gabčíkovo-Nagymaros Project. Hungary claimed that there was no rule of succession that would be applicable in this case. It submitted that the 1977 Treaty did not create "obligations and rights ... relating to the régime of boundary" within the meaning of article 11 of this Convention. It observed that the existing course of the boundary was unaffected by the Treaty. It also negated that the Treaty was a "localised" treaty; or that it created rights "considered as attaching to [the] territory" within the meaning of article 12 of the 1968 Convention, which, as such, are unaffected by a succession of states. The 1977 Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System (hereinafter the "1977 Treaty"), was, according to Hungary, nothing more than a joint investment. Therefore, Hungary concluded, there was no basis on which the Treaty could have survived the disappearance of Czechoslovakia so as to be binding as between itself and Slovakia. According to Slovakia, the 1977 Treaty, which was not lawfully terminated by Hungary's notification in May 1992, remains in force between itself, as a successor state, and Hungary. Slovakia, argued, inter alia, that Treaty is one "attaching to [the] territory" within the meaning of article 12 of the 1978 Convention, and that it contains provisions relating to a boundary. According to Slovakia, "[this] article [too] can be considered to be one of those provisions of the Vienna Convention that represent the codification of customary international law."

The 1977 Treaty is said to fall within its scope because of its "specific characteristics ... which place it in the category of treaties of a localised or territorial régime" which operates in the interest of all Da-

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100 The Gabčíkovo-Nagymaros Case (Hungary/ Slovakia), ICJ Reports 1997, 7 et seq., (70-71 paras 119-123).
nube riparian states, and as “dispositive treaty, creating rights in rem, independently of the legal personality of its original signatories.” Slovakia relied on the recognition by the ILC of the existence of a rule of succession of treaties whereby treaties intend to establish an objective régime which must be considered as binding on the successor State. In the view of Slovakia, the 1977 Treaty was not one that could have been terminated through the disappearance of the original parties. The Court has acknowledged that “… this treaty confirms that, aside from its undoubted nature as a joint investment, its major elements were the proposed construction and joint operation of a large, integrated and indivisible complex of structures on specific parts of the respective territories of Hungary and Czechoslovakia along the Danube. The Treaty also established the navigational rights for an important sector of an international waterway, in particular the relocation of the main international shipping lane to the bypass canal. In doing so, it inescapably created a situation in which interests of other users of the Danube were affected.”

The Court considered that article 12 reflects customary international law. It further observed that according to article 12 the rights and obligations of a territorial character established by a treaty are unaffected by the succession of states. The Court found that the content of the 1977 Treaty indicated that it must have been regarded as establishing a territorial régime within the meaning of article 12 of the Vienna Convention. It created rights and obligations “attaching to” the parts of the Danube to which it relates; thus the Treaty itself cannot be affected by a succession of states.

The findings of the Court in the above case were subject to some criticism. Professor Klabbers submitted that the Court never referred to the text of article 12 directly, only to preparatory works, the reason being, in his view, that article 12 has no direct bearing on the situation at hand. He said that it really only referred to servitudes (the reference to servitudes in relation to objective régimes is very controversial and the present author disagrees with such an unconditional statement), not to rivers, dams etc. The Court in order to circumvent the problem fell back on preparatory work, but even this is not correct, since the precedents submitted by the Commission dealt only with such aspects of the rights and obligations in relation to the water rights as fishing, irrigation or supply of water, “[a]ccordingly, the Court makes something of a stretch in its attempt to bring the Gabcikovo project within the scope

101 ICJ Reports, see above, para. 123.
of article 12."102 In the view of the present author the Klabbers's interpretation is somewhat limiting on the applicability of article 12 in relation to the rights and obligations flowing from territorial régimes. Furthermore the Commission submitted that: "[t]he characteristic of the treaties in question is that they attach obligations to a particular territory, river, canal, etc., for the benefit either of a group of states (e.g., riparian states of a particular river) or all states generally. They include treaties for the neutralisation or demilitarisation of a particular territory, treaties according freedom of navigation, waterway or rivers, treaties for the equitable use of the water resources of an international river basin and the like."103 The formulation “the like” clearly indicates that the list of possible rights and obligations that may be governed by article 12 is broader than the narrow interpretation presented by Klabbers.

Klabbers further observed that the Court did not sufficiently substantiate the argument of the still binding force of the 1977 Treaty. The Court, according to the same author, engaged in a somewhat circular argument: “because territorial treaties in force remain unaffected by state succession, the 1977 Treaty continues to be in force.”104 This author submitted that “... that places a high premium on demonstrating that indeed, the 1977 Treaty is a territorial treaty, and the Court hardly makes a plausible argument to this effect.”105 The same author was particularly critical of the following passage of the Judgment: “[t]he content of the 1977 Treaty indicates that it must be regarded as establishing a territorial régime within the meaning of article 12 of the 1978 Vienna Convention. It created rights and obligations ‘attaching to’ parts of the Danube to which it relates; thus the Treaty cannot be affected by a succession of states.” The Court therefore concluded that the 1977 Treaty became binding upon Slovakia on 1 January 1993. Klabbers interpreted this paragraph as implying that it was not a treaty that was attached to the territory, but only to certain rights and obligations. Therefore, one may assume that on the basis of article 12 those rights and obligations continue to exist unaffected by state succession. But it neither meant that the treaty itself must exist nor that the Treaty was binding upon Slovakia as a successor of the Czech and Slovak Republic.106

104 Klabbers, see above, 354.
105 Ibid., 354.
106 Ibid., 354
The Court noted the problem and observed that:

“...article 12, in providing only, without reference to the treaty itself, that rights and obligations of a territorial character established by a treaty, are unaffected by a succession of States, appears to lend support to the position of Hungary rather than of Slovakia. However, the Court concludes that this formulation was devised rather to take account of the fact that, in many cases, treaties which have established boundaries were no longer in force ... Those that remained in force would nonetheless bound a successor State.”

According to the present author the Court’s reasoning is persuasive.

The Commission’s commentary appeared, however, to add more pertinent elements relating to succession in relation to objective régimes that were neither included in the Court’s Judgment, nor were interpreted by Klabbers. The Commission said as follows: “[t]he Commission in its work on the law of treaties did not consider that a treaty of this character had the effect of establishing, by its own force alone, an objective régime binding upon the territorial sovereignty and conferring contractual rights on States not parties to it. While recognising that an objective régime may arise from such a treaty, it took the view that the objective régimes resulted rather from the execution of a treaty and the grafting upon the treaty of an international custom. In the present context, if a succession of States occurs in respect of the territory affected by a treaty that intended to create an objective régime, the successor State is not properly speaking a “third State” in relation to a treaty. Owing to the legal nexus which existed between the treaty and the territory prior to the date of the succession of States, it is not open to the successor State simply to invoke article 35 of the Vienna Convention under which a treaty cannot impose obligations upon a State without its consent. The rules concerning succession in respect of treaties also come into play. But under these rules there are cases where a treaty intended to establish an objective régime and would not be binding on a successor State, unless such a treaty were considered to fall under a special rule to that effect. Equally, if the succession of States occurs in relation to a State which is the beneficiary of a treaty establishing an objective régime, under the general law of treaties and the law of succession the successor State would not necessarily be entitled to claim the rights enjoyed by its predecessor State, unless the treaty were considered to fall under such a special rule. That such a special rule exists is,
in the opinion of the Commission, established by a number of convincing precedents.”

Thus, in this most illuminating paragraph, the Commission, observed that: an objective régime may arise from a treaty, but a treaty cannot proprio motu, by itself, establish an objective régime, but the objective régime results from: a.) the execution of the treaty; and b.) from the grafting upon the treaty of an international custom; and c.), there is a legal nexus between the treaty and the territory. In relation to the succession of treaties establishing objective régimes, the Commission observed that: if the treaty in question intended to establish such a régime the successor state is not a third state in relation to the treaty; and under the rules of succession there are cases where the treaty which intended to establish an objective régime would not be binding on a successor state, unless such a treaty were considered to fall under a special rule to that effect. Similarly, the beneficiary state, would not always be able to claim the rights enjoyed by its predecessor state, unless the treaty were to fall under such a special rule.

As a general conclusion, it may be observed that certain important issues concerning objective régimes (including their very existence) remain still unresolved. The work of the ILC and the writings of scholars contributed to a certain degree to our understanding of the problem but did not disperse the fundamental legal questions as to their legal nature. For example, the views of McNair that the type of treaties referred to by him, as dispositive treaties, i.e., the treaties which “create, or transfer, or recognise” the existence of certain permanent rights are valid erga omnes, (treaties granting territorial rights — such as boundary treaties or treaties of cession), were not at all adhered to by Waldoek, and as

108 ILCYB, see note 103, paras 30, 204.
109 He said as follows: “[t]hese treaties, it is true, create territorial settlements between the parties which produce effects in general international relations. Thus a treaty of cession or boundary treaty effects the application territorially of any treaty afterwards concluded by either contracting party with another State, and the application of general rules of international law with regard to such matters as territorial waters, air space, nationality, etc. But it is the dispositive effect of the treaty – the situation which results from it – rather than the treaty itself which produces these objective effects.” Waldoek’s Third Report on Treaties, 32 para. 15; and further he observed that these treaties may be distinguished from, for example, the treaties of demilitarisation, owing to their purpose being regulation of particular interests of the parties, rather than to create “a general régime in the general interest. Other States, may be affected – even to an important extent – the
described in the above paragraphs the question of objective régimes polarised the Commission. Additionally, automatic, general validity erga omnes of treaties of cession has not been confirmed by case law (as the Arbitrator Max Huber in the Island of Palmas Arbitration Case illustrates).110

110 Island of Palmas Arbitration Case (The United States v. the Netherlands) RIAA, Vol. 2, 829. He rejected the contention of the United States that article 3 of the Treaty of the 1898 Paris Treaty (United States and Spain), by virtue of which Spain ceded the Island of Palmas to the United States coupled with the later communication of that treaty to the Netherlands which did not question the treaty as to be considered as an affirmation of Spanish sovereignty. The United States claimed the Netherlands was precluded from objecting to the sovereignty of the United States over the Island. He said as follows: "[w]hilst it is conceivable that a conventional delimitation duly notified to third Powers and left without contestation on their part may have some bearing in an inchoate title not supported by an actual display of sovereignty, it would be contrary to the principles laid down above as to territorial sovereignty to suppose that such sovereignty could be affected by the mere silence of the territorial sovereign as regards a treaty which has been notified to him and which seems to dispose of a part of his territory," 843; Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali), ICJ Reports 1986, 554 et seq., may also be cited to prove the doubts of the Court as to the automatic validity of such régimes erga omnes. The Court stated as follows: "[t]he rights of the neighbouring State, Niger, are in any event safeguarded by the operation of article 59 of the Statute of the Court, which provides that 'the decision of the Court has no binding force except between the parties and in respect to that particular case. The parties could at any time have concluded an agreement for the delimitation of their frontier, according to whatever perception they might have had of it, and an agreement of this kind, although legally binding upon them by virtue of the principle pacta sunt servanda, would not be opposable to Niger. A judicial decision, which is 'simply an alternative to the direct and friendly settlement' of the dispute between the Parties ..., merely substitutes for the solution stemming directly from their shared intention, the solution arrived at by the Court under a mandate which they have given it. On both instances, the solution only has legal and binding effect as between the States which have accepted it, either directly or as consequence
Part II — Relevant (Selected) Case Studies on Third States and Treaties and on Objective Régimes

1. Judicial Case-studies

a. The Wimbledon Case

The case in question related to the legal status of the Kiel Canal. This canal passes through Germany and links the Baltic and North Seas. Its legal status was defined by the 1919 Treaty of Versailles (arts 380 – 386). Article 380, reads as follows: “[t]he Kiel Canal and its approaches shall be maintained free and open to vessels of commerce and of war of all nations at peace with Germany and on terms of entire equality.” Against the provisions of this article, a merchant English ship, chartered by French shippers, carrying munitions for the use of the Polish Government during the 1920 Polish-Russian war, was banned from the access to the Kiel Canal, by the German Government. The German Government pleaded that if it gave right of passage to this ship, it would have breached its neutrality in this war. All Parties to the Treaty of Versailles (Poland intervening), brought the case against Germany before the Court. They submitted that Germany was incorrect in refusing the access to the Canal.

In order to answer this question, the Court examined the legal nature of the Kiel Canal, as defined by the Treaty of Versailles.

First of all the Court observed that the relevant provisions of the Treaty, aimed at making out of the Kiel Canal an international waterway which “intended to provide under treaty guarantee easier access to and from the Baltic for the benefit of all nations of the world,” a right which had been granted to the vessels of commerce and war of all the nations. The Court said as follows:

“[t]he Court considers that the terms of article 380 are categorical and give rise to no doubt. It follows that the canal has ceased to be an internal and national navigable waterway, the use of which by the

\[\text{of having accepted the Court’s jurisdiction to decide the case,} \] 577-578, para. 46.

\[111\] The S.S. Wimbledon Case, (United Kingdom, France, Italy and Japan v. Germany), PCIJ, Ser. A. No.1, 10.

\[112\] Ibid.

\[113\] Ibid., 22.
vessels of states other than riparian state is left entirely to the discretion of that state, and that it has become an international waterway intended to provide under treaty guarantee easier access to the Baltic for the benefit of all nations of the world ...”\(^{114}\)

In order to dispute, in this case, the right of S.S. “Wimbledon” to free passage though the Kiel Canal under the terms of article 380, the argument was urged upon the Court that the right really amounts to a servitude by international law resting upon Germany and that, like all restrictions or limitations upon the exercise of sovereignty and confined within its narrowest limits, it should not be allowed to affect the rights consequent upon neutrality in an armed conflict. “The Court is not called upon to a definite attitude with regard to the question, whether in the domain of international law, there really exist servitudes analogous to the servitudes in private law. Whether the German Government is bound by virtue of servitude or by virtue of a contractual obligation undertaken towards the Powers entitled to benefit by the terms of the Treaty of Versailles, to allow free access to the Kiel Canal in time of war as in time of peace to the vessels of all nations, the fact remains that Germany had to submit to important limitations of the exercise of the sovereign rights which no one disputes that she possesses over the Kiel Canal. The fact constitutes a sufficient reason for the restrictive interpretation, in case of doubt, of the clause which produces such limitation. But the Court feels obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted.”\(^{115}\)

The Court examined further the position of Germany as neutral to Russia. Under general international law, Germany, under the rules of neutrality, should not permit the passage of the ship. However, it was bound by article 380 of the Treaty of Versailles, which legal nature was characterised as “categorical” by the Court. This meant that Germany was obliged by virtue of this article to allow the passage of all vessels under all circumstances. An additional complication was that Russia was not a party to the Treaty of Versailles, thus this Treaty remained for it \textit{res inter alios acta} (it has to be observed that it was as well for Germany, also a non-party to this Treaty). Therefore, it was argued Germany could not invoke this article as the legal ground for not performing its obligations as a neutral state and that Russia and Germany were

\(^{114}\) Ibid.

\(^{115}\) Ibid., 43.
bound by general customary law on neutrality. Thus, on this basis, Germany, could exercise its rights as a neutral state in the time of war.

Having examined the situation of the other canals, such as the Suez Canal, the Court observed that the relevant precedents, indicated that the passage through these canals of warships and war materials, did not compromise the neutrality of the states which had territorial sovereignty or jurisdiction over them. The Court concluded that these precedents were:

"... illustrations of the general opinion according to which when an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of a sovereign State under whose jurisdiction the waters in question lie."\(^{116}\)

The Court, therefore, did not rely on the relevant provisions of the Treaty of Versailles (as res inter alios acta) but rather had the recourse to general customary international law on neutrality, from which the above-described situation is an exception.

As to the Court's definition of the legal status of the Kiel Canal, it appears that the Court has acknowledged that the Treaty of Versailles has granted it a "new régime", of a permanent character which aim was to be applied objectively in the interest of international navigation.\(^{117}\)

The Court did not make a conclusive pronouncement as to the argument that the right of passage of ships through the canal amounts to a servitude in international law, resting on Germany. On the contrary, it pointed out that such an analogy with private law is very controversial. The Court did not specify as well the nature of the free passage through the canal for third states; is it a right or a benefit. If it was a right, it could have been directly invoked by third states and perhaps give them a *locus standi* before international courts and tribunals.

In conclusion, it may be said that the Court has admitted the existence of a certain "objective and permanent" régime of the Kiel Canal based on a treaty, without, however, a strict definition, as to the nature of rights (if any) deriving from this régime for third states. Further, it did not really clarify the issue of the position of third states *vis-à-vis* a treaty, in general, since it passed over the issue of the relation of Ger-

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\(^{116}\) Ibid., 28.

\(^{117}\) The Court did not allude to the international settlement theory which was the basis of the Åland Islands régime (see below).
many as non-party in relation to the Treaty of Versailles in connection with the question of neutrality, having based its reasoning rather on customary law than on the provisions of the Treaty of Versailles.

b. Case of the Free Zones of Upper Savoy and the District of Gex

The facts of the case are very complicated. One of the issues dealt with at the Congress of Vienna was the future status of Switzerland. On 20 March 1815, the powers participating in the Congress, which included France with the exclusion of Switzerland, made a Declaration which stated that if “Switzerland acceded to the stipulations contained in the present instrument, an Act shall be prepared containing the acknowledgement and the guarantee, on the part of all Powers, of perpetual neutrality of Switzerland in her new frontiers.” One of the stipulations was that territory in the District of Gex, situated on the French territory of the proposed border between France and Switzerland (in the vicinity of Geneva), which was to be just on the Swiss side of the border, and should be linked with Geneva by one single economic unit. This took into consideration the reliance of the District of Gex for food and other supplies on Geneva. The Declaration thus stated that France would refrain from levying custom duties upon goods crossing into Switzerland into the District of Gex. Switzerland acceded to the Declaration. Similar arrangements were made in relation to the district of Savoy were the Sardinian customs frontier was withdrawn some distance from the Swiss political border. Later France acquired the zone of Savoy. A second Declaration was made, by the same Powers at Vienna, which acknowledged the perpetual neutrality of Switzerland.

At the close of World War I, article 435 of the Treaty of Versailles, to which Switzerland was not a party, declared, inter alia, that the arrangements concerning the free zones of Upper Savoy and the District of Gex were no longer consistent with present conditions, and that it is for France and Switzerland to come to an arrangement together with the view to settling between themselves the status of these territories. Annexed to this article was, included at the request of France, a Swiss note to the French Government acquiescing to the inclusion of the article, but expressly reserving the Swiss position with regard to the status of free zones. The two governments undertook negotiations on the status of free zones but did not reach any agreement. The treaty was

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118 PCIJ Ser.A/B, No. 48.
approved by the Swiss Diet but it was rejected by a plebiscite of the Swiss people.

In 1923, the French Government established unilaterally its customs line on the political border. Switzerland objected to it and the Court was asked to declare the rights of the parties. France argued that its action was justified on the basis of article 435, which according to France, was intended to relieve it of any obligations to maintain free zones. France also argued that Switzerland had no right to insist on the maintenance of free zones since it was not a party to the particular arrangements of 1815 that created the zones. Switzerland contended that it had a right to the maintenance of the zones and that they could not be abolished without its consent.

The Court rendered the Judgment in favour of Switzerland and said the following:

"[i]t follows from the foregoing that article 435, paragraph 2, as such, does not involve the abolition of the free zones. But, even were it otherwise, it is certain that, in any case, article 435 of the Treaty of Versailles is not binding upon Switzerland, who is not a party to that Treaty, except to the extent to which that country accepted it. The extent is determined by the note of the Federal Council of May 5, 1919, an extract from which constitutes Annex 1 of the said article. It is by this instrument, and by it alone, that Switzerland has acquiesced in the provision of article 435; and she did so under certain conditions and reservations, set out in the said note, which states, inter alia: The Federal Council would not wish that its acceptance of the above wording [article 435, paragraph 2, of the Treaty of Versailles] should lead to the conclusion that it would agree to the suppression of a system intended to give the neighbouring territory the benefit of a special régime which is appropriate to the geographical and economical situation and which has been well tested ..."

With particular regard to the zone of Gex, the following is to be noted: Pursuant to article 6 of the Treaty of Paris of 30 May 1814, the Powers assembled at the Congress of Vienna addressed Switzerland on 20 March to the effect that "as soon as the Helvetic Diet shall duly and formally accede to the stipulations in the present instrument, an act shall be prepared containing the acknowledgement and the guarantee, on the part of all Powers, of the perpetual neutrality of Switzerland, in her new frontiers." The "instrument" which forms part of this Declaration, amongst other territorial clauses, provides that the line of the French customs is to be so placed "that the road which leads from Ge-
neva into Switzerland by Versoy, shall at all times be free.” The proposal thus made to Switzerland by the Powers was accepted by the Federal Diet by means of the “act of acceptance” of 27 May 1815.

“On receipt of Switzerland’s formal declaration of acceptance, the Powers drew up the instrument promised in their Declaration of 20 March and declared their formal and authentic acknowledgement of the perpetual neutrality of Switzerland; and they guarantee to that country the integrity and inviolability of its territory in its new limits, such as they are fixed, as well as by the Act of the Congress of Vienna as by the Treaty of Paris of this day, and such as they will be hereafter; conformably to the arrangement of the Protocol of November the 3rd extract of which is hereto annexed, which stipulates in favour of the Helvetic Body a new increase of territory, to be taken for Savoy, in order to disengage from enclaves, and complete the circle of the Canton of Geneva.” It follows from all the foregoing that the creation of the Gex zone forms part of a territorial arrangement in favour of Switzerland, made as a result of an arrangement between that country and the Powers, including France, which agreement confers on this zone the character of a contract to which Switzerland is a Party. It also follows that no accession by Switzerland to the Declaration of 20 November was necessary and, in fact no such accession was sought: it has never been contended that this Declaration is not binding owing to the absence of any accession by Switzerland.

The Court, having reached this conclusion simply on the basis of an examination of the situation of facts in regard to this case, need not consider the legal nature of the Gex zone from the point of view of whether it constitutes a stipulation in favour of a third party. The Court by the way of an obiter dicta made the observations that it cannot be lightly presumed that the stipulation favourable to a third state has been adopted with the object of creating an actual right in its favour. There is, however, nothing to prevent the will of sovereign states from having this object and this effect. The question of the existence of rights acquired under an instrument drawn between other states is therefore one to be decided in each particular case: it must be ascertained whether the states which have stipulated in favour of a third state meant to create for such a state an actual right and the state has accepted this.

All the instruments above mentioned and the circumstances in which they were drawn up established, in the Court’s opinion, that the intention of the Powers was, “rounding up” the territory of Geneva and ensuring direct communication between the Canton of Geneva and the rest of Switzerland as a right on which the country could rely, that
amounted to the withdrawal of the French customs barrier behind the political frontier of the District of Gex, that is to say, of the Gex free zone. In this connection, it should be recalled that the free zone of Gex which was asked for by Switzerland as an alternative to this cession of that territory, constitutes one of the territorial stipulations contemplated by the first Treaty of Paris of 1814, which were made effective by stages by means of the decisions of the Congress of Vienna and the second Treaty of Paris, and are referred to in the Declaration addressed by the powers to Switzerland on 20 November 1815.119

The above case has been often cited, as an authoritative statement by the Court fully acknowledging the existence of treaties granting rights for third states. As apparent from the above-cited judgment, this is not exactly the case. In fact, the Court was very clear in stating firstly that a situation of this type was not present in the case at hand; and secondly that it observed in an obiter dictum that in other situations “it cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour.”

The Court was adamant in stating that Switzerland was not a party to the Treaty of Versailles and as such was not bound by it, “... except to the extent to which that country accepted it.” Great importance was accorded to the acts of acceptance of this article and the Declaration of 20 November 1815 by the Swiss Diet. The Court, having taking into consideration all the facts, came to the conclusion that the “territorial arrangements in favour of Switzerland, [were] made as a result of an agreement between that country and the Powers, including France, which agreement confers on this zone the character of a contract to which Switzerland is a party.” In addition, the important point, as observed by McNair, is that the Court was adamant in relation to three zones in question (Sain-Gingolph, the Sardinian and Gex) that Switzerland had acquired true contractual rights by virtue of agreements made in the years 1815 and 1816, to which this country was a party at the time and which had not been abrogated since. The above made conclusion excludes any speculations other than contractual arrangements.

119 The Court also concluded that Switzerland had a “contractual right” to the withdrawal of the French customs line from the Savoy zone, the creation of which has been promised by Sardinia to the Allied Powers in an undertaking of 11 November 1815, and which has been created by the Treaty of Turin of 1816 (to which Switzerland was a party) and extended by the Sardinian Declaration of 1829. France was bound to respect these zones as “Sardinia’s successor in the sovereignty over the territory in question.”
However, it must be observed the Court’s reasoning in this case is obscure and misleading. On the one hand, it adheres a great importance to the intention of the Powers (see above), the intention that may be treated as an element in the creation of an objective régime, on the other hand, it is dismissive of such a possibility due to contractual rights entered into between Switzerland and the Powers. Finally, it declines to pronounce on the legal status of the objective régimes entirely.

c. The Reparation Case\textsuperscript{120}

In this case, the Court was asked whether the United Nations, as an organisation, was equipped with the kind of international legal personality which would presuppose bringing an international claim in respect of injury to the organisation itself and to its personnel. The legal question at hand related to lodging the claim against a non-member state, Israel, which at that time was not a member of the United Nations.

The Court said as follows: “... the question is whether the Organisation has capacity to bring a claim against the defendant State to recover reparation in respect of that damage or whether, on the contrary, the defendant State not being a member, is justified in raising the objection that the Organisation lacks the capacity to bring an international claim. On this point, the Court’s opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognised by them alone, together with the capacity to bring international claims ...”\textsuperscript{121}

\textsuperscript{120} Reparation for Injuries Suffered in the Service of the United Nations, ICJ Reports 1949, 174 et seq. The question submitted before the Court by the General Assembly was as follows: “I. In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organisation, the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him? II. In the event of an affirmative reply on point I (b) how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?”

\textsuperscript{121} Ibid., 185.
This case is, of course, primarily concerned with the question of an international personality of organisations. What is of interest in this study is the legal notion of “objective international personality” which has been a creation of states “representing the vast majority of the members of the international community” and recognised “not merely ... by them alone.” If we analyse this notion from the point of view of the doctrinal approach of McNair, the type of a treaty entered into by only certain groups of states, which creates an international organisation which is endowed with an objective international personality valid erga omnes, and effective not only vis-à-vis the states which established it but all other states, would appear to belong to the category of so-called constitutive or semi-legislative treaties. These treaties, of a public law character, embody the decisions of a powerful group of states acting or assuming to act in the public interest. To this end, McNair, gave the examples of the United Nations or of the League of Nations.122 It appears, however, that at present, as regards the United Nations, the theory of the public law character of a treaty, concluded by a powerful group of states, in the public interest and valid erga omnes, does not reflect the reality of the almost universal participation of the international community in the United Nations. This kind of theory, obsolete at the present stage of international relations, was tenable in relation to the League of Nations due to its limited participation,123 and perhaps also to the United Nations during the Cold War period.124 In principle, however, the United Nations, ever at its inception, was meant to be an organisation of universal and global participation.

122 McNair, see note 1, 259.
123 N. White writes that “... at the outset the League was not a universal organisation, and despite the fact that its membership rose to 59, it was dogged by impotence and withdrawal so that by its formal dissolution in April 1946 it only had 40 members,” N.D. White, The Law of International Organisations, 1996, 58.
124 The same author says as follows: “[t]he world’s second attempt at establishing a global organisation, the United Nations, was more successful ... In 1945 the membership of the United Nations numbered 51 ... and was, with the exception of the Soviet Union and its allies, Western dominated, but by the end of the Cold War in 1989 the membership had increased to 169, the bulk of the increase consisting of the newly independent States ...dramatically altering the balance of voting power in the General Assembly. The end of the Cold War saw a further dramatic increase in membership so that ...the number stood at 185,” White, see note 123, 58.
Thus in conclusion it may be said, that the objective (\textit{erga omnes}) legal character of the United Nations, if at all it exists, is not due to the power of the elitist group of states, but, quite to the contrary, it stems from the representation of, what the Court aptly named, the “vast majority of the members of the international community.”

d. South West Africa Case (1950)\textsuperscript{125}

In this case the Court was asked, whether or not South – West Africa was still under the mandate which was established in accordance with article 22 of the Covenant of the League of Nations; and what were the obligations of the mandate state, Union of South Africa in respect to this territory.

The argument of the Union was based on a private law theory — which assimilated the mandate to a contract of mandate under private law. The relationship thus was between the Union of South Africa as mandatory and the League of Nations as a mandator. Since, it was argued, the mandator was an extinct organisation, thus, in the light of the lack thereof, the mandate ceased to exist. The dissolution of the League of Nations ended all international rights and obligations under the mandate system.\textsuperscript{126} Therefore, the Union of South Africa could regulate the future status of this territory as a domestic matter.\textsuperscript{127}

The Court, however, rejected the private law argument and explained as follows:

“[t]he contention is based of a misconception of the legal situation created by article 22 of the Covenant and by the Mandate itself. The League was not, as alleged by the Government, a “mandator” in the sense in which the term is used in the national law of certain States. It had only assumed an international function of supervision and control. The “mandate” had only the name in common with the several notions of a mandate in national law. The Mandate was created, in the interest of inhabitants of the territory, and of humanity in general, as an international institution — a sacred trust of civilisation. The international rules regulating the Mandate constituted an

\begin{footnotes}
\footnote{\textit{The International Status of South- West Africa} Case, ICJ Reports 1950, 128 \textit{et seq.}, see also M. Hidayatullah, \textit{The South- West Africa} Case, 1967.}

\footnote{\textit{The South West Africa} Case, see above, 132.}

\footnote{\textit{South-West Africa} Case, ibid., 146.}
\end{footnotes}
international status for the Territory recognised by all the Members of the League of Nations, including the Union of South Africa."\textsuperscript{128}

The Court emphasised the continuous existence of the obligations under article 22 of the Covenant, coupled with those under the mandate, as well as the obligation of transmission of petitions of the inhabitants of this territory. The supervisory function was exercised by the United Nations, a body to which petitions and annual reports should be submitted.\textsuperscript{129} Two factors were of fundamental importance: the continuous recognition by the Union of South Africa of its obligations deriving for the mandate after the demise of the League of Nations; and the transfer of all the functions relating to territories under the mandate system to the United Nations as a successor to the League of Nations as regards the mandate system.\textsuperscript{130}

This case gave rise to Lord McNair's Separate Opinion in which he accorded to international mandates an objective existence that derives its validity from the theory of international settlements. He thus left aside the arguments made by the Court as to why the mandate system was still binding (see above) and relied on an argument based on the very nature of mandates and the legal character of article 22 of the Covenant.

He stated as follows:

"[f]rom time to time it happens that a group of great Powers, or a large number of States both great and small, assume a power to create by a multipartite treaty some new international régime or status, which soon acquires a degree of acceptance and durability extending beyond the limits of the actual contracting parties, and giving it an objective existence. This power is used when some public interest is involved, and its exercise often occurs in the course of the peace settlement at the end of Great War."\textsuperscript{131}

\begin{itemize}
  \item \textsuperscript{128} South-West Africa Case, ibid., 132
  \item \textsuperscript{129} South-West Africa Case, ibid., 134-135.
  \item \textsuperscript{130} South-West Africa Case, ibid.
  \item \textsuperscript{131} McNair, Separate Opinion, 153. He further states as follows: "[t]he occasion was the end of a world war. The parties to the treaties of peace incorporating the Covenant of the League of Nations and establishing the system numbered thirty. The public interest extended far beyond Europe. Article 22 proclaimed "the principle that well-being and development of such peoples for a sacred trust of civilisation and securities for the performance of this trust of civilisation should be embodied in the Covenant. A large
Therefore, the mandate system was built on more than a contractual basis and territories under this system had "a special status designed to be modified in a manner also indicated by article 22."132 He further stated that "[i]n short, the Mandate created a status for South - West Africa ... this status — valid in rem — supplies the element of permanence which would enable the legal condition of the Territory to survive the disappearance of the League, even if there were no surviving personal obligations between the Union and other former Members of the League. “Real” rights created by an international agreement have a greater degree of permanence than personal rights, because these rights acquire an objective existence which is more resistant ... to the dislocating effects of international events.”133

It appears that Fitzmaurice viewed this Advisory Opinion of the Court as giving certain support for the thesis. However, he stated not very explicitly, that, “certain types of international régimes or systems, while having their origin in instruments contractual in form, are not themselves of a contractual character but rather have, or acquire, an essentially objective, self-contained character, a status independent of the instrument which created them, so that their existence is not affected by the lapse of that instrument, material changes in its terms, or the disappearance of one of the parties to it. In coming to the conclusion that the status of South - West Africa as a territory under the mandate had not been affected by the demise of the League, which is a party to the mandate, or by the lapse of the League Covenant (under article 22 of which the mandate system was set up), the Court rejected the contention advanced on behalf of the Union of South Africa that the Mandate had lapsed because the League ceased to exist.”134

The present author cannot agree with either McNair or Fitzmaurice. The Court in this case, although referring to humanity in general and the mandate as an international institution with an international object — a sacred trust of civilisation avoided general statements, and did not give rise to justify the claims purporting both the objective character of

132 South West Africa Case, see note 125, 154.
133 Ibid., 155-156.
a mandate system, \textit{(McNair)}, and the existence of a general group of treaties which generate some \textit{erga omnes} effects \textit{(Fitzmaurice)}.

Quite to the contrary, the Court based its reasoning on a close and precise legal analysis of the Mandate system (in particular article 22 of the Covenant), on the behaviour of the Union of South Africa as regards the existence of this particular mandate, and finally on the legal position of the United Nations as a successor organisation to the League of Nations mandate system. Nothing in the pronouncement of the Court substantiates the view that the Court in any way endorsed the existence of objective \textit{régimes} in general and in particular as it relates to the mandate system. The rejection of the argument of the Union of South Africa as to a private character of a mandate agreement does not automatically accord to it an objective, \textit{erga omnes} character.

In the opinion of Professor Lauterpacht, (commenting on McNairs's Separate Opinion), however, the fact that the Court rejected the private character of the mandate agreement, signifies that “the Mandates are clearly given the complexion of a status independent of the continued existence of the parties to the original treaty which gave rise to it.” Thus, upon analysis, the doctrine of an international status amounts to an affirmation of international legislation. For status implies an area of operation not limited to the contracting parties or to contracting parties in general. Status operates \textit{erga omnes}.\textsuperscript{135} The Court, however, brought up the international character of the mandate agreement in order to reject the argument of the Union of South Africa, claiming that the private nature of the mandate agreement, was the reason it did not survive the demise of the League of Nations and all ensued from the mandate system as regards international obligations.

2. Non-judicial Case Studies

a. The Åaland Islands Case (1920)

The Åaland Islands case is important from the point of view of the introduction into international law of the notion of treaties which established so-called “international settlements” or treaties with a real character. These treaties were characterised as having an \textit{erga omnes} nature.

\textsuperscript{135} Sir H. Lauterpacht, \textit{The Development of International Law by the International Court}, 1958, 180-182.
The League of Nations International Committee of Jurists in its opinion relating to the Status of the Åland Islands expressed this view,\textsuperscript{136} which was later embraced by McNair (see above).

The 1856 Convention concluded between France and the United Kingdom, on the one hand, and Russia, on the other, demilitarised the Åland Islands.\textsuperscript{137} This Convention was attached to the General Treaty of Peace between Austria, France, the United Kingdom, Prussia, Russia, Sardinia and Turkey, signed in 1856.\textsuperscript{138} Article 33 assured that the former Convention “is and shall remain attached to the present Treaty and shall have the same force and effect as if it formed part of the said Treaty.” The Åland Islands had been under Swedish, Russian and Finnish sovereignty. In 1918, on the basis of a plebiscite, the majority of the inhabitants of the Åland Islands, chose to be reunited with Sweden, rather than to remain under the sovereignty of Finland, which had gained independence from Russia. That lead to a dispute between Finland (which treated the problem of the Islands as a domestic matter) and Sweden, and was then submitted by Sweden to the League of Nations. Thus the Committee of Jurists was appointed.

The legal questions which arose were whether the 1856 Convention was still in force; what were the rights established by it; and what was its legal effect on Finland and Sweden—both non parties to it. The Committee concluded that this Convention (notwithstanding occurrence of many events) was still in force. The Committee did not agree with the Swedish argument that “real servitude” was attached to the Åland Islands, \textsuperscript{139} The Committee,

\begin{itemize}
\item \textsuperscript{136} Åland Islands Question, \textit{League of Nations Official Journal, Special Supplement}, No. 3, October 1920. The Committee consisted of Professors Huber, Struycken and Laranaude.
\item \textsuperscript{137} Convention between the United Kingdom, France and Russia, Respecting the Åland Islands, 30 March 1856, 16 Martens, 1st edition, 788.
\item \textsuperscript{138} General Treaty of Peace between Austria, United Kingdom, France, Prussia, Russia, Sardinia and Turkey, signed in Paris on 30 March 1856, 15 Martens, 1st. edition, 780.
\item \textsuperscript{139} “[t]he existence of international servitudes, in the true technical term, is not generally admitted. Those who maintain that real servitudes, similar to those in civil law, can exist between States, meet with difficulty of naming a ‘preedium dominans’ in relation to the ‘preedium serviens’ represented by the Åland Islands. At all events, Sweden can hardly be considered as the ‘preedium dominans’, since it is neither a party to the Convention nor the Treaty of 1856, nor is it even mentioned in these documents,” 16-17, of the
\end{itemize}
however, observed that the inclusion of the Convention into the 1856 Treaty was intended by the powers to make provisions which concerned demilitarisation of the Åland Islands, part of "European Law", in the same manner as other provisions of this Treaty. The Committee was of the view that the Powers "on many occasions since 1815, ... tried to create true objective law, a real political status of the effects of which are felt outside the immediate circle of contracting parties."\textsuperscript{140} The Committee also stated that the demilitarisation of the Åland Islands, was in the permanent international interests. The Committee stated that the 1856 Convention "has a character of settlement regulating European interests." Since it is of a permanent nature it cannot be abolished or modified either by the acts of one particular Power or by conventions between only a few of the powers which signed the 1856 Treaty. Finland, as an independent state cannot exempt itself from international obligations stemming from this Convention (which settled European interests) and thus had to follow the provisions of this Convention.

As regards Sweden, the Committee, rejected the possibility that Sweden either had "any contractual rights"\textsuperscript{141} under this Convention, since it "was not a signatory Power"; or that it could "make use of these provisions as a third party in whose favour the contracting parties had created a right under the Treaty, "\textsuperscript{142} although, as the Committee has observed, a possibility of a treaty in \textit{favorem tertii}, in principle exists. Sweden, however, neither was mentioned in the Convention, nor "was intended to profit indirectly"\textsuperscript{143} from its provisions. The Committee concluded, however, that "... by reason of its objective nature of the settlement of the Åland Islands question by Treaty of 1856 ... Sweden may, as a Power directly interested, insist upon compliance with the provision of this Treaty in so far as the contracting parties have not cancelled it."\textsuperscript{144} The Committee, further stated that in the event of Sweden itself becoming possessed of the Åland islands, it would be bound by the provisions of the 1856 Treaty, for the same reasons on which it is now allowed to rely on them. As for Finland, it "would acquire an in-

\textsuperscript{140} Ibid., the Committee, 18.
\textsuperscript{141} Ibid.
\textsuperscript{142} Ibid.
\textsuperscript{143} Ibid.
\textsuperscript{144} Ibid.
terest in the demilitarisation of the islands quite as great as that which
Sweden can show now."\(^{145}\)

The Committee thus concluded as to the legal nature of the 1856
Convention:

"[t]he provisions were laid down in European interests. They con­
stituted a special international status, relating to military considera­
tions, for the Åaland Islands. It follows that until these provisions
are duly replaced by others, every State interested has the right to
insist upon compliance with them. It also follows that any State in
possession of the Islands must conform to the obligations binding
upon it, arising out of the system of demilitarisation established by
these provisions."\(^{146}\)

The special *erga omnes* character of the treaties concerning the Åaland
Islands, was acknowledged by international lawyers.\(^{147}\) The observa­
tions of the Committee of Jurists are important. The group of treaties
that establish "international settlements" was distinguished. These trea­
ties exhibited certain particular features: they had the participation of
politically significant states; they aimed at the interests of the whole re­
gion (in this case Europe); the settlement was of permanent character
(only to be abolished or modified by another agreement with the par­
ticipation of the same powers); all states (as well as non-parties) could
insist on enforcement of existing treaties.

It is clearly visible from the above that Lord *McNair* was greatly in­
fluenced by the findings of the Committee of Jurists. Treaties which
established so-called international settlements have indeed a special na­
ture, which is at best reflected in their permanence and their certain le­
gal effects on non-parties. Some other features, however, at least as de­
scribed by the Committee, and later adopted by *McNair*, rely on the
1815 Congress of Vienna, later confirmed to a certain extent by the
1919 Treaty of Versailles, structure of power in Europe. As seen above,
the Committee referred explicitly to the Congress of Vienna — as a sig­
nificant event in Europe, establishing certain political status, where the
Powers tried to create "objective law" whose effects fell outside an
"immediate circle of contracting parties."

This element of treaties establishing international settlements or ob­
jective régimes, should be re-examined. It may be also observed that the

\(^{145}\) Ibid.

\(^{146}\) Ibid., 19.

\(^{147}\) Fitzmaurice, see note 4, 66 et seq., (99).
Committee, did not exclude the possibility of the binding force of such régimes on third states based on the classical treaty establishing rights and obligations for third states (the possibility which was rejected in relation to Sweden in this case). It proves further that treaties that establish third treaty rights and obligations and treaties that may establish so-called objective régimes, are difficult to distinguish in an absolutely incontrovertible manner. It may also be true, that at least, at present, the status of the Åland Islands is binding on third states on the basis of customary law, as provided for in article 38 of the 1969 VCLT.

b. The Suez Canal

The legal issues pertaining to the Suez Canal are very complicated and were extensively described elsewhere. Therefore, in this section of the study only the legal elements having relevance to third states (or objective régimes) will be discussed. On 5 January 1856, the Viceroy of Egypt granted a concession to Ferdinand de Lesseps, which in article 14 stipulated on his behalf and on behalf of his successors rights and obligations of the users. This Concession, according to article 14 was approved by the Sultan of Turkey.

The legal status of the Canal was a subject of much academic research. The most prevailing view was that, although, a Concession is a private act, article 14 gave rise to the creation of international rights towards the whole international community. The Sultan of Turkey offered free right of transit to merchant ships of all the nations of the world in peace time, and this offer was tacitly accepted by the Great Powers. Nonetheless, certain issues of law were not clear, such as for example, whether it was a neutral passage.

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149 Moore’s Digest, Vol. 3, 262, “[s]ubject to ratification by His Imperial Majesty the Sultan, that the great maritime canal Suez to Pelusium and the ports belonging to it shall be open for ever, as neutral passages, to every merchant vessel crossing from one sea to another, without any distinction, exclusion, or preference with respect to persons or nationalities, in consideration of the payment of the fees, and compliance with the regulations established by the Universal Company, the Concession-holder, for the use of the canal and its appurtenances.”

150 Obieta, see note 148, 56.
Finally, the status of the Suez Canal was regulated by the 1888 Constantinople Convention signed by Austria-Hungary, France, Germany, the United Kingdom, Italy, the Netherlands, Russia, Spain and Turkey.\footnote{Convention Respecting Free Navigation of the Suez Canal, Constantinople, 29 October 1888, \textit{AJIL} 3 (1909), Suppl., 123, "[t]he Canal remaining open in time of war as free passage, even to ships of belligerents even to ships of war of belligerents ..., the High Contracting Parties agree that no right of war, act of hostility, or act having for its purpose to interfere with the free navigation of the Canal, shall be committed in the canal and its ports of access, or within the radius of 3 nautical miles from those ports, even though the Ottoman Empire should be one of belligerent Powers." The Canal will also remain free of blockade (article 1 para. 3). All provisions of the Convention indicate that for all purposes, the Canal had been neutralised.} The Convention, in its Preamble, stated as follow:

"...the Powers desirous of establishing, by Conventional Act, a definite system intended to guarantee, at all times and to all the Powers, the free use of the Suez Maritime Canal, and thus complete the system under which the navigation of this canal has been placed by the Firman of His Imperial Majesty the Sultan ... sanctioning the Concession of His Highness the Khedive ... ";

and article 1 para. 1 provides as follows:

"[t]he Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag."

The Convention imposed certain limitations which pertained mostly to war vessels, for example the vessels of war of belligerents. However, article 4 stated that the canal remains open in time of war as free passage.

The legal régime of the Suez Canal, produced certain effects on third states. These effects result from two main groups of provisions in the 1888 Convention: the group that grants to all vessels of all nations the right of passage; and the second group that pertains to the neutrality of the Suez Canal. These effects may be explained by the principles of law which are codified in article 36 of the 1969 VCLT. The right of passage under the 1888 Convention was accorded to all states. This was the intention of the parties to this Convention. Assent had been presumed (simply by usage). The obligations concerning neutrality of the canal and the duty to refrain from its blockade could be interpreted as the condition provided for the exercise of the right of passage; which com-
plies with the legal situation as provided for in article 36 para. 2 of the 1969 VCLT. Moreover, from the text of the Convention it is clear that it was the intention of the signatories, as expressed by article 1, to grant free passage to the vessels of all nations.

Further, it appears to be doubtful that the parties to the 1888 Convention relied on the establishment of an objective régime, taking into consideration that they had undertaken to communicate the Convention to third states and to invite them to accede to it. It has to be observed, however, that no such invitations were sent.

The practice of states has proven to be very inconclusive. During both World Wars, the canal was for all purposes closed to enemy vessels and fortified by the British armed forces. As far as Egypt and Israel are concerned, neither of these two countries acknowledged that the Suez Canal was under an objective régime of any kind, as evidenced by the discussions in the Security Council. Israel, relied on the general principle of international law and considered the Suez Canal to be under the régime similar to that of international straits. Egypt claimed that for Israel, non-signatory to the 1888 Convention, it was res inter alios acta.

In 1956, the canal was nationalised. In 1957 the Egyptian Government issued a Declaration in which it pledged: "[t]o afford and maintain free and uninterrupted navigation for all nations within the limits of and in accordance with the provisions of the Constantinople Convention of 1888." It also provided that all the disputes arising out of the Convention are to be settled in accordance with the Charter of the United Nations (para. 9); and that differences arising between the parties to the Convention are to be referred to the ICJ (unless otherwise provided). This Declaration was registered with the Secretariat of the United Nations. In the later adopted Code of the Suez Authority, the Government confirmed the legal force of the 1888 Convention.

The reaction of third states after the nationalisation of the Suez Canal gives as little support to the reliance on the doctrine of objective régimes as to the validity of its legal status in relation to third states.

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152 UNTS Vol. 265 No. 3821.
154 The Suez Canal Users Association, in its statement relied on the 1888 Convention. It said as follows:

"[t]he Egyptian Declaration is insufficient and falls short of the six requirements for the settlement of the Suez Canal question ... Insofar as the use of the Canal is resumed by the shipping of member States this does not imply their acceptance of the Egyptian Declaration as a settlement of the
No state ever invoked its right to use the Suez Canal on the ground of the objective régimes. Rather, a more persuasive argument appears to be that third states acquired a right vested in them under the 1888 Convention, on the basis of the principle *stipulation pour autrui*. It may be as well that the Convention codified some, but not all, rights of usage that predated the Convention. Thus states had rights of passage of the Canal on the basis of the previously existing custom. Finally, it may have been the position in the 1950s that the provisions of the 1888 Convention (almost seventy years after its signing) had already entered into the body of customary international law and were binding on states through the process reflected in article 38 of the 1969 VCLT.

c. The Panama Canal

The legal status of the Panama Canal is equally complicated as that of the Suez Canal. For the same reasons only the most pertinent facts and the legal arguments will be submitted.

The 1901 Hay-Pauncefote Treaty between the United States and the United Kingdom shaped the legal position of this Canal.\(^{155}\) Article 3 of the Treaty set out the main principles on which the legal status of the Canal was based. It reads as follows:

"[t]he United States adopts, as the basis of the neutralisation of the canal the following Rules, substantially as embodied in the Convention of Constantinople, signed 21 October 1888, for free Navigation of the Suez Maritime Canal, that is to say:

1. The Canal shall be free and open to the vessels of commerce and war of all nations observing these Rules, in terms of entire equality, so that there shall be no discrimination against any such a nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charge of traffic shall be just and equitable. 2. The canal shall never be blocked, nor shall any right of war be exercised nor shall any act of hostility be committed within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder."

\(^{155}\) Treaty to Facilitate the Construction of a Ship Canal, 18 November 1901, 30 Martens, 2nd edition, 631; entered into force on 21 February 1902.
Article 4 stipulated that:

"... no change of territorial sovereignty or of the international relations of the country or the countries traversed by ... the canal shall affect the general principle of neutralisation or the obligation of the High Contracting Parties under the present Treaty."

It may be noted that the original draft of the Treaty provided for notification to or accession by third states.

Further, the United States concluded the 1903 Hay-Bunau-Varilla Treaty with Panama.156 Under the Treaty the initial states acquired in perpetuity the use, occupation, and operation of the Panama Canal extending to the distance of five miles on each side of the centre line of the route of the canal to be construed (article 2). Panama has granted to the United States "[a]ll the rights, power and authority ... which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power and authority" (article 3). The United States paid some amount of money in exchange. Article 19 stipulated that the Government of Panama had the "right to transit its vessels and its troops and munitions of war in such vessels at all times without charges of any kind." Article 18 concerned the neutrality and the navigation through the Canal: "[t]he Canal, when construed, and the entrance thereto shall be neutral in perpetuity, and shall be opened upon the terms provided for by Section I of article three, and in conformity with all the stipulations of the treaty entered into by the Governments of the United States and the United Kingdom November 18, 1901."

The provisions of both treaties also indicate that the legal status of third states may be considered to be similar to that under the 1888 Treaty in relation to the Suez Canal and third states. Third states had a right of usage under the condition of conforming to rules governing this Canal. The reading of the text of the Treaties may be interpreted as an indication of the intention of the parties to grant a right to third parties (conditional upon exercise of certain behaviour). Thus, if we adhered to the above interpretation it would appear that we are faced with the situation reflected by article 36 paras 1 and 2.

The other position may be that the third states did not acquire any right but only a benefit and in these circumstances they do not have lo-

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cus standi to bring any claims.\textsuperscript{157} This was the position adopted by the US Government. The statements which were made on the occasion of the signing of the 1977 Treaty of Neutrality (see below), indicate just that. It was strongly observed that:

"[u]nder customary international law, as reflected by articles 35 and 36 of the Vienna Convention on the Law of Treaties ... neither rights nor obligations are created by a treaty unless the parties to the treaty so intend."

The negotiating history of the Hay-Pauncefote Treaty demonstrates that neither the United Kingdom nor the United States intended to confer rights on third party nations. An earlier version of the Treaty contained an adherence clause through which the contracting parties invited other nations to become parties to the Treaty. The United States Senate rejected this provision of the Treaty because it would have granted third parties adhering to the treaty contractual rights against the US. The negotiated Treaty did not contain an adherence clause, but states that "The Canal shall be free and open to the vessels of commerce and war of all nations observing these rules, on terms of equality." Secretary of State Hughes wrote to President Harding that "other nations not being parties to the treaty have no rights under it." The position has been endorsed by the ILC.\textsuperscript{158} A view which endorsed the above was expressed as follows:

"... it is clear that both [treaties] will benefit all nations of the world community. The creation of a third party right, however, requires a specific intent by the contracting parties to confer an "actual right" as distinct from a mere benefit ... In fact, it was the clear intent of both parties that no third party rights be conferred."\textsuperscript{159}

The common view expressed at present is, however, that many third party claims may arise out of régimes established for facilitating international transport and communications.\textsuperscript{160} As Chinkin summarises there were different legal arguments submitted in order to justify third party rights, such as international servitudes or the theory of dedication.

\textsuperscript{157} See e.g., H.S. Knapp, "The Real Status of the Panama Canal", \textit{AJIL} 4 (1910), 314 et seq.

\textsuperscript{158} Mr. Glennon's Letter to Mr. Hansell, 5 February 1978, \textit{US Digest} (1978), 700-702.

\textsuperscript{159} Mr. Hansell's reply, source see note 158, 702.

\textsuperscript{160} See e.g., Chinkin, see note 3, 84-88; R. Baxter, \textit{The Law of International Waterways}, 1965, 177-184.
or reliance, linked with estoppel. Yet another argument in favour of a right of third states is based on the presumed existence of general customary law of international transit through canals despite, existing independently from the treaty of origin. It was also submitted that there exist a legal, imperfect right of international transit which derives from global communication.

We have to agree with Chinkin that the "[w]hatever juridical basis is preferred, third party rights of navigation through international canals are accepted." She asks, however, an interesting question whether these third party rights can supersede those of the parties to the treaty, or whether they can be suspended or modified, and if so under what circumstances. As noted above the first formulation of the Hay-Pauncefote Treaty provided for notification to or accession by third states. That was rejected by the Senate on the grounds that might bestow rights upon third states. Chinkin claims that the assumption that the treaty may be modified or amended by the parties without regard to navigation rights of third states is an outdated view. Support of this view may be found in the Wimbledon Case (see above), in which the Court said that once a waterway has been dedicated to international use, the riparian states cannot exclude the shipping of other states. Thus, Chinkin concludes that "[o]nly the most severe conflict where the territorial integrity and political independence of a State is threatened can only justify interference with third party communication rights through strategic international canals." It may be observed that third states maintained silence as to the legal nature of the canal régime.

In 1977, the new régime of the Panama Canal was established. In 1977 the Panama Treaty established a framework for the operation of the Canal until 31 December 1999. The main features of the Treaty concerned: abrogation of the 1901 Treaty; explicit recognition of the sovereignty of Panama over the Canal Zone and the Canal itself; the bestowing on the United States all rights necessary "to manage, operate, maintain, improve, protect and defend the Canal" until the year 2000;

161 Baxter, see above 160.
162 Chinkin, note 3, 85.
164 Chinkin, see note 3, 85.
165 Chinkin, see note 3, 86.
elimination of the Panama Canal Company and the Canal Zone Government; the creation of a Panama Canal Commission to operate the Canal as an agent of the United States; gradual elimination of the United States in participation of the Canal administration in favour of Panama; retention by the United States primary responsibility for protection and defence of the Canal until the year 2000; new fees for the use of the Canal; and functions of the Commission.

The second treaty was the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal. This Treaty provided that the Republic of Panama declares that "the Canal, as an international waterway, shall be permanently neutral in accordance with the régime established in this Treaty (article I). Article II specifies that:

"[P]anama declares the neutrality of the Canal in order that both in time of peace and war it shall remain secure and open to peaceful transit by the vessels of all nations on terms of entire equality, so that there will be no discrimination against any nations, or its citizens or subjects, concerning the conditions or charges of transit, or for any other reason, and so that the Canal, as therefore the Isthmus of Panama, shall not be the target of reprisals in an armed conflict between the nations of the world ..."

According to article II (c), all vessels must comply with all rules and regulations, pay charges and not commit any act of hostility in the Canal. According to article V:

".. after the termination of the Panama Treaty in 1999, only Panama shall operate the Canal and maintain military forces, defence sites and military installations within its territory."

Article VII stipulated that the United States and Panama "shall jointly sponsor a resolution in the organisation of American States opening to accession by all States of the world the Protocol to this Treaty whereby all the signatories will adhere to the objectives of this treaty, agreeing to respect the régime of neutrality set forth herein."

The Protocol envisaged by the Treaty was announced by the Organisation of American States open to accession.

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168 Protocol to the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, 7 September 1977, UNTS Vol. 1161 No. 18343; ILM 16 (1977), 1042. It provides that: "[w]hereas the maintenance of the neutrality of the Panama Canal is important not only to the commerce and
Neither the United States nor Panama are parties to this Protocol. This Protocol is open to accession by an international community to recognise as widely as possible neutrality of the Canal. It may be observed that there were no reactions from third states as to the neutrality treaty and the Protocol.

In conclusion it may be said that the view that the treaties establishing Panama and the Suez Canal strove to create objective régimes is not convincing. As discussed above, at most (and this proposition may be also doubted), these treaties established a certain régime or legal structures that may result in granting to third states some limited rights. This was, however, denied by the United States in relation to the legal status of the Panama Canal. Neither the character (procedural and substantive) and scope of these rights for third states nor the locus standi in the event of their breach are precisely defined. It may even be that these entitlements for third states are not rights but benefits only, and such an interpretation would further limit the possibility of any claims from third states in relation to the breach of condition of the use of, or denial of, access to the canals in question.

security of the United States ... and Panama, but to the peace and security of the Western Hemisphere and to the interests of the world commerce as well; Whereas the régime of neutrality ... will ensure permanent access to the canal by vessels of all nations on the basis of entire equality; Whereas the said régime of effective neutrality shall constitute the best protection for the Canal ... ; the Contracting Parties to this Protocol have agreed upon the following:

“article I. The Contracting Parties hereby acknowledge the régime of permanent neutrality for the Canal established ... and associate themselves with its objectives;

article II. The Contracting Parties agree to observe and respect the régime of permanent neutrality of the Canal in time of war and in time of peace, and to ensure that vessels of their registry strictly observe the applicable rules.

article III. This Protocol shall be open to accession by States of the world and shall enter into force for each State at the time of deposit of its instruments of accession with the Secretary-General of the Organisation of America States.”
d. The 1982 Law of the Sea Convention — Part XI

Another example of the provisions of a treaty affecting third states is Part XI of the Law of the Sea Convention which relates to deep-sea bed mining. Part XI of the Convention embodies the concept of the Common Heritage of Mankind ("CHM") which is an example of the existence of collective interests.

In general, at least at the time of signing, the legal status of the 1982 LOS Convention vis-à-vis third states caused concern. Certain provisions (such as concerning transit passage) at that time may have been recognised as not forming the body of customary international law. The position which was generally adopted was that this Convention did not establish any rules for third states non-parties to it. This view was strongly expressed by Ambassador Arias-Schreiber of Peru who in his speech said as follows: "[n]o state can claim that the new rules and rights established under the Convention apply to that State if it is not a party to the Convention."

The view was held that third states asserting rights under this Convention, in general, would have to substantiate their rights based on the following: 1.) an agreement, (possibly) a tacit understanding with those states parties that accept such rights of third states; or, 2.) The claim that the rights in question are granted under customary international law.

It has to be said, however, that it was Part XI which was subject to the most controversy and dispute. Broadly speaking it was the approach to the legal status of exploitation of natural resources which

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172 Lee, see above, 547.
caused the differences between the Group of 77-developing states and the developed states.

The general provisions of the LOS Convention in article 137 provide that the Area and its resources are the Common Heritage of Mankind and that “all rights in the resources of the Area are vested in mankind as a whole.” The LOS Convention also provides that an international body, the International Seabed Authority, shall act on behalf of mankind in exploration and equitable distribution of the wealth in the Area. In fact, the concept of the Common Heritage of Mankind was first introduced in the Moon Treaty, which in a similar fashion to the LOS Convention, established a special régime to govern the use of natural resources on the moon. The use of these resources has to be for the benefit of mankind as a whole (and in the case of the LOS Convention, with due regard to the interests of developing countries). The LOS Convention, unlike the Moon Treaty, established the machinery to manage the exploitation of resources in the Area.

The legal status of the Area was subject to divergent views. Developed states accorded the legal character of res communis to the Area under the Common Heritage of Mankind principle and to resources therein; whilst developing states adhered to the theory that the access to the natural resources is not free but strictly limited and administered. The Common Heritage of Mankind principle, as originally provided for in the LOS Convention, also involved free transfer of technology from developed to developing states.

We have to approach the legal nature of Part XI and third states in two phases: as adopted originally in the LOS Convention and after the Implementation Agreement. As to the first period, Part XI could (possibly) have a legal effect against third states on one of the following grounds: a.) on the basis of customary international law; b.) by creation of “an objective régime”; c.) as a result of a “package deal” approach adopted a the UNCLOS III.173 The first of these contentions, will be assessed by applying the standards of the North Sea Continental Shelf Case (see above). The LOS Convention had at first a very poor ratification record and even after the 60th ratification, developed states, were not among the ones which had ratified it. Thus it is difficult to claim that it gained support of states “whose interests are specially affected.” Also the requirement of practice which is extensive and virtually uniform thus evidencing “a general recognition that a rule of law or legal

obligation is involved” is missing. There is no practice available and the United States issued licenses for exploration under its own domestic law, not within the framework of the PIP resolution.\textsuperscript{174}

Furthermore it cannot be assumed that the necessary requirement of \textit{opinio juris} was fulfilled. In the light of the pronouncement of the Court that the creation of a rule of international customary law from a treaty cannot “lightly be regarded as having been attained”, it is safe to say that Part XI in its original form did not enter the body of international customary law, therefore, it did not bind third states on this basis. \textit{Vasciannie} submits the interesting hypothesis that Part XI may be viewed as having legal effect on third states on the grounds of an \textit{erga omnes} character of objective régimes.

However, this ground for a binding force is doubtful as well. This author is right in observing that the doctrine of objective régimes has not gained a wide recognition and their status in international law is at best ambiguous, and for that reason \textit{Waldock’s} attempts at their inclusion in the 1969 VCLT failed due to the lack of support in the ILC and at the Diplomatic Conference (see above). Similarly, the conceptual approach of \textit{Waldock} as to what in his view constituted objective régimes does not conform with the legal character of the deep seabed, as established by the LOS Convention. Since, as \textit{Vasciannie} rightly observes, the core of \textit{Waldock’s} objective régimes structure was based on a premise that at least one of the parties to the relevant treaty had treaty-making competence over territory or locality in question at the time of signing the treaty and further this particular feature distinguished objective régimes from any law-making treaty. That premise cannot be considered in relation to Part XI.\textsuperscript{175} Indeed, it goes against article 137 of the 1982 LOS Convention which is very clear as to the legal status of the Area:

“1. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognised.

\textsuperscript{174} Resolution II (Governing Preparatory Investment in Pioneer Activities Relating to Polymetalic Nodules) of the Final Act of the UNCLOS III, Doc. A/CONF.62/121.

\textsuperscript{175} \textit{Vasciannie}, see note 173, 90.
2. All rights in the resources in the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation.

3. No State or ... juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognised."

Nor is the doctrine of objective regimes as presented by McNair applicable, neither from the first period of his analysis, which was based on the assumption of the existence of certain territorial rights of a state; nor from the later period, when it was based on a premise of political supremacy of certain states thus empowering them to establish permanent objective regimes binding on other states.

Equally, the Reparations Case (see above) is not a useful example to substantiate the assertion that the legal structure of the deep-sea bed is an objective régime. At a first glance, certain formulations (such as "... states representing the vast majority of the members of the international community [have] the power to bring into being an entity possessing objective international personality ...") may appear to be similar to the formulations used in relation to Part XI ("all States"), and to indicate that the deep-sea bed constitutes a régime comparable to that of the United Nations Organisation. These similarities are, however, deceptive. The above case related to the UN and therefore to draw the conclusions vis-à-vis the legal régime of a territory is not substantively correct. Likewise the comparisons between the International Seabed Authority (ISA) — the main regulatory body in relation to the seabed activities and the United Nations cannot be sustained. Although undoubtedly the ISA enjoys a certain degree of legal personality, it may be said that its status is not comparable to that of the United Nations. Most importantly, it has no objective personality as regards non-parties to the Convention.

In conclusion, it appears that, at least at the pre- Implementation Agreement stage, Part XI of the LOS Convention did not enjoy a legal status of an objective régime. Finally, an argument may be put forward that Part XI of the LOS Convention is binding on third states on the basis of the "package deal" theory.\textsuperscript{176} The above technique, adopted by the negotiators of the LOS Convention reflects an uneasy compromise

achieved with respect to the LOS Convention. The LOS Convention consists of provisions which codify existing norms of international customary law, as well as embody progressive development. The division between those two groups of norms is decisive, in the classical theory of international law, as to rights and obligations of third states. The package deal approach, however, departs from this clear-cut division of norms and presents an integral text which has to be taken as a whole, a text which reflects consensus and is a result of a *quid pro quo* between negotiating states. The character of the package deal was best defined by Tommy Koh, the President of UNCLOS III who said as follows: “[a]lthough the Convention consists of a series of compromises, they are for an integral whole. This is why the Convention does not provide for reservations. It is therefore, not possible for States to pick what they do not like. In international law, as in domestic law, rights and duties go hand in hand. It is therefore, legally impermissible to claim rights under the Convention without being willing to assume the correlative duties.”

It appears, however, that the package deal technique of drafting international Conventions has a direct effect only on states that decide to ratify the final text. They have to accept the whole package as it stands,

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177 See, S. Mahmoudi, *The Law of Deep-Sea Bed Mining*, 1987, 246; Churchill/ Lowe, see note 170, 16-22; Ywen Li, *Transfer of Technology for Deep Sea-Bed Mining*, 1994, 102-106. In the view of the Group of 77 the package deal means as follows: “[i]n negotiating and adopting the Convention, the Conference had borne in mind that the problems of ocean and space were closely interrelated and had to be dealt with as a whole. The ‘package deal’ approach ruled out any selective application of the Convention. According to the understanding reached by the Conference from the outset and in conformity with international law, no State or group of States could lawfully claim rights or invoke the obligations of third states by reference to individual provisions of the Convention unless that State or group of States were themselves parties to the Convention. States which decided to become parties would likewise be under no obligation to apply its provisions *vis-à-vis* States not parties. That held true both for new rules laid down by the Convention for areas under national jurisdiction (inland waters, territorial sea, contiguous zone, exclusive economic zone, continental shelf, archipelagic waters and straits used for international navigation) and for the régime instituted, by virtue of the Convention and the relevant resolutions adopted by the Conference, for the use of the area of the sea-bed beyond the limits of national jurisdiction,” Doc. A/CONF.62/SR.183.

without the possibility of appending reservations. To the states which decide to stay *au dehors* the Convention, the package deal approach makes no difference. In order to distinguish the rules of customary law from the rules constituting progressive development, nothing prevents states from applying the standards for establishing whether a norm in question entered into customary law. This was a stand adopted by the ICJ in the 1982 *Tunisia/ Libya* case and in the 1985 *Libya/ Malta* case. In both of these cases the Court has accepted that the EEZ régime exists independently in customary international law from Part V of the 1982 LOS Convention. This indicates that states are free to state their position against certain institutions of international law on the basis exclusively of customary law binding (or non-binding) on them in each and every case. Thus, it appears that notwithstanding the package deal character of the LOS Convention, the attitudes of states non-parties in relation to its contents were shaped on the basis of the application of the standards applicable to customary law. The same may be said as to the régime of deep sea-bed mining. In the view of the present author, the package deal doctrine does not have any relevance as to the binding force of the deep-sea bed régime whatsoever on third states.

The conclusion of the Implementation Agreement (see above) was exactly one of the means to achieve the wide recognition of and participation in the régime of deep sea-bed mining. Industrialised states non-parties to the Convention, did not consider themselves bound by the provisions of Part XI on the basis of the package deal. In fact, they viewed the above régime as not forming as yet part of customary international law, thus being *au dehors* of the Convention they were not bound by its parts which were not customary law. As Churchill and Lowe observe:

"[t]he Implementation Agreement is a curious creature because the title is misleading as to its true nature. The 1982 LOSC does not permit reservations ... and its procedures for its amendment are both protracted and open only to States Parties ... Neither route was suitable for modifications of the Convention sought by industrialised States that remained outside the Convention. Instead, the 1994 Implementation Agreement was made, its title disingenuously implying that it was concerned to put into effect the 1982 provisions rather than to change them. In fact, it stipulates that several provi-

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179 ICJ Reports 1982, 18 et seq., (74, para. 100).
180 ICJ Reports 1985, 13 et seq., (32-34).
sions of Part XI of the LOSC ‘shall not apply’ and modifies the ef-
fact of others.”181

In general, the provisions of the Implementation Agreement are shaped in such a manner as to take into consideration to a great extent the interests of industrialised states. To this effect the ISA takes decisions in a cost-effective manner in conformity with the interests of these states and the exploitation of natural resources of the deep-sea bed is effected in a commercial fashion.

The question that is of interest here is the binding force of this Agreement on third states. According to Churchill and Lowe, the intention was that the 1982 Convention should take effect as modified by the Implementation Agreement. This is the case in relation to states which ratified the Convention at the same time as the Implementation Agreement or which ratified the Implementation Agreement after they ratified the Convention. The problem arises in relation to states which ratified the LOS before 28 July 1994, but have not ratified the Implementation Agreement. There are around 25 such states. Churchill and Lowe state as follows:

“[i]n theory, those States could choose to remain bound by the original LOSC rules on deep-sea bed mining. But since any deep-sea bed mining will in practice take place under the Implementation Agreement régime, that choice is illusory. The Implementation Agreement, which entered into force on 28 July 1996, has effectively modified the LOSC, however, limiting its effects might be in theory.”182

We have a legally curious situation: there are at present two groups of states — third parties as to the deep sea-bed mining régime, as established by the Implementation Agreement. One group consists of states which ratified neither the 1982 Convention nor the Implementation Agreement; and the second group consists of states which are not bound by the Implementation Agreement. According to the above-cited authors, these states have to follow the new régime, in practical terms. What is, however, the legal basis for it? It seems doubtful that this régime is already a part of customary law, certainly not the new régime under the Implementation Agreement. Neither it is an objective régime; nor classical stipulation pour autrui. The practice of states as of now is non-existent. Apart from the United States, all other industrial-

181 Churchill/ Lowe, see note 170, 21.
182 See above, 21.
ised states, “which interests are specially affected” ratified the Implementation Agreement.

Thus at least we may presume that in case of any future activity in exploration of the deep sea-bed natural resources, with the participation of these states, a norm of customary law may be formed (see North Sea Continental Shelf Case), but such a formation process cannot be presumed lightly. It is also rather unlikely, in the light of other industrial developments that put the necessity of mining for manganese nodules in doubt, that deep sea-bed mining is ever going to be an important source of these minerals. Thus the relevant practice may never develop and the question of third states and the régime of deep sea-bed mining will remain in the sphere of academic speculation.

e. Highly Migratory Fish Stocks Convention

The first of the examples of conventions under which treaty rules are apparently intended to be made binding on third states arise under the Agreement for the Implementation of the Provisions of the LOSC 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995 (the “Straddling Fish Stocks Convention” or “SSA”), under which, in article 21, it is agreed that a party (which we will call Party A) may take

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184 Article 21 para. 1, “[i]n any high seas area covered by a regional or sub-regional fisheries management organisation or arrangement a State Party ... may, through its duly authorised inspectors, board and inspect, in accordance with paragraph 2, fishing vessels flying the flag of another State Party to this Agreement, whether or not such a Party is also a member of, or a participant in, the organisation or agreement, for the purpose of ensuring
steps (e.g. boarding and inspection) against the vessels of another party (Party B) which is fishing in a particular geographical area, with a view to enforcement of the conservation measures of the regional organisation which covers that area and of which Party A is a member, even though Party B is not. Thus, as it has been put by one author: “a member of a regional organisation is allowed to take certain enforcement measures within the region concerned against any vessels, including those of non-members ....”

This solution has been assessed as a unique and far-reaching exception to the flag state’s exclusive jurisdiction. Certainly, it is true that the introduction of the concept of a state becoming bound by rules enacted by a body set up under a treaty to which that state is not a party gives rise to a number of additional possible theoretical questions. In the case of the Straddling Fish Stocks Convention, however, the arrangements may, in fact, be viewed as arising entirely under the terms of that Convention, there being, as it were, as between Parties A and B, an incorporation of the provisions of the regional treaty into their mutual rights and obligations under the Straddling Fish Stocks Convention.

But there is an interesting possible alternative analysis. According to article 21 of the Straddling Fish Stocks Convention, the right to board or inspect the fishing vessel of a non-member of the regional fisheries organisation is bestowed on a member of that organisation. The questions arises whether such a right is an individual right of the member of the organisation, or whether the member’s right flows from the organisation itself — which is, not itself a party to the Straddling Fish Stocks Convention, and is wholly in the position of a third party vis à vis the state whose vessel is subjected to inspection. In the latter event, we may be faced with the situation envisaged in the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations and contained in articles 34-35 of the Convention. According to this Convention third states and organi-

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185 Hayashi, see note 183, 61.
sations mean respectively (i) a State, or (ii) an international organisation, not a party to a treaty.

The fundamental rule which governs the treaty relationship between third states and organisations is set out in article 34: "[a] treaty does not create either obligations or rights for a third State or a third organisation without the consent of that State or that organisation." The situation at hand involves an obligation not a right i.e., enforcement of conservation measures by a regional fisheries organisation against a state which is not a member of this organisation. This obligation is contained in a treaty (Straddling Fish Stocks Convention) to which the state is a party. Article 35 of the Convention reads as follows: "[a]n obligation arises for a third State or a third organisation from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State or the third organisation expressly accepts that obligation in writing. Acceptance by the third organisation of such an obligation shall be governed by the rules of that organisation." The theoretical question which may be posed is whether being a party to the Straddling Stocks Convention constitutes such an express acceptance in writing. If the answer to this question is negative, then the problem arises what is the legal ground justifying the application of the enforcement measures by the regional fisheries organisation in relation to ships which do not fly the flag of one of its members. If, on the other hand, the right to inspect and the obligation to submit to inspections flows from an individual right of another state party to the Straddling Fish Stocks Convention, then the inspection probably falls within the treaty relationship between the two states, without any involvement of the regional organisation as a third party.

The views were, however, expressed that this Convention does not create any pacta tertiis rules. First of all, the analysis of article 21 (1) indicates that it only applies to vessels flying the flag of another flag state party to this Agreement. Only then it will be immaterial, this

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187 See generally on the subject, Chinkin, see note 3, 90 et seq.

author claims, whether the flag state of the boarded or inspected fishing vessel is a member of the existing subregional or regional organisation or arrangement. Therefore, given the definition of the State party in the 1995 Agreement, "the pretended negation of the _pacta tertiis_ rule only applies to fishing vessels flying the flag of a country for which the 1995 Agreement is in force."\(^{189}\) The same author, says, (in not quite clear terms) however, that if one reads closely article 21 (1), the _pacta tertiis_ rule can be theoretically violated with respect to states bound by the 1995 Agreement, bearing in mind, he claims, that even if this was the case, states consented to it, and so therefore there is no violation of that rule. These explanations, however, are not entirely convincing and persuasive.

**f. MARPOL 73/78**

The second of these instances of rules intended to bind non-parties to a convention occurs under article 5 para. 4 of MARPOL, and in this case there is no relevant other treaty _nexus_ between the MARPOL party and the third party concerned. The article requires that, with respect to the ships of non-parties to MARPOL, the parties are to apply the requirements of MARPOL "as may be necessary to ensure that no more favourable treatment is given such ship." The measures under article 5 para. 4 are the subject of some doctrinal controversy in so far as they purport to apply to ships flying the flag of non-parties. As an exercise of jurisdiction by the coastal state over foreign ships, the provision cannot, according to one author, restrict the rights enjoyed by non-parties under the general international law principle _pacta tertiis nec nosunt nec prosunt_. According to _Willisch_, the provision which obliges the parties to apply the requirements of a convention to ships flying the flag of non-parties is, under this principle, subject to the geographical limitations of coastal state jurisdiction as determined under general international law.\(^{190}\) It is submitted that this is a correct analysis of the situation. On the other hand, it has been confirmed by the IMO that in practice ships flying the flag of a non-party to MARPOL must indeed conform to the requirements of MARPOL while they are under the ju-

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\(^{189}\) Franckx, see above, 65.

\(^{190}\) J. Willisch, _State Responsibility for Technological Damage in International Law_, Veröffentlichungen des Instituts für Internationales Recht an der Universität Kiel, 1987, 115.
Thus there is, in practice, an apparent imposition of the MARPOL provisions on third parties.

The question then arises whether this conduct of the non MARPOL state is purely voluntary, or whether that state is under any kind of obligation, and if so what is its juridical basis. If the vessel concerned is within the internal waters or territorial sea of a MARPOL member state, then the basis of the imposition of MARPOL provisions would amount to no more than an exercise of the coastal state’s jurisdiction in respect of those areas. But if the vessel is outside those waters — i.e. in the EFZ or EEZ of the MARPOL Member State — any obligation on the non MARPOL state would have to have some other juridical basis. This could, in theory, result from the existence of some form of agreement between the MARPOL state and the non MARPOL state or on the basis of the development of a customary rule of international law.

With regard to an obligation based on agreement, if the non MARPOL state had expressed its agreement to abide by the MARPOL provisions in writing, then, in fact, this would amount to an instance of the imposition of an obligation on a third state (with the agreement of that state) by MARPOL in accordance with the provisions of article 35 of the 1969 VCLT. This, of course, would amount in effect to a separate agreement as between the MARPOL members and the third party. If, on the other hand, as is in practice the case, there is no such agreement in writing (and, indeed, no express agreement at all), then the question would be whether there was some informal agreement to this effect which could be implied from the conduct of the parties. In this respect, it is not denied that, given conduct amounting to evidence of an intention to be bound by the MARPOL provisions, such an agreement could come into existence. But it is submitted that the mere exercise of its right to enter the exclusive zone of a MARPOL member by a non-member, and even its voluntary adherence to the MARPOL provisions, could not, in itself, amount to evidence of such an intention.

On the other hand, it is submitted that a course of conduct by states generally adhering to the MARPOL provisions, would contribute to the development of a rule of customary international law; and, indeed, it may be argued that the provisions of MARPOL have, in fact, now entered into customary law.

191 In an interview with Mr. Blanco-Bázan. Senior Legal Officer of the International Maritime Organisation, 11 February 1997.
192 P. Birnie/ A. Boyle, *International Law and the Environment*, 2002 second edition there are strong grounds for treating the MARPOL Convention as
A similar issue to that discussed above in relation to MARPOL may arise in connection with certain provisions of UNCLOS. These provisions relate to port state jurisdiction, as elaborated under article 218 of UNCLOS. This article provides for the extension of the jurisdiction of a port state to areas outside its internal waters, territorial sea and exclusive economic zones in relation to vessels voluntarily within a port or at an off-shore terminal of the port state. This jurisdiction involves investigation, and where the evidence so warrants, institution of proceedings in respect of any discharge from the vessel in violation of applicable international rules and standards. Institution of proceedings is subject to the pre-emption of the flag state. It is widely presumed that enforcement by port states has not, as yet, entered the body of customary international law. If we accept this presumption, it appears that this jurisdiction can only be exercised towards vessels of a state itself party to UNCLOS. Thus the situation is substantively different to that discussed in connection with MARPOL, above. On the other hand, if we assume that port jurisdiction has become universal jurisdiction under customary international law, then the situation vis-à-vis the ships of third states is substantially the same as that under MARPOL.

**g. The Antarctic Treaty Régime as an Objective Régime**

*aa. Introduction*

As referred to in section A above, the major, indeed really the only, treaty régime in the field of environmental protection, for which an

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194 Birnie/ Boyle, see note 192, 282.

195 See Restatement of the Law (Third), The Foreign Relations Law of the United States, Vol. 2, 43, The American Law Institute, 1987, which states that, on the basis of the adoption in the 1970s of several international agreements relating to marine pollution which broadened the jurisdiction of the port state to allow that state to deal with violations of international environmental regulations that occurred on the high seas or in the waters of another state, "port state jurisdiction has been enlarged from a limited jurisdiction to a general jurisdiction for all port states."
erga omnes effect, as an "objective régime", has been claimed, is the Antarctic Treaty System. It is not the intention of the present author to give a survey of all the legal issues concerning the Antarctic but to highlight the position of third states — i.e. states outside the Antarctic Treaty System. Only a brief introduction will be given to describe the workings of the system in order to illustrate the decision-making process as it affects third parties.196

The Antarctic Treaty is applicable to the whole of the Antarctic — that is, the area consisting of land, ice shelves and water between 60 south latitude and the Pole — a vast, empty and inhospitable region. The Antarctic Treaty was signed in 1959 and entered into force in 1961.197 For decision-making purposes the parties to the Antarctic Treaty may be divided into two groups:

1. So-called Consultative Parties — which have the power to make decisions; and
2. The non-Consultative Parties — which cannot vote.

The Consultative Parties are the original twelve parties to the 1959 Treaty and such additional parties that have become Consultative Parties subsequently. Any party to the Treaty can become a Consultative Party through demonstration of "interest in Antarctica by conducting substantial scientific activity there, such as establishment of a scientific station or the dispatch of a scientific expedition."198

The next question which arises is how the theory of objective régimes is applicable in relation to Antarctica.


197 UNTS Vol. 402 No. 5778.

Undoubtedly, the Antarctic Treaty belongs to the category of treaties which is intended to be directed at third states. This is stipulated in the Preamble — and may, at least on one interpretation, also be inferred from article X of the Treaty. It may thus be assumed that the fundamental principles underlying the Antarctic system were intended by the parties to affect third states. These principles may be enumerated as follows: Antarctica may be only used for peaceful purposes (article I); freedom of scientific investigation (article II); the right of accession to the Treaty (article XIII); prohibition of establishment of military bases and of military testing (article I); the duty of scientific co-operation (arts I and III); prohibition of new territorial claims (article IV), prohibition of nuclear explosions and disposal of nuclear waste (article V); and free access for observation and inspection (article VII).\footnote{Wyrozumska, see note 87, 120.}

Two of the authors whose general theories on objective régimes are considered above gave some consideration to their application in the case of the Antarctic Treaty in particular.

(i) According to Klein, in relation to the Antarctic Treaty System, legal capacity may be accorded by the parties themselves to the treaty, and based on an explicit treaty provision such as article X of the Antarctic Treaty; or may be implied as deriving, e.g., from a general interest or from the participation in the treaty of states which have some territorial competence in relation to its subject-matter. In relation to the Antarctic Treaty, he postulates that article X amounted to an “assertion of competence” which was accepted by states which raised no objection.

(ii) The Antarctic Treaty was an example, according to Fitzmaurice, of participation in use of a marine and land territory on which a treaty established an international régime. Fitzmaurice admitted that the Antarctic Treaty has shown certain features of an objective régime. These features may be summarised as follows: (i.) this treaty establishes in a permanent manner a joint system for use of a territory by both parties to the treaty and third states; (ii.) the manner of the use of territory does not breach any rights accorded to third states on the basis of general international law; (iii.) the parties to the treaty consist of all the interested states in the establishment of the régime together with the states which have territorial claims.
Despite this, views have been expressed denying that the Antarctic Treaty has the necessary characteristics of an objective régime effective *erga omnes*. These views are based on two theoretical premises: a general one which negates the existence of such régimes at all; and a particular one which denies the existence of such a régime in the case of the Antarctic Treaty System. These latter arguments may be grouped in the following manner:

(i) Arguments which deny the intention of the Parties to establish an objective régime

According to these arguments the *raison d'être* of the Antarctic Treaty was to suspend the conflict between Claimant States and Non-Claimant States "which endangered the maintenance of international peace and security in Antarctica."

(ii) Arguments which deny the establishment of an effective territorial régime in Antarctica due to article IV of the Antarctic Treaty which consequently deprived any state of a territorial title over Antarctic Territory. Only an effective title to territory can result in an establishment of an objective régime.

(iii) Arguments which deny the quasi-legislative competence of the parties to the Antarctic Treaty as against and between themselves in their character as Claimant States.

In the light of article IV, the Antarctic Treaty can only have effectiveness *erga tertios*. If the contrary were true, we would have in effect two legal régimes for Antarctic: one for Contracting Parties themselves and one valid *erga tertios*.

*cc. The Consent Element*

The binding force of the Antarctic Treaty based on consent of third states has been equally criticised. It has been submitted that third states have never expressed their explicit consent to the provisions of the Ant-

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200 Lefeber, see note 196, 120.
201 According to Tunkin "the intention had been to create a legal régime which could become universally accepted. But there had been no intention imposing that régime: any attempt to do so would have been illegal." Statement made by Tunkin during the 70th Mtg. of the ILC, *ILCYB* 1964, Vol. 1, para. 15, 107.
202 Simma, see note 85, 201.
arctic Treaty and their silence cannot be interpreted as an expression of consent. On the other hand, it has been argued that no states protested against the Antarctic Treaty at the time of its conclusion and during subsequent years; and that statements of states made within the framework of the First Committee of the United Nations General Assembly from 1983 indicate an acceptance of the general provisions of the Treaty. However, though the system of decision-making and the broadening of competence of the Consultative Parties in relation to the conclusion of the subsequent treaties on Antarctica has been subject to criticism, nonetheless the fundamental principles governing the Antarctic Treaty remain unchallenged. 203

The existence of such divergent opinions concerning the existence of consent of third states arises in part from the lack of clarity in the provisions of the 1969 VCLT in relation to rights and obligations of third states as formulated in arts 34–37. For example, according to article 35 of the 1969 VCLT there is a requirement for written acceptance of an obligation sought to be imposed by a treaty on a third state. No third state has ever accepted expressly in writing the Antarctic Treaty. It appears moreover, that the main difficulty in relation to the applicability of the relevant provisions of the 1969 VCLT is caused by the lack of a clear distinction in the Antarctic Treaty as to exactly what constitutes rights and obligations of third states in relation to it. The whole concept of treaties and third states is too vague to be applied to a complex treaty on a generalised basis. It appears that it is most useful in concrete cases such as the stipulation pour autrui. 204

**dd. Customary International Law**

A separate line of opinion considers that any binding effect of certain provisions of the Antarctic Treaty on third parties has arisen as the result of the general working of customary international law. This effect of treaties was expressly recognised by article 38 of the 1969 VCLT. The question of the binding effect of the Antarctic Treaty (or of parts of it) on third parties as a part of customary law has to be viewed against the general background of law-making treaties — i.e. treaties whose provisions have the capacity to be transformed into norms of customary in-

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204 Wyrozum ska, see note 87, 137; generally see on the subject: De Aréchaga, see note 12, 338.
ternational law. According to the standards adopted by the ICJ in the *North Sea Continental Shelf* Case of 1969, in order to become norms of customary international law, provisions of the Antarctic Treaty would have to fulfil the following conditions: be of a fundamentally norm-creating character, such as could be regarded as forming the basis of a general rule of law; have passed into the general corpus of international law; and be accepted as such by the *opinio juris* "so as to have become binding even for the countries which have never, and do not become parties to the Convention." The ICJ, however, took a cautious approach to this process and stated that: "[a]t the same time this result is not lightly to be regarded as having been attained."

There is no definition of what constitutes a norm-creating provision of a treaty. According to the ICJ, such a norm at least should have the capacity to be transformed into a general rule of law. According to Simma, however, "everyone will agree that if one had to look for a textbook example of a treaty provision that is not potentially norm-creating, article IV of the Antarctic Treaty would certainly be the first choice." According to this author, the interim character of the Treaty as evidenced by its article IV, precludes even the possibility of its crystallisation into custom. The problem of norm-creating treaty provisions may be linked to the classical distinction between law-making treaties and contracts or "traité-loi and traité-contrat." This distinction is also far from clear. Some authors adopt the distinction based on the criteria of its abstract character in relation to the number of subjects (non-defined) and the number of situations (general). There is not, however, any agreement in doctrine as to what norms may be law-creating. Some authors are of the opinion that objective régimes do not constitute general customary law, but may generate regional cus-

205 See e.g. Fitzmaurice, *ILCYB* 1960, Vol. II, 95 et seq.; *North Sea Continental Shelf* Case, see note 46.
206 *North Sea Continental Shelf* Case, see note 46, para. 71.
207 Simma, see note 85, 203. This author presented the most in-depth critique of all theories pertaining to the Antarctic Treaty as an objective régime i.e., based on a treaty law approach, public law theories approach, and the subsequent practice approach (in the face of a change in paradigms).
208 Villiger, see note 45, 190.
209 A good example of difficulties in relation to this problem is the 1969 VCLT; e.g., S. Rosenne is of the view that all its provisions are of a norm-creating character – "The Temporal Application of the Vienna Convention on the Law of Treaties," *Cornell Int'l L. J.* 4 (1970), 22 et seq.
It may be argued that in some cases rules originally applicable only to a particular or regional situation — as, e.g. the rules relating to neutrality which evolved originally in relation to the neutrality of Switzerland — may contribute to the establishment of general customary law.\textsuperscript{211}

Several views have been expressed in order to prove that the Antarctic Treaty does not have a norm-creating character; \textit{inter alia}, arguments were put forward that the Consultative Parties do not have any means of enforcing provisions of the Treaty;\textsuperscript{212} that its character is only temporary; that it does not aspire to regulate in a permanent manner the legal situation of Antarctica in relation to, e.g., sovereignty over natural resources;\textsuperscript{213} and that the existence of provisions enabling the denunciation of a treaty, its revision or the making of reservations to it deprive it of a norm-creating character. However, in the latter respect, the position is that the Antarctic Treaty cannot be denounced unilaterally, and contains no provisions making its revision obligatory.

The ICJ, in the \textit{North Sea Continental Shelf Case}, has cast doubt on the possibility of reservations in relation to provisions of a treaty which embody norms of customary law, and said as follows: “article 6 (delimitation) appears to the Court to be related to a different position. It does directly relate to continental shelf rights as such, rather than to matters incidental to these; and since it was not, as were articles 1 to 3, excluded from the faculty of reservation, it is a legitimate inference that it was considered to have a different and less fundamental status and not, like those articles, to reflect pre-existing or emergent customary law.”\textsuperscript{214} This pronouncement of the Court was the subject of much criticism in numerous Dissenting Opinions of the judges who were of the general view that reservations are only effective in relation to the contractual sphere and have no influence on the creation of customary norms.\textsuperscript{215} An important source of evidence of state practice and \textit{opinio juris} is to be found in the behaviour of third states. It appears that third states have not so far violated the provisions of the Antarctic Treaty and in statements before the General Assembly of the United Nations, sup-

\textsuperscript{210} D’Amato, \textit{The Concept of Custom in International Law}, 1971, 104.
\textsuperscript{211} Wyrozum ska, see note 87, 141.
\textsuperscript{212} W.M. Bush, \textit{Antarctica and International Law, A Collection of Inter-State and National Documents}, Vol. 1, 1982, 101-103.
\textsuperscript{213} Bush, see above, 193.
\textsuperscript{214} \textit{North Sea Continental Shelf Case}, see note 46, 40.
\textsuperscript{215} See above the Judges Opinions.
ported, for example, the ban on dumping of nuclear waste. It may be observed that the Parties to the Antarctic Treaty always emphasised its character *erga omnes* in their statements during the debates in the General Assembly of the United Nations,\(^\text{216}\) and that, although it is not as important from the point of view of the formation of customary international law as the practice of third states and *opinio iuris*, it seems to indicate, at least to a certain extent, that the second element of customary international law — i.e. *opinio iuris* — is present, at least in so far as the parties are concerned. Nonetheless, it is important to distinguish between support expressed in relation to some aspects only of the Antarctic Treaty and disapproval as to its foundations. Several states, such as Malaysia and Antigua, opposed the arrogance of a handful of states taking decisions which have a bearing on the whole of the international community.\(^\text{217}\) Such a régime, in their view, should be based on the concept of the Common Heritage of Mankind which takes into consideration the interests and rights of all states.\(^\text{218}\)

It is a very difficult task to draw conclusions as to the status of the Antarctic Treaty in relation to customary international law. It appears that at least in certain parts, the Treaty has a law-making character. It is without any doubt that such principles as non-militarisation, the preservation of the environment, and freedom of scientific research have entered the body of international customary law.\(^\text{219}\) It may be observed that “the same is not true, at least not any more, for the special status of the Consultative Parties.”\(^\text{220}\)


\(^{217}\) During a number of years Malaysia introduced draft resolutions at the annual sessions of the General Assembly expressing disappointment on the exclusivity of the Antarctic Treaty (see e.g. Doc. A/C.1/40/PV.48, page 9). The States parties to the Antarctic Treaty did not participate in the vote on such resolutions. The Antarctic Treaty Consultative Parties now provide regularly information on their consultative meetings and their activities in Antarctica. Resolution A/RES/51/56 of 10 December 1996, dealing with the Question of Antarctica (adopted without a vote) welcomes this development.

\(^{218}\) A/RES/40/156 (B) of 16 December 1985.

\(^{219}\) Charney, see note 216, 67 et seq., (83-93).

\(^{220}\) Lefeber, see note 196, 123.
Some authors, such as Birnie, assert that the lack of opposition towards the Treaty as such, and towards its main underlying principles, has resulted in endowing them with effectiveness *erga omnes* and has transformed them into norms of general customary law. But a different interpretation in relation to the lack of opposition to the Antarctic Treaty (at least until 1983) by third states was presented by Simma. He is of the view that the silence of third states cannot be considered as amounting to an expression of an agreement or *opinio iuris*, since the intention of the parties to the Treaty were themselves not so broad. The main purposes of the parties to the Treaty were to suspend questions of territorial sovereignty, to demilitarise Antarctica, to facilitate scientific research and to protect the environment of this continent. Moreover, according to the same author, the Parties to the Treaty always claimed to act in the general interest and denied any wish to benefit from this activity. In the light of this, the attitude of third states was merely that of waiting. Third states reacted, however, when the Mineral Resources Convention was being negotiated. Thus, in conclusion, it may be said that the silence of these states cannot be presumed to constitute an agreement to a customary law *régime* introduced under the Antarctic treaty.

It may also be noted that the legal character of the Antarctic Treaty as an objective *régime* effective *erga omnes* is inextricably linked with its territorial character. As has been pointed out above, Waldock restricted the scope of the doctrine of objective *régimes* to treaties which concern states having territorial competence with respect to a subject-matter of the treaty. If this doctrine is rejected, it may be argued that Antarctica is not governed by an objective *régime*.

Another view that has been expressed is that the Antarctic region should be classified as *res commnunis* — i.e. that all states have an equal status in policy matters and decision-making, no state has greater competence than the other. This view, if adhered to, would undermine the very cornerstone of the effectiveness of an objective *régime* in the area, and would put in doubt the competence of the Consultative Parties, and in fact call for the rethinking of the whole of the Antarctic Treaty System. Yet another view that has been expressed on the character of the Antarctic Treaty System rejects any binding force on third parties of the Antarctic treaty provisions. Third parties, according to this view,

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221 Birnie, see note 203, 255.
222 Simma, see note 85, 204.
are bound by other global agreements which are applicable to Antarctica.223

ee. The Effect vis-à-vis Third States of Additional Provisions, Measures and Treaties Under or within the Antarctic Treaty System

The Antarctic Treaty System has been further developed through the adoption of many measures and recommendations, including the Agreed Measures for the Conservation of Antarctic Fauna and Flora of 1964.224 Further, there are several Conventions which belong to the Antarctic Treaty System, and the living resources of Antarctica have been the subject of a number of treaties which regulated particular and general issues. An example of such a particular regulation is the Convention for the Conservation of Antarctic Seals of 1972 (the Sealing Convention). An example for a general convention is the Convention on the Conservation of Antarctic Marine Living Resources (CMLR) of 1980.225 We shall consider below the extent, if any, to which any of these are binding on third states, or amount to any form of objective régime. Finally, we shall also see that in relation to the Antarctic Treaty System, a number of issues which were considered above in Part II again arise.

ff. CMLR

The application of the Convention is defined in its article 1 para. 1 “The Convention applies to the Antarctic marine living resources of the area of 60 deg. south latitude and to the Antarctic marine living resources of the area between that latitude and the Antarctic Convergence which form part of the Antarctic marine ecosystem.” The CMLR aims at “the rational use” of Antarctic living resources, through an ecosystemic approach.226 Although the organisation of the membership in the Commission (an organ of the Convention) is similarly established to that of the Antarctic Treaty it is reserved to states which can undertake the obligations stemming from the Convention and are engaged in research or

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223 Overholt, see note 196, 252.
224 Recommendations III-VIII. Handbook of the Antarctic Treaty System (Part 2), 2403 et seq.
226 Joyner, see above.
harvesting activities in Antarctic waters, article VII para. 2 lit.(a) and (b). It appears, however, that the measures which are taken by the Commission under the article XII para. 1 and article IX para. 2 of the Convention are binding exclusively on the parties to the Convention.\(^{227}\) In general, this Convention has not been uniformly praised on the basis that it is unable to attain its goals, in particular to enforce catch quotas on third parties “due to the continued uncertainty of offshore jurisdiction in the Antarctic and non-membership of CMLR by principal fishing states, and the continuing special status given by CMLR to the Antarctic Treaty and ATCPS.”\(^{228}\) It may be said therefore that this Convention does not establish any objective régime.

\[\text{gg. CRAMRA}\]

Although not yet in force, the Mineral Convention (CRAMRA) of 1988\(^{229}\) is very interesting from the point of view of the development of international law. The cornerstone of this Convention is prohibition of Antarctic mineral resource activities outside the terms of the Convention (article 3). The structural bases of the Convention are the same as those of the Antarctic Treaty and this “exclusive” character coupled with the lack of environmental provisions provoked criticism. The wording of the Convention indicates that it was meant to have an \textit{erga omnes} effect. In article 2 it is stressed that the Convention “is an integral part of the Antarctic Treaty System” the “prime purpose of which is to ensure that the Antarctic shall continue for ever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord.” In paras 2 and 3 of article 2 it is pledged that “... the Parties shall ensure that the Antarctic mineral resources activities, should they occur, take place in a manner consistent with all the components of the Antarctic Treaty System and the obligations flowing therefrom.” Moreover, in relation to all mineral activities, the parties acknowledged the special responsibility of the Consultative Parties for the protection of the environment. The Convention confirms the status of the Consultative Parties in general and relies on the main principles of the Antarctic Treaty.


hh. Protocol on Environmental Protection

The most recent addition to the Antarctic Treaty System is the 1991 Protocol on Environmental Protection to the Antarctic Treaty. As one author has pointed out "... The Protocol is governed by the general provisions of the Treaty; it applies to the same geographical area; decision-making is governed by article XI of the Treaty; and inspections under the Protocol are to be performed in accordance with the observer system established under article VII of the Treaty." This is confirmed by article 4 para. 1 of the protocol itself, which stipulates as follows: "[t]his Protocol shall supplement the Antarctic Treaty and shall neither modify nor amend that treaty." Article 6 para. 1 of the Protocol imposes on the Parties a general obligation "to share to the extent possible information that may be helpful to other Parties in planning and conducting their activities in the Antarctic Treaty area, with a view to the protection of the Antarctic environment and dependent and associated systems." This obligation may express the duty of all the states to cooperate in protection of the Antarctic environment. The provisions of article 7, which prohibits in absolute terms any activity in relation to mineral resources unless it is for scientific purposes, appears to indicate as well that this provision is directed at all states, not only at the parties to the Antarctic Treaty System. Further, some of the provisions contained in the Annexes, such as in Annex IV: Marine Pollution, seem to affect states other than the parties, for example, each party to the Protocol undertakes the obligation in respect of "all ships entitled to fly its flag and any other ship engaged in or supporting its Antarctic operations ... " (article 9 para. 1 of the Annex).

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231 One author says that the Annexes present a number of principles and obligations in relation to protection of the environment and the system of Annexes has replaced the system of Recommendations, R. Lefeber, "Nederland en het stelsel van Antarctische verdragen," Milieu en Recht, 1992, 279 et seq.
A few comments will be made on the subject of some Recommendations the subject-matter of which is the environmental protection of the Antarctic. For example, Recommendation VIII-13, provides inter alia that “[I]n exercising their responsibility for the wise use and protection of the Antarctic environment [the Antarctic Consultative Parties] shall have regard to the following: (a) that in considering measures for the wise use and protection of the Antarctic environment they shall act in accordance with their responsibility that such measures are consistent with the interests of all mankind” and further Recommendation IX-5 says the following: “[t]he Consultative Parties determined to protect the Antarctic environment from harmful interference — declare as follows: (4) they will continue to monitor the Antarctic environment and to exercise their responsibility for informing the world community of any significant changes in the Antarctic Treaty Area caused by man’s activities.”233 The wording of Recommendations, admittedly vague, nonetheless clearly indicates that the Consultative Parties feel responsible for the general conduct of all states in relation to the Antarctic region.

A different legal character seems to apply to the 1964 Agreed Measures for the Conservation of Antarctic Fauna and Flora. Article XIII states as follows: “after the receipt by the government of notification of approval by all governments were representatives are entitled to participate in meetings provided for under Article IX of the Antarctic Treaty, these measures shall become effective for those governments.” This quite clearly indicates that the Agreed Measures are binding on all who were Antarctic Treaty Consultative Parties at the time the measures were negotiated and on any other Contracting Party to the treaty which agrees to be bound by them. There is no provision for a non-contracting party to accede to the Agreed Measures. The lack of uni-

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formity between these measures and the previously mentioned Recommendations is quite puzzling and perhaps unintentional.

**kk. “Measures” taken by the Consultative Parties.**

Finally, one of the unsolved issues in relation to the Antarctic region and third states is that of the binding force among parties to the Antarctic Treaty of measures which are taken by the Consultative Parties. Thus, towards the end of this article, we come again to the issue of the rule making capacity of an international treaty organisation, which formed much of the subject matter of Part II. In the period 1961–1995, the (Antarctic Treaty Consultative Meeting (ATCM)) recommended to the Governments of the Consultative Parties 209 measures under article IX para. 1 of the Antarctic Treaty, which covered various subjects such as the exchange of scientific personnel and data, protection of fauna and flora and historic sites, especially protected areas, air safety, telecommunications, tourism, minerals, exploration, disposal of nuclear waste and others. Article IX para. 4 provides that the measures adopted at an ATCM “shall become effective” when they have been approved by all Consultative Parties. The legal effect of these measures was unclear, due to the lack of any express definition of their character in article IX, which does not provide any indication whether approved measures are legally binding.

The practice of the Consultative Parties indicated, however, that they regard measures duly approved by them as legally binding “at least in so far as their nature and content is capable of creating a legal obligation.”234 As Aust observes, much of the confusion as to the legal status of measures adopted under the Antarctic Treaty derived from insufficient understanding and misapplication of article IX para. 1. This article provides for adoption of “measures” recommended by Consultative Parties to their Governments. These acts were treated merely as non-binding Recommendations. But despite their non-binding character they were subject to a unanimous approval procedure under article IX para. 4. This unclear legal position resulted in many recommendations not being applied for many years after their adoption.

In 1995, the ATCM agreed that the term a “measure” is used if it is intended to create legally binding provisions. It has been further agreed that a “decision” concerns internal organisational matters and that a

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"resolution" is only exhortatory. \(^{235}\) This agreement has been embodied in Decision I (1995). \(\text{Aust}\) states that this decision may be treated as a subsequent agreement between the parties regarding the interpretation of a treaty. The question may be posed whether measures are also binding on third states. From the point of view of uniformity of the measures adopted in relation to the Antarctic, it would appear at least that they were intended to be so. The problem is, again however, how to provide theoretical justification for this.

Again reverting to issues covered in Part II, we must finally consider the position concerning amendments to the Antarctic Treaty. The formal amendment procedure is contained in article XII para. 1. \(^{236}\) But this has, in fact, never been used. Instead, when it has been desired to modify or develop the Treaty, this has been done by use of the article IX procedure (see above under “Measures” taken by the Consultative Parties”). \(^{237}\) Thus again we see (as was the case with the introduction of the “down-listing” system in CITES) the by-passing of an unduly cumbersome traditional amendment procedure by use of simpler procedures.

\(^{235}\) The ATCM has adopted five measures, two Decisions, and 9 Resolutions.

\(^{236}\) (a) “[t]he present Treaty may be modified or amended at any time by unanimous agreement of the Contracting Parties whose representatives are entitled to participate in the meetings provided for under article IX. Any such modification or amendment shall enter into force when the depository Government has received notice from all such Contracting Parties that they have ratified it; (b) [s]uch modification or amendment shall thereafter enter into force as to any other Contracting Party when notice of ratification by it has been received by the Depository Government. Any such Contracting Party from which no notice of ratification is received within a period of two years from the date of entry into force of the modification or amendment in accordance with the provisions of sub-paragraph 1 (a) of this Article shall be deemed to have withdrawn from the present Treaty on the date of the expiration of such period.”

\(^{237}\) A flexible procedure was also applied to the Protocol. There are four technical Annexes to the Protocol, and article 9 provides that amendments and modifications to Annexes are to be made with the use of article IX of the Treaty. Any Annex may provide itself for amendments and modifications on accelerated basis. Annexes provide that a measure adopted under article IX of the Treaty amending or modifying that Annex shall unless the measure specifies otherwise, be deemed to have been approved, and shall become effective, one year after the ATCM at which it was adopted, unless one or more of the Consultative Parties has notified the Depository that it wants an extension of the period or it does not approve the measure. \(\text{Aust}\), see note 234.
for binding resolutions passed in a treaty organisation. This, without doubt, again indicates that clear distinctions between consent, modification and amendment procedures have been blurred.

Concluding Remarks

It is very difficult, if not impossible to draw general conclusions as to the position of third states and treaties. A particularly unclear problem is the theoretical explanation of the existence of the phenomenon of third party rights and obligations in practice. It can be said, without doubt, however, that the principle *pacta tertiis nec nocent nec prosunt*, remains the basis for the co-operation between states in the field of treaty law and rights and obligations of third states stemming from treaties to which they are non-parties are exceptional.

There are quite a number of theoretical questions which still beg answers, such as the existence of the so called “corollary agreement” in relation to the imposition of obligations on third states. Further, as we have seen above, it is not altogether clear whether, in some cases, we have a right or only a benefit for third states. Further, there are cases where the clear-cut difference between the existence of rights and obligations for third states deriving from a treaty and, from customary law, which originated from this treaty, is almost impossible to tell.

As analysed above, some of the putative objective régimes, such as the Suez Canal and the Panama Canal, do not have any characteristics of such a régime in fact, in the case of the Panama Canal, doubts arose whether the relevant treaties granted even rights for third states or only benefits. Likewise, the legal basis of the existence of objective régimes may be in doubt both from the theoretical and practical point of view.

In general, the problems of such régimes and their legal structure are not entirely solved. In fact, there is no theory in international law that really justifies the existence of such régimes in a fully convincing manner. As shown above the theories which have their roots in domestic law do not really reflect all the possible legal institutions that may belong to such a régime; and the theories that rely on public law doctrine and profess the legal system that emanates from the powers are simply obsolete and do not conform to contemporary international law.

Finally, the role of customary international law, historic considerations, recognition, acquiescence and estoppel in relation to the establishment of régimes valid *erga omnes*, belong, according to Simma, to a
group that relies on traditional "consent-based understanding of such treaty-régimes and of the generation of international legal rights and obligations in general." The same author, drawing generally from the example of the Antarctic, however, acknowledges the possibility that a certain group of states may be arrogated a power to define a community of interests and set the law accordingly; to act as self-appointed guardians of general interests. An example is given as a dispute between Canada and Spain in which Canada took the measures to prescribe and enforce domestic legislation on high seas against foreign (Spanish) vessels in order to preserve certain fish stocks. It may be argued, however, that states do resist such guardianship effected by only certain members of the international community.

As a proof may be given the fact that of the Antarctic treaty systems binding force _erga omnes_ was negated by certain states (see above). A similar line of reasoning was adopted by Subedi. He admits that certain states should not interfere into domestic affairs of other states in the name of the establishment of objective régimes. However, in the interest of the international community, the Security Council should fulfil the role in the imposition of political or territorial settlements (under Chapter VII, when necessary) in order to maintain or restore international peace and security.

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239 See e.g. P. Davies, “The EC/Canada Fisheries Dispute in the North-West Atlantic,” _ICLQ_ 44 (1995), 927 et seq.
240 Subedi, see note 76, 162 et seq.