THE DOCTRINE OF TREATIES

PROVIDING FOR "OBJECTIVE REGIMES"

Thesis submitted to fulfil the requirement

for

the Ph.D. Degree

By

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Abstract

The object of this study is to examine the doctrine of treaties providing for “objective regimes”, which postulates that there exists a certain category of treaties which, by their very nature, create legal rights and obligations for States not party to them regardless of the generally accepted principle *pacta tertiis nec nocent nec prosunt*. The main purposes of the study are to determine whether or not this doctrine forms part of the modern law of treaties and, if it does, to determine its content and scope. In this way, it should be possible to clarify the extent to which treaties may produce rights and obligations.

The study consists of Five chapters. Chapter I furnishes a general overview of the historical development of the doctrine of treaties providing for “objective regimes”, so that the kind of treaties which allegedly fall within the scope of this doctrine may more easily be identified. Chapter II examines the rules and principles of international law concerning the question of the legal effects of treaties upon third States. It is mainly based on the rules codified in the Vienna Convention on the Law of Treaties (1969). Chapter III concentrates on the questions of whether or not the Vienna Convention recognises the special position of a category of treaties providing for “objective regimes” and, if it does not, of the extent to which the *erga omnes* effects claimed for this kind of treaties may possibly be explained by the mechanisms for producing third-State effects which are contemplated in that Convention. Chapter IV examines various theories which have been proposed in support of the proposition that there is a certain class of treaties which do produce, by their very nature, legal effects for third States. Finally, Chapter V studies in detail some selected treaty regimes which are frequently cited as instances of treaties providing for “objective regimes” in order to determine if the doctrine in question enjoys the approval of, or has ever been founded on, State practice.

The main conclusions of this study are: that the doctrine of “objective regimes” is not in line with the contemporary theory of international law, which advocates the principles of *pacta tertiis nec nocent nec prosunt* and *res inter alios acta* as the proper rules to govern the effect of treaties on third States; that the doctrine finds little or no support in State practice; and, finally, that most of the automatic legal effects claimed for the treaties concerned may more satisfactorily be explained by the rules on the effects of treaties on third States which are contained in the Vienna Convention on the Law of Treaties.
Acknowledgements

I would like to express my deepest gratitude to my supervisor, Mr. David Hutchinson, without whose assistance I would not have been able to complete this work. His comments and recommendations have played a vital role in shaping my thoughts and ideas. I would also like to thank the staffs of the Library of the Institute of Advanced Legal Studies and of the British Library of Social and Political Science for their constant help and practical advice in searching for legal materials.

I would also like to acknowledge my special thanks and devotion to Professor G. Eftekhar, Dean of the Faculty of Laws, Shaheed Beheshti University (Tehran), and Mr. Gh. Tollou (BILS-London) for giving me constant support and, indeed, facilitating my higher education in England. I must also thank the Bureau of International Legal Services of Iran for financing my studies in England. Last, but not least, I would like to thank my wife for her support, love and tolerance both of my absences from home and of my bad temper.

I dedicate this work to my wife and daughter (my ever-loving companions) and to my father, to whom I owe everything.
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<tr>
<td>AFDI</td>
<td>Annuaire Francaise de Driot International</td>
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<td>AJIL</td>
<td>American Journal of International Law</td>
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<td>B.C. Prize Cases</td>
<td>British and Colonial Prize Cases</td>
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<td>BFSP</td>
<td>British and Foreign State Papers</td>
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<td>BYBIL</td>
<td>British Yearbook of International Law</td>
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<td>Ch.</td>
<td>Chapter/ Chapters</td>
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<td>CHM</td>
<td>Common Heritage of Mankind</td>
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<td>Cornell JIL</td>
<td>Cornell Journal of International Law</td>
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<td>Doc.</td>
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<td>edn.</td>
<td>Edition</td>
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<td>EEC</td>
<td>European Economic Community</td>
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<td>EEZ</td>
<td>Exclusive Economic Zone</td>
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<tr>
<td>GA</td>
<td>General Assembly (of the United Nations)</td>
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<td>GAOR</td>
<td>United Nations General Assembly Official Record</td>
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<tr>
<td>GYBIL</td>
<td>German Yearbook of International Law</td>
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<tr>
<td>Hackworth’s Digest</td>
<td>Hackworth, G.H., <em>Digest of International Law</em> ((Washington, Government Printing Office, 8 vols., 1940-)</td>
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<tr>
<td>Harv. ILJ</td>
<td>Harvard International Law Journal</td>
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<tr>
<td>ICl</td>
<td>International Court of Justice</td>
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<tr>
<td>ICI Rep.</td>
<td>Reports of Judgements, Advisory Opinions and other Orders of the International Court of Justice</td>
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<td>ICLQ</td>
<td>International and Comparative Law Quarterly</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>ILM</td>
<td>International Legal Materials</td>
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<td>ILR</td>
<td>International Law Reports</td>
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<td>Ind. JIL</td>
<td>Indian Journal of International Law</td>
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<tr>
<td>Ital. YBIL</td>
<td>Italian Yearbook of International Law</td>
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<tr>
<td>Jap. AIL</td>
<td>The Japanese Annual of International Law</td>
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<tr>
<td>LNTS</td>
<td>League of Nations Treaty Series.</td>
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<tr>
<td>Martens</td>
<td>Nouveau Recueil Général de Traité, Series 1 (1843-75), 2 (1876-1908), 3 (1909-21)</td>
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<td>Neths. YBIL</td>
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<td>NILR</td>
<td>Netherlands International Law Review</td>
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<td>Parl. Papers</td>
<td>British Parliamentary Papers</td>
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<tr>
<td>PCIJ</td>
<td>Publication of the Permanent Court of International Justice</td>
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<td>Polish YBIL</td>
<td>Polish Yearbook of International Law</td>
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<tr>
<td>RdC</td>
<td>Recueil des Cours de L'Academie de droit International de La Haye</td>
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<td>Rep.</td>
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<td>Res.</td>
<td>Resolution(s)</td>
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<tr>
<td>RGDIP</td>
<td>Revue generale de droit International public</td>
</tr>
<tr>
<td>RIAA</td>
<td>United Nations, Reports of International Arbitral Awards.</td>
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<tr>
<td>SC</td>
<td>Security Council (of the United Nations)</td>
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<td>SCOR</td>
<td>Security Council Official Reports</td>
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<td>Sec.</td>
<td>Section(s)</td>
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<td>Stat.</td>
<td>United States Statutes at Large</td>
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<tr>
<td>TIAS</td>
<td>Treaties and Other International Acts Series</td>
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<tr>
<td>TS</td>
<td>(United States) Treaty Series</td>
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<tr>
<td>UKTS</td>
<td>United Kingdom Treaty Series</td>
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<tr>
<td>UNCLT</td>
<td>United Nations Conference on the Law of Treaties</td>
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<tr>
<td>UNTS</td>
<td>United Nations Treaties Series</td>
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<tr>
<td>UNYB</td>
<td>United Nations Yearbook</td>
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<td>Abbreviation</td>
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<tr>
<td>UST</td>
<td>United States Treaties and Other International Agreements</td>
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<td>Virgin. JIL</td>
<td>Virginia Journal of International Law</td>
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<td>vol(s.)</td>
<td>Volume(s)</td>
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<tr>
<td>YB</td>
<td>Yearbook</td>
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<tr>
<td>YBILC</td>
<td>Yearbook of International Law Commission</td>
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<tr>
<td>ZAÖRV</td>
<td><em>Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht</em></td>
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Introduction

Waldock, the Special Rapporteur of the International Law Commission on the Law of Treaties (ILC), proposed, in his third report, a draft article on "Treaties providing for objective regimes" which tried to settle the legal issues surrounding the so-called doctrine of "status-creating treaties" or "treaties valid erga omnes" advocated by leading jurists such as McNair and Rousseau. According to this doctrine, certain treaties that define or fix the permanent status of a State, a territory, or an international waterway by establishing an international legal regime intended to be valid and binding erga omnes constitute, under certain circumstances, a particular class of treaties to which certain especial rules of international law apply. As examples, reference is usually made to: treaties attaching a special status of neutralisation or demilitarisation to a State (e.g. Switzerland, Belgium, Luxembourg), or part of a State (e.g. the Suez Canal, the Aaland Islands) or a territory not under the sovereignty of any particular State (e.g. Antarctica); treaties regulating the status or use of such international waterways as the Suez, Kiel and Panama Canals; and finally treaties which establish a special status such as a mandate or trusteeship, as established under the Covenant of the League of Nations and the Charter of United Nations, respectively.

The fact that international society currently does not have a supranational authority capable of enacting rules of general validity and competent to settle territorial and political problems among some of its members in a manner that is automatically valid and binding as against the others prompted some writers to ponder alternative means

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3 Verzijl provides a long list of parts of a State, e.g. islands, towns, border areas, harbours, that from 17th century have been under some sort of neutralisation or demilitarisation treaty regime. Verzijl, J.H.W., International Law in Historical Perspective (Leyden, Sijthoff, 1979), vol. 10, pp. 20-27.

4 McNair's Law of Treaties, p. 259.
by which such a gap in the international legal system could be filled. These writers have indicated that leaving the matter for general customary rules to evolve would not be appropriate because such rules normally come into existence only over a relatively prolonged period of time. Besides, there is normally an element of uncertainty inherent in customary rules. On the other hand, a mechanism that requires the participation of all members of international society would not be a favourable alternative, because securing the participation of a very large number of States, let alone all States, would not be practical. Consequently, they have opted for the “treaty” itself as the mechanism to fill the gap. Thus, the suggestion has been made that treaties which settle the territorial and political status of a given territory by creating for it a permanent regime of common user or any other political regime which is intended to, and which actually does, serve the interests of States as a whole, are to be valid **erga omnes**, no matter how many or how few States participated in their conclusion. In the earlier literature, a regime established by this kind of treaty was referred to as an “international settlement”. Waldock however preferred the term “objective regimes” to put emphasis on the peculiar effect alleged for this kind of treaty-arrangement: that is, their general validity and effect.

As a result of the above classification of treaties, two specific rules have been proposed which tend to derogate from the general principles governing “ordinary” treaties.

The first — and probably the most important — rule suggested is that this class of treaties can, by their own force and without more, produce “objective” effects, irrespective of the generally accepted principle of **pacta tertiis nec nocent nec prosunt**. While the general validity of the **pacta tertiis** ... principle is admitted, the class of treaties providing for “objective regimes” is suggested to constitute an exception to it. Third States are said to be bound by the general terms of such a treaty, so that they derive their rights and their obligations from that treaty.

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6 Of course, certain conditions are said to be required for a treaty to be qualified as one which might constitute an objective regime. For details see Ch. 1 (2.) below.

7 Some writers have tried to explain the alleged objective effect by some other route. They have, for instance, suggested that such treaties would produce objective effects by operation
This is, of course, a far-reaching claim, considering that, even in the case of customary law, it is widely accepted that a State may be excluded from the application of a generally accepted customary rule of international law if it persistently rejected such a rule while that rule was in the process of emerging. 

The second proposed rule is that a change of sovereignty over a territory subjected to a territorial arrangement established by a treaty belonging to the category of treaties under consideration cannot and does not change the territorial status or regime which has been so established. Accordingly, it cannot change the rights or obligations which exist for States under such treaty-arrangements. Thus, on the basis of this alleged rule, a State succeeding to sovereignty over a territory impressed with an “objective regime” would automatically be bound by that regime, whether it be a newly independent State or a pre-existing State. Likewise, third States would continue to enjoy their rights and obligations under that regime. In this regard, the notions of rights in rem, conveyance and servitude are frequently invoked as legal justifications for the admission of such a kind of automatic effects in international law, just as they are in the municipal laws of many countries.

In addition, as a natural consequence of admitting the objective effects attributed to this class of treaties, further sets of rules have been postulated as being necessary. Firstly, rules to take into account the specific interests of third States in the event of the modification or termination of the treaties concerned. For instance, if it is admitted that treaties providing for “objective regimes” establish rights and obligations for third

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of the legal mechanisms of stipulation pour autrui, inter-action of treaty and custom, recognition, tacit consent, the duty to respect and to recognise the regime established by the category of treaties in question and so on. In effect, these theories deny the existence of any special doctrine of “objective regime” treaties — there is no special rule of the law of treaties which gives them erga tertios effects. These explanations, together with those theories which advocate automatic erga tertios effects, are examined in Ch. IV below.

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Waldock, H., Third Report on the Succession of State in Respect of Treaties, YBILC (1970-II), p. 25. Also see his Fifth Report on the same subject in YBILC (1972-II), pp. 44-49. For further detail see Ch. I (1.4. and 2.3.) and Ch. II (3.4.) below.

See Klein, E., Statusverträge im Völkerrecht: Rechtsfragen Territorialer Sonderregime (Treaties Providing for Objective Territorial Regimes) (Berlin, Springer-Verlag, 1980), English Summary: pp. 350-359. Moreover, Klein considers that a special rule, or some adjustment of the rule, on the interpretation of treaties might also be necessary to take into account the rights and obligations of third States. Ibid., pp. 329-338.
States, it would be natural to postulate rules to protect these rights and obligations in the event of an attempt by the parties to modify or terminate such treaties. Secondly, rules to regulate and provide for the effects of breaches of the class of treaties under consideration, whether committed by a State party or by a third State. On the hypothesis that the class of treaties in question establishes rights and obligations for third States, there would then be a need for regulation of the legal position of both parties and third States vis-à-vis each other and among themselves in the event of a breach of the regime: for example, whether or not a State may incur international responsibility for its breach of the terms of a treaty to which it is not a party and whether or not such a State may become an “injured State” as a result of a breach committed by a State party or by another third State under such a treaty. Lastly, on the basis of the same hypothesis, there would be a need for an adjustment of the rules regarding third party intervention before international courts and tribunals. Naturally, these subsidiary rules would only be required if the theory of “objective regimes” were in fact recognised in international law.

As will be seen, although Waldock’s proposed draft article 63 covered only one aspect of the above mentioned rules — namely the questions whether or not and, if so, how a treaty can produce “objective” legal effects vis-à-vis both party and non-party States — and in spite of the fact that in substance it did not in fact recognise any sort of absolute automatic effect for the class of treaties in question — it nevertheless caused a great deal of controversy among the members of the International Law Commission. The Commission finally decided not to adopt any draft provision on the question of treaties establishing “objective regimes”, because of disagreement among its members and because of its apprehension that, at the current stage of development of international law, proposing any specific rule of that nature might not have been acceptable to States participating in a future conference on the law of treaties.

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11 See Riphagen’s view cited in n.16 below.
12 Ibid.
13 The question of the effect of war on this kind of treaty may also be added here. McNair has suggested that war would not affect the validity of this class of treaties. See McNair, A.D., The Functions and Differing Legal Character of Treaties, BYBIL 11 (1930), pp. 100-118, at p. 113.
A few years later, however, the Commission, in its work on the question of succession of States in respect of treaties, approved an article — which later became article 12 of the Vienna Convention on Succession of States in respect of Treaties — which, to some extent, upheld the view of the advocates of the doctrine under consideration as far as the aspect of succession of States in respect of treaties was concerned. Although the term "objective regime" was not used, the article envisaged that State succession as such does not affect the rights and obligations relating to the use of any territory established by a treaty for the benefit of any territory of a foreign State or for the benefit of a group of States or all States, if such rights and obligations are considered as attaching to that territory.

More recently, Professor Riphagen, in his Fourth Report on the question of the content, forms and degrees of international responsibility, introduced the terminology of "objective regimes" to describe a special category of legal regimes whose existence serves to limit the applicability of countermeasures in respect to an internationally wrongful act. Riphagen's deliberations on the notion of "objective regimes" are mainly focused on the regulation of the position of a third State (as an 'injured State') in the case of a breach of a treaty establishing an "objective regime". In particular, he examined the admissibility of reprisals in the case of a breach of an obligation under a treaty of that sort. However, Riphagen's conception of the term "objective regime" was not very clear and, indeed, was much broader in its scope than what was suggested by

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14 See Ch. I (2.3.) below.
15 This Article is fully cited in Ch. II (3.4.) below.
16 Riphagen, W., Fourth Report on the Content, Forms and Degrees of International Responsibility, YBILC (1982-II), Part I, p. 1, at p. 16, paras. 85 et seq. The question he discussed in this regard was whether a State, not being a party to the creation of "an objective regime may, by way of reprisal, act in a manner not in conformity with its obligations under such a regime". He suggested that such a reprisal was not admissible. Ibid.
17 Riphagen indicated that in principle, to the extent that non-parties to a treaty may become parties to the relationships governed by that treaty, they may also "be 'injured States' or 'parties to the breach' of an obligations under such treaty." As such, he suggested, they would be entitled to respond accordingly, subject to any machinery provided for by the regime for collective enforcement of its obligations (see YBILC (1982-II), Part I, p. 42). For an examination of the Riphagen's proposals see Ramcharan, B.G., State Responsibility in Respect of the Violation of Treaty Rules in General and those Creating an "Objective Regime" in Particular, Ind. JIL 26 (1986), Nos. 1 & 2, pp. 1-41.
18 He stated that an "objective regime" could be identified by its normative character, the existence of a collective interest, the fact that the parties to the regime were bound to fulfil the
Waldock under his proposed draft article 63. For instance, it included treaties for the protection of human rights and environmental treaties, while Waldock’s draft only embraced a limited group of treaties relating to a specific land or maritime territory. Riphagen’s attempt to introduce the concept of “objective regimes” into the draft articles on state responsibility was not accepted by the members of the International Law Commission.  

The decision of the Commission in 1964, not to adopt any draft article on the class of treaties under consideration, it being a matter not yet ripe for codification, and the fact that the notion of “objective regimes” was subsequently considered by the Commission — though in a very restricted manner — in the contexts of State succession and State responsibility have left several, very basic questions either unsettled or at least not clearly answered. Whether or not treaties may by themselves create “objective regimes” is a question which has not yet been answered. At the same time, frequent references continue to be made to the notion of “objective regimes” in different areas of international law in order to extend the legal effects of certain (territorial) regimes established by treaties to which only a limited number of States are parties. Yet no systematic work, at least in the English language, has been prepared to clarify the legal issues arising from this doctrine. That being so, research into the matter is worthwhile,
both from the theoretical and practical points of view. It would certainly throw light upon present questions of international law, such as the status of the regime established by the Antarctic Treaty (1959) — a regime which is said by some to be valid *erga omnes*, though that claim is rejected by others. Of similar importance are regimes such as those involving the permanent neutralisation of such States as Laos, Cambodia and Malta, which regimes are established by treaties to which not all States of the world are parties. To these, the question of rights of passage through such waterways as the Panama and Suez Canals, as well as the Turkish Straits, can be added, having always been topical.

The examination of each and every aspect of the doctrine — which, as indicated above, involves so many questions of fundamental importance, touching upon various branches of international law — is beyond the limits of a Ph.D. thesis. Accordingly, this work is confined to the basic legal issues arising from the doctrine under consideration. In particular, it is limited to examining the question from the perspective of the law of treaties. The fundamental issue is thus whether or not international law acknowledges the ability of any category of treaties, by their own force and without more, to create regime(s) binding on the generality of States regardless of the basic principle of *pacta tertiiis nec nocent nec prosunt*, as is asserted by some of the advocates of the doctrine in question. Consequently, reference will not be made to questions which do not specifically fall within the purview of the law of treaties: for example, the question whether or not the class of treaties under consideration will survive a succession of

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25 See Ch. V (4.) below.
States or a war and the question of what rules of State responsibility govern breach of treaties of the type in question. Nor will any attempt be made to elaborate upon the relevance or significance of the doctrine of "objective regimes" in any of these fields.

In addressing the issue outlined above, several approaches might possibly be adopted. Firstly, one might choose to consider, *in abstracto*, various theories or justifications which have been or might be proposed in support of the proposition that a certain category of treaties, by their own force and without more, create legal effects for third States, it being assumed for the purpose of argument that such a category of treaties does exist. Some of these theories or justifications might, when examined, turn out to be consistent with the general law of treaties, including its general rules on treaties and third States; others might not be, though, and it would be these that would underpin any true doctrine of "objective regimes". If the conclusion was that the former type of theory or justification could not fully or satisfactorily explain the objective effects assumed, then there would be a need for the adoption of the doctrine of "objective regimes". Once it was admitted that, in theory, such a doctrine were needed, then one would have to consider, *in concreto*, the question if any of the treaties which have been said to create "objective regimes" have *in fact* done so in the manner which is claimed by the advocates of the doctrine. An affirmative answer would prove both the existence of the category of treaties providing for "objective regimes" and the need for a special rule of treaty law to accommodate their binding effects on third States. A negative answer would, on the other hand, invalidate the existence of the category and the doctrine of "objective regimes".

Alternatively, one might choose to consider the matter the other way round by focusing, first, on concrete cases in order to determine whether or not in practice they have involved the creation by a treaty of legal rights and/or obligations for third States, proceeding, then, to examine the manner in which such effects are produced: whether by the force of the treaty itself or whether through third States' consent or other recognized and uncontroversial means such as acquiescence, recognition and estoppel. If the conclusion were that third States have in fact been affected by means of the former mechanism, then one could postulate the existence of a category of treaties providing for "objective regimes", as well as the need for the adoption of a rule to account for
their effects on third States. The question would, however, remain of the basis on which or how this rule could be justified — a question which could be settled by reference to the various theories or justifications proposed to this end.

Whichever method is chosen, one should be able to deliver a clear answer to the question whether or not and, if so, how certain treaties may establish generally binding (objective) regimes. However, neither of these routes can lead to a conclusive and comprehensive result without giving due regard to the Vienna Convention and the rules incorporated therein. The Convention was, on the whole, meant to codify the rules of treaty law at the time of its conclusion and, subsequently, has widely been seen as re-stating general rules of (customary) treaty law which are applicable to all treaties. It contains specific rules on the effect of treaties on third States which are capable of explaining the alleged effects of the category of treaties providing for “objective regimes”. Moreover, the doctrine of “objective regimes” was actually advanced during the preparatory work of the International Law Commission and was subjected to elaborate examination by the members of the Commission. Therefore, how the Commission treated the doctrine is absolutely crucial for the determination of the current position of the doctrine of “objective regimes”. So is the question of whether the Vienna Convention excludes the existence of any special rule of treaty law on “objective regimes”. Accordingly, the methodology adopted here, while to a large extent it follows the first mentioned approach, gives special consideration to the Vienna Convention and its rules on treaties and third States.

Firstly, Chapter I furnishes a general overview of the historical development of the doctrine of treaties providing for “objective regimes” up to the point at which it came under consideration by the International Law Commission in the 1960s. The aim will be to identify the material sources of the doctrine and to clarify its ambits as it is expounded in the literature. This seems to be essential, considering that little work is done on the question of the doctrine of “objective regimes”. Although an effort will be made to define the characteristic features of the category of treaties which allegedly are capable of creating “objective regimes” — the types of treaties which supposedly fall under its purview — no reference will yet be made to the mechanisms adduced to

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26 See Ch. II (2.) below.
explain the objective effects which are claimed for that category of treaties. Chapter II and III will together try to clarify the position of the doctrine of "objective regimes" under the Vienna Convention. At the same time as illustrating the content and the right interpretation of the relevant rules of the Convention, these Chapters will attempt to clarify the following:

(i) whether or not these rules can themselves fully explain the objective effects which have been claimed for the category of treaties providing for "objective regimes" (which arguendo are assumed to exist); and

(ii) whether or not the Convention excludes the possibility of the existence of a special rule of treaty law on "objective regimes", and if there was any support, in abstracto, during the drafting of the Vienna Convention for the existence of such a special rule.

If the conclusions are that the Convention cannot fully explain the objective effects claimed and that it does not necessarily bar the existence of "objective regimes" and a special rule to explain such effects, then we may move on to consider if such a special rule would fit in with the theories and principles which inform and underpin modern international law. To do this, Chapter IV will examine the accuracy and the validity of various theories which have been or may be proposed in support of the existence of such a special rule on the assumption, still, that there is a certain category of treaties which produce objective effects. Finally, an attempt will be made in Chapter V to ascertain, in concreto, the fundamental question of if any of the treaties which have been said to create "objective regimes" have in fact done so in a way which would require a special rule of treaty law to justify them. These two Chapters will enable us to decide whether or not the doctrine of "objective regimes" enjoys any recognition in modern international law.
Chapter I
The Doctrine of Treaties Providing for “Objective Regimes”

In this chapter an attempt will be made first to provide a general overview of the development of the doctrine of treaties providing for “objective regimes” in a sort of chronological order until the time that it came under consideration by the International Law Commission (ILC) and, secondly, to clarify that doctrine and its ambit as expounded in the literature. This will be essential for the characterisation of the kind of treaties that fall within the notion and help to lead to a better understanding of the doctrine. It must, however, be noted that, in doing so, this Chapter will only address those opinions and judicial precedents in which the theory that a class of treaties produces effects for or against third States is recognised or is highlighted. As the basic presumption has always been that treaties merely bind the parties thereto and do not create rights or obligations for third States, no reference will here be made to the views of the authorities that have rejected the theory or have been totally silent on the matter.

1. The origin and historical development of the doctrine
1.1. The era of “public law of Europe”

Certainly the title “treaties providing for objective regime” was first introduced by Waldock in his proposed Draft Article 63; but the idea that the provisions of certain “territorial regimes” established by treaties could be enforced by as well as against States which have not participated in their conclusion, and that such treaties constitute a particular category upon which the general principle of the relative effect of treaties — otherwise represented by the ancient principle *pacta tertiis nec nocent nec prosunt*¹ — does not apply, existed long before Waldock proposed his draft Article.

Like many other aspects of international law, the starting-point has to be the Vienna Congress of 1815, which has rightly been regarded as the base where most of the contemporary international rules began to take shape. Historically, the Congress can be seen as the platform for the emergence of a kind of treaty-practice which may, in turn, be seen as the inspiration for the emergence of the doctrine under consideration in its

¹ The meaning and the scope of this principle as currently understood in the light of the Vienna Convention on the Law of Treaties are explained in Ch. II (2.) below.
earlier form. The newly formed "Concert of Europe", or the Great Powers, in the sense understood at the time, appeared to consider themselves capable of settling territorial and political questions by means of agreement only among themselves — often at the congresses which concluded one of the great European wars — started to claim for themselves the right to establish a European system of law which also affected smaller States. In other words, they started to make decisions on their own and subsequently enforce them upon others — normally smaller States. The latter States, of course, had no choice but to accept or acquiesce in the decisions made by such a self-appointed de facto legislative body of Europe throughout the nineteenth and early twentieth century. The so-called "public interest of Europe", the "general peace" and the "balance of

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2 The Concert of Europe emerged as a result of the alliance between England, Russia, Austria and Prussia who decided upon post-war order at the Vienna Congress (1815). In 1818, France was formally admitted into the concert of the Great Powers. Turkey, Italy, Germany (as a successor to Prussia), the United States and Japan were recognised as Great Powers in 1856, 1867, 1871, 1898 and 1905 respectively. See: Emmott, C. (ed.), European History (London, 1965), pp. 306-311; Randelzhofer, A., Great Powers, in Bernhardt’s Ency., vol. 8, pp. 142-146. For more detailed consideration see: Lawrence, T.J., Essays on Some Disputed Questions in International Law (Cambridge, 1884), Essay V. (The Primacy of Great Powers), at pp. 190 et seq.; Crawford, J., The Creation of States in International Law (Oxford, Clarendon Press, 1979), pp. 301 et seq.

3 This kind of action was usually exercised upon the territory of the defeated State in relation to which the leading victor Powers assumed a power of disposition. See: Crawford, ibid., pp. 302-303; Brownlie, I., Principles of Public International Law (Oxford, Clarendon Press, 4th edn., 1990), pp. 135-136. Of the major congresses, mention can be made of: the Congress of Troppau in 1820, which endorsed the principle of armed intervention against national liberation movements; the London Conference of 1830-1832, which provided for the future partition of Belgium from the Netherlands; the Congress of Paris 1856, which settled the questions arising from the Crimean War (e.g. neutralisation of Black Sea and internationalisation of Danube); the London Conference of 1867, which dealt with neutralisation of Luxembourg; the Paris Conference of 1869 which dealt with the Greco-Turkish dispute. See below (n. 14-16).

4 In theory, the Great Powers were supposed to act or to intervene in conflicts between other States upon the invitation and with the consent of the conflicting nations. See: Point 4 of the Protocol of the Conference between Austria, Great Britain, Prussia and Russia, signed at Aix-la-Chapelle, 15 November 1818, 69 CTS 36; 76 BFSP 19. See: also a British Memorandum dated October 1818 recorded in the same Conference, which indicates that the Great Powers acted with due respect for the rights of other nations (the relevant passage is cited in p. 176 below).

5 The fact that this kind of practice was a reality in the international relations of States during the 19th century has been admitted by many writers. In this regard, see: Hicks, F.C., The Equality of States and the Hague Conferences, AJIL 2 (1908), pp. 530-561, at pp. 544-61; Dickinson, E.D., The Equality of States in International Law (Cambridge, 1920), pp. 138 et seq., especially at pp. 294-96; Weinschel, H., The Doctrine of the Equality of States and its Recent Modifications, AJIL 45 (1951), pp. 417-442, at pp. 420-421.
powers” were often invoked both as the underlying purpose and as the justification for the actions taken.⁶ The Congress of Vienna of 1815 itself⁷ affords the best example. It confirmed, inter alia, the third partition of Poland of 1795,⁸ created the Free City of Cracow and the German Confederation,⁹ enlarged and neutralised the Swiss Confederation¹⁰ and united Belgium with the Kingdom of the Netherlands,¹¹ without the smaller States or Principalities, who were present at the Congress, having free choice in acceding to the decision taken by the Great Powers.¹² Commenting on this point, Peterson writes:

“The lesser or "small" Powers were denied equality of representation; they had no voice in the decision making except as to ratify what the Great Powers had agreed upon; and they had no choice but to accept a settlement which the Concert had agreed upon and which it stood ready to enforce.”¹³

As Crawford indicates, much the same was true of the treaties which secured the independence of Greece (1827), and the independence and permanent neutrality of Belgium (1831-1939)¹⁴ and Luxembourg (1867),¹⁵ the neutralisation of the Black Sea

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⁷ *General Treaty of Vienna Congress* (with Annexes), 9 June 1815, 2 Martens (1st.), 379; 2 BFSP 3; 64 CTS 453, Articles 1-5, Annexes I and II.


⁹ *Ibid.*, Articles 53-64, Annex IX.


¹¹ *Ibid.*, Articles 65-6, 73, Annex X.

¹² Crawford referring to the action of the Great Powers in the Vienna Conference states that “To these dispositions the States present at the Conference, and the Princes and Free Cities involved, were invited to accede, but the term 'invitation' was not intended to imply any degree of free choice in the smaller States or principalities.” (Crawford, *op. cit.* above (n. 2), pp. 302-303).

It should be noted that at the time the concept of “State”, “independence”, and “sovereign equality” did not have the same meaning as is understood now.


¹⁴ See: *Treaty between Austria, Belgium, Great Britain, France, Prussia and Russia Relative to Separation of Belgium from Holland*, London, 15 November 1831, 82 CTS 239; 11 Martens (1st.) 394; 18 BFSP 645; *Treaty between Austria, Great Britain, France, Prussia and Russia, on the one part and Belgium on the other, relative to the Netherlands and Belgium* London, 19 April 1939, 88 CTS 421; 16 Martens (1st.) 770; 27 BFSP 990; *Treaty of separation, between Belgium and the Netherlands*, London, 19 April 1939, 88 CTS 427; 16 Martens (1st.) 772; 27 BFSP 1000.

¹⁵ *Treaty between Austria, Belgium, France, Great Britain, Italy, the Netherlands, Prussia and Russia, relative to the Grand Duchy of Luxembourg and the Duchy of Limburg*, London, 11 May 1867, 135 CTS 1; 18 Martens (1st.) 448; 57 BFSP 32.
(1856)\textsuperscript{16} and other such judicial situations during the nineteenth and early twentieth centuries.\textsuperscript{17}

The sphere of the Great Powers' action was not, of course, limited to Europe, but extended to the whole world. For example, the Berlin Conference of 1885 provided for the neutralisation of the Basin of the Congo (1885), and indeed the partitioning of Africa between the Great European Powers.\textsuperscript{18} Again, the Constantinople Conference of 1888 established the neutralisation (internationalisation) of the Suez Canal.\textsuperscript{19} Nor was the subject-matter of their agreements or arrangements limited to territorial problems. Many important treaties were concluded that tended to establish general rules of conduct and, like the territorial treaties referred to above, these were meant to be legally enforceable by and against smaller States.\textsuperscript{20}

The above kind of practice and its reality in the international relations of the nineteenth century\textsuperscript{21} led some writers to deny the principle of equality of States as not being in line with what was happening in practice. For instance, Lawrence, after examining the emergence of the "Concert of Europe" and the international events upon which the Great Powers made decisive decision during the nineteenth century, suggested that

"the Great Powers have by modern usage a position of pre-eminence in European affairs, which is so marked, and has such important legal results, that the old doctrine of the absolute equality before International Law of all sovereign states is no longer applicable. It is not merely that the stronger states have influence proportionate to their strength; but that \textit{custom} has given them what can hardly be distinguished from a legal

\textsuperscript{16} \textit{General Treaty of Peace between Austria, Great Britain, France, Prussia, Russia, Sardinia and Turkey}, Paris, 30 March 1856, 114 CTS 409; 15 Martens (1st.) 780; 46 BFSP 8.

\textsuperscript{17} Crawford, \textit{op. cit.} above (n. 2), pp. 302-303.


\textsuperscript{19} For reference and detailed examination of this treaty regime see Ch. V (2.2.) below.

\textsuperscript{20} However, it must be noted that the so-called "public law of Europe" was regarded as being applicable to European States. See: Lawrence, \textit{op. cit.} above (n. 2), pp. 212-213. For more details see Ch. IV (1.1.) below.

\textsuperscript{21} Westlake \textit{(op. cit.} above (n. 6), p. 323) considering the role of Great Powers during the nineteenth century, refers to such a reality:

"the great powers have by agreement among themselves made arrangements affecting the smaller powers \textit{without consulting them}, and with the full intention that those arrangements should be carried into effect, although it has not been necessary to resort to force for that purpose because the hopelessness of resistance in those circumstances has led to an express or tacit, but peaceable, acceptance of the decrees by the states concerned." Emphasis added.
right to settle disputed questions as they please, the smaller states being obliged to ac-
quiesce in their decisions.”  

Comparing the Great Powers’ alliance (the Concert of Europe) with other Euro-
pean alliances, Lawrence suggested that the latter have never been held to possess the
international authority which is ascribed to the Concert of Europe:

“Germany and Austria, for instance, are at present united by the bonds of an exceed-
ingly close alliance, ... But if they were to agree upon the neutralisation of any state,
the treaty they might make for that purpose would not be held to bind the whole of
Europe; whereas when the Great Powers guaranteed the neutrality of Belgium, they
fixed the international status of the newly created kingdom, and made its neutralisation
a principle of public law.”  

The view that the Concert of Europe had a legal supremacy in international law
and the consideration that the territorial arrangements of the Great Powers made by
treaty were often meant to stabilise the political situation and secure general peace and
accordingly were in the interest of all States provided a good justification for some
writers to give special importance to treaties of the Great Powers and to suggest several
speculative claims which, although not specifically pronounced in the context of the ef-
fect of treaties on third States, provided a large amount of literature which might be
called in aid of or said to support the doctrine of treaties providing for “objective
regimes”.

1.2. Treaties as “Legislation”

Evidently inspired by what was happening in practice, some writers expressed the
view that the Great (European) Powers, when acting together, had a special legal
authority in settling political and territorial problems. Suggestion was made that “an
European Congress, representing the greater number of states, and all the states of first
importance, can legislate by convention for the absent European States, and even for a
dissenting minority.”

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22 Lawrence, op. cit. above (n. 2), p. 209, emphasis added. Against this view see below Ch. IV
163.

23 Lawrence, op. cit. above (n. 2), p. 212.

cites Taylor as having claimed for the Great Powers a position of legal superiority in rela-
tion to smaller States.

25 Roxburgh cites Bluntschli and Alvarez as maintaining this view, though not on similar
As can be seen from the passage cited, the focus was not on the question of the legal effects of treaties or of any particular kind of treaty upon non-party States. It was mainly on the role of the greater political Powers in establishing or changing rules and the authoritativeness of their agreement in respect of lesser States. As such, it primarily related to the doctrine of the sovereignty and equality of States in international law — or, to be more precise, in the European system of international law. However, the proposition was implied that, in certain circumstances, certain treaties can be viewed as an act of legislation and so can be held valid against a group of States which have not participated in their conclusion. The questions of what conditions needed to be fulfilled for this to happen and of how that effect could be justified will be examined later.\[^{26}\]

Suffice it to say here that the idea that treaties concluded by the unanimous agreement of the Great Powers could have legislative effect paved the way for the attribution of special importance to treaties which are sometimes said to create “objective regimes” and for their classification as a distinct category of treaties not subject to the general principle of the relative effect of treaties.\[^{27}\]

1.3. “Law-making Treaties” and “International Settlements”

Accordingly, a tendency started on the part of some publicists writing around the turn of the century to concentrate on the classification of treaties. Two types of treaties were recognised as embodying rules and regulations which, together with customary rules, constituted international law proper. The first category consisted of what is still sometimes described by the term “law-making treaties”?\[^{28}\]: namely, treaties specifically meant to define or crystallise existing or nascent customary rules and principles or to introduce new rules of conduct to govern the future relations of the States parties.\[^{29}\] As

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\[^{26}\] See Ch. IV (1.1.) below.

\[^{27}\] On the meaning and validity of this principle see Ch. II (2.1.1.) below.


\[^{29}\] Lauterpacht has stated that the term “law-making” was introduced into international law by Bergbolm (in 1877) and Triepel (in 1899). It takes into account the distinction made between two types of contract by Civil Law jurists. On the one hand, there was Vertrag or Kontrakt, or contract proper, where “the will of one party is different from that of the
they embodied the formally expressed views of Governments as to what the law was, or ought to have been on a particular matter, they were considered as having great impact, at least as best evidence of the formal views of the States parties, on the formation or alteration of general rules of conduct. Contrary to what the term "law-making" might imply, it was generally accepted that such treaties would be binding only on the States parties, including States which subsequently consented to be bound by formal acts of accession, acceptance or other similar means. Thus the classification was understood in the light of the rule that a treaty would strictly bind only the States which were parties thereto; and, as such, it was not much relevant to the question of the class of treaties providing for "objective regimes".

other, the contract (Vertrag) being here a means for achieving different and opposite ends ...

On the other hand, there was (Vereinbarung), agreements (real union of wills) which meant to serve the purpose of realising identical aims of the parties. Following this distinction in the municipal law of contracts, it became common to distinguish "law-making treaties" and treaties embodying "International Settlements" from treaties embodying transactions or arrangements which mainly affected the interests of the contracting parties in their mutual relations: as such, the latter were referred to as "traite-contract". As the latter kind of treaties were not meant to serve the interest of any State but the parties to them they were not regarded as sources of international law. Lauterpacht, however, states that, although the above-mentioned classification of treaties might be useful for the purpose of emphasising the fact that some treaties are of more permanent and general application than others, it could not entail any consequences so far as the juridical value of such treaties as a source of international law is concerned. He emphasises that

"every treaty contains rules governing the international conduct of the signatory States, and every treaty, law-making or not law-making, is a source of international law for the contracting parties — and for no one else."


"Since the Family of Nations is no organised body, there is no central authority which could make law for that body as Parliaments make law by statutes within the States. The only way in which International Law can be made by a deliberate act, in contradiction to custom, is that the members of the Family of Nations concludes treaties in which certain rules for their future conduct are stipulated. Of course, such law-making treaties create law for the contracting parties solely. Their law is universal International Law only then, when all the members of the Family of Nations are parties to them." (Oppenheim, op. cit. above (n. 22), p. 23, emphasis added).
The second category consisted of treaties of the Great Powers which were meant
to fix the political status of a State, or a particular part of it, or the rule for the use of
international waterways by establishing a general regime, normally of a permanent na-
ture, to be a part of the international order. As such, they were commonly referred to as
treaties establishing or embodying "International Settlements or Arrangements". An
"International Settlement" is described by Roxburgh\(^{31}\) as:

"an arrangement made by treaty between the leading Powers, intended to form part of
the International order of things, either defining the status or territory of particular
states, or regulating the use of International waterways, or making other dispositions
general importance, and incidentally imposing certain obligations or restrictions on
international conduct. Such a treaty may or may not contain an "accession" clause; but
in any case it is intended to be binding upon, and in favour of, the whole International
Community."\(^{32}\)

In parallel to what was commonly understood by the term "International Settlements",
the term "objective situation" was for the first time suggested by De Visscher,
by which he meant to describe the special validity and character of one of the treaties
which was usually considered as an International Settlement: namely, the treaties of 15
November 1831 and 19 April 1839 which established the Belgium's permanent neutrality.\(^{33}\) In considering the breach of Belgium's neutrality by Germany in 1914, De
Visscher argued that the permanent neutralisation of Belgium under the circumstances
constituted an "objective situation" and, was as such, of general validity, in a manner
similar to rules of law.\(^{34}\) However, the use of this terminology was not followed by oth-
ers until Waldock employed a part of it in his proposed Draft Article 63, entitled "trea-
ties providing for objective regimes".

Although it was generally clear what was meant by the terms "International Set-
tlements", it was not common to discuss in detail the features that a treaty, or a treaty-
arrangement, must have in order to be considered as embodying an "International

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\(^{31}\) Probably Cobbetts was the first to employ the phrase "International Settlement", but the
definition suggested by Roxburgh, which is mostly taken from the Cobbett's definition, is
more clear. See Cobbetts, *ibid.*, vol. 1, p. 10.

\(^{32}\) Roxburgh, *op. cit.* above (n. 25), p. 81, emphasis added. It must be noted that he did not
support the proposition that this class of treaties would automatically produce legal effects
for or against third States (see p. 178 below). For a similar position see Wright, *loc. cit.*
above (n. 30), p. 573.

\(^{33}\) *Loc. cit.* above (n.14).

\(^{34}\) De Visscher, Ch., *Belgium's Case* (London, 1916), p. 17.
Settlement”, much less the basis upon which their effects on non-party States could be justified.\(^{35}\) Thus no work could be found specifically devoted to the question of the place of the category of treaties embodying “International Settlements” as an exception to the *pacta tertiis* ... principle. Roxburgh’s monograph on “*International Conventions and Third States*”, published in 1917, which was the first and so far the only work specifically devoted to the question of effects of treaties on third States, did refer to the theory of “International Settlements”, but in a very brief manner.\(^{36}\) While he rejected the above-mentioned tendency, which viewed such Settlements as binding by their own force on third States, he proposed that

> “there are ... grounds for suggesting that in International Law a treaty intended to make an International Settlement, but containing no “accession” or “adhesion” clause, is regarded as an offer (by the original parties) to third States, capable of acceptance by conduct, and that by acceptance third States acquire rights and incur obligations.”\(^{37}\)

Accordingly, the most that can be said here is that until the later part of the nineteenth century, there existed a tendency on the part of a few writers to differentiate some kind of treaties as embodying “International Settlements or Arrangements” and, as such, as being valid *erga omnes* — that is, opposable to all States, including non-party States. Various reasons were offered for this effect: that the “Settlement” such a treaty embodied was made by, and had the backing of, the Great Powers; or that it was in the interest of all States; or that non-party States, practically speaking, had no choice but to accept or to acquiesce in the arrangements made; or that a collateral treaty was created as a result of third States accepting, by conduct, the settlement offered to them. Indeed, a combination of two or more of these reasons was sometimes given.

1.4. “Dispositive” or “Localised” treaties and “International Servitude”

While the above classification of treaties was gaining some currency in the context of theories of the sources of international law, there was a separate tendency in the field of the law relating to the succession of States in respect of treaties and the nature

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35 The reason for this silence is not hard to understand. Given the fact that the idea was plainly in contradiction with the principle of the absolute sovereignty and equality of States, which was gaining ground as a result of the integration of non-European States, such as China and Persia into the European system of international law, it was safer not to get involved with the difficult question of reconciling the two conflicting ideas.


of territorial rights created by treaties to pursue a kind of classification, which although
different in its scope and subject-matter, encompassed the same type of treaties as those
exemplified as "International Settlements". The inspiration was not the practice of the
Great Powers mentioned above, but the desire to make an analogy between treaties and
well-established legal institutions of municipal law such as conveyance, rights in rem,
servitude and so on, in order to gain in international law the benefits that these institu-
tions have in stabilising the rights and obligations of individuals relating to property.
Thus, in considering the problem of succession of States in respect of treaties, two cate-
gories of treaties were distinguished "personal", on the one hand, and "real" or "dis-
positive"; on the other.

A treaty characterised as "personal" imposed "obligations of a repeated character
on both sides" and, as such, could not "remain in force except through the continued
existence of the contracting powers". On the other hand, "real" or "dispositive" trea-
ties consisted of those treaties whose legal effect was to impress on a territory a status
which was intended to be permanent and independent of the identity of the State exer-
cising sovereignty. It included, as Vattel suggested, "contracts by which a right is

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38 There is by no means a universal agreement on the appropriateness of the term "disposi-
tive". McNair who prefers the expression "treaties creating local obligations" criticised it as
confusing on the ground that the term is used in French to refer to the operative part of a
judgment (McNair's Law of Treaties, p. 656). On the other hand, O'Connell and Lester
doubt whether the term "localised" is any less confusing. (O'Connell, D.P., State Succes-
sion in Municipal Law and International Law (Cambridge, 1967), vol. II, p.15; Lester,
A.A., State Succession to Treaties in the Commonwealth, ICLQ 12 (1963), pp. 475-507, at
pp. 489 and 498.). Westlake is reputed to have employed the term "dispositive" first in ref-
erence to treaties creating obligations of a permanent character connected with territory.
But he also used the expression "transitory" as a synonym of "dispositive." (Lester, *ibid.*).

39 Vattel was the first to distinguish these two classes of treaties. He maintained that
"we must not confound those treaties or alliances which, since they impose the obligation of
repeated acts on both sides, cannot remain in force except through the continued existence of
the contracting powers, with those contracts by which a right is once for all acquired, inde-
pendently of any subsequent acts of either party." (Vattel, E. de., The Law of Nations or the
178).


40 The International Law Association has defined "dispositive" or "localised" treaties as trea-
ties that

"(a) are in the nature of objective territorial regimes created in the interests of one nation or
the community of nations;
(b) are applied locally in virtue of territorial application clauses;
(c) touch or concern a particular area of land." (See International Law Association, The Effect
once for all acquired, independently of any subsequent acts of either party." As the most important example of such treaties, reference was made to those treaties which provide for the neutralisation or demilitarisation of a region, or treaties which accord a right of way over territory or right of navigation on national waterways to a neighbouring State or States or to all States. While it was generally accepted that "personal" treaties of a totally or partially absorbed State did not bind its successor, it was suggested that, since the real or dispositive treaties created "real rights" — or "rights in rem", as they were known in Roman law — they would, by analogy to this concept of municipal law, automatically become binding upon a State succeeding to a territory affected by such treaties. Moreover, it was suggested that the rights created for third States by "dispositive treaties" would not be affected by a succession of States. In other words, it was common to treat "dispositive treaties" as being valid *erga omnes*, in the sense that, firstly, the rights or obligations created by this kind of treaty were of permanent nature and opposable against all States and, secondly, a succession of States would not alter the rights and obligations which exist for parties or third States in relation to the territory affected by a "dispositive" treaty.

In parallel to this development and in the same context, mention was also made of treaties creating "international servitudes", as being either an example of "dispositive

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41 Vattel, *op. cit.* above (n. 39).
44 In the case of *Free Zones of Upper Savoy*, the Swiss Government asserted that dispositive treaties transfer or create a real right and real rights in international law are those which are attached to a territory, and which are in essence valid *erga omnes*. See PCIJ Rep., Ser. C, No. 17-I, vol. III, p. 1654.
45 For a list of writers who have recognised or have disputed the category of "dispositive treaties" see O'Connell, *op. cit.* above (n. 38), vol. II, p. 13, n. 2. The majority seems to favour the isolation of the category of "dispositive treaties" in the context of the law of State Succession. For the rejection of the classification in this context see International Law Association, *loc. cit.* below (n. 154).
treaties" or else a further distinct class of treaties. It was common to consider that the restrictions placed on a territory, and the correlative rights granted, could be considered as analogous to the ancient servitudes of Roman law or to their counterpart of "easements" in English law. The correlative rights over impressed territory invested in the beneficiary State or States were considered to be independent of the existence or will of the parties. Accordingly, views were expressed, albeit indirectly, that treaties such as those granting to non-party States rights of passage through national waterways or those establishing a territorial regime in the interest of one or more States and the like created international servitudes and that, accordingly, by analogy to the eponymous notion in Civil law, their terms bound States successors to the territory concerned. In addition, it was also postulated that beneficiary States would continue to enjoy their rights irrespective of a succession of States and could invoke the terms of the treaties establishing the servitudes, even though they were not parties thereto.

As will be seen later, there was not much agreement on whether or not it was appropriate to make an analogy to institutions of Civil law. However, like the concept of "International Settlements", these analogies and notions were influential on the opinions of later jurists and international tribunals in finding solutions to problems of treaty-law and in further developing the doctrine of treaties providing for "objective regimes".

1.5. The Aaland Islands Case (1920)

The idea that treaties embodying "International Settlements" and that "dispositive" or "real" treaties are to be treated as a separate category of treaties producing effects _erga omnes_ earned strong support as a result of the decision of the International Committee of Jurists (consisting of Professors Larnaude, Struycken and Huber) relating to the Status of the Aaland Islands in 1920.

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47 O'Connell, _op. cit._ above (n. 38), vol. II, p. 17.

48 Oppenheim, _op. cit._ above (n. 22), pp. 257-263.

The details of the case were that, by a Convention dated 30 March 1856 made between France and Great Britain, on the one hand, and Russia on the other, Russia declared “that the Aaland Islands shall not be fortified, and that no military or naval base shall be maintained or created there”. The Convention was attached to the General Treaty of Peace between Austria, France, Great Britain, Prussia, Russia, Sardinia and the Ottoman Empire, signed at Paris on 30th March 1856. Article 33 of this Treaty expressly declared 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”.

Until 1809, except for a short period of Russian domination at the beginning of the Eighteenth century, the Aaland Islands had been part of the Kingdom of Sweden; but, in 1809, they were conquered by Russia and went, together with continental Finland, under the sovereignty of that State. In 1917-1918, Finland gained her independence from Russia. A large majority of the Aaland Islanders, by means of a plebiscite held by the Islanders themselves, expressed the view that the islands should be reunited to the Kingdom of Sweden, rather than remain under the control of Finland. Considering that the said islands were strategically of vital importance to Sweden’s national security, the Swedish Government upheld and encouraged this cause. As Finland did not agree to a plebiscite with a full guarantee of independence, Sweden took the dispute before the Council of the League of Nations. Finland’s position was that the Aaland Islands problem was a domestic question.

As the Permanent Court of International Justice was not yet established, the Council of the League of Nations appointed the aforementioned Committee to give an opinion as to the nature of the dispute between Finland and Sweden and as to whether or not the Council of the League of Nations was competent, under Article 15 of the Covenant, to make any recommendations in the matter. In this regard the Committee concluded that the dispute did not involve a question which was left by International

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50 Convention between Great Britain, France, and Russia, Respecting the Aaland Islands, Paris, 30 March 1856, 114 CTS 405; 16 Martens (1st.) 788; 46 BFSP 23.
51 Loc. cit. above (n. 16).
52 Ibid.
Law to the domestic jurisdiction of Finland and that the Council of the League was competent to make recommendations.\footnote{Aaland Islands question, loc. cit. above (n. 49), p. 16.}

A second — and more important for the purpose of our inquiry — question put before the Committee was to comment on the present position with regard to the international obligations concerning the demilitarisation of the Aaland Islands. The question for the Committee was whether or not the Convention and Treaty of the 30th March 1856, were still in force and if they were what was the nature and legal consequence of the regime of demilitarisation they established for the parties in dispute (neither of which was party to the treaties involved), as well as for other interested States. The Committee concluded that, in spite of many intervening events, the provisions of the Convention and Treaty of Peace of 30th March 1856 concerning the demilitarisation of the Aaland Islands were still in force.\footnote{Ibid., p. 19.} As to the legal nature of the regime of demilitarisation\footnote{Ibid., pp. 16-17, emphasis original.} and its consequences in law, the Committee, firstly, hesitated to accept the theory put forward by Sweden that the Convention of 1856 created a “real servitude” attaching to the territory of the Aaland Islands. The Committee maintained that

“the existence of international servitudes, in the true technical sense of the 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 "praedium dominans" in relation to the "praedium serviens" represented by the Aaland Islands. At all events, Sweden can hardly be considered as the "praedium dominans", since it is neither a party to the Convention nor to the Treaty of 1856, nor is it even mentioned in these documents.”

After an examination of the political conditions under which the regime of demilitarisation was agreed upon, the Committee observed that the provisions agreed at Paris between the other Great Powers and Russia concerning non-fortification of the
Islands related to "a general European interest arising out of the strategic importance of the Aaland archipelago", irrespective of the fact that in 1856 Sweden had formally appealed to the Great Powers such a non-fortification. The incorporation of the Convention concerning the demilitarisation of Aaland Islands into the General Treaty of Peace manifested, the Committee asserted, the intention of the Powers to make the provisions concerning demilitarisation into "European law" just as other provisions did in the case of the Treaty of 1856. The Committee further stated that:

"Indeed the Powers have, on many occasions since 1815, and especially at the conclusion of peace treaties, tried to create true objective law, a real political status the effects of which are felt outside the immediate circle of contracting parties. In the case in point, the permanent international interests which require the maintenance of the situation created in 1856, showed themselves once again after the constitution of Finland as an independent State; as evidence of this there is the agreement entered into on 30th December, 1918, concerning the demolition of fortifications erected on the Aaland Islands by Russia, by those of the Powers most directly interested on account of their geographical position, namely Sweden, Finland, Germany."  

Accordingly, the Committee asserted that the 1856 Convention bears the "character of a settlement regulating European interests", which, as such, could not be abolished or modified either by the acts of one particular Power or by conventions between some only of the Powers which signed the provisions of 1856 treaties. As a result of the admission of this particular nature of the settlement, the Committee held that Finland, by declaring itself independent and claiming on this ground recognition as a legal person of International Law, cannot escape from the obligations imposed upon it by a "settlement of European interests" and, accordingly, had to conform to the provisions of the 1856 Convention. As concerns Sweden, the Committee held that:

"no doubt she has no contractual rights under the provisions of 1856 [Convention] as she was not a signatory Power. Neither can she make use of these provisions as a third party in whose favour the contracting parties had created a right under the Treaty, since — though it may, generally speaking, be possible to create a right in favour of a third party in an international convention — it is clear that this possibility is hardly admissible in the case in point, seeing that the Convention of 1856 does not mention Sweden, either as having any direct rights under its provisions, or even as being intended to profit indirectly by the provisions. Nevertheless, by reason of the objective nature of the settlement of the Aaland Islands question by Treaty of 1856 ..., Sweden may, as a

\[57\] Ibid., p. 17.
\[58\] Ibid., p. 18.
Power directly interested, insist upon compliance with the provisions of this Treaty in so far as the contracting parties have not cancelled it."^59

The Committee further stated that, in the event of Sweden herself becoming possessed of the Aaland Islands, she would still be bound by the provisions of 1856, for exactly the same reasons which now permitted her to rely on those provisions. In this eventuality, the Committee further stated that "Finland would acquire an interest in the demilitarisation of the islands quite as great as that which Sweden can now show."^60 Moreover, in elaborating the position of Russia in the matter, the Committee indicated that Russia as a party remained bound by 1856 treaties as long as she retained possession of the Islands. She could not free herself from those obligations, nor could she relieve Finland of them by recognising the latter's independence. On the other hand, as the islands had passed into the possession of another State, Russia could then, as an interested party, make use of the status created by the provisions of 1856, on the same basis as Sweden.^61

As can be seen from the passages cited, the Committee's decision furnishes the best authority for consolidating the earlier theories mentioned above which, till then, had been advocated but tentatively and with much imprecision. It boosted the idea that there existed a distinct category of treaties embodying "International Settlement" as far as the European system of international was concerned.^62 This kind of treaties were distinguished from others by, firstly, the fact that normally a large number of politically powerful States participated in their conclusion; that, secondly, the "status" or "settlement" agreed upon was meant to serve the general interest of the whole of Europe; that, thirdly, such a "status" or "settlement" was normally of a definitive character, in the sense that it was meant to be perpetual and could not be abolished or modified unless by the agreement of the States establishing it; and, finally, that every State, whether party or non-party to the treaty concerned, could insist upon compliance with it so long

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^59 Ibid., emphasis added.
^60 Ibid.
^61 Ibid.
^62 Fitzmaurice, commenting on the Aaland Islands case, makes a similar conclusion:
"It is clear that the Committee landed very much in the direction of the theory of the inherent character of certain treaties as creating an objective situation good erga omnes." (Fitzmaurice, G., Fifth Report on the Law of Treaties, YBILC (1960-II) pp. 69-107, at p. 99. Hereinafter cited as Fitzmaurice's 5th. Rep.).
as they remained in force. The final conclusion of the Committee on the question of the validity of the provisions of the 1856 treaties concerning the demilitarisation of the Aaland Islands makes the relevance of all these elements clear:

"The provisions were laid down in European interests. They constituted a special international status relating to military considerations, for the Aaland 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."\(^{63}\)

To sum up, the decision of the Committee of Jurists gave support to and promoted two key ideas. Firstly, that in the case of a State succession treaties in the nature of “International Settlements” automatically devolve upon the succeeding State; and secondly, that this kind of treaty, or the “settlement” it embodies, are not contractual in nature and, as such, every State, whether party or non-party, may insist upon its performance so long as it is in force.\(^{64}\) However, the Court’s implicitly accepted and recognised the *pacta tertiis ..* principle when discounting the possibility that Sweden had acquired rights in respect of the demilitarisation of the islands due to operation of normal rules of treaty law, there being no basis for finding any *stipulation pour autrui* in its favour.\(^{65}\)

1.6. The Wimbledon Case (1923)

A few years after the decision regarding the Aaland Islands, the nature and the legal validity of treaties regulating the use of international waterways — another alleged example of treaties that may constitute an “International Settlement” or be a “dispositive treaty” — came under the examination of the newly established Permanent Court of International Justice in the case of the *S.S Wimbledon*.\(^{66}\) The case was concerned with the status and the legal force of the regime of navigation through the Kiel Canal which

\(^{63}\) *Aaland Islands question, loc. cit.* above (n. 49), p. 19, emphasis added. For a commentary on status of the islands subsequently to the decision of the Committee of Jurists see Gregory, C.N., *The Neutralisation of the Aaland Islands*, AJIL 17 (1923), pp. 63-76.

\(^{64}\) It may by implication inferred from the decision of the Committee that the “objective nature of the settlement” is a sufficient reason for requiring all States interested to respect treaties in the nature of, or embodying, “International Settlement” and to refrain from any act prejudicial to their operation.

\(^{65}\) See the passage cited in p. 37 above.

\(^{66}\) *The S.S. Wimbledon* (United Kingdom, France, Italy, and Japan / Germany), PCIJ Rep., Ser. A, No. 1.
was established by Articles 380-386 of the Treaty of Versailles 1919, which concluded the First World War. Most of the leading powers were parties to that treaty. By virtue of Article 380, the Kiel Canal, previously an internal waterway of Germany, together with its approaches, was to be:

"maintained free and open to the vessels of commerce and war of all nations at peace with Germany and on terms of entire equality."

Contrary to the wording of this provision, during the Russo-Polish war of 1920, the *S.S Wimbledon*, a British merchant ship chartered by French shippers for shipment of munitions for the use of the Polish Government, was denied access to the Kiel Canal by the German Government. The reason given by the German Government was that the *S.S. Wimbledon*’s carriage through the canal of a cargo of munitions bound for Poland, then at war with Russia, would involve Germany in a breach of her obligations as a neutral in that war. In a joint application, France, Great Britain, Italy and Japan (all party to the Treaty of Versailles) instituted proceedings against Germany before the Permanent Court of International Justice, submitting that Germany was wrong in refusing free access to the Kiel Canal to the *S.S. Wimbledon*. The question at issue, therefore, concerned the true interpretation of, and the nature of the regime established by, the provisions of Articles 380-386 in time of a war in respect of which Germany had taken up a neutral position.

The Court considering the nature of the regime established for the Kiel Canal by Articles 380-386 of the Treaty of Versailles, indicated that these provisions had made of the Kiel Canal an international waterway "intended to provide under treaty guarantee easier access to and from the Baltic for the benefit of all nations of the world" and that vessels of commerce and of war of all nations were vested with the right (or benefit) of free passage through the Kiel Canal. In this regard the Court further observed 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 vessels of states other than the riparian state is left entirely to the discretion of that state,.... Under its new regime, the Kiel Canal must be open, on a footing of

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68 Poland (also a party to the Treaty of Versailles) later intervened in the case in the side of the four applicant States. See PCIJ. Rep., Ser. A, No. 1., p. 10.

69 Ibid., p. 22.
equality to all vessels, without making any distinction between war vessels and vessels of commerce, but on one condition, namely, that these vessels must belong to nations at peace with Germany."

The argument was made to the Court that the right of free passage envisaged in Article 380 amounted to a servitude of international law resting upon Germany and, like all restrictions or limitations upon the exercise of sovereignty, servitude must be construed as restrictively as possible and must not be allowed to affect the rights consequent upon neutrality in an armed conflict. In reply, the Court emphasised that:

"Whether the German Government is bound by virtue of a servitude or by virtue of a contractual obligation undertaken towards 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 has to submit to an important limitation of the exercise of sovereign rights which no one dispute she possesses over the Kiel Canal."

Accordingly, giving determinative effect to the wording of the provisions of Treaty of Versailles, the Court appeared to have regarded Articles 380-386, or the regime established by them, as having vested a right (or benefit) of free passage in the vessels of commerce and war of all nations at peace with Germany — though, strictly speaking, the Court did not make it clear if third States could invoke the terms of Article 380 directly and on their own account, could insist upon its application and could

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70 Ibid., It must be noted that two Judges (Anzilotti and Huber) did not agree with the majority approach which gave determinative value to the wording of Article 380. The right approach for the Court, according to them was, to consider the question "Do the clauses of the Treaty of Versailles relating to Kiel Canal also apply in the event of Germany's neutrality, or do they only contemplate normal circumstances, that is to say, a state of peace, without affecting the rights and duties of neutrality?" (Ibid., p. 39).

One of the main argument raised by these Judges was that:

"If Article 380 should be taken in its strictly literal sense, it would follow that Germany as belligerent, would have to allow the canal to be free and open to the vessels of neutral nations, since such a vessel would belong to nations at peace with Germany. But an obligation of this kind is hardly conceivable without a corresponding obligation on the part of States with which Germany was at war to respect the right of free passage through the canal. An obligation imposed on a State to leave open a waterway in time of war is only comprehensible in so far as such waterway is protected from the action of belligerents." (Ibid.).

This argument supports the modern law that international canals, such as the Suez and Panama Canals, would remain open in time of war, if the sovereign stayed neutral, but, otherwise, may be closed to navigation for security reasons. For further detail see Ch. V (3. and 4.) below.

71 See German National Judge Walther Schucking (Sep. Op.), ibid., at p. 43.

72 Ibid., p. 24, emphasis added. The Court's did not give an opinion on the place of the theory of international servitudes, though it indicated that theory was very controversial. (Ibid., p. 24).
claim breach under it or they were to use the canal without being entitled to any of these.  

The Court then examined the question of the effect of the provisions of Articles 380-386 of Treaty of Versailles, or the regime it established, on Germany's duties as a neutral to Russia. Normally, Germany, as a neutral State, was obligated not to allow her territory to be used for purposes prejudicial to one of the belligerent parties. On the other hand, according to the provision of Article 380, as interpreted by the Court, Germany was obligated to allow passage to a vessel in all circumstance, even if it was carrying material of war which was destined for use by one of the belligerents (except in the case when the vessel concerned belonged to a State which was at war with Germany). Thus, Germany was faced with two conflicting duties, being obliged, by the law of neutrality, not to allow the passage of *S.S. Wimbledon* and, at the same, being obliged to allow such a passage as required by Article 380. The situation was more complicated by the fact that Russia (the State which had benefited for the *Wimbledon*’s denial of passage) was not a party to the Treaty of Versailles, so that Germany could not invoke Article 380 as an excuse for non-performance of her obligations as a neutral. If the rule that a treaty is *res inter alios acta* for non-party States were to be applied here, then Germany could not be relieved from its duty as a neutral towards States not parties (here, Russia), whose relationship with Germany remained governed by general (customary) international law, rather than by a treaty to which they were not party. For this reason, the argument was advanced that the general grant of a right of passage to vessels of all nationalities through the Kiel Canal must not be interpreted in a way which deprived Germany of the exercise of her rights as a neutral in time of war.

After an examination of State practice under the treaties regulating passage through the Suez and Panama Canals the Court observed that the precedents afforded by these canals indicated that the passage through these of warships or war materials had not been treated as compromising the neutrality of the States which had territorial sovereignty or jurisdiction over them. It further stated that these precedents were indeed:

"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

*3* For further detail see text which follows.
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 the sovereign State under whose jurisdiction the waters in question lie.  

Accordingly, the Court held that German's neutrality would not have been imperilled if her authorities had allowed the passage of the *S.S. Wimbledon* through the Kiel Canal and that German authorities were wrong in refusing such a passage. In its finding, the Court clearly did not rely on the idea that Article 380-386 of the Treaty of Versailles were automatically opposable to non-parties, so as to deprive them, by operation of treaty-law, of their rights not to have Germany let its territory be used in a non-neutral way. It rather appeared to have considered that there was an exception, in custom, to the general rules on neutral's duties when it came to internationalised canals, according to which passage of war vessels, or private vessels carrying war materials, through such kind of canals would not, *per se*, affect the neutrality of the States through whose territory those canals run.

Although the Court's treatment of the regime established by Articles 380-386 of the Treaty of Versailles did not follow the theory of "International Settlement", as it was construed and advanced by the Committee of Jurists in the Aaland Islands Case, it afforded another precedent which to a certain extent boosted that notion. The Court's statements that the Kiel Canal "has ceased to be an internal and national navigable waterway" and that the Treaty of Versailles has established a "new regime" under which "the Kiel Canal must be open, on a footing of equality to all vessels, without making any distinction between war vessels and vessels of commerce" witness the Court's inclination towards "International Settlement" or "treaty regime" theory, according to which the Treaty of Versailles had established a new (permanent) international regime for the Kiel Canal which was meant to be applied objectively in the interests of international navigation. The Court did not, however, address the question whether or

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74 See PCIJ, Rep., Ser. A, No. 1., p. 28, emphasis added.

75 It must be noted here that the Court was frequently referred to the *right or benefit* of passage as granted to "vessels" of "all nations". As such the *right or benefit* seems to have been considered by the Court as having granted to and acquired by the "vessels" owner. However, as individuals are not considered as subjects of international law, it would not be wrong to consider "all nations" or all States as having been granted or acquired such a *right or benefit* for the purpose of international law: a State would claim the right of passage on behalf of vessels flying her flag. In this regard see authorities cited in Ch. III (n. 62) above.
not and on what basis third States enjoyed under this regime legal right as distinguished from mere benefit. If third States were vested with legal right they could invoke Article 380 of the Treaty of Versailles directly and on their own account and could insist upon its application — at least so long as the treaty remained in force (as recognised by the Committee of Jurists in the Aaland Islands case). Moreover, that would give them a locus standi before an international court or tribunal. On the other hand, if they were simply to benefit from the terms of that Article they could not invoke the Article or insist upon its applications directly and on their own account. At most they could request one of the parties to claim on their behalf. In the former situation, there is a legal tie between the parties and third States while in the latter it is not. As was seen, the Court did not enter into such a discussion because it was not faced with a question involving third party right under treaty. Whether or not the regime established by Article 380-386 involved the imposition of obligations upon non-party States, the Court did not also consider. By giving effect to the terms of the Treaty of Versailles, it appeared to have considered that that regime had restricted third States’ right under customary law (namely, the right to have Germany, if it was neutral, deny passage to material of war destined to one or other belligerent). However, as was seen, the Court seemed to rely, in this regard, on an exception in customary law rather than the theory that certain class of treaties, or treaty regimes, by their nature would bind third States.

1.7. McNair’s views (1925 and 1930)

The above-mentioned precedents in turn provided more encouragement for some later writers to speak of “dispositive treaties” or treaties embodying “International Settlements” and to claim specifically, for the first time, that such treaties constituted a true exception to the principle pacta tertiis nec nocent nec prosunt. Thus, McNair in his article on the relevance of the concept of “State servitudes” as a principle explaining the

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77 For further detail see Sec. 2.2. and Ch. II (2.2.2.1.) below.
validity of conventional territorial restrictions in international law, published in 1925, asserted that:

"while it is true that *pacta tertiiis nec nocent nec prosunt*, this maxim has certain qualifications, and in particular, two classes of treaties have a law-creating effect beyond the immediate parties to them which is recognised though not yet well defined: (a) the first class consists of treaties which form part of an international settlement such as treaties resulting from the Congress of Vienna in 1815, the Treaty of Paris, 1856, and the treaties of peace which concluded the [First] World War; (b) the second consists of treaties which regulate the dedication to the world of some new facility for transit or transport such as a new canal or the right of navigation upon a river formerly closed."  

A few years later in 1930, analysing the legal character of treaties, he submitted that treaties tend to bear "widely differing functions and legal characters", requiring a different system of rules which are most suitable according to such functions and character. Generally, McNair distinguished four categories of treaties: (1) "treaties having the character of conveyances"; (2) "treaties having the character of contracts"; (3) "law-making treaties"; (4) "treaties akin to charters of incorporation". The category of "law-making treaties" in turn consisted of two classes of treaty: (a) "treaties creating constitutional international law", which he preferred to call "treaties creating international public law"; and (b) "treaties creating or declaring ordinary international law, or

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78 McNair, A.D., *So-called State Servitudes*, BYBIL 6 (1925), pp. 111-127. Here, the main point at issue was the validity of territorial restrictions created by treaty and their effect as regards successor States, rather than the legal effect of treaties upon third States. 

79 *Ibid.*, p.122. Having distinguished the above classes of treaties, McNair concluded that the concept of "State Servitudes" was not adequate to explain the place and effect of conventional restrictions on territory. Summarising the position in international law of the conventional restrictions on territory, he concluded that:

"(a) International law recognises the existence of conventional restrictions upon territory which differ in juridical nature from the obligations in personam normally created by a treaty.  
(b) The main guide as to the juridical nature of any particular obligation must be the intention of the parties to the instrument creating it. Did they intend to be permanent, objective, and irrespective of change of sovereignty, or did they intend it to endure only while the burdened and benefiting territories remained under the same sovereignties?  
(c) When a treaty creating the restriction is of the nature of an International Settlement or of a dedication *urbi et orbi* of some natural advantage or facility, the presumption is that the territorial restrictions created by it are intended to form part of the body of public international law. If indeed, as some would assert, they do not at once become so owing to a legislative virtue to be attributed to such treaties, they very soon become by tacit consent a part of customary international law and thereupon transcend the sphere of ordinary personal obligations."  


81 Of these four categories, he regards only some of the treaties belonging to the third category as capable of producing legal effect for third States. See text which follows.
pure law-making treaties. The latter class of treaties were those multilateral treaties which created rules of law for the parties alone. The former class of treaties consisted of treaties which created "international organs and general rules" (e.g. the Covenant of the League of Nations or the Statute of the Permanent Court of International Justice) as well as "those multilateral treaties which from time to time settle the political affairs of a group of countries in a particularly solemn and semi-dictatorial fashion which likens the arrangement to a governmental act imposed from above upon the parties affected, rather than to a voluntary bargain between them" (e.g. treaties in the nature of, or embodying, "International Settlements", mentioned earlier). For McNair, these constitutional treaties were of special importance, because they created "a kind of public law transcending in kind and not merely in degree the ordinary agreement between States". As one of the practical consequences of the distinction of "constitutional treaties", McNair suggested the existence of a tendency for this class of treaties to produce exceptions to the rule that a treaty cannot confer benefits or impose burdens upon third parties: *pacta tertiis nec nocent nec prosunt.*

McNair was not alone in holding such views. There were other writers who shared his opinion. For instance, Verdross, during his Hague lectures in 1929, indicated that the principle "*pacta tertiis .." "n'est pas valable pour les conventions créatrices de droits territoriaux"; for these rights, "une fois établis, sont valables vis-à-vis de toute autorité". Most notably, Rousseau in his book on the principles of international law, published in 1944, advocated this view in a more detailed manner, saying that "[i]t happens fairly frequently that treaties establishing a political and territorial regime are regarded as being good against Powers other than the signatory States" and that

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81 McNair, *loc. cit. above* (n. 80), pp. 112-116.
83 Ibid., p. 112.
84 Ibid., p. 113.
85 Another practical consequence, in his view, was that this class of treaties were not abrogated by the outbreak of a war. Ibid., p. 301.
87 Ibid., p. 376. Likewise, Hostie expressed the view that territorial rights are effective *erga omnes* and preserve their validity in case of succession of States. See: Hostie, J., *Examen des quelques règles du droit international dans le domaine des communications et du transit*, RdC 40 (1932-II), pp. 403-524, at pp. 447 et seq.
"[i]t has happened on a number of occasions that treaties relating to communications, fluvial as well as railroad, have been regarded as binding equally all riparian or interested States, which are deemed to constitute a special group and on that basis, to be subject to a common ordinance valid even without express consent."*9

Leaving aside for a moment the doctrine we come to two Advisory Opinions of the International Court of Justice (ICJ) pronounced in its early years which both gave further support to the doctrine under consideration and indeed expanded its scope and purpose.

1.8. The Reparation Case (1949)

In the case known as Reparation for Injuries Suffered in the Service of the United Nations (1949),90 the Court was asked, inter alia, whether or not the United Nations, as an organisation, possessed international legal personality of a sort which included the capacity to bring an international claim in respect of injury to itself, and to its personnel, and more specifically, if it could bring such a claim against a non-member State — in truth, Israel which was not yet a Member State. The Court, finding that the Organisation was an international legal person, advised, inter alia, 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, together with capacity to bring international claims."91

As can be seen from the passage cited, this decision firstly upheld the earlier views that, in certain circumstances, a sort of inherent power could be attributed to a group of States to create by treaty a political status (in this case an international person) with effect erga omnes — at least, as far as the international personality of the organisation is concerned — and, secondly, it broadened the subject-matter of the doctrine of "International Settlements", which hitherto was only concerned with maritime or land territory.92

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92 Cf. Sec. 2.1. below.
1.9. The International Status of South-West Africa Case of 1950

A year later, in the *International Status of South-West Africa Case* (1950), the Court was asked, *inter alia*, whether or not South-West Africa was still under the Mandate which had been established in accordance with Article 22 of the Covenant of the League Nations and what the obligations of the Union of South Africa were in respect of that territory. On behalf of the Government of South Africa, it was argued: that the Mandate was based on the analogy of the contract of mandate in private law, the League being the Mandator and the Union of South Africa the Mandatory; the relationship could not subsist without a Mandator at one end and a Mandatory at the other; that as "between the League and the Union Government, the Mandate therefore came to an end, and that means that, as from the dissolution of the League there had been no Mandate"; and that the "dissolution of the League had the effect of extinguishing all international legal rights and obligations under the Mandates system". As a result, the Government of South Africa was free to regulate the future status of South-West Africa as a domestic matter. The Court, rejecting the South African argument, observed that:

"This contention is based on 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 this 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 mandate in national law. The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an *international institution* with an international object — a sacred trust of civilisation. The international rules regulating the Mandate constituted an *international status* for the Territory recognised by all the Members of the League of Nations, including the Union of South Africa."  

Accordingly, the Court replied that the international status of South-West Africa, as a mandated territory, survived despite the dissolution of the League of Nations (the Mandator) and the termination of the Covenant and that the Union of South Africa continued to have "the international obligations stated in Article 22 of the Covenant of the League of Nations and the Mandate for South-West Africa as well as the obligations to transmit petitions from the inhabitants of that Territory, the supervisory functions to be

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95 Ibid., p. 132, emphasis added.
exercised by the United Nations, to which the annual reports and petitions are to be submitted ..." In reaching these conclusions, the Court relied on two factors: firstly, that continuation and validity of the obligations under the Mandate were expressly recognised by the Union of South Africa in many occasions after the dissolution of the League of Nations; and, secondly, the United Nations was a legitimate successor for the League of Nations as far as the question of Territories under Mandate was concerned. 96

Although the Court's reliance on the two afore-mentioned factors reduced the evidential value that the case might otherwise have had as a precedent for the theory of "International Settlements", the Court's statements that "Mandate constituted an international status" and that such a "status" was created, "in the interest ... of humanity in general, as an international institution with an international object — a sacred trust of civilisation" gave sufficient ground to some writers to treat the case as an authority which advocated a line of theory similar to that previously proposed under the notion "International Settlements". Indeed, one of the Judges — namely Judge McNair — while concurring with the replies given by the majority of the Court in most respects, criticised the Court's approach by asserting that it would be best to place the endurance, or survival, of the Mandate of South-West Africa on a different basis, that was, inter alia, "the legal nature of the Mandates System" and "the objective character of Article 22 of the Covenant of the League of Nations". In a broad statement, he asserted that

"From 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 regime 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 a great war." 97

After referring to the Aaland Islands case and the Committee of Jurists' reliance on the "International settlements" theory, McNair suggested that the Mandates System,

96 Ibid., pp. 134-135, 136. The Court appeared to deduce from the Resolution of the League of Nations of 18th April 1946 and other evidence that the League did not consider that an end to its existence, as well as its functions with regard to mandated territories, extinguished the Mandates themselves. It rather seemed to have assumed that the United Nations would assume such functions. (Ibid., p. 134).

established in accordance with Article 22 of the Covenant of the League of Nations, was a typical example of the above tendency. He stated that

"The occasion was the end of a world war. The parties to the treaties of peace incorporating the Covenant of the League and establishing the system numbered thirty. The public interest extended far beyond Europe. Article 22 proclaimed that "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 part of the civilised world concurred in opening a new chapter in the life of between fifteen and twenty millions of people ..." 98

He thus concluded that the Mandates regime established in accordance with the principle in Article 22 of the League of Nations "has more than a purely contractual basis, and the territories subjected to it are impressed with a special legal status, designed to last until modified in the manner also indicated by Article 22." 99 Therefore, as Fitzmaurice put it in his commentary on the case:

"Although the point was not perhaps very explicitly stated in the opinion of the Court itself, the South-West Africa case is authority for the proposition(s) that certain types of international regimes 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 that 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." 100

Lauterpacht commenting on the opinions of the Court and McNair's, however, indicates

"While in the above cited passage of the Separate Opinion of Judge McNair the element of "subsequent acceptance and durability" seems to refer to a requirement additional to the outright legislative effect of the original treaty, even that requirement seems to partake of a legislative quality. For the "degree of acceptance and durability" is not identical with universal acceptance. The result is that there is assumed a method of creating binding obligations which is independent of the will of any particular State held to be bound by them. In the Opinion of the Court that legislative character, independent of subsequent acceptance of the treaty in question, appears even more prominently. Divorced of any analogy with its private prototype, 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 international status amounts to an affirmation of international legislation. For status implies an area of operation not limited to the original contracting parties or to contracting parties generally. Status operates erga omnes." 101

98 McNair, ibid., p. 154.
99 Ibid.
101 Lauterpacht, op. cit. above (n. 97), pp. 180-182, emphasis added.
1.10. McNair’s New Opinion (1957-1961)

These two Advisory Opinions again provided more ground for furtherance of the doctrines of treaties embodying “International Settlements”; “dispositive treaties”, and so on. Thus, in 1957, McNair devoted an article to the kind of treaties under consideration under the new title of “Treaties Producing Effects Erga Omnes”,¹⁰² his purpose being specifically to justify the status of certain treaties as an exception to the pacta tertiis .. principle. A few years later, in the second edition of his book on the law of treaties,¹⁰³ he placed this article in one of its chapters, but under yet another title: namely, that “Dispositive and Constitutive Treaties”.¹⁰⁴ There, he indicated that

“the existence of certain kinds of treaties producing effects beyond the parties to those treaties is recognised, but it cannot be said that they have yet found a place in any well recognised category. There has been a tendency to regard them as explicable on the ground 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 assents, or (b) that “third States” acquire rights under them … by virtue of the operation of custom."¹⁰⁵

He suggested that we would be on surer ground if

“we are willing to recognise that the effects of certain kinds of treaties erga omnes is to be attributed to some inherent and distinctive juridical element in those treaties, rather than on any presumed collateral agreement approach or on the operation of custom upon treaties.”¹⁰⁶

This distinctive element would, he suggested, be, in some cases, the “semi-legislative authority” of groups of States particularly interested in the settlement or arrangement made and, in others, the “real” or “dispositive” character of the transaction effected by the treaty, or the permanent nature of the rights created, either for States or for individuals, by or in pursuance of the treaty. As examples of these two kinds of treaties, he mentions (1) “treaties forming part of an International Settlement”; (2) “treaties involving the dedication of some highway or artificial waterway of universal or at least general utility”; (3) “treaties which bring into existence some new international entity,

¹⁰³ McNair’s Law of Treaties, Ch. XIV.
¹⁰⁴ Ibid., pp. 255-271.
¹⁰⁵ Ibid., p. 255.
¹⁰⁶ See further Ch. II (2.2.1.2. and 2.2.2.3.) and Ch. IV (2.3.) below.
whether a State or not”; and (4) “treaties affecting Sovereignty by Recognising, Creating or Transferring Rights in regard to Territory”.

Accordingly, he specifically claimed that “dispositive or real treaties” — that is to say, treaties which “recognise or grant or transfer real rights” (for instance, a boundary treaty or a treaty of cession) — and “constitutive or semi-legislative treaties” — that is, “treaties of a public law character” frequently embodying the decisions of a powerful group of States, acting or assuming to act in the public interest” (e.g. treaties relating to neutralisation or demilitarisation) — produce effects *erga omnes* and must be treated as exceptions to the *pacta tertiis* principle.

1.11. Fitzmaurice’s proposed Draft Articles (1960)

As the codification of treaty law was on the agenda of the International Law Commission, further developments were to be expected. The era of the first two Special Rapporteurs on the topic did not last long enough to enable them to dwell on the legal effect of treaties on third States; but, Fitzmaurice, as the third Special Rapporteur, proposed, in his fifth Report, several draft articles on the problem of the legal effects of treaties on third States and these covered the special class of treaties under consideration.

Generally, Fitzmaurice advocated the view which regards the principle of *pacta tertiis* as having an absolute character and as being subject to no real exception. However, he added that:

“But few authorities actually leave it at that. All or most admit in varying degrees that in practice there are, if not strictly exceptions, at any rate qualifications …”

Among a number of qualifications — or “quasi exceptions” — adduced by him was the kind of treaties earlier considered as embodying “International Settlements” or “treaties producing effects *erga omnes*” which he regarded as special cases weakening, or entirely negating, the generality of the *pacta tertiis* principle. However, he did not follow the view that all such treaties constituted a single category. Rather, he

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107 McNair, *loc. cit.* above (n. 102), pp. 23-36, emphasis original.
110 For elaboration of Fitzmaurice’s view see Ch. IV (2.2.) below where his proposals are examined in greater detail.
treated them differently, dealing with them under the two separate headings of "Cases of the use of maritime or land territory under a treaty or international regime" (Draft Article 14(2)-type of case) and "General duty of all States to recognise and respect situations of law or of fact established under lawful and valid treaties" (Draft Article 18-type of case). The former cases covered, inter alia, treaties placing a territory under an international regime of common user "for purposes, and on conditions, specified in the treaty, and in circumstances causing the treaty to have, or come to be regarded as having, effect erga omnes". Typical examples of this kind of treaty were, in his view, treaties governing such international rivers as the Rhine, Danube, and Oder, and such sea-ways as "the Suez and Panama Canals, the Sounds and Belts, and the Dardanelles and Bosphorus", as well as the treaty concerning Antarctica (The Antarctic Treaty 1959). The latter cases embraced all the other treaties considered as "embodying international regimes or settlements", or as having "a dispositive character", the more important examples of which, in his view, were:

(a) Peace treaties, and other treaties containing political or territorial settlements;
(b) Treaties creating a general regime or status of neutralisation, or demilitarisation, for particular territories or localities;
(c) Treaties of a dispositive character, such as treaties of cession, frontier demarcation, or treaties creating a servitude."

He suggested that these two kinds of treaties are different in respect of the nature of the effects that they produce for third States. He argued that, as in the former type of case the third States are actually making use of the maritime or land territory subjected to the regime of common user, they could be held to have accepted the rules and regulations involved by reason of their very conduct. Thus, he formulated a general principle according to which availment by third States of rights under a regime of common user entails automatically their acceptance of the obligations attached to it. Such an entailment, however, he added, could not be found in the latter type of case. For instance, in the case of the neutralisation of a particular territory, third States could not in any sense be seen as availing themselves of rights, or taking advantages by their conduct so that one could then assume their acceptance of the obligations under such a regime. As a

111 Fitzmaurice's 5th Rep., proposed draft Article 14(2).
112 Ibid., paras. 50 and 54 of the Commentary on proposed draft Article 14. For the examination of the Antarctic Treaty see Ch. V (4.) below.
113 Ibid., proposed draft Article 18 (2).
result of the above distinction, Fitzmaurice suggested two sets of rules to govern, as well as to justify, the legal effects of such treaties on third States.

As regards the Article 14-type of case, he proposed the principle of "automatic entailment of obligations by exercising corresponding rights, and vice versa", according to which a third State availing itself of the benefits of a treaty or exercising rights under it must incur the corresponding obligations. On the other hand, third States (their vessels and nationals), if conforming to the conditions of user, were not only to enjoy the user and other benefits of the treaty or regime on the conditions attached to them; but they were also entitled, in certain circumstances, "to object to any termination or modification of such treaties or regimes".

As regards the Article 18-type of case, he formulated two principles: a "General duty of all States to respect and not impede or interfere with the operation of lawful and valid treaties entered into between other States" (proposed draft Article 17) and a "General duty of all States to recognise and respect situations of law or of fact established under lawful and valid treaties" (proposed draft Article 18). The former principle was not directly relevant to the Article 18-type of case, as it was formulated in a way which covered all kind of treaties, including the categories of treaties subsumed under draft articles 14 and 18. Nevertheless, it was mainly intended to complement the principle formulated in his proposed draft Article 18, which specifically dealt with the (in detrimentum) effects of treaty regimes it covered. According to the principle enunciated in draft Article 18, "all States are under a duty to recognise and respect situations of law or fact established by lawful and valid treaties tending by their nature to have effects erga omnes". However, this was not meant to involve or imply that the treaties specified can impose any direct or positive obligations on States not parties to them, but only that, subject to the conditions indicated, such States cannot deny the validity of the treaty, must respect its provisions, and must also conform to them in so far as any such States avail themselves of facilities created

114 Ibid., proposed draft Article 13.
115 Ibid., proposed draft Article 26 fully cited in Ch. IV (n. 131) below.
116 The text of the proposed draft Article 17 is fully cited in p. 207 below.
117 The in favorem tertii effect of this type of case was regulated by his proposed draft Article 29.
118 Fitzmaurice's 5th. Rep., proposed draft Article 18 (1).
by the treaty, or have dealings in or relative to the locality or region which is the
subject-matter of the treaty.\textsuperscript{119}

As can be seen from the above, Fitzmaurice firstly did not regard the draft Article
14-type of case as relating to treaties which themselves produced effects which were
valid against third States. According to his proposed rule, these States were to acquire
the rights of user, and become obliged by the corresponding obligations, only as a result
of their implied consent deduced from their conduct. As regards the draft Article
18-type of case, his position was not clear. On the one hand, he imported an \textit{erga omnes}
test as a feature which must be present in a treaty in order for it to qualify as a case cov­
ered by the draft article. On the other hand, he denied that these treaties, or any other
treaties, could \textit{by their very nature} have objective effects, though he did not "not deny
that, in the result, they do".\textsuperscript{120} To him this result seemed to be achieved:

\begin{quote}
"... not on the basis of some \textit{mystique} attaching to certain types of treaties, but simply
on that of a general duty for States — which can surely be postulated at this date (and
which is a necessary part of the international order if chaos is to be avoided) — to re­
spect, recognise and, in the legal sense, accept, the consequences of lawful and valid
international acts entered into between other States, which do not infringe the legal
rights of States not parties to them in the legal sense."
\end{quote}

Fitzmaurice’s proposed draft articles did not come under consideration by the In­
ternational Law Commission; but they were examined by Waldock, the fourth Special
Rapporteur, who rejected most of Fitzmaurice’s proposals in respect of the type of trea­
ties under consideration. In brief, Waldock contended that Fitzmaurice was not right to
distinguish between cases of the use of maritime and land territory and other treaties.
Nor did he think that Fitzmaurice’s views were correct in respect of the draft Article
18-type of case.\textsuperscript{122}

1.12. Waldock’s proposed Draft Article 63 (1962)

Waldock, who was opposed to his predecessor’s treatment of the subject, subse­
quently proposed his Draft Article 63 entitled “treaties providing for objective re­
gimes”. In explaining his approach, he indicated that international opinion and practice

\textsuperscript{119} Proposed draft Article 18 (3), emphasis added. The principle was further subjected to the
conditions specified in Article 17, paragraph 1 (a) and to the terms of the treaties them­
selves or of any other relevant treaties.

\textsuperscript{120} \textit{Ibid.}, para. 71 of the Commentary on proposed draft Article 18.

\textsuperscript{121} \textit{Ibid.}

\textsuperscript{122} \textit{Waldock’s 3rd. Rep. on Treaties}, p. 28, para. 6, emphasis added.
firmly upheld the existence of certain kinds of treaties, or treaty regimes, as having effects *erga omnes*, but it was not clear why and when such an effect arose: in other words, from what time and on what basis they could legally be held good against third States. In order to provide as acceptable a solution as possible, he opted for a mechanism which was very broad in its terms and scope. According to his proposed Draft Article 63, under certain conditions certain territorial treaties may establish what he calls an "objective regimes". An objective regime was established if, from the terms and the circumstances of the conclusion of the treaty concerned, it appeared that the parties intended to create in the general interest general rights and obligations relating to a particular region, State, territory, locality, river, waterway, or to a particular area of sea, sea-bed, or air-space. Moreover, the State having territorial competence with reference to the subject-matter of the treaty had to be present among the contracting parties, or to have somehow expressed its consent to the provisions in question. Such a regime could then be invoked by and against third States which, for a period of time (the length of which he wanted the Commission to fix) remained silent: in other words, if third States did not expressly oppose the establishment of the regime and its operation. The silence of the third States, which was presumed as their acceptance of the regime, was, therefore, the determinative element in Waldock's proposals.\(^{123}\)

Waldock's formula, therefore, covered all kinds of treaties previously considered as constituting treaties embodying "International Settlements" or "constitutive and dispositive treaties". However, the fact that his definition of an objective regime was limited to treaties "relating to a particular region, State, territory" or such like, excluded from the list treaties establishing international organisations, which, as has been seen, were considered by McNair as an example of "constitutive treaties".\(^{124}\) So were the cases of treaties concerning the "cession of territory" or delimiting of a frontier (boundary treaties), both of which were considered by McNair to be "Dispositive treaties", these treaties being excluded since they are not normally made "in the general interest", nor does there typically exist an intention on the part of the parties to create "general

\(^{123}\) For detailed examination of Waldock's proposals see below Ch. III (1.) and Ch. IV (1.2.).

\(^{124}\) See further Sec. 2.1. below.
rights and obligations” for third States. However, he specifically added to the list the cases of “mandates” and “trusteeships”.

2. The characteristics of treaties providing for “objective regimes”

We have seen how the doctrine of treaties providing for (territorial) objective regimes was presented and understood up until the time at which Waldock introduced his proposed Draft Article 63. What is striking is the differences of opinion even amongst advocates of the doctrine. The extent of the variation is reflected by the fact that the doctrine is discussed and presented under so many different terms in the literature. In fact every writer has selected his own terminology in referring to the kind of treaties involved and has even changed it through time. While some treaties have been treated by some writers as producing erga omnes effects and, as, therefore, tending to constitute exceptions to the pacta tertiis .. principle, those same treaties have been excluded by others as not producing any such effect. Moreover, there does not exist a clear-cut definition by which one may readily distinguish treaties falling within the purview of the category of treaties under consideration. Of course, there exists a more profound division of opinion still as far as concerns the question of the legal basis or mechanism which allows a treaty to create, by its own force, rights and obligations for third States is concerned.

As there are so many differences of, and so much variation involved in opinion, attempt will be made here to clarify the characteristics which it has been claimed that a treaty must have in order to be considered to belong to the special category of treaties providing for “objective regimes”. This will help us to delimit and to identify the kind of treaties falling under this notion. In doing so, the definition proposed by Waldock in his Draft Article 63 will be adopted as the basis. The reason for this selection is that, firstly, the doctrine of treaties providing for “objective regimes” is currently usually discussed by reference to Waldock’s proposed Draft Article 63; secondly, being almost the latest proposal on the matter, Waldock’s draft article could be presumed to have

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125 See further Sec. 2.3. below.
126 What happened to Waldock’s proposed draft Article in the International Law Commission and other subsequent developments are considered in Ch. III (1.) and Ch. IV (1.2.) below.
127 See McNair’s views examined in Sec. 1.7. and 1.10. above.
128 For more detail see Ch. IV below.
covered almost all the elements previously suggested by the other writers; and, finally, being proposed in the form of a draft Article for the purpose of the codification of law of treaties, Waldock's draft defines, in a very clear way, the class of treaties providing for objective regimes as a result of which one can easily identify the type of treaties falling within the purview of the notion. Accordingly, the subsequent sections will concentrate on the clarification of the characteristics of the kind of treaties under consideration so as to be able to identify specifically what treaties fall under the classification of treaties providing for "objective regimes". First of all, though it seems useful to cite the complete text of paragraph 1 of Waldock's proposed Draft Article 63 which furnishes a definition of an "objective regimes".\textsuperscript{129} According to this paragraph:

"1. A treaty establishes an objective regime 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."

2.1. The "Territorial" element

The first distinctive feature of the class of treaties in question is the fact that they relate to or are concerned with the political or legal status of a land or maritime territory. This may be a State, a part of a State's territory, e.g. a river or a canal, or a territory over which there exist conflicting territorial claims, e.g. Antarctica. This feature excludes, firstly, all treaties which are not concerned with the status of a land or maritime territory, e.g. treaties concerning commerce and navigation, extradition, dispute-settlement, etc. Secondly, it excludes the so-called general law-making treaties specifically concerned with the codification of existing customs as well as the progressive development of international law.\textsuperscript{130} These treaties are primarily designed to establish general rules of conduct (law) to be applicable to the legal relations of the parties and normally contain accession clauses in order to allow non-party States formally to

\textsuperscript{129} The text of Waldock's proposed Draft Article 63 is fully cited in p. 131 below.

\textsuperscript{130} As examples Waldock refers to the Geneva Convention on the High Seas, and on Fishing and Conservation of the Living Resources of the High Seas (450 UNTS 82 and 599 UNTS 285, respectively), as well as the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 5 August 1963, (known as the Nuclear Test-Ban Treaty), 480 UNTS 43; UKTS 3 (1964), Cmnd. 2245. See Waldock's 3rd. Rep. on Treaties, p. 33.
adhere to the rules adopted. Certainly, the rules which they contain may come to be regarded as general rules of international law, either through the number of accessions or through general acceptance as custom. Despite this *erga omnes* validity of the general law-making treaties, they have never been treated as belonging to the category of treaties under consideration. The reason is that, in the first case, the source of third States rights and obligations would be their consent manifested through their acts of accession; and in the second case, it would be the rule of customary international law thus emerged upon the basis of treaty which would be the source of their rights and obligations, not the treaty as such. Thirdly, it excludes treaties establishing general international organisations, because they are not related to or concerned with a particular territory. As was seen, McNair treated this kind of treaties as falling within the purview of "treaties valid *erga omnes*" and as such presumably having, or producing, objective effects. The main consideration militating for their exclusion is not, however, merely their non-territorial character. The reason is that their effect, if any, for third States does not depend on the existence of an exception to the *pacta tertiis* principle. As was seen, the International Court Justice in the *Reparation Case*, appeared perhaps to suggest that a general international organisation, such as the United Nations, is a special form of "International Settlement" by holding that "fifty States, representing the vast majority of the members of the international community, had the power, ..., to bring into being an entity possessing objective international personality". On this basis, the non-member States were held obliged to recognise the personality of the United Nations. However, the Court's pronouncement does not in any way suggest that non-

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132 See Ch. II (3.2.2.) and Ch. IV (2.3.) below. See further Fitzmaurice's proposed draft Article 16 (*Fitzmaurice's 5th Rep.*, p. 80).


134 See Sec. 1.8. above. Waldock referring to the relevance of the Court's pronouncement suggests that it "leaves too much room for argument as to what exactly was the principle on which it acted for it to be possible simply to recast the opinion of the Court in the form of a draft Article dealing with the objective effects of treaties." (*Waldock's 3rd. Rep. on Treaties*, p. 33, para. 20).
member States were bound by the provisions of the Charter. Nor has it any regard to the theory of “International Settlement” and its alleged status as an exception to the *pacta tertiis* .. principle. The Court’s emphasis is on the particular issue of the “international personality” of the United Nations. It emphasises that under international law the legal personality of the United Nations is opposable to a non-member independently of its recognition by the latter. True the personality of the United Nations has been given an *erga omnes* validity; but this validity is different from the *erga omnes* effect claimed for, for instances, Canal treaties. In the former situation, no treaty right or obligation is directly created for third States as a result of the treaty establishing an international organisation. The *erga omnes*, or objective, effect claimed for the latter kind of case would, however, involve the emergence of certain rights and obligations for third State with regard to the particular territory which is the subject of the treaty regime. As such their explanation would normally depend on claiming an exception to the *pacta tertiis* .. principle. Of course, the obligation to “recognise” the “international personality” of the “United Nations”, as postulated by the ICJ, would bring about extra additional obligations for non-members, for example a duty not to cause damage to the United Nations by causing harm to its officials or agents; but, as just indicated, this

135 In the *Aerial Incident Case* (Israel / Bulgaria), the International Court of Justice expressly held that

“Until its admission, it [a non-party State] was a stranger to the Charter [of the United Nations] and to the Statute [of the Court]. What has been agreed upon between the signatories of these instruments cannot have *created any obligation binding upon it*, in particular an obligation to recognise the jurisdiction of the Court. The Statute of the present Court could not lay any obligation upon Bulgaria before its admission to the United Nations.” (See ICJ Rep. (1959), p. 143, emphasis added).


137 All that the “objective international personality” may mean is that, on the basis of the *Reparation for Injuries* case, non-member States have to recognise the personality of the United Nations and they may be obliged to live with the consequences arising from the personality of the international organisations. As such, these effects can hardly be considered as arising from the treaty establishing the organisation (i.e. the Charter of the United Nations). The Court’s decision does not clearly address the issue of the possibility of a non-member State being bound by any provisions of the Charter. See Widdows, K., *Security Council Resolutions and Non-members of the United Nations*, ICLQ 27 (1978), pp. 459-462, at p. 461.
kind of indirect effects cannot be considered as the effect of the Charter on non-members: at most they are effects arising from the "international personality", or the factual existence, of the United Nations as an international organisation. As a result, recent writers such as Klein and Wyrozumsk, following Waldock's proposal, have deliberately put to one side treaties establishing international organisations by placing the word "territorial" before the word "regime" in the title of the class of treaties under consideration.\footnote{Klein, E., Statusverträge im Völkerrecht: Rechtsfragen Territorialer Sonderregime (Treaties Providing for Objective Territorial Regimes) (Berlin, Springer-Verlag, 1980), English Summary: pp. 350-359; Wyrozumsk, A., Treaties Establishing Territorial Regimes, YBIL 15 (1986), pp. 251-276. It must be noted that this exclusion does not bar one from invoking, if necessary, the principle that a substantial number of States may create obligations for third States by establishing entities or organisations with legal personality and an objective character.}

2.2. The "Intention of Parties"

The second feature is the fact that there must be an intention on the part of the parties to create a regime of "general obligations and rights" for the territory concerned to be applicable "objectively" to all States, including third States.\footnote{See Wyrozumsk, ibid., pp. 258 and 260; Waldock's 3rd. Rep. on Treaties, proposed Draft Article 63.} In other words, firstly, the provisions of the treaty or the regime must be formulated in "objective" terms or in a way which appear to confer rights and/or impose obligations to all States both parties and non-parties; and, secondly, the parties must appear to have the intention to see such a "regime" operate not only in their mutual relations, but also vis-à-vis other States in a similar manner. Thus a treaty which purports to establish certain \textit{ad hoc} rights or obligations for or against third States, even if of a territorial nature, would not fall under Waldock's classification of "treaties providing for objective regimes". A similar situation arises if the terms of a treaty is formulated in an "objective" manner but the parties, or some of them, appear to have no intention to see the regime established operates in their legal relations vis-à-vis third States.\footnote{See the position of the United States with regard to the Hay-Pauncefote Treaty (1901) discussed in Ch. V (3.2.1. and 3.3.4) below.} In earlier literature this element was not discussed in detail. Waldock, and writers recently examining this doctrine, have, however, placed special emphasis on this element. According to Waldock's proposed Draft Article 63, it is important to ascertain that the parties have intended a
regime established for a territory to produce general *rights and obligations* in a manner to be also effective for or against third States. How the existence of this kind of intention, or lack of it, may be determined is discussed in Chapter II; but suffice it to say here that the existence of such an intention may be ascertain by looking, first of all, at the terms of the treaty\(^{141}\) then by referring to other evidence, such as its preparatory work, the subsequent practice of the parties, etc. Thus, if the clauses of the treaty itself were formulated in a way which expressly provided that non-party States were to enjoy certain rights or be subject to certain obligations similar to those specified for the parties, then the element of intention could probably be said to exist. Similarly, if the parties expressed such a desire by means of a declaration. A difficulty may arise as to whether the parties intended to confer legal *right* or merely certain advantage or *benefit* on third States. In the latter case, third States do not have any *locus standi* to invoke against the parties provisions of the treaty concerned.\(^{142}\) A further difficulty may arise with regard to the relevance of “accession clause” in treaties under consideration.\(^{143}\) The presence of such a clause may rightly be taken as evincing parties’ desire or intention to establish legal rights and/or obligations vis-à-vis third States. It is, however, debatable whether they want third States to acquire those rights and/or obligations exclusively through “accession” to the treaty\(^{144}\) or they consider “accession” as one of the possible

\(^{141}\) While the formulation of a treaty in objective terms may normally imply the existence of an intention on the part of the parties to see the regime established to operate *erga tertios*, that still is not enough: it is always necessary to determine the parties’ intention to that effect in the light of other evidence.

\(^{142}\) This problem is indeed felt as regards the treaties which originally established the regime of the Panama Canal. For further detail see Ch. II (2.2.2.2.1), Ch III (3.2.) and Ch. V (3.2.1. and 3.3.4.) below.


\(^{144}\) The International Court of Justice seemed to have given the former meaning to an “accession clause” in the *North Sea Continental Shelf Cases*:

> “In principle, when a number of states, including the one whose conduct is invoked, and those invoking it, have drawn up convention specifically providing for a particular method by which the intention to become bound by the regime of the convention is to be manifested — namely by carrying out of certain prescribed formalities (ratification, accession), it is not lightly to be presumed that a state which has not carried out these formalities, though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way.” *(loc. cit. above (n. 131), pp. 25-26)*

However, the International Court of Justice seems to have adopted a more relaxed approach with respect to questions of form in treaty law-making — at least with regard to the form through which States may express their consent to be bound by its compulsory jurisdiction.
means available to third States. If the former, it would seem impossible to envisage any automatic creation of rights or obligations for third States on the basis of “objective regimes” theory or on any other basis. For this reason, the advocates of the doctrine of “objective regimes” seem to have disregarded the relevance of “accession clause” and have instead relied on the intention of the parties as a determinative factor. It is worth recalling here that a treaty providing for an “International Settlement” is the one which “may or may not contain an accession clause; but in any case it is intended to be binding upon, and in favour of, the whole International Community”. Thus, although stipulations purporting to affect third States coupled with an “accession clause” may well be viewed as evidence of an intention on the part of the parties to establish legal rights or obligations for third States, the lack of an “accession clause” may not in itself be taken as negating the existence of such an intention. Nor may the presence of an “accession clause” be viewed as an evidence of the parties’ intention that third States should derive rights or obligations exclusively through their “accession”. Nevertheless, in any of these situations, a clearly expressed intention of the parties to the contrary will prevail.

2.3. The “General Interest”

The third element is the requirement that the regime established is not made to serve the interest of the party States alone, but rather to serve the interest of the community of States as a whole. Whether or not and how a treaty regime may be considered as serving “general interest” is discussed below. Suffice it to say here that it would be extremely difficult to establish that a treaty regime is actually in the general interest of all States given that States are deeply divided and diverse in their social and political aspirations. A state of affairs may be considered by a group of States (e.g. party States) to be in the interest of the international community, while another group (non-
party States) may view it quite the opposite way. It would always be controversial as to what constitutes “general interest”.

The “general interest” feature, together with the element of “intention of parties”, excludes from the purview of the class of treaties providing for “objective regimes” treaties which are meant to serve the interests of the parties alone and in respect of which there exists no intention to extend the effect of the treaty beyond the actual circle of the parties. This is the position in respect of what McNair referred to as “dispositive or real treaties”: namely, treaties which “create, or transfer, or recognise” the existence of, certain permanent (territorial) rights — e.g. boundary treaties or treaties of cession.149 Waldock, referring to these treaties, states that

“These 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 affects 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.”150

He further states that these treaties differ from, for instance, treaties establishing a regime of demilitarisation, in that their purpose is to regulate the particular interests of the parties, rather than to establish

“a general regime in the general interest. Other States, no doubt, may be affected — even to an important extent — by the conclusion of the treaty, but they are affected by the treaty incidentally, not by direct application of the provisions of the treaty itself. Nor have the parties manifested any intention that other States should have or acquire any right or interest in the treaty, and other States cannot, in consequence, derive from the treaty any legal title for claiming a locus standi with regard to the maintenance or revision of the settlement established by the treaty.”151

As can be seen from the passages cited, Waldock’s argument is that boundary treaties and treaties of cession are not normally meant to produce legal effects for third

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149 Roxburgh cites Huber as classifying this kind of treaties as “executory treaty of cession”. He cites Westlake as referring to this kind of treaties as “transitory or dispositive”. See Roxburgh, op. cit. above (n. 25), pp. 103-105. It must be noted that in recent literature the term “dispositive treaties” is employed to cover a wider range of treaties and not merely limited to treaties which “create, or transfer, or recognise” the existence of, certain permanent (territorial) rights. See International Law Association, op. cit. above (n. 40), pp. 352-355.


151 Ibid.
States by establishing a regime of general rights and obligations in the "general interest" of international community. As such, they would not fall within the purview of his proposed draft Article on treaties providing for "objective regimes". Without any doubt, boundary treaties and treaties of cessions may embody specific stipulations favourable or detrimental for third States. This kind of stipulations would, of course, be governed by the general rules of the law of treaties on the effect of treaties on third States. The question, however, is whether or not they may produce any other kind of effects for third States which also must be regulated by the law of treaties. According to McNair, these treaties "create, or transfer, or recognise the existence of, certain permanent rights" (right in rem), and, as such, are similar to the conveyance of English and American private law", creating rights valid against the whole world and thus constituting another example of the class of "treaties valid erga omnes" in relation to which the pacta tertiis.. principle must not be applied. Nevertheless, this view does not seem to be plausible for the following two reasons.

Firstly, it is not very clear whether international law recognises any erga omnes validity claimed for treaties of cession or boundary treaties in the same manner as is understood for a "conveyance" of municipal law. The relevance of the notion of right in rem in international law is chiefly based on the analogy that writers make with this concept in private law, rather than on any evidence of State practice or judicial precedents. As will be seen, the Vienna Convention on the Law of Treaties (1969) does not recognise any such opposability for treaties of cession or boundary treaties, or, in fact, for any kind of treaties. Nor does the Vienna Convention on Succession of States in

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152 For instance, a treaty between State A and State B by which State A cedes a particular part of its territory to State B may contain an stipulation to the effect that State B grant certain rights to State C; or the same treaty may stipulate that the title to the territory would not be transferred to State B until State E fulfils certain obligation (e.g. pay a large sum of money to State A). In both cases, the treaty purports to establish legal right or obligation, respectively, for States not party thereto.


155 See Ch. II (2.) below.
respect of Treaties concede any such validity for these treaties. Indeed, there exists evidence which undermines any automatic general validity which might be claimed for a treaty of cession. In this regard, the Island of Palmas Arbitration Case furnishes a precedent for the non-existence of any such an ipso facto general validity. In this case it was, inter alia, contended by the United States that as Article 3 of the Treaty of Paris of 1898 between the United States and Spain, by which Spain ceded the Island of Palmas to the United States, must be considered as an affirmation of sovereignty on the part of Spain, and that as the United States communicated that Treaty to Holland and no reservations were made by the latter in respect of that part of the Treaty, Holland was precluded from questioning the sovereignty of the United States over the island. The Arbitrator (Max Huber) rejected this contention by holding that:

"Whilst it is conceivable that a conventional delimitation duly notified to third Powers and left without contestation on their part may have some bearing on an inchoate title not supported by any 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."  

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156 Vienna Convention on Succession of States in Respect of Treaties, 23 August 1978, UN Doc. A/CONF. 80/31 (1978), 17 ILM 1488; AJIL 72 (1978), p. 97. This Convention is not yet in force, see (n.166) below. For more detail see: text which follows and Ch. II (3.4.).

157 Island of Palmas Arbitration Case (the United States / the Netherlands), 2 RIAA 829. For further support of the relativity of title to territory and relative (inter parti) effects of boundary treaties, see: Case Concerning the Frontier Dispute (Burkina Faso / Republic of Mali), ICJ Rep. (1986), p. 554. In this case, Mali contended that "the tripoint Niger-Mali-Burkina Faso cannot be determined by the two Parties without Niger’s agreement, nor can it be determined by the Chamber, which may not affect the rights of a third State not a party to the proceedings." (Ibid., p. 576, para. 44).

The Chamber on this point held that "The 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 of 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 of 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 (PCIJ Rep., Series A, No. 22, p. 13), merely substitutes for the solution stemming directly from their shared intention, the solution arrived at by a Court under the mandate which they have given it. In both instances, the solution only has legal and binding effect as between the States which have accepted it, either directly or as a consequence of having accepted the Court's jurisdiction to decide the case." (Ibid., pp. 577-578, para. 46, emphasis added).
A similar view is advocated in the Arbitration on the *Frontiers Between Colombia and Venezuela*. In this case one of the issue was the effect of the lack of any protest by Venezuela against the Treaty of 1907 between Brazil and Colombia. In this Treaty Colombia had purported to cede to Brazil a territory which was in dispute between Colombia and Venezuela. The Swiss Federal Council, as Arbitrator, held that Venezuela's silence could not be held against her, for, in relation to Venezuela, the Treaty between Brazil and Colombia was "*res inter alios acta*."

Secondly, assuming that international law recognises the notion of rights *in rem* and gives an *erga omnes* effect to treaties of cession and boundary treaties so that third States are legally bound to respect the cession and its attendant legal consequences, it would still be inconceivable to consider the treaty of cession as having directly created obligations for third States. To clarify this, let us suppose that, by a bilateral treaty, State A cedes to State B a part of its territory, e.g. an island. The treaty being executed, State B takes full control of the island. On the basis of the theory of rights *in rem*, (third) States C, D, E .. would become, from the date when the cession was completed, bound to respect the territorial sovereignty of State B over the island. Now, can this ongoing obligation of (third) States C, D, E .. be considered as arising from the treaty of cession? Surely not, for the simple reason that there cannot normally be found in treaties of cession a clause requiring other States to respect the change of sovereignty or other territorial disposition they embody. Their duty proceeds from their original

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159 *Frontiers between Columbia and Venezuela*, 1 RIAA 223, at p. 228. For commentary on this aspect of the case see Schwarzenberger, *op. cit.* above (n. 91), p. 467.

160 McNair trying to give concrete example where the dispositive or real character of this kind of treaties would produce special results, mentions four instances: (1) when one of the party extinguished many of the effects produced by this kind of treaties continue and would not be affected by such an extinction; (2) an outbreak of war between parties does not affect these kind of treaties; (3) Mandates (as a kind of treaty-arrangement having dispositive character) established by the League of Nations survived the dissolution of the League (one of the party to the Mandate Agreement); (4) rights *in rem* acquired by individual under dispositive treaties survive even if the treaties concerned terminated (see McNair's *Law of Treaties*, pp. 256-259). Evidently, in none of these scenarios can there be seen any kind of third party effects directly arising from the supposedly "treaties valid *erga omnes*"; nor any relevance of, or need for, a claim of exception to the *pacta tertiis* rule. In all instances, except the case number 2, the matter somehow concerns the question of succession. As is stated below, the special effect of "dispositive or real treaties" is, to a certain extent, recognised by the Vienna Convention on Succession of States in respect of Treaties. See text which follows.
recognition of sovereignty of A over the island with which it carries the power of A to cede the island to other States (in the given example to B). Thus States C, D, E ... are in fact bound to respect B’s title to the island because of their original recognition of the A’s title to the island, rather than from the nature of the treaty of cession or its intrinsic quality. In addition, as a result of a territorial change third States may be further affected. For instance, in the example given, States C, D, E ... may have to apply respectively different rules regarding nationality, immigration, requirement of visa, etc. to the inhabitants of the island. However, this kind of effect on third States is not relevant to, nor dependent on, the existence of an exception to the *pacta tertiis* principle. As Waldock made clear, the effects of a boundary treaty or a treaty of cession for third States are indirect, consequential and flow from rules of general international law, rather than the treaty involved. As a result, it would be appropriate to exclude boundary treaties and treaties of cession from the scope of the category of treaties in question.

Before going any further, it must be noted here that the special nature and classification of dispositive treaties and rights *in rem* has been given special place in the context of the law relating to the succession of States in relation treaties. Article 11 of the Vienna Convention on Succession of States in respect of Treaties (entitled *boundary regimes*), specifies that a succession of states as such does not affect:

"(a) a boundary established by a treaty; or
(b) obligations and rights established by a treaty and relating to the regime of a boundary."

Similarly Article 12 (entitled "other territorial regimes"), in essence, indicates that a succession of State does not as such affect the territorial rights and obligations relating to the use of any territory established by a treaty for the benefit of any territory of a foreign State or for the benefit of a group of States or all States if such rights and obligations considered as attaching to that territory. According to these articles, a successor State, which is usually a third State with regard to the treaty establishing a boundary regime or other territorial regime, is precluded from invoking the *pacta tertiis* principle. Equally, the rights and obligations established for third States under these regimes would not be affected by a succession of States in respect of the territory concerned.

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161 For more detail see Ch. II (3.4.) below.
162 *Loc. cit.* above (n. 156).
163 Article 12 is fully cited in Ch. II (3.4.) below.
Thus, to this extent the notion of rights in rem, “dispositive or real treaties” and “objective regimes” can be said to have been recognised. The underlying consideration here is that a successor State is not a total stranger to the treaties concerning the territory it succeeds to. Beside, a territory may, or will, be transferred with all the rights and obligations attached to it. In addition, it would be desirable, in the interest of peace and security, to close the possibility of territorial regimes once settled from being re-opened every time a succession of States occurs. However, it must be noted that the Vienna Convention on Succession of State in respect of Treaties has not gained a great deal of support among States, though the status of Articles 11 and 12 as custom is widely supported.

Commenting on this point, the International Law Commission states that

"... if a succession of States occurs in respect of the territory affected by the treaty intended to create an objective regime, the successor State is not properly speaking a 'third State' in relation to the 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 third States without its consent. The rules concerning succession in respect of treaties also come into play. But under these rules there are cases where the treaty intended to establish an objective regime would not be binding on a successor State, unless such a treaty were considered to fall under a special rule to that effect." (See the ILC's Report to the General Assembly, YBILC (1974-II), Part 1, p. 204, para. 30).

The Chairman of the United States' Delegation to the Vienna Conference on Succession of States in respect of Treaties states that

"... the underlying logic for [article 11 and 12] is simple and incontrovertible. A successor state can only acquire as its territorial domain the territory and territorial rights of the prede­cessor." (US Digest (1974), p. 233).

See further Whiteman's Digest, vol. 2, pp. 1007-1008.

Almost 18 years after its conclusion, the Convention has not yet entered into force. As at 31st. December 1995, only fourteen States out of fifteen required for its entry into force have expressed their consent to be bound by the Convention. Almost no Western State has signed the Convention. See: Bowman, M.J., & Harris D.J., Multilateral treaties: index and Current Status (London, Butterworths, 1984), 11th Cumulative Supplement (1995), p. 297 (Treaty No. 737) and Multilateral Treaties Deposited with Secretary General, Status as at 31st. December 1995, UN. Doc. ST/LEG/SER.E/14.

2.4. The "Territorial Jurisdiction"

The fourth element is that the "parties must include amongst their number the State or States having territorial competence with reference to the subject-matter of the treaty or, at least, that State or (those) States must have expressly assented to the provisions (of the treaty) creating the regime". This feature serves two purposes. Firstly, it protects the territorial State against any attempt by others to establish a treaty regime over part of her territory without its participation in the treaty or without having secured her consent. Respect for sovereignty and the territorial rights of independent States being accepted as a fundamental principle of international law under both the Covenant of the League of Nations and the Charter of the United Nations, it goes without saying that a treaty could establish a regime of general rights and obligations for a territory only if the State having sovereignty has expressly consented to such an establishment, most particularly by means of its participation in the treaty. Secondly, it excludes from the purview of the class of treaties under consideration cases in which the territory involved is not subject to the exclusive jurisdiction of one State or a limited number of States. In another words, treaties concerning a territory over which one or more State does not have exclusive territorial jurisdiction would not fall under the classification of treaties considered by Waldock as providing for "objective regimes". Therefore, treaties dealing with areas, such as the high seas, over which no one State has greater competence than any other, will not come within the scope of the classification. For instance, the classification does not cover the Geneva Conventions of 1958 on the regime of High Seas and on Fishing and Conservation of the Living Resources of the High Seas or the recent United Nations Convention on the Law of the Sea 1982, nor does it cover the Nuclear Test-Ban Treaty which concerns areas over which no State or group of States has exclusive territorial competence.

169 Loc. cit. above (n. 130).
171 Loc. cit. above (n.130). As has already been seen, some approaches define the classification more broadly and may view, for instance, the rules established by the Nuclear Test-Ban Treaty as a treaty regime made by the Great Powers in the general interest of the international community and accordingly applicable erga omnes. However, for the purpose of
In this connexion, it may be noted that the status of Antarctica and the Antarctic Treaty is somewhat peculiar. While a number of States (all parties to the Antarctic Treaty 1959) have made territorial claims to part of Antarctica, a large number of States (mostly also parties to the Antarctic Treaty) have rejected such claims. Accordingly, Antarctica, on one view, can be seen as capable of becoming subject to an objective regime and, on another view, not. A similar situation exists with regard to the status of the Turkish Straits and the Montreux Convention. These Straits by definition, as a natural waterway, do not fall within the exclusive jurisdiction of the sole coastal State, Turkey; but they have always been governed by a particular treaty regime in which a special privileged position — a kind of semi-territorial sovereignty — has been recognised for that country. Despite their peculiarity, Waldock treated both of these treaty regimes as prime examples of treaties providing for “objective regimes”.

2.5. Conclusion

Therefore, amongst those who propounded and supported the existence of a special rule which accorded objective, 

\textit{erga omnes}, effects to treaties establishing objective regimes, it was considered that a treaty must possess the following characteristics for it to fall within the scope of that rule. First of all, it had be concerned with the general status of a particular piece of land or maritime territory over which one or more States enjoyed territorial competence or, at least, had made a territorial claim (territorial element). Secondly, the parties to the treaty must have intended to establish a general regime that territory involving legal rights and obligations for third States similar to those of the parties themselves (element of intention of parties). Thirdly, such a regime must have been made, and must be, in the general interest of the international community or

\begin{footnotes}
\footnotetext[172]{See Ch. V (4.1.) below.}
\footnotetext[173]{See Ch. III (n. 65) below.}
\footnotetext[174]{For more detail see Ch. III (3.1.) below.}
\footnotetext[175]{\textit{Waldock's 3rd. Rep. on Treaties}, pp. 29-30. Although, most of the treaties considered as creating “objective regimes” are multilateral, they are not necessarily required to have such a feature. Thus frequent reference has been made to the regime of the Panama Canal as an “objective regime” despite the fact that the two treaties originally establishing it were bilateral; one between the and Great Britain (1901) and the other between the United States and Panama (1903). See Ch. V (3.1.1. and 3.1.2.) below.}
\end{footnotes}
at least of the States of a particular region as a whole (general interest element). Finally, the State, or States, having territorial competence over the territory concerned must have been present among the parties, or must have expressly consented to the arrangement (territorial jurisdiction element).

Treaties which possess these characteristics were said to benefits from a rule which constituted an exception to the *pacta tertiis* principle. The following were considered to constitute examples of such treaties: First, treaties creating international regimes for the use of a land or maritime territory, such as those establishing a regime of common user for a particular land or maritime territory under the sovereignty of one or more States (current examples of which are treaties governing such international rivers as the Rhine, Danube, and Oder, and such waterways as the Suez and Panama Canals, the Sounds and Belts, and the Dardanelles and Bosphorus, as well as the Antarctic Treaty 1959); secondly, treaties attaching a special political status to a particular territory or locality for in the general interest, such as a status of permanent neutrality or demilitarisation, (the examples of which are the regime of permanent neutrality of Switzerland (1815), Laos (1962) and Cambodia (1991) or the status of mandate or trusteeship established in pursuance of the Covenant of the League of Nations (1919) and the Charter of the United Nations, respectively.

As can be seen from the above (Section 1), among those who support the doctrine, there is already evident disagreement as to the exact nature of the legal mechanism which is said to serve to cause *erga omnes* effects to arise. These differences will be drawn out and explored in later chapters, especially in Chapter IV where an inquiry is made into the accuracy or the validity of various theories proposed in support of the existence a special rule which allows treaties providing for "objective regimes" to produce legal effects for or against third States — though there are particular observations on the question in Chapter II and III.

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176 See Ch. V (2. and 3.) below.
177 See Ch. V (4.) below.
178 See Ch. V (1.4.) below.
Chapter II

International Law Rules on the Effects of Treaties on Third States

The purpose of this Chapter is to identify and to describe the rules governing the effect of treaties on third States. Since the rules embodied in the Convention on the Law of Treaties, done at Vienna on 23 May 1969, are rightly considered, in most aspects, to be codification of the customary international law existing both at the time of the conclusion of that treaty and at the present time, the focus is bound to be on the rules as formulated in that Convention. Therefore, an effort will be made to describe the relevant rules of the Vienna Convention with reference to the interpretation placed upon them by various authorities involved in its conclusion as well as writers. The ultimate aim, however, will be to clarify whether the law of treaties, as codified by the Vienna

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2 The International Court of Justice in the Legal Consequences for States of the Continued Presence of South-Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), despite the rule concerning non-retroactivity effects of the Convention; and before its entry into force, held that: “The rules laid down by the Vienna Convention ... concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) in many respect be considered as codification of existing customary law on the subject.” (ICJ Rep. (1971), p. 47).

3 These includes the views expressed by the International Law Commission (ILC), which was responsible for the preparation of the Drafts of the Convention, and its members, the views expressed by the representative of States in the Sixth Committee of the General Assembly of the United Nations in early stage (upon the ILC’s proposed Draft Articles) and in the Vienna Conference where the Convention was finally adopted.
Convention 1969, recognises the *erga omnes* effect which is often claimed for the category of treaties providing for "objective regimes" and if not, whether it excludes the possibility that such effects may arise. These questions are dealt with (in the subsequent Chapter) after the content, and the scope, of the Vienna Convention rules on the effects of treaties on third States are clarified.

**The Vienna Convention (1969) and the Question of the Legal Effects of Treaties on Third States**

An examination of the rules embodied in the Vienna Convention on the legal effects of treaties on third States cannot be exhaustive without a clarification of the meaning attributed by the Convention to the term "third State". Accordingly, an effort will be made here to clarify this notion, which in turn should be beneficial for an understanding of the rules on the legal effects of treaties on third State, as well as the theory of treaties providing for "objective regimes".

1. The notion of "third State"

The term "third State" is generally used to describe a State which is not a party to a transaction or an agreement to which two or more other States are parties, in the same way that the expressions "third person" or "third party" are used in municipal contract law. Obviously the term is not in itself a very satisfactory one. It is strictly appropriate only for the case of a bilateral treaty; whereas the question of the nature of the position of States which are not parties to a particular treaty arises not just in the case of bilateral treaties, but also in relation to treaties to which three or more States are parties. However, it has traditionally been employed to describe the position of a State which is not a party to a treaty, whatever be the number of the parties thereto.

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4 In the literature, both prior to and even following the adoption of the Vienna Convention (1969), there has been confusion as regards the terms to be used to distinguish between the different status that States may have in relation to a treaty. The reason is largely, though not exclusively, that each convention uses its own vocabulary. For the purpose of clarity, the terms defined by Article 2 (a) of the Vienna Convention will be used here.

5 For a detailed consideration of this notion from a different perspective see Chinkin, C., *Third Parties in International Law* (Oxford, Clarendon Press, 1993), pp. 7 *et seq.*

It is sometimes suggested that, in relation to a treaty, a State may be either in the position of a "party" or not, as if there can be no intermediate status. In other words, as regards a treaty, there can only be States which are "parties" and States which are not — namely "third States". This is what appears at first glance from the Vienna Convention definition's of the positions that a State may enjoy with respect to a treaty. According to Article 26 of the Convention, "Every treaty in force is binding upon the parties to it ..." A "party" is defined by Article 2 (1) (g) as a "State which has expressed its consent to be bound and for which the treaty is in force". On the other hand, in Article 2 (1) (h), a "third State" is defined as a "State not a party to the treaty". Reading these provisions together, one may, therefore, think that, under the Convention, the position of a State in relation to a treaty may be either that of a "party" or that of a "third State". However, the Convention further characterises certain intermediate positions.

From the time a treaty is negotiated to the time it enters into force, a State could stand in a wide range of positions in relation to it. At one extreme, it could have the position of a total stranger: the position of a State which has not taken part in any of the stages of the conclusion of a treaty nor is in any way entitled to do so. At the other extreme, it could enjoy the position of a State which has "expressed its consent to be bound by a treaty and for which the treaty is in force" — namely a "party" State. In between these two extremes, there are certain intermediate positions to which the Vienna Convention attribute certain rights and obligations. These positions are "States entitled to become parties", "negotiating States" and "contracting States".

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8 The reason for the existence of these intermediate positions is the fact that a treaty is born through many distinct stages. Indeed, the process by which States associate themselves with a treaty or, in other words, the process by which a treaty is born is complex and often prolonged. There is sometimes the stage of the establishment of the authority of the representatives of the negotiating State or States concerned to perform the necessary formal acts involved in the drawing-up of the text of a treaty Then there is the stage of adoption whereby the form and content of the proposed treaty are settled. Then there is stages of authentication and expression of consent to be bound (by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession. Finally, there is the stage of entry into force of the treaty. See Articles 2-17 of the Vienna Convention.
1.1. "States entitled to become parties"

The position of "States entitled to become parties" is not defined by the Vienna Convention, probably because of its self-evident nature. It refers to the position of a State which, for one or more of a variety of reasons, is entitled to become a party to a treaty. Normally, these States are those which have participated in the negotiation of a treaty. A total stranger State may also enjoy this position if the treaty concerned so provides, or if it is otherwise established that the negotiating States (prior to entry into force of the treaty) or the parties (subsequently to entry into force) have agreed that such a State could become a party by means of accession. In principle, a State entitled to become a party to a treaty would remain a third State with regard to that treaty unless and until it subsequently becomes a "party". In addition to the distinct right of accession, a "State entitled to become a party" is entitled to be notified of certain events, such as the entry into force of a treaty.

1.2. "Negotiating States"

Unlike the position of "States entitled to become parties", the position of a "negotiating State" is defined by the Vienna Convention. Article 2 (1) (e) defines a "negotiating State" as "a State which took part in the drawing up and adoption of the text of the treaty". A "negotiating State" would also remain a third State with regard to the treaty, the text of which it has adopted, unless and until it subsequently becomes a party thereto. However, a "negotiating State" enjoys more rights and responsibilities than a "State entitled to become party". Article 24 (4) of the Vienna Convention specifies that:

"the provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner of date of the entry into force, reservations, the functions of the depository and other matters arising

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9 Article 15. See further the case of Certain German Interests in Polish Upper Silesia (Germany / Poland), PCIJ Rep., Ser. A, No. 7, pp. 28-29.
10 Article 77 (1) (b) (e) (f).
11 Article 77 (1) (f).
12 The inclusion of this rule resulted from an amendment proposed by the United Kingdom delegation at the Vienna Conference, which in turn was taken from the Fitzmaurice’s proposal (First Report on the Law of Treaties, YBILC (1956-II), pp. 104-128, proposed draft Articles 30 (2) and 42). The acceptance of the rule in question by the overwhelming majority of States participating in the Vienna Conference is a good evidence with regard to the nature of the rule as a general rule of treaty law.
necessarily before the entry into force of the treaty apply from the time of adoption of
the text."\(^\text{13}\)

Thus, the provisions of a treaty which, for instance, oblige the negotiating States
to sign or to ratify by a certain date, or stipulate that a reservation must not be made to
certain provisions of the treaty, or indicate what States are entitled to become a party to
the treaty by means of accession, must be followed immediately after the adoption of
the text. A "negotiating State" has to observe such kind of provisions even if it has not
expressed its consent to be bound by the treaty. A non-compliance of the provisions
covered by Article 24 (4) would not, however, constitute a breach of the terms of the
treaty, which is not yet in force.\(^\text{14}\) A "negotiating State" which fails to ratify by a given
date, or formulate a prohibited reservation, would not incur State responsibility. It just
fails to satisfy a condition: its ratification, carried out not in due time, would be invalid.
In addition, "negotiating States" are collectively entitled, before the treaty enters into
force, to determine what other State or States may establish their consent to be bound
by means of accession.\(^\text{15}\) Lastly, like "States entitled to become parties", "negotiating

\(^{13}\) Emphasis added. Two theoretical explanations are given as to the legal basis upon which
this rule rests. Firstly, Waldock — and many others — have suggested that
"... the source of the legal validity of the final clauses lay not in the treaty itself, but in the
(collective) consent given when the text of the treaty was adopted." (See UNCLT Off. Rec.,
26th Meeting of the Committee of the Whole, p. 140, para. 16).

Sinclair, putting the same proposition in other words, offers that the prior application of the
final clauses rests on the "tacit assumption of the negotiating States that these provisions
will be applicable from that date". Sinclair, I.M., The Vienna Convention on the Law of
Treaties (Manchester, Manchester UP, 2nd. edn. 1984) p. 99. Reuter, inclining to this ex­
planation, states that the (presumed) consent relates only to "the procedure, without com­
mitting the States on the substance." (Reuter, P., The Operational and Normative aspects of
have suggested that "the basis of the rule was to be found in international custom" (the
Chairman of the Drafting Committee, 26th Meeting of the Committee of Whole, UNCLT
Off. Rec., p. 140, para. 17). Whichever be considered as the basis of the rule, it is certain
that the provisions regarding the procedural matters provided for in a proposed treaty bind
any State which has taken part in its adoption. This rule has also been supported by other
authorities: for example, see: Harvard's Draft Convention on the Law of Treaties, Com­
mentary on Article 9; McNair's Law of Treaties, p. 203.

\(^{14}\) Such a non-compliance may at most deprive the State which, for instance, chosen not to ac­
cede or to ratify, the right to become a party. In this regard, See Fitzmaurice, loc. cit. above
(n. 12), proposed draft Article 42 (5), p. 116.

\(^{15}\) Article 15 of the Vienna Convention. See further the debate in the International Law Com­
mision and General Assembly of the United Nations on GA Res. 1903 (XVIII) on Partici­
pation in General Multilateral Treaties Concluded under the auspices of the League of
Nations (item 70), UN Doc. A/5602.
States" are entitled to be informed of the key events relating to the treaty.\textsuperscript{16} It is worth noting here that the Commission in its draft Article proposed that a State which "has agreed to enter into negotiation ...." was also obliged to refrain from acts tending to frustrate the object of a proposed treaty".\textsuperscript{17} But this was rejected by the States participating in the Vienna Conference.\textsuperscript{18}

1.3. "Contracting States"

A "contracting States" is defined by Article 2 (1) (f) of the Vienna Convention as a "State which has consented to be bound by the treaty, whether or not the treaty has entered into force". Evidently, this definition covers two distinct positions: one relating to the status of a State which has expressed its consent to be bound and for which the treaty is not yet in force and the other relating to a similar position when the treaty is in force. A State in the former position would remain a third State with regard to the treaty to which it has expressed its consent to be bound, for the reason that the treaty is not yet in force. A State in the latter position, however, qualifies as a "party", because the treaty is in force in its respect.

Leaving aside this latter meaning, a "contracting States", during the period awaiting the entry into force of the treaty, carries those rights and obligations mentioned for a State in the position of a "negotiating States". Additionally, a State in the position of a "contracting States" enjoys certain further rights and obligations. Firstly, on the basis of Article 40 (2) of the Vienna Convention, a State in the position of a "contracting States" is entitled to participate in any decision-making on the amendment of a multilateral treaty. Secondly, according to the rule in Article 18 of the Convention\textsuperscript{19} a

\textsuperscript{16} Article 77 (1) (b) (e) (f).
\textsuperscript{17} ILC's Draft Articles on the Law of Treaties (1966), proposed draft Article 15 (a).
\textsuperscript{19} Article 18 reads:
"a State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
(a) it has signed the treaty or has exchanged instrument 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;
contracting State is obliged "to refrain from acts which would defeat the object and purpose of a treaty". What is the basis of the obligation, its nature and the nature of acts which may defeat the object and purpose of a treaty have been controversial.  

"Good faith" is generally invoked as the basis of the obligation; some authorities have doubted if non-compliance with this obligation produced any legal results. The majority of writers, however, have viewed the obligation as "legal".

A State which enjoys the position of a "State entitled to become party", a "negotiating State" or a "contracting State", but no more, is not a party and, therefore, is a "third State". As such, it does not normally have rights or duties under the treaty,

(b) it has expressed its 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."

As can be seen, a State that has signed or exchanged instrument of the treaty subject to ratification is also under this obligation. In a way, a position of 'signatory State' may also be distinguished here. What distinguishes a "signatory State" from a "negotiating" or "contracting" State is the act of the "signature" which takes place, one step further, after the "adoption" of the text and one step before the completion of the stage of ratification, acceptance, ... etc. if so is required. Of course, when signature is the means of expression of consent to be bound by a treaty, then a 'signatory State' would exactly be in the same position as a "contracting State".

Lauterpacht, H., First Report on the law of treaties, YBILC (1953-II), pp. 90-162, at p. 108; Fitzmaurice, loc. cit. above (n. 12), proposed draft Article 30 (c) and 33 (2); Waldock, H., First Report on the Law of Treaties, YBILC (1962-II), pp. 27-83, proposed draft Article 9 (2)(c). See also authorities quoted in n. 18 above.

McDade (loc. cit. above (n. 18), p. 18) cites the following as having advocated this point of view: the authors of the Harvard Draft Convention on the Law of Treaties (loc. cit. p. 783); Kelsen, H., Principles of International Law (NY, 2nd edn., ed. by Tuker, 1962), pp. 466-468; McNair’s Law of Treaties, p. 204; Morvay, loc. cit. above (n. 18), pp. 451-462.

20See: Holloway, K., Modern Trends in Treaty Law (London, Stevens, 1967) pp. 56-60; O’Connell, D.P., International law (London, Stevens, 2nd. edn., 1970), pp. 222-224; Cheng, B., General Principle of International Law as Applied by International Courts and Tribunals (Cambridge, Grotius, 1987), pp. 111-112 (n. 28); Turner, R.F., Legal Implication of deferring Ratification of Salt II, Virgin. JIL 21 (1981), p. 747; and Hassan, loc. cit. above (n. 18), p. 444. Lauterpacht, Waldock and Fitzmaurice can also be numbered amongst this group. While agreeing that the "good faith" is the basis of the obligation, these authorities argued that States are legally bound to "do nothing which may affect in any way the provisions of the treaty before its entering into force". (Report by the Attorney General and Queens Advocate cited by McNair in his Law of Treaties, pp. 200-201). More recent efforts to provide a satisfactory explanation justify the obligation by referring to the "legitimate expectations", which all States signatories have with a view to the future entry into force of a treaty, non-fulfilment of which is incompatible with good faith. See McDade, loc. cit. above (n. 18), p. 1.

21 The content of the draft Article 1 (definition of a third state) proposed by Fitzmaurice would support this conclusion. This proposed draft Article stipulated that:

"1. For the purposes of the present articles, the term “third State” in relation to any treaty,
because, firstly, a "treaty in force is binding upon the parties to it" (Article 26) and, secondly, "a treaty does not create either obligations or rights for a third State without its consent" (Article 34). However, as has been seen, the Convention attributes certain rights and duties to these (third) States without providing for exceptions in Article 34. This may look contradictory to the general rules in Article 34. The truth, however, is that there is neither a contradiction, nor any exception involved in the matter. Firstly, the general rule in Article 34 does not necessarily mean that no rights or obligations can exist for a State in relation to, if not under, a treaty to which it is not a party. The rule only specifies that a treaty could not produce rights and obligations for a third State without its consent. It does not preclude the possibility of third States having certain rights or obligations in relation to a treaty to which they are not party. For instance, "States entitled to become parties", while they do not enjoy any right or obligation under a treaty, are entitled to a right in relation thereto, namely a right to become a party. Another example is the obligation envisaged in Article 18 which obviously does not proceed from the treaty itself. Secondly, as is suggested by some writers, the rights and duties enumerated for States in the position of "States entitled to become parties", "negotiating States" and "contracting States", are not of a "substantive nature". In other

denotes any state not actually a party to that 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." (Fitzmaurice's 5th Rep., proposed draft Article 1).

For detailed consideration of this principle see Sec. 2. of this chapter.

In an Article entitled "The Operational and Normative aspects of Treaties" (loc. cit. above (n. 13), pp. 124-125), Reuter suggests that a treaty "... on the one hand, [it] 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."

Clauses of treaties can, therefore, be categorised, he suggests, into two groups: those which "contain provisions pertaining to the mechanism of the legal transaction", which may be termed its "operational rules", and those which "contain rules of content" which may otherwise be called "rules of substantive law." The former category are provisions concerned with what may in broadest sense be called, "conclusion of the treaty ... [and] deal mainly with: applicability to States, various stages of conclusion, instruments, depository, date of entry into force, registration, amendment procedure, period of application, withdrawal". The latter category consists of the rest of the treaty provisions: clauses which are aimed at securing the purposes which the negotiating States have in concluding the treaty: e.g., the transfer of a territory from one State to another, the delimitation or demarcation of boundary between two or more neighbouring States, etc. See Reuter, ibid. See further: Fitzmaurice, loc. cit. above (n. 12), Commentary on proposed draft Article 14; McNair's Law of Treaties, p. 203.
words, they are not constituent elements of the goal that the "negotiating States" have in concluding a treaty — namely disposition of certain rights and obligations. They are rather procedural rights and obligations regulating the mechanism through which these States can achieve their aims by means of treaty and as such they must not be viewed as falling within the purview of the rule in Article 34 which seems to talk of the inability of treaties to create *substantive* rights or obligations for a third State without its consent. Finally, although, strictly speaking, States in the position of "States entitled to become parties", "negotiating States" and "contracting States" (for which the treaty is not in force) by their definition have to be treated as "third States", their position must be distinguished from "total stranger" third States. A "total stranger" third State does not enjoy any right or obligation whatsoever under or in relation to a treaty, while the third States in the former sense enjoys certain rights and obligations in relation to, if not under, a treaty.

From what has been said above, we may conclude that, firstly, when considering the legal effect of treaties on third States, it is essential to bear in mind that, generally speaking, it is true that, in relation to a treaty, a State may be either in the position of a "party" or not. However, there exist certain intermediate positions of: "State entitled to become party", "negotiating State" and "contracting State". A State in these positions remains a third State (*lato sensu*) though its position would be different from the position of a "total stranger" third State (third States *stricto sensu*). Secondly, it is appropriate to suggest that in accordance with the rules of treaty law relating to "treaty-making procedure" — or for other reasons — rights and duties which are mainly procedural in nature may result for States — which have at least participated in the adoption of the text of a treaty — which States technically remain "third States" until they be qualified as "parties", whether or not the treaty is in force for other (party) States. Despite the facts that these rights or duties are not of a "substantive nature" and that they do not

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26 For possible exceptions see Fitzmaurice's postulated general duty to respect valid treaty discussed in Ch. IV (2.2.2) below and Article 27 of Part 1 of the International Law Commission's Draft on State Responsibility cited in p. 126 below.

27 For instance, in the case of the rule in Article 24 (4), for the reason that the "negotiating States" are assumed to have agreed that the provisions concerning the authentication, reservations, entry into force etc. shall be effective from the time of adoption of the text of the treaty.
derive from the treaty itself, the situation may still be viewed as a matter of the legal effects arising for third States in relation to, if not under, treaties.

2. The Vienna Convention (1969) rules on “Treaties and Third States”: Articles 34-38

As has been seen, certain legal effects may arise from a treaty for States which are technically in the position of “third States”. These legal effects mainly arise from the general rules of treaty law relating to treaty-making procedure, rather than from the treaty itself. Moreover, such effects relate mainly to “procedural” matters and do not give rise to “substantive” rights and obligations. Now we consider the question what are the rules of the Vienna Convention on the legal effects of a substantive nature that a treaty (in force) may produce for third States. The aim here is not as such to describe the rules of the Vienna Convention. It is rather to clarify the scope and the content of those rules, in order to make it easier at a later stage to clarify whether or not they may explain and provide for the legal effects which are sometimes attributed to those treaties which are claimed to provide for “objective regimes”.

The rules governing the substantive effects which treaties may have on third States are contained in Section 4 of Part III of the Vienna Convention, entitled “treaties and third States” (Articles 34-38). These rules will be examined under three different headings: (1) General rule regarding third States (Article 34); (2) Conditions in which treaty rights or obligations may be created (modified or terminated) for a third State (Articles 35-37); and (3) Limits and qualifications relating to the application of the rules in Articles 34-37 (Articles 38, 73 and 75 and the Preamble).

Before starting to explain the above rules, two points need to be noted. The first of these is that Articles 34 to 38 constitute a group of interdependent articles covering the topic of the effect of treaties in creating obligations or rights for third States. Therefore, in considering each of these articles, it is necessary to keep in mind the contents of

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28 It should be noted that, because of the lack of judicial and State practice relating to these provisions of the Convention, it is hardly possible to do more than to restate the relevant provisions and to interpret them by reference to the text of the Vienna Convention and its preparatory works.
the five articles as a whole. The second point is that the Convention imposes no restrictions on the freedom of States to conclude treaties which may, either favourably or detrimentally, touch upon the political, economic or security interests of third States.

Nor does it (subject to the rules of *jus cogens*) restrict the freedom of States to conclude treaties which, in themselves or through their performance, would affect the legal rights of third States — for example, a treaty whose conclusion or performance would involve the parties in breaches of their obligations, treaty or otherwise, to third States.

However, these types of effects on third States are not within the scope of the Vienna

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29 See Article 31 (1) of the Vienna Convention, which requires provisions of a treaty to be interpreted “in their context”.

30 For example, military alliances, which may be regarded by potential adversary States as being detrimental to their security. In this type of case, third States can react by political means (diplomatic channels), but they have no legal instrument at their disposal to undermine the validity of the treaty. Schweisfurth refers to the North Atlantic Treaty (34 UNTS 243; UKTS 56 (1949), Cmnd. 7789) and the Western European Union Treaty as example of treaties having detrimental effect on the political and security of interests of the former Soviet Union. He indicates that “it is quite natural that the [former] Soviet Union cannot ... "remain indifferent" to these treaties and their applications. Thus the Soviet Union by a declaration to the Turkish Government of November 11, 1951 tried to discourage Turkey from joining the North Atlantic Treaty; and just recently, ... to the Government of the Federal Republic of Germany, the Soviet Union pointed to the ‘negative consequences’ which would follow if the Federal Republic made use of the modification of Annex III to Protocol No. III of the Western European Union Treaty, i.e., build up its own ‘long-range missiles and guided missiles’ ... These reactions of Soviet Union are purely political in their nature and thus demonstrate that a third State can only use political means but not legal instruments in case the treaty violates the mere interests of the third State.” (Schweisfurth, T., *International Treaties and Third States*, ZAÖRV 45 (1985), pp. 653-673, at p. 656).

31 See: Roxburgh, *op. cit.* above Ch. I (n. 25), pp. 31-32; Fitzmaurice’s 5th Rep., Commentary on proposed draft Article 16, pp. 94-96.

32 It must be noted that a rule recently adopted by International Law Commission in its draft Articles on State Responsibility (draft Article 27) seems indirectly to restrict the freedom of States to enter into treaty relations. This draft Article stipulates that:

“Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act, carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.”

The International Law Commission has specifically recognised the possibility of a treaty itself being a form of “aid or assistance”. Accordingly, a treaty between two or more States the subject-matter of which is the aid or assistance by one, or more, party to one, or more, another party for the commission of an internationally wrongful act, itself constitutes an “internationally wrongful act” which as such may not lawfully be executed or be relied on by any of the parties before an international tribunal, though, it does not declare such a treaty null and void. For the text of the draft Article and International Law Commission Commentary see: YBILC (1978-II), Part 2, pp. 99-105. See further Sec. 3.4. below.
Convention's rules on "treaties and third States", which are intended to cover solely the question how a treaty may create legal rights and obligations for States not party to them. It is only this aspect of the effect of treaties on third States which will be examined here.

2.1. General rule regarding third States: Article 34

"A treaty does not create either obligations or rights for a third State without its consent."

2.1.1. The principle of the relative effect of treaties and its negative implication: the principle of pacta tertiis nec nocent nec prosunt

In the doctrine of international law, the rule that treaties, in principle, neither impose obligations nor confer rights upon third States, is generally formulated in the well-known Roman private law maxim pacta tertiis nec nocent nec prosunt. As McNair submits, "both legal principle and common sense are in favour of the rule pacta tertiis ..., because as regards States which are not parties ... a treaty is res inter alios acta". The rule is reiterated many times by the Permanent Court of International Justice and its successor, the International Court of Justice, by various international arbitral tribunals and by almost all international law jurists. There is abundant evidence

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33 McNair's Law of Treaties, p. 309.
35 Acquisition of Polish Nationality, 1 RIAA 401, at pp. 412-413; Frontiers between Columbia and Venezuela, loc. cit. above Ch. I (n. 159), p. 262; The Pablo Najera, 5 RIAA 466, at p. 471; Island of Palmas Case, loc. cit. above Ch. I (n. 157), p. 843; The Forests of Central Rhodope, 3 RIAA 1405, at pp. 1407-1417.
36 Roxburgh, summarising the views of publicists up until 1917, acknowledges that "all writers on International Law are agreed that third States cannot, as a general rule, incur obligations under a treaty, but they are not in agreement as to the acquisition of rights." (See
confirming the status of the rule *pacta tertiis* .. as part of customary international law and it would not serve much use to list it all here — one may safely say that this is one of the most overwhelmingly accepted principle within the law of treaties. This rule may, from another perspective, be viewed as the negative aspect or the corollary of the principle of the relative effect of treaties\(^37\): treaties legally bind the parties to them (positive aspect) and do not bind or legally affect, under treaty law or *qua* treaties, non-parties (negative aspect).\(^38\)

The Vienna Convention appears to have embodied these concepts in two ways: first, as a positive statement, contained in Article 26, according to which “every treaty in force is binding upon the parties to it ...”, a party being “a State which has consented to be bound by the treaty and for which the treaty is in force” (Article 2 (1) (g)); and, secondly, as a negative proposition, contained in Article 34, cited above.\(^39\) Consequently, it may be suggested that the normal way for a treaty to produce legal effects for a State is through its consent to be bound thereby, which is normally, but need not necessarily be, manifested in practice by a formal act,\(^40\) being either one of the means

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\(^38\) For a novel account of the *pacta tertiis* .. principle, see the judgment of the Chamber formed to deal with the *Frontier Dispute* case between Burkina Faso and Mali. The relevant passage cited in Ch. I (n. 157) above.

\(^39\) Rozakis, *loc. cit.* above (n. 36), p. 1. Reuter referring to the principles formulated in Articles 26 and 34 of the Vienna Convention suggests that these principles are “obvious to the point of being tautological, or rather they are another expression of the definition of a treaty.” Reuter, *op. cit.* above (n. 36), p. 101.

\(^40\) Namely, by signature (Article 12 (1)(a)(b)), exchange of instruments constituting a treaty (Article 13 (a)(b)), ratification, acceptance, approval (Article 14 (1)(a)(b)), accession (Article 15 (a)(b)), or by any other means if so agreed” (Article 11).
agreed upon, in the treaty or elsewhere by which a State might establish its consent to be bound by the treaty concerned, or, exceptionally, by a means not so agreed to, but permitted, either by acquiescence of the (other) negotiating States or by a rule of law.\textsuperscript{41} Once a State becomes a “party” to a treaty, it enjoys all the rights and obligations arising from the treaty. It also enjoys all the rights and obligations which the rules of treaty law recognise for a “party” State. Articles 34-37 postulate, however, that there is an exceptional way through which specific treaty rights and obligations may be created for a third State, even though it does not formally participate in the treaty and even though it still retains the status of third State in relation to the treaty.\textsuperscript{42} Here again this result is generally achieved through the channel of the third State’s consent, which, moreover, in the case of obligations, must be expressed in \textit{writing}. In the course of this study, an effort will be made to clarify this exceptional mechanism through which treaty rights and obligations may be established for third States.

Before examining this mechanism, two points need to be clarified. The first point relates to the actual wording of the general rule in Article 34; the second point concerns the legal basis and justification of that general rule in international law.

2.1.2. The wording of the general rule of Article 34

Reading the article in isolation may lead to some misunderstanding, mainly because of the proviso “without its consent”. \textit{A contrario} reading of the article may

\textsuperscript{41} This is, of course, not envisaged by the Vienna Convention which is intended to govern treaties “concluded between States in written form”. However, the Convention (in Article 3) expressly safeguards the possibility, the existence and the validly, of treaties being concluded between States not in “written form”. For the validity of informal agreements see \textit{Legal Status of Eastern Greenland Case} (PCIJ Rep., Ser. A/B, No. 53, pp. 69-73) where international binding effect was given to the oral reply made by the Minister of Foreign Affairs (M. Ihlm) on behalf of Norway. See further: \textit{Aegean Sea Continental Shelf Case, loc. cit. above} (n. 2), p. 39; \textit{Interpretation of the Agreement of 25 March 1951 between the WHO and EGYPT, loc. cit. above} (n. 2), p. 73, especially see Judge Ruda (Sep. Op.), \textit{ibid.}, pp. 123 and 125.

\textsuperscript{42} What is the difference between the position of a “party” and a third State affected through the mechanism envisaged by Articles 35-37 is fully explored in Sec. 2.2. below. Suffice it to say here that a third State affected will become bound by, or entitled to, the specific (substantive) \textit{obligations or rights} established for it under a treaty. While it may have a saying with regard to the modification or termination of such obligations or rights, it will not have any right with regard to the modification or termination of the provisions of the treaty irrelevant to her obligations or rights; nor the modification or termination of the treaty as whole. For further detail see Sec. 2.2.3. below.
suggest that the mere consent of a third State to the treaty would be enough for the emergence of rights or obligations for that State. However, this is not a necessary interpretation and, indeed, is not the correct one. As we will see in detail, there are other conditions, such as an intention on the part of the States parties to impose obligations or to confer rights on the third State in question, which need to be met for such an event to occur. The phrase "without its consent" has, in fact, been inserted into the article to indicate the interrelation of the rule in Article 34 with the subsequent articles.\footnote{Because of such a misgiving, the Tanzanian delegation introduced an amendment at the Vienna Conference (UNCLT, Doc. A/CONF.39/C.1/L.221) proposing deletion of the words "without its consent" at the end of the draft Article and adding at the beginning of the Article a reference to Articles 35, 36 and 38 as containing exceptions to the principle pacta tertiis ... This proposal was rejected by the Drafting Committee. UNCLT Off. Rec., First Session, 74th meeting of the Committee of the Whole, p. 443.} The proviso may also imply that a treaty may confer rights or impose obligations on a third State only when and if it has expressed its consent. While this is surely true in the case of obligations, there is doctrinal disagreement as regards the case of rights. As we will see in more detail, a large number of the members of the Commission were of the opinion that, when the parties to a treaty intend that a provision shall create an actual right in favour of a third State, there is nothing in international law to prevent that intention having such an effect by itself and without more (stipulation pour autrui). Consequently, the general rule of Article 34 must not be read in isolation; nor should it be interpreted as prejudging this doctrinal position. In view of the above considerations, the rule in Article 34 can be regarded as establishing a presumption,\footnote{Sinclair, op. cit. above (n. 13), p. 101; American Law Institute, op. cit. above Ch. I (n. 167), pp. 194-196.} in the sense that a treaty cannot be said to create rights or obligations for third States, unless, in accordance with the provisions of Articles 35 to 38, it is proven otherwise.

2.1.3. The basis of the general rule of Article 34

Although the rule that "a treaty does not create either obligations or rights for a third State without its consent" is technically taken from, or at least inspired by, the municipal law of contract and the principle pacta tertiis ..., its justification does not simply rest on that principle. The underlying considerations of the rules of international law are totally different as a result of the fact that international society does not have, and has not ever had, a supra-national body similar to that of a government on the
national level. In the international legal system, the equality and independence of States have long been considered as the most fundamental principles. The rule in Article 34 is, indeed, one of the most important facets of these principles, preventing the enforcement of rules and decisions agreed upon by two or more States against a State which has no part in such decision-making. As suggested by some eminent writers, the rule is "the bulwark of the independence and equality of States". The International Law Commission, in its commentary on Draft Article 30 of its final Draft Articles (1966), expresses precisely this important point on the nature of the general rule which later became Article 34. It stated that

"the rule underlying the present article appears originally to have been derived from Roman law in the form of the well-known maxim pacta tertiis ... In international law, however, the justification for the rule does not rest simply on this general concept of the law of contract but on the sovereignty and independence of States." The position taken by the majority of the States participating in the Vienna Conference seems to be in line with the above argumentation, as almost all the delegates expressed their satisfaction with the formula suggested by the Commission. Writers also appear to have unanimously agreed with the fact that the principle of the sovereignty of States, as formulated in Article 2 (1) of the United Nations Charter, is the actual basis of the pacta tertiis rule in international law.

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45 Indeed, this has rightly been considered as the most fundamental principle upon which the present international legal system is constructed, developed and continues to exist. See: Article 2 (1) of the Charter of the United Nations (1 UNTS 16; UKTS 67 (1946), Cmd. 7015); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations 1970 (GA Res. 2625 (XXV), 24 October 1970); Article I of the Declaration on Principles Guiding Relations between States Participating in the Conference on Security and Co-operation in Europe, 1 August 1975, 14 ILM 1293. For a commentary see Schweisfurth, loc. cit. above (n. 30), p. 653.


47 ILC’s Draft Articles on the Law of Treaties (1966), para. 1 of Commentary on Draft Article 30. Fitzmaurice in his proposed draft Article 3, entitled “pacta tertiis nec nocent nec profert”, also noted this point. The draft article reads:

"1. By virtue of the principles pacta tertiis nec nocent nec profert 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 ..." (See Fitzmaurice’s 5th. Rep., proposed draft Article 3).

48 See authorities cited in n. 44-45 above. See also Cahier, P., Le problème des effects des traités a l’égard des Etaté tiers, RdC 143 (1974-III), p. 589, at p. 609; Elias, op. cit. above
2.2. Conditions in which treaty rights or obligations may be created (modified or terminated) for a third State: Articles 35-37

Once it was envisaged that a treaty might create rights and obligations for a third State without its becoming a party thereto, but subject to its consent, the next step was to determine the mechanism through which that result could be achieved. In particular, the form in which the consent of the third State might be manifested was a matter of vital concern. Articles 35 and 36 deal with the question of this mechanism. In turn, the nature of such a mechanism having been determined, it became important to clarify the way in which the right or obligation, once established, might be modified or terminated. Article 37 regulates this question. Before examining these articles, two preliminary points need to be noted. Firstly, as the above remarks regarding the actual wording of Article 34 indicate, Article 35 and 36 do not, strictly speaking, constitute exceptions to the general rule in Article 34, as is sometimes suggested.\(^49\) They do provide for an exception to the principle of *pacta tertiis*, which merely expresses the non-creative legal effect of treaties in respect of third States. However, Article 34 goes further than that, by suggesting that treaty rights and obligations may be created for a third State by its consent. Therefore, in truth they set out the particulars and the conditions in which the rule in Article 34 applies in practice. Secondly, as far as the manner of the creation of rights and obligation for third States is concerned, the International Law Commission from the outset was anxious to make a distinction according to whether a treaty gives rise to rights or obligations for third States. This distinction was justified by reference to the supposition that the conferment of a right on a third State does not produce any detrimental results for such a State. It may be but beneficial to it. Consequently, there could be little objection to a flexible rule which might meet the needs of the international community. On the other hand, the imposition of an obligation upon a State by means of a treaty to which it was not a party would certainly endanger the sovereignty and independence of that State. Therefore, it appeared necessary to adopt a more severe and precise rule which would avoid any risk of imposing unwanted obligations upon third States. As the Convention has dealt with the question of obligations and rights of

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\(^{49}\) See the Tanzanian's amendment referred to in n. 43 above.
third States in two separate articles (Articles 35 and 36), it is appropriate to follow that
approach in exploring the true legal basis upon which obligations and rights may be
created for a third State.

2.2.1. Treaties providing for obligations for third States: Article 35

As we briefly observed, in drafting the rule regarding obligations emphasis was
placed upon clarifying, as precisely as possible, the required conditions in which the
obligations might be generated. The rule, as finally incorporated in Article 35, appears
to have satisfied such needs and purposes. Article 35 reads:

"An obligation arises for a third State 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 expressly accepts that obligation in writing."

2.2.1.1. Conditions for the creation of an obligation for a third State: Article 35

As can be seen from the wording of the article, two fundamental conditions have
to be fulfilled before a third State can become bound by a provision of a treaty:50 firstly,
the parties to the treaty must intend the provision in question to be the means of estab­
lishing an obligation for the third State; and, secondly, that State must expressly accept
the obligation concerned in writing.

2.2.1.1.1. The intention of the parties to the treaty

As to the first condition, the main problem relates to the determination of the “in­
tention” of the “parties” to that effect. Article 35 does not address itself to this question.
One may be tempted to resort to the rules on interpretation of treaties contained in Arti­
cles 31-33. According to Articles 31-33, for the interpretation of treaty provisions, su­
premacy is given to the text of the treaty and recourse to certain materials, such as the
preparatory work of a treaty and the circumstances of its conclusion, has been allowed
only as a secondary, or “supplementary”, means of interpretation. If this rule was to be
applied in the present context for a determination of the intention of the parties, then
such a limitation would bar an immediate recourse to the preparatory work and the cir­
cumstances of the conclusion of a treaty. However, this is not the case, because,

50 See: ILC’s Draft Articles on the Law of Treaties (1966), pp. 227 et seq., para. 1 of Com­
mentary on draft Article 31; Sinclair, op. cit. above (n. 13), p. 101; Rozakis, loc. cit. above
(n. 36), p. 10; Reuter, op. cit. above (n. 36), p.102.
although the determination of the intention of parties may, in a sense, involve some act of interpretation, these two exercises must be differentiated as far as the permissible means to which recourse may be made are concerned. The reason is not far to seek. Articles 31-33 specifically lay down rules for the interpretation of treaties, not rules on the interpretation of the intention of the parties to treaties — though the former are quite commonly viewed as aiming at the determination of the intention of the parties, as it is expressed in the text.\(^5\) The rules of Articles 31-33 would be directly applicable if Article 35, instead of incorporating the phrase “if the parties to the treaty intend the provision to be the means of establishing the obligation ....”, read “if the treaty [provides for] the provision to be the means of establishing the obligation ...”, because, in that case, the finding of the correct meaning of the treaty, in the case of doubt, would surely be an act of treaty-interpretation.\(^6\) Therefore, the determination of the “intention of the parties” is an extra-treaty interpretation matter and for that reason, as Rozakis has rightly suggested, “any piece of evidence, such as the preparatory work, the conduct of the States parties, the text of the treaty, might be considered as legitimate means to find the intention of the parties”.\(^7\) This does not make Articles 31-33 irrelevant, of course, as, if the treaty, properly interpreted, provides for a third State obligation, the parties are bound to intend that there be one.

Moreover, it is important to bear in mind that Article 35 talks of “parties” and of their “intention” in the present tense. Therefore, it is the current intention of the States for which the treaty is now in force, which counts. If the treaty provides that it is to impose obligations on third States, then the parties are bound to have that intention, unless and until they decide otherwise by amending the treaty. But if neither the treaty nor

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other evidence (e.g. preparatory works) indicates such an intention, the parties may still formulate this intention subsequently and do so by any means — not just via an amendment to the original treaty. In that case Article 35 will then become applicable.\textsuperscript{54}

2.2.1.1.2 The consent of the third State

As to the second condition, it is important to note that the original draft proposed by the Commission did not require that the acceptance of the obligation by the third State should be \textit{in writing}. The Commission's draft solely required "express consent", which could be \textit{oral} or \textit{in writing}. This new restriction on the Commission's draft was brought about by a proposal of the Vietnamese delegation, which suggested that:

"Because of its importance, the obligation must be accepted by the third State in a form which could not give rise to any misunderstanding and which involved no risk of tendentious interpretation ... It was therefore desirable that the third States ... should express their willingness to accept an international obligation in writing only."\textsuperscript{55}

The debate on this proposal was very brief.\textsuperscript{56} Only the United Kingdom delegation made any comment on it. Opposing the proposal, it was submitted that the amendment:

"... ran counter to the fundamental principle of international customary law underlying the convention: namely, that States were free to bind themselves otherwise than by written treaties."\textsuperscript{57}

However, the proposed amendment was adopted by 44 votes to 19, with 31 abstentions.\textsuperscript{58} Restricting the method of giving consent to be expressed "in writing", as Rozakis suggests, establishes "a radical departure from the scheme of informalism

\textsuperscript{54} The parties to the Fourth Hague Convention (respecting the laws and customs of war on land) specified their intention in Article 2 which provided that the provisions of the Convention "do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention". See Anderson, F. M. & Hershey, A.S., \textit{Handbook for the Diplomatic History of Europe, Asia, and Africa, 1870-1914} (Washington, Government Printing Office, 1918, reprinted in 1974), vol. 2, p. 2. This Convention, together with the others concluded at the Hague on the Laws of War, Neutrality and so forth, have been subsequently applied vis-à-vis third States though as rules of customary international law. This indicates that the parties intention may change and it is their current intention which is material for the purpose of Article 35 of the Vienna Convention. See \textit{Fitzmaurice's 5th. Rep.}, p. 95.

\textsuperscript{55} \textit{UNCLT Off. Rec.}, Second Session, 14 plenary meeting, p. 59, para. 5.


\textsuperscript{57} \textit{UNCLT Off. Rec.}, Second Session, 14 plenary meeting, p. 60, para. 6.

\textsuperscript{58} \textit{Ibid.}, p. 60, para. 7.
which has been traditionally quite acceptable in ... [treaty] law". Lastly, it should be mentioned that such a limitation, as we will see in the subsequent chapters, may in practice turn out to be disadvantageous. Certainly, it would be a barrier to the rules under consideration (Articles 34-37) explaining the alleged effects of treaties providing for “objective regimes”.

2.2.1.2. Mechanism through which the obligation established for a third State: collateral-agreement?

Once the above conditions are fulfilled, it can be deemed that in effect a new treaty is concluded. In explaining this process, the Commission and the majority of States participating in the Vienna Conference referred to the mechanism of a collateral agreement — an agreement collateral to the main treaty between the parties to that treaty as offerors, on the one hand, and the third State(s) as offeree(s), on the other. Consequently, there appears to be no departure from the traditional principle of pacta tertiiis ..., because the third State’s obligations apparently derive from this newly concluded agreement, rather than the original treaty.

59 Rozakis, loc. cit. above (n. 36), p. 13. Under customary law prior to the Vienna Convention, the requirement was that the third States must “accept” the obligation, as was acknowledged by the PCIJ in the Free Zones Case where it held that “it is certain that, in any case, Article 435 of the Treaty of Versailles is not binding on Switzerland who is not a Party to that treaty, except to the extent to which that country accepted it.” (PCIJ, Ser. A/B, No. 46, p. 141, emphasis added).

See also Treatment of Polish Nationals in Danzig, loc. cit. above (n. 34), pp. 30-31. The Court did not specify, in neither of these cases, by what means a third State must manifest her “acceptance”. In the light of the Court decision in Eastern Greenland Case (loc. cit. above (n.41)), a third State could quite possibly bind herself orally. As hinted earlier, the International Law Commission did not exclude this possibility. However, States participating in the Vienna Conference did not follow this course. The novel requirement that third State must express its consent in writing seems quite understandable given that the Vienna Convention is meant only to regulate treaties concluded in written form. For a commentary see Waldock, H., General Course on Public International Law, RdC 106 (1962-II), pp. 1-250, at pp. 70-73.


61 As will be seen, the provision of paragraph 1 Article 37 consolidates this interpretation by requiring the mutual consent of both the parties to the treaty and the third State for the revocation or modification of the obligation in question.
The constituent elements of this agreement fully satisfy, it seems, the Vienna Convention's definition of a treaty — an agreement concluded between States in written form and governed by international law — so as to merit treatment as an independent treaty. The only exceptional aspect to it is that the collateral treaty is concluded in a simplified form: the parties and the third State are not appeared as specifically entering into a treaty relationship. However, despite the general tendency to treat the mechanism under Article 35 as a kind of collateral agreement, there exists no special reason for not treating such a mechanism as an autonomous way through which a treaty-obligation could be established for a third State. It is a well established fact that international obligations may well arise for States otherwise than by means of treaty — for instance, from a unilateral declaration. Accordingly, the stipulation providing for an obligation for the third State, as well as the third State's written acceptance, may well be considered as two parallel unilateral acts — not being intended to establish a treaty relationship between the parties and the third State — capable of establishing an obligation for the third State.

2.2.2. Treaties providing for rights for third States: Article 36

2.2.2.1. The doctrinal problems

2.2.2.1.1. Difference of opinion among the members International Law Commission

While both in the Commission and in the Vienna Conference there was near unanimous agreement on the theoretical source and the mechanism by which obligations may be created for a third State, considerable problems arose in drawing up a satisfactory formula on the question of the creation of an actual right for a third State. From the beginning, the members of the Commission were divided into two groups, following two different theories which already existed in the jurisprudence and

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doctrine. Supporters of both groups agreed that in principle "a treaty provision may be the means of establishing a right in favour of a third State, and that the third State is free to accept or reject the right as it thinks fit".63

However, there was disagreement as to the way in which such a result might be achieved. According to one group,

"while a treaty may certainly confer, either by design or by its incidental effects, a benefit on a third State, the latter can only acquire an actual right through some form of collateral agreement between it and the parties to the treaty."64

In other words, the stipulation constitutes an offer of a right to the third State and must be accepted by the latter in order for the right to vest in it. In their view, the right offered did not come into being until it was "accepted by the third State".65 Accordingly, the source of the right, as in the case of obligations, was "the additional or collateral agreement to which the third State was a party".66 Finally, they maintained that "neither State practice nor the pronouncements of the Permanent Court in the Free Zones67 furnish any clear evidence of the recognition of the institution of stipulation pour autrui in international law".68 On the other hand, others, including all the four Special Rapporteurs on the law of treaties, took a different position. Broadly, their view was that

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64 *ILC's Draft Articles on the Law of Treaties (1966)*, para. 3, emphasis added. The Commission referred to McNair and Rousseau as advocating this view, though both writers exclude dispositive treaties or treaties of an "objective" character from the scope of this proposition. See further: Roxburgh, *op. cit.* above Ch. I (n. 25), pp. 45-46; Judges Nyholm and Dreyfus in Free Zones of Upper Savoy and the District of Gex Case (*PCIJ Rep.*, Ser. A, No. 22, p. 5, at pp. 26-27 and 37-38, respectively) who rejects the application of *in favorem tertii* theory in international law.


66 Tunkin, *ibid.*, para. 58.

67 The Permanent Court, having decided the merits of the case on a different ground, went on to say that

"It cannot be lightly presumed that stipulation 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 the 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 which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such." (*PCIJ Rep.*, Ser. A/B, No. 46, pp. 145-148).

“there is nothing in international law to prevent two or more States from effectively creating a right in favour of another State by treaty, if they so intend; and provided that such intention exists, the third State becomes legally entitled to invoke, directly and on its own account, the provision conferring such right.”

According to them, such a right is not “conditional upon any specific act of acceptance by the other State or any collateral agreement between it and the parties to the treaty”. They further maintained that State practice confirms this view and that authority for it is also to be found in the report of the Committee of Jurists to the Council of the League on the Aaland Islands Question and more specially in the judgment of the Permanent Court in 1932 in the Free Zones case.

2.2.2.1.2. The Commission’s Proposals

The formula provisionally adopted in 1964 by the Commission followed the view that the right could be established only if the parties intend the provision to accord that right to the third State, and “the [third] State expressly or impliedly assents thereto”. Accordingly, it tended to endorse the collateral agreement theory. However, this formula met with criticisms from a number of governments. As a result of these comments, and in order to improve the formulation of the rule with reference to cases where the intention is to dedicate a right, such as a right of navigation, to all nations, the Commission decided to delete the words “expressly or impliedly” and at the same time to add a provision that the assent was to be presumed so long as the contrary was not indicated.

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70 Ibid.

71 Ibid. The Commission mentioned as examples the following as holding this opinion: Briely (Law of Nations, 5th edn., pp. 251-52); Lauterpacht (op. cit. above Ch. I (n. 97), pp. 306-310); Fitzmaurice (Fitzmaurice’s 5th. Rep., pp. 81 and 102-104); Jiménez de Aréchaga, E., Treaty Stipulation in favour of Third States, AJIL 50 (1956), pp. 338-57 at pp. 358-87); Authors of the Harvard Draft Convention on the Law of Treaties (loc. cit., pp. 924-37).

72 The Commission attached special importance to the wording of this Article when it decided not to include an Article dealing with so-called “objective regimes”. As we will see, the presumption was, in fact, introduced in order to protect the position of third States in respect of that important category of treaties which create rights in favour of all States or wide categories of States. For further detail see Ch. III (1.) below.
2.2.2.1.3. The Commission's draft at the Vienna Conference

Despite the fact that many States were reluctant to accept the proposition that "assent shall be presumed ..." in paragraph 1 of the Commission's draft, the formula which was finally adopted by the Vienna Conference preserves all the substantive ingredients of the Commission's draft Article; the only change being the addition of the phrase "unless the treaty otherwise provides" at the end of the second sentence of the first paragraph — an amendment proposed by the Japanese. The final terms of Article 36 reads:

"1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. 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."

2.2.2.2. Conditions for the creation of rights for third States: Article 36(1)

Paragraph 1 of Article 36 has been interpreted as suggesting that a right arises for a third State if two basic conditions are fulfilled: first, the existence of an intention on the part of the parties to the treaty to accord a right to such a State; second, the existence of the third State's assent. The question whether or not the latter statement amounts to a condition for the creation of the right is uncertain because, as we will see, those who support the stipulation pour autrui theory as the mechanism to which the Vienna Convention has adhered in Article 36 are of the opinion that the third State's assent is not necessary for the vesting of the right at all. For the time being, though, we will assume that it amounts to a distinct condition and, therefore, it will be dealt with after the first condition is illustrated.

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73 See the amendments put forward by the representatives of Finland (UNCLT, Doc. A/CONF.33/C.1/L.141) and the Netherlands (UNCLT, Doc. A/CONF. 39/C.1/L.224).
75 Sinclair, op. cit. above (n. 13), p. 102; Rozakis, loc. cit. above (n. 36), p. 17.
2.2.2.2.1. The intention of the parties to the treaty

As in the case of obligations, the determination of the intention of the parties is an extra-treaty interpretation matter and need not necessarily be expressed in the treaty. Any piece of evidence which proves the existence of an intention to that effect would appear to be enough. However, in view of the fact that bestowing an actual right upon a third State entails the imposition of the burden of an obligation upon a party or the parties to the treaty, the search for the letter's intention, as Rozakis rightly submits, "must be governed by the severity with which the question of the undertaking of obligations is determined by the Vienna Convention." Consequently, for the purpose of the rule in Article 36, it appears best to hold that there must be clear and unambiguous proof of the intention of the parties which does not leave any door open for doubts as to, for example, whether the parties have intended to grant a benefit, rather than an actual right. Evidently, in the former case, the parties, or one of them, may deny the benefit to third States even if the treaty is fully in force, since they are bound vis-à-vis each other to see certain third States benefit from certain provisions of the treaty. Third States could at the most resort to one of the party — in a case where only one or a limited number of the States parties deny the benefit — for the continued application of the treaty provisions. They have no right of their own. In the latter case, third States may, however, directly and on their own account invoke the terms of the treaty and insist upon the application of the treaty provision or the right granted: whether they have a right to the maintenance of the right is a different matter (which is governed by Article

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76 Rozakis, *ibid.*, p.18.
78 The following statement made by International Court of Justice in *Anglo-Iranian Oil Company Case* (Jurisdiction) both emphasise the need for the intention of the parties to confer a right and the fact that reference may be made to any other instrument for the existence of such an intention. The Court observes:

"A third party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between United Kingdom and Iran: it is *res inter alias acta*. No intention that the two parties to the 1933 agreement [between Iran and the Anglo-Iranian Oil Company] intended to confer rights on the United Kingdom thereunder could be inferred either from the agreement itself or from any other relevant instrument." (ICJ Rep. (1952), p. 109).
79 See the opinion of the United States Secretary of State concerning the right of passage through the Panama Canal granted to ships of all States which was provided for in the Hay-Paunceforte Treaty of 1901 between Great Britain and United States (examined in Ch. III (3.2.) as well as Ch. V (3.2.1.) below.
80 For further detail see: Ch. I (2.2.) above; Ch III (3.2.) and Ch. V (3.2.1 and 3.3.4.) below.
In any case, the burden of proof would be on third States. According to an unchallenged principle of procedural law, the burden of proving the existence of a fact upon which a legal claim is based rests on the person who puts forward the claim. Therefore, in cases of doubt or when the parties claim absence of their intention to confer an actual right on a third State, the burden is on the latter State to prove the existence of the parties' intention to that effect. Finally, it appears best to hold that, in order to safeguard the sovereignty of the parties, the presumption must be that there is normally no intention on their part to confer an actual right on a third State.

2.2.2.2. The assent of the third State

As to the second alleged condition, the question is whether or not the third State's assent is necessary for the vesting of the right at all, and if such is the case, is it necessary for it to be manifested in some particular form. The first sentence of Article 36 (1) seems expressly to require the assent of the third State as a condition for the emergence of the right, because it reads "a right arises for a third State ... if the parties ... intend ... to accord that right ... and the third State assents thereto ....". This is also what the principle of Articles 34 suggests, if it is read in affirmative terms: "a treaty creates ... rights for a third State "with ... its consent". Consequently, some writers have suggested that, for a treaty right to be established, apart from the intention of the parties, "the third State must give its consent". However, this is not true in all cases. When a treaty seems intended to accord a right to a third State, the following possibilities present themselves as to the acts a third State might take:

a) Manifest its consent expressly or impliedly, e.g. by means of a declaration or by unambiguous conduct;

b) Express its dissent by similar means;

c) Take a perfectly neutral position, without expressing either consent or dissent.

In situation (a) and (b) there is evidence of the third State's assent and dissent. Therefore, according to the wording of Articles 34 and 36(1), the right may, or may not, respectively be established for the third State. However, things are different as regards situation (c). The second sentence of Article 36(1) specifies that the third State's "assent shall be presumed so long as the contrary is not indicated, unless the treaty

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otherwise provides". In other words, when the third State takes a perfectly neutral position (as in situation (c)), the existence of its assent is presumed in law — of course, unless and until it indicates its refusal or rejection of the right. Consequently, a third State which remains silent, or even is not yet aware of the treaty stipulation, may effectively be vested with the right. Even then, of course, such a third State does not have to exercise the right and it goes without saying that the holder of the right may renounce it at any time. Therefore, a beneficiary third State cannot be stuck with a right which it wishes not to have.

Consequently, it is right to say that, despite the wording of the first sentence of Article 36 (1), the third State’s consent or “assent” need not be manifested and accordingly cannot be a condition for the establishment or vesting of the right — provided, of course, that the treaty does not provide for any special form through which the third State must express it assent. In truth, therefore, it would not be wrong to suggest that a right may arise for a third State “from a provision of a treaty if the parties to the treaty

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82 Some have suggested that the provision of Article 36(1) is inconsistent with the general rule of Article 34 because it envisages a case where a right can be created for a third State which remains silent. In order to avoid or overcome this inconsistency (which is not really true), the phrase the assent of the third State “shall be presumed so long as the contrary is not indicated” is taken as meaning that the third State should express its consent at least “through unmistakable behaviour” [Saulle, Appunti di storia e di diritto dei trattati (Rome, 1977), quoted by Napoletano, G., Some Remarks on Treaties and Third States under the Vienna Convention on the Law of Treaties, Ital. YBIL 3 (1977), pp. 75-91, at p. 85]. However, this proposition is incorrect, because the wording of Article 36(1) clearly indicates otherwise, i.e. the right can effectively be conferred so long as the contrary is not indicated by the third State (its assent is presumed in law, therefore, no positive expression of consent is necessary). For further detail see Sec. 2.2.2.2. below.

83 Napoletano, ibid. p. 79.

84 The very fact that the third State has the power to renounce the right, if it wishes, rules out the possibility of the imposition by parties of an unwanted right upon such a State.

85 Napoletano, loc. cit. above (n. 82), pp. 76-77.
intend the provision to accord that right ... to the third State ..., and [if] the third State does not express its dissent.

2.2.2.3. The mechanism through which the right emerges: collateral agreement or stipulation pour autrui?

As explained above, there was controversy, both in the Commission and in the Vienna Conference, as to the question how a treaty could confer actual rights on third States. According to one view, when the parties to a treaty intend that a provision shall create an actual right in favour of a third State, there is nothing in international law to prevent that intention having such effect (stipulation pour autrui theory). According to the opposite view, a treaty in itself can at most confer a benefit on a third State, which can be transformed into a right only by some form of collateral agreement between the third State and the parties. The main difference between these two theories may be summed up as follows: according to the former view "the right arises at once and exists unless and until disclaimed or renounced by the beneficiary State", whereas, according to the latter view, the right could not be said to be established until "the beneficiary State has in some manner manifested its acceptance of the right", which could take the

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86 Article 36 (1). In 1965, in the Restitution of Household Effects Belonging to Jews Deported from Hungary (44 ILR 301) the Court of Appeal of Berlin unequivocally upheld the right of treaty parties to create rights in favour of third States, provided they so intend. It maintained that the waiver clause in Article 30 (4) of the Treaty of Peace with Hungary, constituted a genuine stipulation pour autrui, having released Germany (not a party to the Peace Treaty) from any responsibility vis-à-vis Hungary or its nationals. The Court also held that whether Germany had accepted the waiver (or the right) was irrelevant. For further detail see Chinkin, op. cit. above (n. 5), p. 28. See further the American Law Institute's text on the "Effect of International Agreement on Non-Party State" which only requires the intention of the parties for the creation of treaty right for third States. See American Law Institute, Restatement of the Law: the Foreign Relations Law of the United States (Second, 1965), Sec. 139, pp. 427-430.

87 The phrase "unless the treaty otherwise provides" at the end of paragraph 1 transforms the provision of Article 36 into a residuary rule as far as the presumed consent of the third State is concerned. In other words, the specifications of a particular treaty prevail over the general rule of Article 36 (1). Therefore, States parties to a treaty which seems to confer a right on a third State are free to require the third State, for example, to express a written acceptance of an offered right. In this case, the third State may only enjoy the right if it fulfils the procedure required by the parties. This fact itself is another proof that it is always the terms of the treaty, containing the stipulation, and the wish of the parties to it, which constitute the crucial factor in the mechanism of conferment of a treaty right to third States. See Rozakis, loc. cit. above (n. 36), p. 19.

form of a simple exercise of the right offered to it. Concomitantly, there was also disa­greement as to the legal effect of the third State’s acceptance or refusal of the right — or its appropriation and renunciation thereof, according to the former theory. The ques­tion is whether such acts must be treated as retroactive (ex tunc) or prospective (ex 
nunc) in effect. According to the stipulation pour autrui theory, third State’s “accept­ance” of the right is not necessary and is merely the “appropriation” of an already vested right. In turn, its renunciation of the right is presumed to have effect ex tunc: it being assumed subsequently to the renunciation that the third State has renounced both the right as well as the right to reparation for its past infringements. The sponsors of the “collateral agreement” theory, however, are divided among themselves. According to one view, the third State’s acceptance or refusal of a right offered to it is effective ex 
nunc. Therefore, it can claim the right (and can claim for any breach of it) only if and from the time it manifested its “acceptance” of the right. On the other hand, according to another view, such acceptance or refusal must be considered to have effect ex tunc, so that the third State may claim the right and reparation for any breach of it as from the time that the treaty stipulation becomes valid — i.e. the entry into force of the treaty. In result, this latter view is not much different from what is suggested by the stipulation pour autrui theory,*^ because, in both approaches, the right is considered to be conferred from the time of the entry into force of the treaty and the third State’s refusal is assumed to rule out such a conferral ab initio.

The Commission, in its commentary on its Draft Article 32, expressly asserted that it left open the doctrinal question relating to the source of the right and the rule adopted is meant not to “prejudge the doctrinal basis of the rule”^*^ and to be susceptible to explanation by both mechanisms. Consequently, there is room for the advocates of

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^9 The view expressed by Judge Bustamante (in his Separate Opinion in the South-West Africa Cases, Preliminary Objections) indicates, to certain extent, this similarity. He observes that "a stipulation pour autrui may also be considered [as] an offer which remains outstanding until withdrawn or terminated in some other way. Since, ..., the offer contained in Article 7 [of the Mandate Agreement made on 17 December 1920] was still outstanding on 4 November 1960, the filling of the Applications on that date was an acceptance." (ICJ Rep. (1962), p. 381).

For a similar point of view see Judge Jessup’s Separate Opinion in the same case: ICJ Rep. (1962), p. 410.

^90 ILC’s Draft Articles on the Law of Treaties (1966), para. 5 of Commentary on Draft Article 32.
both theories to adjust their arguments to fit the formula adopted by the Vienna Convention.

Supporters of the stipulation pour autrui theory may concede that the wishes of the third State always remain important and must be accorded respect, since that State can reject a right or not exercise it. Nevertheless, it is not the assent of that State which causes the right to vest. Instead, the reference to "presumed assent" in Article 36(1) indicates that the right is vested in the State concerned by the very fact that the parties to the treaty intended it to have such a right; and, from that very moment, the right exists and continues to exist, unless and until the third State indicates its refusal of it or disclaims it. The third State's positive response — for example, starting to exercise the right — simply indicates its failure to renounce the right — though it always remains free to renounce it later on. The third State can always, without having previously indicated its assent, exercise a right, or even claim for past breaches.

The sponsors of the collateral-agreement theory might, in turn, argue that the wording of both Articles 34 and 36 indicates that the right cannot be regarded as established unless and until the third State somehow indicates its assent. In this regard, Reuter has suggested that

"the commentary on the draft articles and the provision adopted for the creation of rights shows that the texts predominately refer to the collateral agreement theory. Indeed, the beneficiary's assent exists even for the creation of rights, although such assent 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 disappears if they are rejected (retroactively it would seem, although the Vienna Conventions do not clarify this point)."

The right consequently arises out of the third State's consent (its acceptance of the right) and it may, depending on the circumstances of each case, be effective from the time of entry into force of the treaty. Here, two alternative explanations may be submitted. It may be suggested, as Reuter does, that the "presumed consent" means that there is a "tacit agreement" from the time the intention to accord the right is born. Thus, the third State can claim the right from the outset so long as it remains silent.

91 In other words, according to Reuter, it is the tacit or explicit agreement collateral to the main treaty which is the source of a change in the legal status of the third State. Reuter, op. cit. above (n. 36), p. 104.
Alternatively, it might be suggested that there is no such a "tacit agreement" involved but the third State's positive attitude, in claiming or exercising the right, is an act of acceptance of a previously offered right and is effected ex tunc. Therefore, the third State can claim the right (and can claim for any breach of it prior to its acceptance of the right) from the moment that the intention to confer the right is born, but as a result of a newly concluded "agreement" collateral to the original treaty.

Despite the fact that the Commission was of the view that the differences between the two rival theories were "primarily of a doctrinal character and that they would be likely to give much the same results in almost every case", it is important to see which one of these theories is more appropriate, especially in so far as concerns the potential of Article 36 to serve as a mechanism for explaining the peculiar effects which are claimed for treaties which are said to create "objective regimes". Our discussion concerning the role of assent under Article 36 (1) demonstrates to some extent that the Vienna Convention formula is more in line with the former theory (stipulation pour autrui).

The following considerations may be taken into account as strengthening this position.

92 On the other hand if the third State indicated its dissent, then it could not claim the right; nor could it claim for the breaches which occurred in the past, because the third State is no longer silent and there is evidence against "the presumption of consent".

93 ILC's Draft Articles on the Law of Treaties (1966), Commentary on Draft Article 32 at pp. 227-229. The Commission referred to the controversy between the United States Treasury and the State Department as to whether the Finnish Peace Treaty had actually vested a right in the United States to avail itself of a waiver of Finland's claims "as an exceptional example in which the two opposing doctrines might produce different practical results". The problem related to the interpretation of the constitutional competence of the Executive and Legislative as regards the foreign affairs of the United States. According to the stipulation pour autrui theory, the right was vested in the United States by the stipulation of the Finnish Peace Treaty (loc. cit. below Ch. III (n. 120)). Consequently, as the Comptroller General argued, the Executive could not, and should not, have renounced it without the permission of the Legislature (because the renunciation of the United States proprietary right, under the Constitution, is not within the sole jurisdiction of the Executive). According to the collateral agreement theory, on the other hand, the said Peace Treaty "vested no rights in the United States, given the absence of affirmative acceptance, since third countries could not place the United States in a third [-State] beneficiary status without its affirmative acceptance" (The State Department argument). Consequently, the decision of the Executive not to accept the offer does not constitute a renunciation of the United States' right, which normally required the authorisation of the Legislature. For more detail see Whiteman's Digest, vol. 14, pp. 337-347.

a. It would hardly be convincing to say that the third State's act of taking advantage of a right constitutes a manifestation of that State's consent to a second agreement. As Jiménez de Aréchaga suggests:

"it does not seem reasonable to contend that the actual exercise of the right by the beneficiary State constitutes the consent to an offer, the conclusion of a collateral agreement from which the very right which is being exercised is supposed to arise."

b. If the assent of the third State were to constitute an act of acceptance directed to an offer, it would be necessary that it be manifested in some positive manner or by a positive implication. However, as concluded above, according to Article 36(1), the assent of the third State is not necessary for the emergence of the right: so long as the third State remains silent, the right is deemed in law to be vested in it. Therefore, it would be fictitious to equate a totally neutral attitude (i.e. mere silence) to an act of acceptance directed to an offer.

c. If the collateral agreement was the true mechanism for creating treaty rights for third States under Article 36, the solution as to its revocation or modification would have naturally to be based on the contractual analysis and would consequently be simple: the offered right would be revocable prior to the acceptance of the beneficiary, because an unaccepted offer may be withdrawn, but it would become irrevocable once the third State expressed its acceptance and an agreement was consequently concluded, since no one can be deprived of a contractual right without its consent. However, as will be seen, according to Article 37(2), the right may be revoked or modified by the parties without the consent of the third State, unless "it is established that the right was intended not to be revocable or subject to modification without the consent of the third State". In other words, the "revocation" or "modification" of the right is solely dependent on the intention of the parties to the original treaty, in just the same manner as its conferral.

d. The collateral agreement theory may raise difficulties in practice, especially as regards treaties providing for freedom of navigation in rivers or canals (which we will refer to in detail later on). Such treaties normally stipulate a right of passage for the ships, public or private, of all States. Yet it is hard to see how the captain of a private vessel flying the flag of a State can be deemed a competent authority to manifest the

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95 Jiménez de Aréchaga, loc. cit. above (n. 69), p. 53, emphasis added.
consent of that State to a collateral agreement falling within the purview of public international law. Normally, only certain governmental authorities of a State are competent to bind that State in international law to a treaty.

e. Finally and most importantly, if international rights and obligations may be established by unilateral acts in the sense admitted in the Nuclear Tests Cases,\(^9\) there is no reason not to give a similar validity to the action of the parties, under Article 36, which may well be treated as a multilateral or collective unilateral act, as it were, by the parties to the treaty vis-à-vis a third State.\(^9\) When, under Article 36, the parties to a treaty formally and publicly undertake to accord a right to a third State, there is no reason for not giving an effect or a validity similar to that the International Court of Justice gave to the unilateral declarations of the individual State involved in those cases: namely, France. Thus, according to the above-mentioned rule pronounced in the Nuclear Tests Cases, the parties' intention to accord a right to a third State or third States should be sufficient for the conferral of that right. It is worth further noting here that Fitzmaurice in his proposed draft articles on the question of the legal effects of treaties on third States specifically devoted an article to recognising the validity of unilateral declaration as a means through which rights could be conferred on other (third) States, without any need for evidence of the latters' acceptance, consent or assent.\(^9\)

\(^9\) In these cases, the International Court of Justice held that

"It is well recognised that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a \textit{quid pro quo} nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State made." (\textit{loc. cit.} above (n. 62), 267 and 472).

The Court subsequently considered a series of unilateral declarations made by France concerning the French intention to abstain from future atmospheric nuclear tests in the South Pacific area, held that the assurance given by French Authorities was binding on France (\textit{ibid.} pp. 270-272 and 475-477). As regards the validity of unilateral declaration see further n. 62 above.

\(^9\) For advocacy of this point of view see: Reuter, \textit{op. cit.} above (n. 36), p. 103; Obieta, \textit{op. cit.} above (n. 94), pp. 32-35.

\(^9\) Fitzmaurice's 5th Rep., proposed draft Article 22.
Consequently, it appears sound to conclude that the presumption of assent shows that, as suggested by Jiménez de Aréchaga, “the *jus tertii* is created by the treaty and that the third State’s conduct in exercising the right is not an expression of assent to a second agreement, but an act of appropriation of rights directly derived from the treaty”.

Unless the parties intend otherwise, the right comes into existence when the treaty enters into force (or whenever the intention to confer a right arise, if that occurs later in time). The third State can, therefore, claim and exercise the right from that time. If the third State, however, expresses its dissent, two situations must be distinguished: first, if it has indicated its dissent after it has already exercised the right; second, it has done so without previously having claimed or exercised the right. In the former instance, the dissent may be regarded as having effect *ex nunc*; and, in the latter case, such a dissent might must be given a retrospective (*ex tunc*) effect — at least unless it indicates a wish to the contrary.

2.2.2.4. Conditions for the exercise of the right: Article 36(2)

Paragraph 2 of Article 36, cited above, specifies that a State exercising a right in accordance with Paragraph 1 of that article “shall comply with the conditions for its exercise provided for in the treaty or in conformity with the treaty”. This provision was first suggested by Fitzmaurice, in a broader form, as a general principle relating to the “automatic entailment” of rights and obligations, according to which:

> “the lawful use of the 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 user in the manner provided by the treaty.”

There is no problem as to the validity of the rule adopted, since it is commonly accepted that no one may at the same time claim to enjoy a right and be free of the

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99 Jiménez de Aréchaga, *loc. cit.* above (n. 69), p. 54. In his earlier article, in considering the legal effect of the acceptance of a benefit in municipal law and in the case of a stipulation “*in favorem tertii*”, he observes that

> “the word ‘acceptance’ is used to describe legal acts differing in nature and effects, such, for instance, as the acceptance of an inheritance and the acceptance of contractual offer. In the first case the *act of acceptance merely confirms pre-existing rights*, while in the second case the rights are acquired after the acceptance is performed. The acceptance called for in the case of a stipulation “*in favorem tertii*” belongs to the first and not to the second group.” (Jiménez de Aréchaga, *loc. cit.* above (n. 71), p. 352).

100 This was meant by Fitzmaurice to resolve the problems arising from “Cases of the use of maritime or land territory under a treaty or international regime” — the prime examples of a treaty which is said to create an “objective regimes”. For detailed examination of Fitzmaurice’s proposal see Ch. IV (2.2.1.) below.
obligations attaching to it. Certain points, however, need to be clarified in respect of the nature and effect of this provision.

a. As can be inferred from the wording of Article 36, a right may be conferred upon a third State subject to certain conditions, which may involve duties for the latter State, without its consent being expressed (the stipulation pour autrui). This by no means implies that, through this mechanism, treaty-obligations may be imposed on third States against their will. A beneficiary third State is free to choose whether or not to exercise the right. If it wishes to do exercise it, it must then comply with any conditions which have been placed upon the exercise of such a right. For example, under the 1977 treaties concerning the Panama Canal, the canal is to remain secure and open to peaceful transit by the vessels of all nations on terms of entire equality. However, vessels using the canal must pay tolls and other charges for transit and other ancillary services; they must comply with applicable rules and regulations; and they must not commit any act of hostility in the Canal. Consequently, to the extent that the attached conditions are directed solely to the exercise of the right, the third State’s assent can still be presumed, as suggested by Article 36 (1) and the right vest in regardless of its lack of actual consent.

b. Although “conditions” do not necessarily imply “duties”, they may amount to an undertaking, duty or obligation when attached to a right that is being conferred on a third State. Under Article 36, duties may be regarded as “conditions for the exercise of the right” which delimit the way that the third State must exercise the right, but “do not suspend or suppress the right” in the event that the third State decides not to exercise it. As such, they seem to include duties which must be fulfilled if the third State chooses to exercise the right and while it is actually exercising it. The third State cannot be held responsible for performance of these duties if it chooses not to exercise the right or if it stops exercising the right if it has already started to do so (except for infringements committed while still exercising it). The duty attached to the right of non-member States under Article 35 of the United Nations Charter, may be invoked as an example. A non-member can exercise the right to bring its dispute to the attention of the

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101 For detailed examination of the provisions of 1977 treaties concerning Panama Canal see Ch. V (3.3.1. and 3.3.2.) below.
102 Jiménez de Aréchaga, loc. cit. above (n. 69), p. 55.
the Security Council or General Assembly its disputes if it undertakes the obligations of pacific settlement laid down in the Charter. This obligation would not be enforceable against a non-member State (at least as a treaty-based obligation) which chose not to exercise the right concerned, or if it chose to abandon its effort to resolve its dispute through the United Nations. As another example, reference may be made to the duty of a third State’s ships exercising the right of passage through Suez or Panama Canal to pay tolls, or to observe regulations relating to customs, pollution, etc. The fulfilment of such duties could only be demanded if a third State’s ship approached the Canals to exercise the right of passage or while it was actually exercising it. However, it must be noted that, as Rozakis observes, the question whether a treaty produces an obligation parallel to a right, or a condition for the enjoyment of the right or a mere condition for its exercise is often not an easy one to answer; it is “a matter to be examined in concreto whenever such a problem arises”. A general criterion, however, could be whether the parties to the treaty have intended to confer a conditional right or a right of which the exercise is conditional.

c. The phrase “in conformity with the treaty” entails compliance with conditions not stipulated in the text of the treaty. As the Commission pointed out, this phrase was inserted to take account of the fact that conditions for the exercise of the right may be laid down in a supplementary instrument or even unilaterally by one of the parties. For example, in the case of a provision allowing freedom of navigation on an international river or maritime waterway, “the territorial State has the right in virtue of its sovereignty to lay down relevant conditions for the exercise of the right, provided, of course, that they are in conformity with its obligations under the treaty”.

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103 In the Status of Eastern Carelia case, the PCIJ specifically held that non-member States “are not bound by the Covenant. The submission, therefore, of a dispute between them to the methods provided for in the Covenant could take place only by virtue of their consent.” (loc. cit. above (n. 34), pp. 27-28). For a similar treatment of the Covenant see the Pablo Najera case, loc. cit. above (n. 35), p. 471.

104 Rozakis, loc. cit. above (n. 36), p. 20.

105 For detailed examination of these two questions see text that follows.

106 ILC’s Draft Articles on the Law of Treaties (1966), para. 8 of the Commentary on Draft Article 32; UNCLT Doc. 49.
d. A problem may arise with regard to the rule which is to apply to treaties which simultaneously provide for rights and obligations for third States. The question is: which rules, those in Article 35 or those in Article 36, will govern the situation? In other words, in what cases the third State's consent required to be in writing (Article 35) and in what cases may it be presumed (as prescribed by Article 36 (1))? In some situations, the answer is very straightforward. For example, when two or more States by provision of a treaty agree to use the territory of a third State for transit of their nationals or goods in return for payment of certain lump-sums of money, the written consent of the third State would become necessary as prescribed by Article 35, simply because that provision purports to impose an obligation (i.e. to allow the nationals or goods of the party States to use its territory) on the third State. In contrast, if the same States undertake by means of a treaty stipulation to accord to a third State the right to use their territory for transit of her nationals or goods subject to the payment of customs duties to the States parties, the third State can, on the basis of Article 36, at any moment start exercising this right without the need for her assent to be manifested. It has to comply, however, with the condition which is attached to that right: payment of the customs duty. Both of these cases are fully in conformity with the hypotheses envisaged by articles 35 and 36.

The situation is, however, not so clear-cut in a case where a treaty purports to establish for a third State independent rights and obligations simultaneously: for example, when a treaty between two States, while conferring on a third State a right to make use of their ports, requires that State to allow its territory to be used for passage by the States parties. In this situation, the provision which requires the third State to allow its territory to be used by the States parties amounts to an obligation which, on the basis of Article 35, must be accepted by the third State in writing for it to be established. On the other hand, the provisions conferring on the third State the right to make use of the ports of the States parties seems to amount to a conferment of a right, which according to Article 36, does not require the consent of the third State for it to be established. The question arises, therefore, whether or not the "acceptance in writing" rule or the

"presumed assent" rule will be applicable in this kind of situation. Applying these rules independently would mean that the third State can start to exercise the right without having already expressed its acceptance of the obligation, or possibly even if it has rejected the obligation. However, this does not seem to be what the parties probably intended. It is also not just.

In considering this hypothesis, Sinclair suggests that, in cases such as this, "the stricter rule — that related to obligations — should apply, so that the third State must give its consent in writing". He does not, though, give the reason why the stricter rule prevails.

In distinguishing the case of Article 35 from that of Article 36 (2), the following approach seems preferable. Two kinds of situation need to be distinguished. The first is when there seems to be no evidence to indicate a direct linkage between the conferment of a right and the imposition of an obligation: they just happen to be pronounced in a single treaty. If it can be established that the enjoyment of the right, or its exercise, is in no way subjected to the third State's performance of the obligation, then, unless the treaty provides otherwise, it may be suggested that both Articles 36 and 35 could be applicable. The right might be deemed vested according to Article 36(1), assent being presumed, but the third State's written acceptance could be necessary for the obligation to become operative against it in accordance with Article 35. As an example, reference may be made to the obligation and the right envisaged for non-members of the United Nations by Article 2 (6) and Article 35 (2) of the Charter respectively — assuming for the sake of argument that the provision of Article 2 (6) amounts to an imposition of an obligation upon third States for the purpose of the rule of Article 35 of the Vienna Conventions. Here no direct connection could be found between the right of non-

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108 Chinkin, op. cit. above (n. 5), pp. 40-41.
109 Ibid., p. 103. He cites Cahier (loc. cit. above (n. 48) ) as holding the same opinion. Cf. Chinkin, op. cit. above (n. 5), pp. 40-41.
110 Article 2(6) reads:

"The organisation shall ensure that the states that are not members of the United Nations act in accordance with these principles so far as they may be necessary for the maintenance of international peace and security."

A number of writers have claimed that, as the expression of the will of the vast majority of the international community to maintain world peace, Article 2(6) imposes obligations on non-member States. See, among others, Kelsen, H., The Law of the United Nations (Lon-
member States to bring any dispute to the attention of the United Nations authorities (Article 35 (2) of the Charter) and their alleged obligation to act in accordance with the principles enumerated by Article 2 of the United Nations Charter (so far as may be necessary for the maintenance of the peace and security). Accordingly, the rules in Articles 35 and 36 would independently be applicable.

The second situation is when there is a direct link between the conferment of the right and the imposition of the obligation. In this case, a further distinction must be made according to whether the obligation amounts to:

(a) a pre-condition for the enjoyment of the right;\(^{111}\)

(b) a condition directed solely to the actual exercise of the right;\(^{112}\)

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\(^{111}\) For example, the United Nations Charter, in Article 35(2), provides that “a State which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party”; but it immediately adds “if it accepts in advance for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter”. A non-member State is thus obliged to comply with this condition if it wishes to exercise that right. The right will not be assumed to have been vested unless and until the third State accept the obligations of pacific settlement.

\(^{112}\) As an example, reference may be made to the right conferred to third State, and the conditions attached, under the Convention Concerning the Regime of Navigation on the Danube
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(c) a condition for the enjoyment and exercise of the right.\(^{113}\)

As was observed above, the "presumed assent" rule could apply only when the parties intend to confer a right accompanied with conditions for its exercise. Therefore, if the conferment of a right is accompanied with the (b)-type of obligation, the third State's consent is not necessary at all in respect of the obligations and its assent to the right can be presumed according to Article 36(1). However, in situations (a) and (c), the conferment or enjoyment of the right is subjected to an undertaking, by the third State, of the obligation concerned. The right, therefore, may vest in the third State only once it accepts the bargain in writing. Before that happens, the parties cannot require the third State to implement the obligation attached, nor can the third State exercise the right. These latter two cases seem to fall within the scope of the words "unless the treaty otherwise provides" in Article 36(1).

In the example referred to by Sinclair,\(^{114}\) an undertaking by the third State to bestow a right of passage over its territory to the States parties surely cannot be regarded as a condition of the actual exercise of its right of making use of the States parties' ports. Apparently, it amounts to a pre-condition to the conferment or enjoyment of the right by the third State, in so far as, without its fulfilment, the third State cannot claim the right. Therefore, the third State's written acceptance will be necessary for the rights and obligations of the parties and the third State to become operative.\(^{115}\) However, that

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\(^{113}\) For example, the Constantinopole Convention of 1888 regarding the Suez Canal (loc. cit. below Ch. V (n. 92) accords a right of free passage to "every vessel of commerce or of war, without distinction of flag". However, it goes on to attach a number of conditions such as payment of dues, observance of sanitary measure in force in Egypt, ... etc. to the exercise of the right of passage. Moreover, it provides that "The canal shall never be subjected to the exercise of the right of blockade." Obviously, the conditions relating to the payment of dues or observance of sanitary measures are obligations directed to the right of free passage through the Canal. However, the obligation not to blockade the canal seems to amount to a (c)-type of obligation, the observance of which is a condition for the enjoyment of the right of free passage. For more detail see Ch. III (3.2.) below.

\(^{114}\) See p. 110 above.

\(^{115}\) It is possible, though, that, in practice, both the parties and the third State might, without bothering about the third State's written acceptance of the obligation, start exercising their rights without facing any objection. In that case, it seems rules of general customary law other than those codified in the Vienna Convention might govern the situation. Neither
does not mean that the stricter rule contained in Article 35 would always apply to cases where a treaty confers rights and imposes obligations. The stricter rule in Article 35 will not be applicable in a "rights-and-duties" treaty if the duties constitute conditions directed solely to the actual exercise of the rights ((b)-type of obligation). In contrast, it will be applicable if the duties concerned could not be regarded as conditions for the exercise of that right, but rather amount to independent obligations or conditions for the conferment or enjoyment of the rights ((a) and (c)-types of obligations).

Finally, having the above distinctions in mind, it can easily be seen that, if a beneficiary (third) State finds the conditions for the exercise of the right to be burdensome or disadvantageous, it can simply refrain from exercising the right or stop its exercise if it has already started it. The conditions mentioned by Article 36(2) are solely connected with or related to the actual exercise of the right and may be applied, as Rozakis rightly puts it, only "if that exercise actually takes place and [only] for as long as it takes place". Consequently, any burden accompanying a right which cannot be regarded as the condition for the exercise of the right must be considered an independent obligation, which falls under Article 35 of the Vienna Convention.

2.2.3. Revocation or modification of obligations or rights of third States: Article 37

"1. When 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 to the treaty and of the third State, unless it is established that they had otherwise agreed.

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."

Before examining how rights and obligations established for a third State may be modified or revoked, two preliminary points must be noted in respect of the rule in Article 37.

a. The rules articulated in this Article refer solely to the revocation or modification of obligations and rights themselves, rather than to the revocation or modification side, by relying on the Vienna Convention rule which requires the third State's acceptance of the obligation in writing, could challenge the validity or existence of its obligation established through the mutual conduct; other general rules of customary law, such as the principles of estoppel and rules of recognition, would prevail.

Rozakis, loc. cit. above (n. 36), p. 20.
of the provisions from which they have arisen. It seems that, once obligations and rights are established under Articles 35 and 36, they stand on their own. This has an important effect on the applicable rules governing, on the one hand, the revocation or modification of all or part of the provisions of a treaty; and, on the other hand, the revocation or modification of an obligation or a right arising from such a treaty under Articles 35 and 36. In the former case, the general rules concerning the modification and termination of treaties (Part IV and Part V (3) of the Vienna Convention) will be applicable between the parties themselves. In the latter case, however, such acts will be governed by special rules contained in Article 37. Broadly speaking, if a revocation of or a modification to the provision of a treaty from which an obligation or a right has arisen for a third State bears upon such an obligation or a right, the special rules in Article 37 become applicable as between the parties and the third State. Therefore, subject to Article 37, any change relating to the provisions of the original treaty will not be prejudicial to the position of the parties and of the third State vis-à-vis each other. However, this does not mean that the third State is entitled to participate in the life of the treaty. Parties can even terminate the treaty in toto, if they wish, inter se, but they cannot terminate their relationship with the third State except in accordance with Article 37.

b. The rules in Article 37 will be applicable only once the obligations and rights in question have already been established for the third State. Consequently, it is always necessary for an interested State, if it is to rely on the rules of Article 37, "to prove that an obligation or a right has validly emerged and is still valid at the time of invocation".

2.2.3.1. Revocation or modification of an obligation: Article 37(1)

Paragraph 1 of Article 37 covers both the case when the parties and the case when the third State take the initiative to revoke or to amend the obligation which has arisen under Article 35. This is so, even though, if it is the parties who seek the revocation or modification of the third State's obligation, the letter's consent would seem unnecessary, since the parties to the principal treaty could presumably renounce their rights to the performance of the third State's obligation without its consent. The International

117 Chinkin, op. cit. above (n. 5), p. 42.
118 Rozakis, loc. cit. above (n. 36), p. 23.
Law Commission, in its commentary on its Draft Article 33, justified the requirement of mutual consent on the ground that

"in international relations such simple cases are likely to be rare, and that in most cases a third State's obligation is likely to involve a more complex relation which would make it desirable that any change in the obligation should be a matter of mutual consent."\(^{119}\)

In any case, the requirement of mutual consent might be regarded as an indispensable consequence or corollary of the collateral agreement mechanism to which, as was stated above, both the Commission and States participating in the Vienna Conference adhered.

Finally, it must be remembered that the phrase "unless it is established that they had otherwise agreed" at the end of paragraph 1 renders the provision in question a residual rule. Therefore, it applies only if the parties and the third State have not agreed to some other means for revocation or modification of the obligation.

2.2.3.2. Revocation or modification of a right: Article 37(2)

In this respect, the Commission, in formulating the rule, considered that two conflicting considerations had to be taken into account. On the one hand, States would be reluctant to stipulate rights in favour of third States if the effect of their so doing would be to restrict their freedom of action in modifying or revoking those rights. On the other hand, it was important that such rights, especially in such matters as navigation in international waterways, "should have a measure of solidity and firmness".\(^ {120}\) The Commission, in an earlier draft which it provisionally adopted on first reading in 1964, treated both obligations and rights uniformly and in a single paragraph. It provided that the right or obligation established by the provisions of a treaty could not be revoked or modified by the parties without the consent of the third State, unless it appeared from the treaty that the provision concerned was intended to be revocable.\(^ {121}\) This draft encountered opposition from certain Governments, who considered it to go too far in restricting the power of the parties to revoke or modify a stipulation in favour of the third

\(^{119}\) ILC's draft Articles on the Law of Treaties (1966), para. 3 of the Commentary on Draft Article 33.

\(^{120}\) Ibid., para. 4 of the Commentary on Draft Article 33. See also: Sinclair, op. cit. above (n. 13), p. 103; Rozakis, loc. cit. above (n. 36), p. 24.

\(^{121}\) ILC's Draft Articles on the Law of Treaties (1966), para. 1 of the Commentary on Draft Article 33.
State and in giving the latter a veto over any modification of the treaty provision.\textsuperscript{122} As a result, the Commission decided, first, to deal with the question of obligations and rights in two separate paragraphs and, secondly, to reformulate the rule concerning rights along the lines of the provisions now in the Vienna Convention. This succeeded in satisfying the above-mentioned conflicting considerations.

Article 37 (2) accordingly indicates that a right cannot be revoked or amended if it is established it was intended that it could not be. It does not, strictly speaking, address itself to the question of what would happen if one could not find out at all what the intention of the parties was in this regard, or if there were discovered to be an intention in favour of revocability. However, by resorting to the sort of policy considerations referred to by the Commission as cited above,\textsuperscript{123} it may be suggested that it would be desirable to make a presumption according to which a right which has arisen for a third State in conformity with article 36 is always revocable,\textsuperscript{124} unless it is established that "the right was intended not to be revocable or subject to modification without the consent of the third State".\textsuperscript{125} The basic position is, then, that the parties may revoke or amend the right at any time.\textsuperscript{126} To stop this, the third State concerned must prove that

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\textsuperscript{122} For a summary of the governmental comments on this draft Article, see: YBILC (1966-II), pp. 69-73. See particularly: the comment of Turkey on the proposed draft Article 60; and the comments of the United States and the United Kingdom on the proposed draft Article 61.

\textsuperscript{123} Namely, that if the presumption was irrevocability, then the States party would be discouraged in future from conferring rights on third States.

\textsuperscript{124} Napoletano has expressed an opposite view, saying that the rule that "the right may not be revoked ... 'if it is established that the right was intended not to be revocable' ... can only imply that 'the right may ... be revoked ... if it is established that the right was intended to be revocable'... Therefore, when the treaty does not provide for the termination of the third State's right, the latter must be considered as not revocable ..." (Napoletano, \textit{loc. cit.} above (n. 82), p. 80).

Similarly, he proposes that "when a right has arisen for a third State ... the right may not be ... modified 'but only' if it is established that the right was intended not to be ... subject to modification". \textit{Ibid.}, p. 82.

\textsuperscript{125} The Commission, in it commentary on its final draft, submits that the irrevocable character of the right would normally be established either from the terms or nature of the treaty provision giving rise to the right or from an agreement or understanding arrived at between the parties and the third State. See \textit{ILC's Draft Articles on the Law of Treaties (1966)}, para. 4 of the Commentary on Draft Article 33.

\textsuperscript{126} In this regard see: Judge Negulesco (Sep. Op.) in the \textit{Free Zones} case (PCIJ Rep., Ser. A, No. 22, pp. 37-38) who maintained that "even if it be held that several States may, under a treaty, create rights in favour of a third State without its name being even mentioned, it is difficult to say that this treaty cannot be ab-
the right was in fact intended to be irrevocable or not capable of amended without its consent.

3. Limits and qualifications relating to the application of the provisions of Articles 34-37

While the general rule in Article 34 appears to be fully supported, its application is limited to the context of the law of treaties. In so far as the legal effects of treaties on third States are concerned, there may be cases in which rules and principles belonging to other branches of international law may prevail. Moreover, there may be questions which are not dealt with by the Convention. The authors of the Vienna Convention appear to have recognised this interrelationship of the various branches of international law. There are several qualifications, either specifically to the provisions of Articles 34-37 (the rule formulated in Article 38) or to the provisions of the Convention as a whole (the Preamble, Articles 73 and 75), which appear to have been intended to put the reader on notice of that fact. In order to clarify the scope of the application of the Vienna Convention's rules on treaties and third States, it is, therefore, necessary to make brief reference to each of these “savings” clauses.

3.1. Limitation relating to the scope of the Convention as a whole

First of all, the Vienna Convention is limited in its scope to treaties in written form concluded by States after the entry into force of the Convention with regard to such States (Articles 2(1)(a) and 4 of the Convention). However, this is meant to be without prejudice to the legal force of international agreements not in written form and also “without prejudice to the application of any rules set forth in the ... [Vienna] Convention to which treaties would be subject under [customary] international law

rogated without such third State's consent ...”  

See also the Dissenting Opinion of Judges Altamira and Hurst in the same case who made reservations as to the view which tried to laid down a principle according to which the

“rights accorded to third Parties by international convention, to which the favoured State is not a Party, cannot be amended or abolished, even by the States which accorded them... such a theory would [in the Judges' view] be fraught with so great peril for the future of conventions of this kind now in force, that it would be most dangerous to rely on it in support of any conclusion whatever.” (PCIJ Rep., Ser. A/B, No. 46, p. 185).

independently of the Convention”. Therefore, in so far as the rules incorporated in Articles 34-37 may not reflect customary international law, they cannot apply to treaties concluded between two States before the entry into force of the Vienna Convention between those States, nor to treaties concluded after the entry into force of the Vienna Convention with regard to one concluding State but before it has entered into force for the other, nor to unwritten treaties in general.129

3.2. Limitations resulting from the interrelation of the Vienna Convention on the law of treaties and customary law

3.2.1. Questions not regulated by the Convention

The Vienna Convention is intended not to prejudice or affect the validity of existing rules of the customary law of treaties relating to questions which are not regulated by its provisions. The Vienna Convention's preamble expressly articulates that “the rules of customary international law will continue to govern questions not regulated” by the provisions of the Convention.130 Consequently, any question of treaty-law to which the Vienna Convention has not addressed itself, either expressly or impliedly, will continue to be governed by the existing rules of customary international law. The impact of this reservation on the doctrine of “treaties providing for objective regimes” is that, if customary law contained a rule which attributed objective effects to certain treaties, then that rule would continue to operate in respect of those treaties, if it were the case that the Vienna Convention has put to one side, and has not decided one way or another, the question whether there is a special rule of treaty law which attribute objective effects to certain treaties. Again, if the Vienna Convention has rejected the idea of a special rule of treaty law attributing objective effects to certain treaties, other devices of international law not dealt with in the Convention,131 may still help to explain objective

128 Article 3 (b) of The Vienna Convention.
129 Therefore, the provisions of the Vienna Convention are not applicable as treaty law to most of the existing treaties which have been said to be examples of “treaties providing for territorial objective regimes”.
130 The Vienna Convention preambular paragraph 8.
131 Such as, for instance, the principle of estoppel, explicit or implicit recognition and other general principles of customary law which may be of relevance here (see Schwarzenberger, op. cit. above Ch. 1 (n. 91), pp. 458-459). Of more significance is the principle, formulated by Fitzmaurice and confirmed by some other writers such as Jiménez de Aréchaga, on the basis of which States are under a general legal duty, first, “to respect and not to impede or
effects of certain treaties — except if and in so far as the Convention may exclude them (which, as will be seen, it does not).

3.2.2. Treaty-rules becoming binding on third States through international custom: Article 38

"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."

The fact that treaties may in various ways affect the formation of customary international law has long been recognised both by writers and the International Court of Justice. Firstly, a conventional rule may be no more than a declaration, the formal and written expression, of a pre-existing rule of customary law. In this case the provision in the treaty is "purely and simply a codification or restatement of a customary rule already in force" (declaratory effect). Secondly a treaty rule may constitute "the first textual statement of a custom which had not previously reached full maturity, but was

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... interfering with the operation of lawful and valid treaties entered into between other States"; and, secondly, "to recognise and respect situations of law or of fact established under lawful and valid treaties", as a corollary of the principle of non-intervention or co-existence. See Fitzmaurice’s 5th. Rep., Commentary on proposed draft Articles 17 and 18; Jiménez de Aréchaga, YBILC (1964-1), 739th meeting, p. 100, para. 18. For detailed examination of this proposed principle see Ch. IV (2.2.2.) below.


133 Inter alia, see: North Sea Continental Shelf Cases, loc. cit. above Ch. I (n. 131), pp. 38-39; Namibia case, loc. cit. above (n. 2), p. 47; Fisheries Jurisdiction Case, Merits, ICJ Rep. (1974), pp. 23-26; Continental Shelf (Libya / Malta), ICJ Rep. (1985), pp. 29-30; Nicaragua Case, Jurisdiction, loc. cit. above Ch. I (n. 144), p. 424, para. 73; Merits, ibid., pp. 93-98. See further Ch. IV (2.3.) below.

134 Jiménez de Aréchaga, loc. cit. above (n. 69), pp. 14-15. See further: International Law Commission's comment on this matter, in YBILC (1950-II), p. 368; ICJ in North Sea Continental Shelf and Nicaragua cases discussed in Ch. IV (2.3.) below.
what the Court [ICJ] has called an emerging rule, a rule in statu nascendi.” As a consequence of being embodied in a [general multilateral] treaty ... that rule in statu nascendi or that emerging rule crystallises as a rule of law” (crystallising effect). Thirdly, a treaty provision may constitute “the focal point for a consistent subsequent practice of States in harmony with that provision to such an extent that the provision in question may in due course generate or become a rule of customary law” (constitutive or generating effect). Finally, the possibility that just “widespread and representative participation” in a convention may suffice for transformation of a treaty rule into a custom has been suggested as conceived by the International Court of Justice (instant effect).

Since there was a possibility that the misleading impression might be given that the rules contained in Articles 34 to 37 excluded the possibility that customary rules might originate from treaties, the International Law Commission introduced draft Article 34 (Article 38 of the Vienna Convention) to prevent such a misinterpretation. As is evident from the terms of the Article itself, the rule does not deal with the problem of the creation of custom in international law. The rule merely states a reservation, aimed at securing and protecting the legitimate process of customary law-creation against

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135 Jiménez de Aréchaga, ibid.. This indeed is what Danish and Dutch Governments argued in the North Sea Continental Shelf Cases (loc. cit. above Ch. I (n. 131), p. 38, para. 61) as regards Article 6 of the Geneva Convention on the Continental Shelf (499 UNTS 311; UKTS 39 (1964), Cmd. 2422). See further: Fisheries Jurisdiction Case, Merits, loc. cit. above (n. 133), pp. 23 and 52; Case Concerning Continental Shelf (Tunisia / Libya), loc. cit. above Ch. I (n. 167), p. 38; and Ch. IV (2.3.) below.

136 Jiménez de Aréchaga, ibid..

137 Again this was argued on behalf of Denmark and The Netherlands in the North Sea Continental Shelf Cases (loc. cit. above Ch. I (n. 131), p. 41, para. 70). For a systematic consideration see Roxburgh, op. cit. above Ch. I (n. 25), pp. 72-95. See further: D’Amato, Manifest Intent ..., loc. cit. above (n.132), pp. 892-901; Jiménez de Aréchaga, loc. cit. above (n. 69), pp. 18-23.

138 D’Amato, The Concept of custom ..., op. cit. above (n.132), pp. 104 and 149-160. See further Ch. IV (2.3.) below.

139 In the North Sea Continental Shelf Cases, the International Court of Justice held that:

“With regard to 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, provided it included that of States whose interests were specifically affected.” (loc. cit. above Ch. I (n. 131), p. 42, para. 73, emphasis added).

In this regard see Ch. IV (2.3.) below for more details.

140 For the International Law Commission’s Commentary see Ch. IV (2.3.) below.
misinterpretations which might otherwise arise from the rules contained in Articles 34 to 37. It specifically deals with cases where a treaty rule gives rise to a customary rule which did not exist before the treaty was adopted. When, in the course of time, such a provision comes to be recognised as a rule of customary law, it binds all States, whether parties to the treaty upon the basis of which the new custom was generated or third States in relation to that treaty. As Baxter suggests, the States parties to the treaty are doubly bound, while the others (third States) are bound only by custom: "for them the treaty rule is binding qua custom rather than qua treaty". It must, however, be noted that the phrase "recognised as such" at the end of the provision of Article 38, which was not present in the International Law Commission's proposed draft Article, makes it clear that the "treaty rule" must be "recognised" as a "customary rule of international law" in order to become binding on a third States. In the Vienna Conference, there was a sharp division between participating States as to the question whether the recognition of a treaty rule as a "customary rule of international law" by a great number of States, including those "specially interested", suffice to make this rule binding, as a customary rule, upon all and every States ("liberal approach"), as held by the International Court of Justice in the North Sea Continental Shelf Cases or was it necessary that the rule be specifically recognised by a third State in order to be binding upon it ("rigid approach"). The wording of rule finally adopted in Article 38 is susceptible of both of these interpretations. Whatever be the right interpretation of the provision, the

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141 Sinclair, op. cit. above (n. 13), p. 9.
142 Rozakis, loc. cit. above (n. 36), pp. 25-39.
143 Baxter, loc. cit. above (n. 132), p. 32. For further support of the view that a rule may, in both customary and treaty forms, exist side by side see Viliger, op. cit. above (n. 132), pp. 237-88; International Court of Justice in Nicaragua Case, Jurisdiction, loc. cit. above Ch. I (n. 144), pp. 422-424; Merits, ibid., pp. 93-97.
144 The change was made as a result of a Syrian amendment which in essence intended to clarify that:
   "for a [treaty] rule to become binding upon a third State, that State must recognise it as a customary rule of international law ..." (UNCLT Off. Rec., First Session, 35th Meeting of the Committee of the Whole)
   For detailed consideration of this aspect of the rule in Article 38 see Ch. IV (2.3.) below.
145 Loc. cit. above Ch. I (n. 131), pp. 41-42, paras. 72-75. It must be noted that the Court has, however, followed a restricted approach in the case of "special" or "local" custom. See the cases cited in Ch. IV (n. 219) as well as Oppenheim's comment cited in Ch. IV (n. 225) below.
146 Rozakis, loc. cit. above (n. 36), pp. 31-32.
minimum requirement is that a treaty rule must at least *generally* be “recognised” as a “rule of customary international law” in order to become binding upon a third State.

Finally, as far as the question of treaties providing for “objective regimes” is concerned, the Commission considered the rule in Article 38 to be essential in order to make up, in part, for the omission of the former Draft Article 63 which was proposed in 1964 by Waldock. In fact, as will be seen, some members were of the opinion that the Commission’s decision to drop that article was on the understanding that the rule in Article 38, together with the mechanisms provided for in Articles 35 and 36, could appropriately explain and account for the legal effects of that category of treaties. This is evident from the International Law Commission’s Commentary on Draft Article 34 (Article 38 of the Vienna Convention).

3.3. Obligations imposed by international law independently of a treaty: Article 43

Another “savings” clause is the rule contained in Article 43, which is designed to safeguard, after a treaty ceases to be in force, the continuing force of customary rules of international law which may have been created by or codified in that treaty. As indicated above, Article 38 is aimed at preserving the validity vis-à-vis third States of customary rules generated upon treaties while they are in force. A further provision was thus necessary to preserve the operation of such rules of customary law vis-à-vis both former parties and former third States once the treaty ceases to be in force. Article 43 accordingly stipulates that

“The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of 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.”

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\[^{147}\] For further detail see Ch. IV (2.3.) below.

\[^{148}\] For examination of this draft Article see Ch. III (1.) below.

\[^{149}\] See Ch. IV (2.3.) below.

\[^{150}\] The International Court of Justice in the *Nicaragua Case* (Jurisdiction, *loc. cit.* above Ch. I (n. 144), pp. 422-424; Merits, *ibid.*, pp. 92-93 and 94-98) elaborated this by acknowledging the possibility of a rule being in existence, both as a rule of “customary” and “treaty” law, in parallel to each other. Such a rule would be binding on all States as a matter of customary international law and on the States parties as a matter of treaty-law. The fact that it cannot, for any reason, be applied to the legal relation of two or more States parties as a matter of treaty law, would not be a barrier for it to be applied as a matter of “customary law”.
Therefore, if one could establish that a particular part or the whole of a treaty regime — such as, for instance, that established for the Suez Canal by the Constantinople Convention of 1888\(^{151}\) — had been transformed into a customary one, then one could postulate that an end, either interim or definitive, to the operation of such a treaty would not release the parties or third States from the obligations which they owed vis-à-vis each other \textit{qua} custom.

3.4. Cases of State succession, State responsibility and outbreak of hostilities: Article 73

The Vienna Convention rules on treaties and third States are valid in the context of the law of treaties, but only in that context. There may be cases in which the rules and principles of other branches of international law may prevail over the rules specifically constituting the law of treaties (or apply because the case in hand is beyond the latter's scope).\(^{152}\) As Sinclair points out,\(^{153}\) one example is the question of State succession in respect of treaties. Considering the question from the standpoint or within the context of the law of treaties, a successor State is surely a third State as regards treaties concluded by its predecessor and, therefore, such treaties should not create either obligations or rights for it without its consent.\(^{154}\) But, looking at the problem within the context of the law of State succession convinced the International Law Commission to formulate rules (now incorporated in Articles 11 and 12 of the Vienna Convention on State Succession in respect of Treaties) that State succession as such shall not affect certain territorial situations arising from treaties, some of which regarded as examples of "objective regimes". According to Article 11, a succession of States does not as such affect a boundary established by a treaty or obligations and rights established by a treaty and relating to the regime of a boundary.\(^{155}\) Similarly, Article 12, declares that

\textit{"1. A succession of States does not as such affect:}\)

\(^{151}\) For reference and detailed examination of this treaty regime see Ch. V (2.2.) below.
\(^{152}\) Chinkin, \emph{op. cit.} above (n. 5), pp. 138-139.
\(^{153}\) Sinclair, \emph{op. cit.} above (n. 13), p. 105.
\(^{154}\) Indeed, in some respects the Vienna Convention on succession of States in respect of treaties follows this principle, for example see Articles 8 and 10 of the Convention, \emph{loc. cit.} above Ch. I (n. 156).
\(^{155}\) Article 11, in full, reads:

"A succession of States does not as such affect:
(a) a boundary established by a treaty; or
(b) obligations and rights established by a treaty and relating to the regime of a boundary."
(a) obligations relating to use of any territory, or to restrictions upon its use, established by a treaty for the benefit of any territory of a foreign State and considered as attaching to the territories in question.

(b) rights established by a treaty for the benefit of any territory and relating to the use, or to restrictions upon the use, of any territory of any foreign State and considered as attaching to the territories in question.

2. A succession of States does not as such affect:

(a) obligations relating to use of any territory, or to restrictions upon its use, established by a treaty for the benefit of a group of States or of all States and considered as attaching to that territory.

(b) rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and considered as attaching to that territory.**156**

What is the right interpretation of these provisions is not necessary to discuss here. But it is important to clarify that although these provisions seem to recognise the possibility for States to attach rights and obligations to a territory — which is, as Reuter put it, "tantamount to introducing the concept of rights in rem"**157** — they should not be viewed as affecting the law of treaties and its dominant principle *pacta tertiis*..., except in so far as the position of the successor State is concerned. All that the long text of Article 12 provides is that "the successor State takes over qua successor the territorial rights and obligations of the predecessor State as they stand, States which are not parties to the treaties concerned remain in the same position in relation to it, with the exception of the successor State. For the latter, under the law relating to succession of States in relation to treaties, its situation as a successor is prevailed over its non-party status.**159**

Similarly, the rules and considerations relating to international responsibility of States may prevail over, or exclude the relevance of, the rules belonging to the law of treaties. For instance, a rule recently adopted by the International Law Commission in its draft Article on State Responsibility (draft Article 27) seems to qualify the *pacta tertiis*.. rule by creating liabilities for third States by reference to treaties between other States. This draft Article stipulates that:

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**156** Article 12. It must be noted that paragraph 3 stated that "the provisions of the present article do not apply to treaty obligations of the predecessor State providing for the establishment of foreign military bases on the territory to which the succession of States relates."

**157** Reuter, op. cit. above (n. 36), p. 128.

**158** Ibid.

**159** Ibid.
"Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act, carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation."\(^{160}\)

From its commentary on this draft Article, the International Law Commission appeared to have had in mind "aid or assistance" by one State to another State, for the breaches of the latter's obligations under general international law, and in particular the case where that State commits an act of aggression against a third State. However, the wording of the draft Article is wider and refers to "an internationally wrongful act, carried out by the latter", which, on the basis of the definition given to this phrase by the Commission, includes the breach of a treaty. Assuming that, for example, States A and State B, by treaty, have undertaken not to increase the size of their navy beyond a certain level,\(^{161}\) selling of some warship by a third State to either States, if that level thereby exceeded, would seem to be unlawful. Obviously, this runs contrary to the *pacta tertii*.. rule on the basis which the treaty between A and B cannot, or must not, impose any obligations on, or *limits the freedom* of, a third State without its consent.\(^{162}\)

Moreover, certain considerations may make it possible to treat a (third) State which has suffered injuries as a result of a breach under a treaty to which it is not a party as an injured State for the purpose of the law of international responsibility. In this situation, the special considerations pertaining to the law of State responsibility

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161 A concrete example is the *Treaty between the United States and the Soviet Union on the Limitation of Anti-Ballistic Missile Systems* (ABM Treaty), Moscow, 26 May 1972 (23 UST 3435) in which the parties undertake, *inter alia*, not to have more than an agreed number of ABM launchers.

162 A number of Governments, in their commentary on proposed draft Article 27, have questioned the accuracy of the rule proposed. In particular, Sweden has specifically raised the incompatibility of the rule in draft Article 27 with Article 34 of the Vienna Convention. Together with Netherlands and the former German Democratic Republic, Sweden has called for restricting the scope of the draft Article to serious cases such as the international crimes referred to in International Law Commission's proposed draft Article 19; or as Sweden Government put it, "not to apply in cases where the wrongful act of the latter State consists in the breach of a treaty to which the former State is not a party". See YBILC (1981-II), Part 1, p. 77; *ibid.*, (1982-II), Part 1, pp. 18-19; *ibid.*, (1988-II), Part 1, pp. 4-5.
may prevail over the general principle that a treaty does not create rights or obligations for a third State.\(^{163}\)

In order to safeguard the phenomenon of the interrelationship of various branches of international law, the International Law Commission adopted a reservation (contained in Article 73) according to which the Vienna Convention

"shall not prejudice any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States."

Therefore, if it were the case that the doctrine of "treaties providing for objective regimes", as a special notion of treaty-law, were totally rejected by the Vienna Convention, that doctrine may still be of some relevance nevertheless in the related contexts of State Succession and State responsibility.

3.5. Case of an aggressor State: Article 75

Article 75 provides for a general reservation which has a direct bearing on the application of rules contained in Article 34-38. It stipulates that:

"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."

The inclusion of this rule can be traced back to suggestions made by Lachs and Tunkin, who had in mind the effect of treaties on an aggressor State which is not party thereto as in the case of the agreements regarding Germany concluded by the Allied Powers at the end of the Second World War, as well as the peace treaties imposed on Italy, Bulgaria, Hungary and Romania, in which it was stipulated that the said treaties would enter into force upon ratification by the victorious States and by them alone.\(^{164}\) Later on, certain Governments (Hungary, USSR, Ukraine and the United States),\(^{165}\) in their comments on an earlier draft Article proposed by the Commission, urged the International Law Commission to insert the idea into the Commission's Draft Article 59

\(^{163}\) In this regard, see Riphagen's proposals in his *Fourth Report on the Content, Forms and Degrees of International Responsibility*, YBILC (1982-II), Part 1, p. 3, at p.16, paras. 85 et seq. For more detail consideration of his proposal see pp. 17-18 above.

\(^{164}\) YBILC (1964-I), p. 71, paras. 46 and 53. For the peace treaties see Ch. III (n. 115 and 120) below.

\(^{165}\) For the Comments of these Governments as well as the Observation and Proposal of the Special Rapporteur see: YBILC (1966-II), pp. 68-69.
(later became Article 35 of the Vienna Convention), rather than into the commentary, as was first done. The said governments, as well as several members of the Commission, were of the conviction that the consent of an aggressor State is not needed in such cases, since "international law recognises exceptions to the principle of free consent where treaties impose obligations on aggressor States guilty of unleashing aggressive war".\(^{166}\)

In the Commission, there was controversy as to whether or not the notion had any place in the draft articles on the law of treaties. All members of the Commission were agreed that an act of aggression should be condemned; but some members considered that the case belonged to "a quite distinct part of international law, the possible impact of which on the operation of the law of treaties in particular circumstances could be assumed and need not be provided for in the draft articles".\(^{167}\) These members were of the opinion that the obligation derived either from the principles of State responsibility or the Charter of the United Nations or both. Mr Briggs in particular argued that, "if a group of States agreed between themselves by treaty to impose a particular policy on a State which they regarded as an aggressor, it was not the treaty provisions as such which were imposed or became binding on the aggressor State, but the policy of the other States".\(^{168}\) On the other hand, Tunkin argued that, "under modern international law, an aggressor State was not in the same position as in the past, and the consequence, for the law of treaties, was that treaties imposed on an aggressor State, which would constitute exceptions to the principle laid down in [draft] Article 59 [which later

\(^{166}\) The Ukrainian government Comment, \textit{ibid.}

\(^{167}\) YBILC (1966-II), p. 268, para. 4. See also YBILC (1964-I), pp. 60-63 for the statements of Castren, Verdross, Yasseen, Bartos and de Luna who argued that,

"from both 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 \textit{pax est servanda} principle, which was a rule of \textit{jus cogens}."

\(^{168}\) YBILC (1964-I), p. 61, para. 67. Schweisfurth, in examining this point, asks whether or not, assuming that Germany had been defeated and completely occupied by only one of the victorious powers and that power had issued a declaration with the material content of the Potsdam Agreement, this declaration would be a treaty. His answer is negative. He concludes that

"the basis of its legal effect on the defeated aggressor [whether they are formulated in a unilateral act (declaration) or in a multilateral instrument (treaty)] could not be the aggressor State exception of treaty law, but only other norms provided for international law for this case: State responsibility and the rights of belligerent occupation." (Schweisfurth, \textit{loc. cit.} above (n. 30), pp. 670-671).
became Article 35 of the Vienna Convention], did not require the consent of that State in order to be valid treaties”.

He further indicated that “admittedly certain aspects of the matter were within the province of State responsibility, but the particular proviso suggested for [draft] Article 59 was part of the law of treaties and must be stated as a very clear-cut exception to the rule that any treaty, to be effective, for third States, required their consent”. Finally, the Commission concluded that a general reservation to the whole draft articles would serve a useful purpose. As a result, an aggressor State cannot resort to the provisions of Articles 34 and 35 in order to deny the force of an obligation arising from a treaty employed as an instrument embodying the “measure” taken, in conformity with the Charter, against such a State by the victorious States or the competent organs of the United Nations.


\[170\] Ibid., para. 27. For more support see: comment by Lachs (ibid., para. 59) and Rosenne (ibid., para. 66).

\[171\] As a concrete example see the Security Council Res. 687 (3 April 1991) regarding the settlement of the situation arising out of the Iraqi invasion of Kuwait. UNYB (1991), p. 171. In this regard see Tomuschat, loc. cit. above Ch. I (n. 135), pp. 242-244.
Chapter III

Treaties Providing for "Objective Regimes" and the Vienna Convention on the Law of Treaties

In this chapter, two related questions will be dealt with: firstly, whether or not the Vienna Convention rules on "treaties and third States" have dealt with the question of treaties providing for "objective regimes", and, secondly, if they do, the extent to which they can satisfactorily explain the legal effects which are frequently attributed to such treaties — assuming, that is, that they do in fact produce the effects which are sometimes claimed for them. To that end, it is necessary to elaborate the way that the members of the International Law Commission treated the doctrine of "treaties providing for objective regimes" and particularly the underlying reason why the International Law Commission did not adopt a draft article on that question. To answer these questions is absolutely essential in order to determine the place of the doctrine of "treaties providing for objective regimes" in modern international law. In addressing the above questions, reference will first be made to the position of the Commission and its members regarding Waldock's proposed Draft Article 63. Examination will then be made of the question whether or not the Vienna Convention rules which were outlined in Chapter II are applicable to those treaties which are sometimes considered to establish "objective regimes". Finally, if the conclusion is that they are so applicable, an attempt will be made to clarify the extent to which the Convention's rules can explain the \textit{erga tertios} or \textit{erga omnes} effects claimed for those treaties.

1. The position of the International Law Commission with regard to Waldock's proposed Draft Article 63

As stated in Chapter I, during the preparatory work of the International Law Commission on the law of treaties, Fitzmaurice proposed several draft articles in which reference was made to treaties considered to producing effects \textit{erga omnes}. These draft articles, however, were not debated as a result of Fitzmaurice's appointment to the International Court of Justice and his consequent replacement by Waldock as Special Rapporteur for the subject. Thus, it was only Waldock's proposed Draft Article 63,

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1 See Ch. I (1.12.) above.
entitled "Treaties providing for objective regimes", which was debated by the members of International Law Commission. As special attention is frequently given to this proposed Draft Article, it seems desirable to cite it in extenso before examining the reaction of the members to it. The complete text of the Draft article reads:

"1. A treaty establishes an objective regime 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 the treaty, which expressly or impliedly consents to the creation or to the application of an objective regime, shall be considered to have accepted it.

(b) A State not a party to the treaty, which does not protest against or otherwise manifest its opposition to the regime 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 regime.

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

(a) bound by any general obligations which it contains; and

(b) entitled to invoke the provisions of the regime 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 regime 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 the regime and have a substantial interest in its functioning."

In his commentary on this draft article, Waldock referring to Fitzmaurice's treatment of the question of "objective regimes", stated that

"it may freely be conceded that certain kinds of treaty, e.g., treaties creating territorial settlements or regimes of neutralisation or demilitarisation, treaties of cession and boundary treaties, either have or acquire an objective character. But the question is whether this objective character derives from such a general duty to recognise and respect situations of law or of fact established under a lawful and valid treaty [as argued by Fitzmaurice], or from the particular nature of the treaty, or from the subsequent recognition or acquiescence of other State, or indeed from a combination of these elements."

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2 YBILC (1964-I), 738-740th Meetings, pp. 96-109.
4 See Ch. I (1.11.) above and Ch. IV (2.2.) below.
Rejecting Fitzmaurice’s theory of general duty, Waldock’s considered that the objective character of the class of treaties enumerated in paragraph 1 of his proposed Draft Article 63 derives from the particular nature of the treaties involved as well as subsequent recognition by third States.

The response to Waldock’s proposed Draft Article 63 was full of misgivings and scepticism. From the outset, an overwhelming majority of the members of the Commission4 were in favour of the proposal of Elias that the proposed draft article be deleted.7 Their reasons for so doing varied, but comprised the following.

Firstly, some contended that the proposed draft article attempted to deal, within the framework of the law of treaties, with a variety of complex questions which not only “differed greatly, both in factual background and in legal character”, but also “touch[ed] on other branches of international law”.8 Tunkin, referring to this complexity, stated that one case:

“was the delimitation of a land frontier or of the territorial sea by two neighbouring States; so far as third States were concerned, that type of settlement constituted res inter alios acta. Another case was ... the Montreux Convention ... The material and legal bases of that settlement were completely different from those of the former example. Another case was ... the 1948 Convention on the regime of the Danube ... Yet another case ... was that covered by the Antarctic Treaty of 1959.”9 Likewise, El-Erian argued that Paragraph 1 of the Draft Article

“listed matters some of which related to the demarcation of the territory of a State, others to the setting up of an international legal order as a result of the establishment of the League of Nations and the United Nations, and others to territorial settlements and their recognition by other members of the community of nations. Those questions could be described as sensitive spots in international law and the Special Rapporteur had been very ambitious in attempting to deal with so many of them in a single Article of his draft.”10

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6 Out of 18 members who participated on the debate on Waldock’s proposed Draft Article 63, 14 members favoured the deletion of the draft Article. Three members (Verdross, Rosenne, and Briggs) considered that the Draft Article was worth keeping. De Luna was ready to accept the draft if the whole Commission, or a large majority, was in favour of it. See YBILC (1964-I), 738-740th Meetings, pp. 96-109.

7 Those supporting Elias were El-Erian, Ruda, Tsuruoka, Jiménez de Aréchaga, Yasseen, Castren, Pal, Amado, Paredes, Tunkin, Bartos and Tabbibi (ibid., 738-740 Meetings).

8 Tunkin, ibid., 740 Meeting, pp. 106-107, paras. 11-15.

9 Ibid., para. 15. For his view on the Antarctic Treaty see Ch. V (4.1.1.) below.

10 El-Erian, 738th Meeting, p. 97, para. 39.
Consequently, the suggestion was made that the subject-matter of the proposed draft article, "in so far as it related to the law of treaties, was closely bound up with problems of international custom, implied consent, rights *in rem* and their recognition by other members of the international community" and that "it was not advisable to treat those matters purely from the standpoint of the effects of treaties." In other words, a treaty on treaties was not the appropriate place to deal with the question, since other areas of law were involved.

Secondly, others argued that the rules in paragraphs 2(b) and 3(a) of the proposed draft article were highly objectionable, because they imposed a heavy burden on third States "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 paragraph 1", on pain, if they failed to do so, of incurring the extremely severe penalty of becoming bound by "any general obligations which it contains". On this point, Jiménez de Aréchaga argued that it was likely that, by the combined effect of those two paragraphs, since States would often fail to know of such treaties, let alone object to their having any effects for them, certain groups of States might "acquire a sort of legislative power over the rest of the world" and that power was most likely "to be exercised by the Great Powers, as in the case of "international settlements". It was significant that nearly all the examples of "international settlements" given by such authorities as Rousseau and McNair were taken from the Concert of Europe in the nineteenth century."

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11 El-Erian, *ibid.*, para. 41. Other supporter of this argument were: Ruda (*ibid.*, 739th Meeting, para. 9); Castren (*ibid.*, para. 29); Tunkin, (*ibid.*, 740th Meeting, para. 11) and Lachs (*ibid.*, para. 26).

12 As noted by Jiménez de Aréchaga, the principle of non-intervention, for instance, may require third States to respect situations of law or fact created by treaties (*Ibid.*, 739th Meeting, p.100, para. 17). Cf. Ch. IV (2.2.2.) below.

13 Jiménez de Aréchaga, *ibid.*, 739th Meeting, para. 21. The following also advocated this argument: Yasseen (*ibid.*, para. 25); Pal (*ibid.*, para. 35); Paredes (*ibid.*, para 41); Tabbibi (*ibid.*, para. 66) and Liu (*ibid.*, para. 73).

14 Para. 3 (a) of Waldock’s proposed Draft Article 63 (cited in p. 131 above).

15 *YBILC* (1964-I), 739th Meeting, para. 22. It is worth noting that, in his opinion, third States might have a general duty to abstain from interfering with, and thus have duty to respect, situations of law or of fact established by lawful and valid treaties. However, he made it clear that

"... it would be going too far to suggest, as was done in paragraph 3(a) [of Waldock’s proposed Draft Article 63], that they become ‘bound by any general obligations’ contained in..."
A further, third, argument was also made that the rule embodied in proposed Draft Article 63 was not *lex lata* and was not a good *lex ferenda*. Thus, according to Jiménez de Aréchaga, that rule:

"would clearly not constitute codification of existing law and it was extremely unlikely that States would regard it as a progressive development ... They would undoubtedly prefer the present situation, in which they remained legally unconcerned by what constitute for them *res inter alios acta*, retaining their freedom to take a position with respect to any such treaty only if and when the need to do so arose."\(^{16}\)

Fourthly, it was argued that the draft article was attempting to legitimise a past practice which was no longer acceptable,\(^{17}\) and accordingly, was charged with undesirable political implications.\(^{18}\) In this regard, de Luna indicated that

"Law was not only a logical and harmonious structure, however; it had also to be realistic. And it was to be feared that States might regard such an article as an approval of *de facto* legislation or of government of the world by the Great Powers; for ‘objective regimes’ had in fact been used to impose certain conditions on small States at a time when the sovereign equality of States had not yet been affirmed by the United Nations Charter. The Commission should therefore consider how its drafts was likely to be received."\(^{19}\)

Finally, it was argued that to the extent that the situations envisaged in proposed Draft Article 63 came within the scope of the law of treaties, they were properly covered, or could be covered, by Waldock’s proposed Draft Articles 62 (the predecessor of Articles 35 and 36 of the Vienna Convention\(^{20}\)) and 64 (now, with some

\(^{16}\) *Ibid.*, para. 21. For support for this line of argument see the statements of El-Erian (*ibid.*, 738th Meeting, para. 40); Tunkin (*ibid.*, 739 Meeting, para. 45); Bartos (*ibid.*, para. 52); Tabbibi (*ibid.*, para. 65); Yasseen (*ibid.*, paras. 24 and 27 and Pal (*ibid.*, para. 37).

\(^{17}\) See Tunkin who argued that draft

"article 63 created more problems than it solved. It was concerned with an obsolete practice which might have been common fifty years earlier, but could not be regarded as a rule ..." (*Ibid.*, 739th Meeting, p.103, para. 45)

\(^{18}\) *Ibid.* See also statement made by Liu, who favoured the deletion of the proposed draft Article for the sole reason that it covered different situations which were “charged with political implications”. *Ibid.*, 739th Meeting, para. 72.

\(^{19}\) *Ibid.*, 739th Meeting, para. 7. Also see statement made by Pal (*ibid.*, paras. 35-36); Tabbibi (*ibid.*, para. 65)

\(^{20}\) The proposed draft Article 62, entitled *Treaties providing for obligations and rights of third States*, read:

"1. A State is bound by a provision of a treaty to which it is not a party if — (a) the parties to the treaty intended that the provision in question should be the means of creating a legal obligation binding upon that particular State or a class of States to which it be-
minor changes, incorporated in Article 38 of the Vienna Convention), without leaving any gap in the Draft Articles. Referring to the content of these draft articles, Ruda stated that

"Article 61 [the predecessor of Article 34 of the Vienna Convention] laid down the general rule that treaties created neither obligations nor rights for third States and [draft] articles 62, 63, and 64 provided for exceptions to that rule. [draft] Article 62 dealt with treaties from which obligations or rights derived for third States and were accepted by them; [draft] Article 64 dealt with the case in which a treaty was applicable to third States because its provisions became transformed into rules of customary international law. [draft] Article 63 gave recognition to a special kind of treaty which provided for an "objective regime" in the general interest. It laid down that the third States concerned were bound by the objective regime in question if they accepted it; from that it followed that the source of the rights and obligations of the third State was their consent. The Special Rapporteur explained ... that the objective regime became binding in the absence of timely opposition from other States. Three possibilities had been open to the Special Rapporteur in his endeavour to explain why third States acquired rights and became bound by obligations under a treaty setting up an "objective regime". The first was to recognise that the type of treaty envisaged in [draft] Article 63, either by its nature or because of the procedure followed in concluding it, had a semi-legislative character and therefore operated _erga omnes_; the Special Rapporteur had not chosen that approach ... The second possibility was to consider that the third States were bound by a customary regime [grown upon the treaty]; the Special Rapporteur had not chosen to do that either. He had chosen the third possibility, which was to regard the consent of the third States as the basis of their rights and obligations. On that assumption, [draft] Article 63 appeared to deal with a special case of the situations covered by [draft] article 62, and could therefore be dropped."  

Likewise, Amado argued that:

1. That a State has expressly or impliedly consented to the provision.
2. Subject to paragraph 3, a State is entitled to invoke a right provided for in a treaty to which it is not a party when —
   (a) the parties to the treaty intended that the provision in question should create an actual right upon which that particular State or a class of States to which it belongs, could rely; and
   (b) the right has not been rejected, either expressly or impliedly, by that State.
3. The provision in question may be amended or revoked at any time by the parties to the treaty without the consent of the State entitled to the right created thereby, unless —
   (a) the parties to the treaty entered into a specific agreement with the latter with regard to the creation of the right; or
   (b) a contrary intention appears from the terms of the treaty, the circumstances of its conclusion or the statements of the party.
4. A State exercising a right created by a provision of a treaty to which it is not a party is bound to comply with any conditions laid down in that provision or elsewhere in the treaty for the exercise of the right.

The following members stressed this proposition: Elias (YBILC (1964-I), 738th Meeting, para. 38); Jiménez de Aréchaga (ibid., para. 20) and Tunkin (ibid., 740th Meeting, paras. 11-16).

Ibid., 739th Meeting, paras. 10 and 11.
"In the case of article 63, if the source of the obligations and rights was to be in the consent given by the third States [as appeared from the wording of the proposed Draft Article 63], the situation was in effect that which had been dealt with in [proposed draft] article 62." 23

Thus, many members of the Commission believed that the rules already adopted (presently contained in Articles 34-38 of the Vienna Convention) properly regulated the legal effects that the treaties covered by proposed Draft Article 63 might have for third States. 24 Accordingly, there was no need to adopt the proposed Draft Article 63.

In contrast, there were a few members who favoured maintaining Waldock's proposed Draft Article 63. They advocated this step on three main grounds. Firstly, the proposition was made that "objective regimes unquestionably existed in international law". 25 Thus Rosenne asserted that

"the general thesis which underlay [draft] article 63 ... [that States could, by treaty, create a state of affairs valid erga omnes]... was established international practice and was lax lata. Moreover, that possibility met a real need in international life ... " 26

Secondly, it was contended that the legal effects which were envisaged in proposed Draft Article 63 would not be reproduced by proposed Draft Articles 62 and 64. Rosenne, referring to this point, stated that

"The obligations and rights referred to in [proposed draft] article 62 were intended to extend to a particular State or class of States, whereas those referred to in [proposed draft] article 63 would extend to every State having an interest in the subject of the treaty ..." 27

Nor did article 63 come within the scope of international custom. There were inherent differences between customary and conventional law, the essential one in the present

23 Ibid., para. 40.
24 Tunkin, referring to this point, stated that:

"When the Commission had considered [Waldock's proposed draft] article 62, it had come to the conclusion that a State or group of States could not impose an obligation or an actual right on other States without their consent. Thus [proposed draft] article 62 covered situation which might lawfully arise today. But [Waldock's proposed draft] article 63 seemed to him somewhat ambiguous; although the "objective regimes" envisaged were based on consent, the very term implied the imposition of conditions by a group of States on other States." (Ibid., para. 46).
25 Briggs, ibid., para. 48. He stated that he had

"tended to regard them [objective regimes] as based on customary international law, even though they might have been initiated by treaties. The process of their creation was a slow one, and the Special Rapporteur had drafted Article 63 with the commendable aim of hastening that process in the interest of the progressive development of international law." (Ibid.).
26 Rosenne, ibid., paras. 52-54.
27 Cf. the provision of Article 36 which covers treaties which grants rights to all States.
context being that observance of customary law by a State would not depend on any legal interest.\footnote{Ibid., paras. 55-56.}

Lastly, it was suggested that the rule embodied in the proposed draft article “was entirely based on the idea of consent” and that it was a particular application of Waldock’s proposed draft Article 62, adding only a “new rule under which consent was presumed if third States remained silent for a certain length of time”. Accordingly, the draft article “did not confer a right or impose an obligation on a third State without its consent, any more than [draft] article 62”, and, as such served a purpose.\footnote{See the comments of Verdross and Briggs (ibid., 738 Meeting, para. 50; 739 Meeting, paras. 2 and 6). However, as will be seen, this argument is not accurate because third States’ silence may not be interpreted as their “consent”. See Ch. IV (1.2. and 1.3.) below.}

Before going any further, it is worth noting that the implications of various arguments cited above are very different from each other. Some imply that there might well be a rule on “objective regimes”, but that it lies beyond the scope of the Vienna Convention on the Law of Treatise. Some imply that there is no such rule. And some imply something different again. However, one may easily deduce that there was next to no support for the strong idea that certain treaties automatically create effects \textit{erga omnes}, without more. The most that can be said is that there was some support for a special rule which made it easier for certain types of treaty to bind third States by making it easier to consider them as having consented thereto. According to this view, certain treaties would come to bind third States unless they protested at that result (or, in other words, if they “remained silent for certain length of time”, as proposed by Waldock). However, it is doubtful if one can, in such a case, consider third States’ silence as “consent”.\footnote{Whether the “silence” of the third States may be viewed as “consent” is a question examined in Ch. IV (1.2. and 1.3.) below.}

As can be seen from the above, the majority of the members of the International Law Commission did not feel comfortable with the rule contained in Waldock’s proposed Draft Article 63 mostly because, in essence, it treated third States silence as “consent” — though there was some support for the existence of the category, or the notion of, treaties providing for “objective regimes”.

At the end of the Commission’s deliberations, Waldock elaborated upon the consequences of not adopting his proposed Draft Article 63 in the following terms
"In so far as [draft] article 63 was intended to cover the granting of rights to third States, [draft] article 62 could, if redrafted, cover its subject-matter; it would, of course, be necessary to reformulate article 62 in such a way as to cover the case of provision for rights in favour of all States."

However, he stated that, like Lachs who expressed a similar view, he feared that the draft Article 62, even after such a reformulation, could still "not cover the case of negative obligations, such as those arising from demilitarisation. Such obligations were often concomitants of rights, but occasionally they were independent of the exercise of rights. For example, the Antarctic Treaty provided for freedom to use Antarctica for scientific purposes; but it also laid down an objective obligation in the form of the definite prohibition of all nuclear activities in Antarctica. If the Commission dropped article 63, that type of situation would have to be left to be covered by custom, which was necessarily a slower process. His intention in drafting article 63 had been to provide legal machinery for accelerating the process of recognition of such a regime as part of established international legal order ... However, since many members were not prepared to accept the provisions of [draft] article 63, [draft] article 62 must be redrafted and the deletion of [draft] article 63 must be borne in mind by the Commission when it came to consider [draft] article 64. Some of the materials relating to [draft] article 63 must be preserved in the commentaries on articles 62 and 64 in order to avoid misunderstanding."

Finally, the Commission, because of the position taken up by the majority of its members, decided not to propose any special provision on treaties providing for so-called "objective regimes" in its Draft Articles on the Law of Treaties. However, following Waldock's advice, it redrafted the provisions dealing with the granting of treaty-rights to third States so as to enable it to cover and to provide for as much as possible the cases which were to have been regulated by the proposed Draft Article 63. As will be seen, this purposeful redrafting of that draft article helps the provisions finally adopted in the Vienna Convention to explain and to account for, to a certain extent at least, the automatic effects which are sometimes claimed for the category of "treaties providing for objective regimes". In addition, the Commission decided to insert the

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31 YBILC (1964-1), 740th Meeting, para. 33.
32 See Lachs, comment, ibid., paras. 27-29 and 34.
33 YBILC (1964-1), 740th Meeting, paras. 34 and 35, emphasis added.
34 Waldock's proposed draft Article 62 did not originally deal with cases in which a right was conferred to all States. This kind of cases were to be regulated by the provisions of his proposed Draft Article 63 (as cases of "objective regime"). However, the Commission, after deciding not to adopt the proposed Draft Article 63, redrafted the draft Article 62 so that it included in its scope cases in which rights were granted to all (third) States in general. For the text of draft Article 62 see n. 20 above. For the content and the history of the draft Article 62 as later became Article 36 of the Vienna Convention see Ch. II (2.2.2.) above.
following passage into its commentary on its Draft Article 34 (now Article 38 of the Vienna Convention):

"The Commission considered whether treaties creating so-called "objective regimes", that is, obligations and rights valid *erga omnes*, should be dealt with separately as a special case. Some members ... favoured this course, expressing the view that the concept ... existed in international law and merited special treatment in the draft articles. In their view, treaties which fall within this concept are treaties for the neutralisation or demilitarisation of particular territories or areas, and treaties providing for freedom of navigation in international rivers or maritime waterways ... Other members, however, while recognising that in certain cases treaty rights and obligations may *come to be* valid *erga omnes*, did not regard these cases as resulting from any special concept or institution of the law of treaties. They considered that these cases resulted either from the application of the principle in article 32 [Article 36] or from the grafting of an international custom upon a treaty [Article 38]."\(^{35}\)

The Commission, in very general terms, went on to state why it did not propose an autonomous rule on the question. It indicated that “to lay down a rule recognising the possibility of the creation of objective regimes directly by treaty might be unlikely to meet with the general acceptance” of States.\(^{36}\) It indicated that the provision in Draft Article 32 (later to become Article 36 of the Vienna Convention), regarding treaties intended to create rights in favour of States generally, together with the process of the interplay of custom and treaty (Article 38), “furnish a legal basis for the establishment of treaty obligations and rights valid *erga omnes*, which goes as far as is at present possible.”\(^{37}\)

2. Does the Vienna Convention cover the category of treaties in question?

The consideration of the question of “objective regimes” during the preparatory works of the Vienna Convention ended there. No further action was taken by the Commission on this question. There was no reaction by any government to the above-mentioned decision of the International Law Commission. Nor there was any attempt by the States participating in the Vienna Conference to take up the issue. Without going into a detailed examination of the implication of this unconcerned attitude, it may be argued that the States participating in the Vienna Conference did not, as predicted by the

\(^{35}\) *ILC's Draft Articles on the Law of Treaties* (1966), para. 4 of Commentary on Draft Article 34, emphasis added.

\(^{36}\) *Ibid.*

International Law Commission, consider the idea of "objective regimes" as acceptable now. Satisfied with the rules proposed by the International Law Commission, they seem not to have considered such a concept as advancing any desirable solution to the problem of the effects of treaties on third States. Otherwise, one or more of the participating States would have raised the question. Leaving aside the implication of the unconcerned attitude of States participating in the Vienna Conference in this regard, it is time now to consider the significance of the absence of a provision in the Vienna Convention recognising the "objective effects" claimed for certain category of treaties. The question is whether or not the International Law Commission's decision not to propose a rule on the question of "objective regimes" has finally and conclusively put an end to the doctrine of "treaties providing for objective regimes" (if it ever existed), at least as far it is concerned with the law of treaties or whether it has left the matter simply to be governed by customary rules of treaty law.38

Scholars who have commented on these points are not precise in their remarks. Sinclair considers that one must not assume that the deliberate decision of the Commission and the Conference not to make special provision for treaties providing for "objective regimes" in the series of articles on treaties and third States in the Vienna Convention constitutes a denial of the existence of this category of treaties. He suggested that, at most, it constituted

"a denial of the need for a special rule to explain the relationship between treaties creating 'objective regimes' and third States; the category still has its significance in the separate, but related, context of succession of States in respect of treaties."39

Similarly, Reuter suggests that

"it would be a mistake to deduce from [the Commission's decision] that some acts or situations are never applicable to a State that has not participated in the treaty from which they arise. The Commission's decision means only that the basis for such cases, if they arise, does not lie in the rules of the law of treaties; the question of their legal validity has not thereby been settled, and remains open."40

38 It must be noted that, strictly speaking, the Vienna Convention' rules are applicable as between States that are party thereto, therefore, our answer may seem to touch the position of these States only. However, as was seen in Chapter II, the Convention was meant to codify the customary law of treaties and has subsequently been seen as reflecting custom. Accordingly, our conclusion may well be good vis-à-vis the position at custom and valid among all States.

39 Sinclair, op. cit. above Ch. II (n. 13), p. 105.

40 Reuter, P., Sixth Report on the Question of Treaties Concluded between States and Interna-
On the other hand, Schweisfurth contends that the argument that the problem of treaties establishing "objective regimes" has remained unresolved by the Vienna Convention is not convincing:

"The Vienna Convention has indeed solved this problem. The majority of the ILC denied that "objective regimes" are a special concept or institution of the law of treaties and the Vienna Conference adopted this line. The omission of any reference to "objective regimes" in the Vienna Convention does not mean that this type of treaty is not covered by the Convention."\(^4\)

The Vienna Convention's rules on treaties and third States, described in Chapter II, do not distinguish one kind of treaty from another. This is also true in respect of the Vienna Convention as a whole; for it does not recognise any sort of classification of treaties. Article 1 of the Convention stipulates that the "Convention applies to treaties between States" and Article 2 (1)(a) defines a treaty as an "international agreement ... concluded between States in written form and governed by international law." Thus, a presumption can be drawn according to which any international agreement which falls under this definition is governed by the Convention.\(^4\) Consequently, the rules stipulated in Articles 34-38 were meant to govern the legal effects of all treaties upon third States, including the category of treaties in question. Looked at in this way, Schweisfurth's view appears to be more accurate.

However, such a statement is not absolutely and without qualification. As previously observed in Chapter II, the Vienna Convention as a whole, and its rules on treaties and third States in particular, are subjected to several reservations and qualifications, which, to a great extent, limit the scope of their application and which may in one way or another safeguard the possible existence of any special rule outside the Vienna Convention justifying the special status of the category of treaties under consideration.

Reference can firstly be made to the provisions of Articles 2 (1)(a), 3 and 4 of the Convention, as a result of which the Vienna Convention as a whole cannot, strictly

\(^{4}\) Schweisfurth, loc. cit. above Ch. II (n. 30), p. 665.

\(^{4}\) Provided, of course, that it is concluded by States after the entry into force of the Convention with regard to such States (Article 4 of the Convention).
speaking, be applied to almost all of the existing treaties which are regarded as examples of “treaties providing for objective regimes”. Thus, for instance, the 1888 Convention of Constantinopole concerning the Suez Canal might still produces _erga omnes_ effects if the 19th century customary law of treaties provided for such. The principles of international law will ensure that any such treaties will continue to yield this objective effects.

A second qualification is the clause articulated in the eighth paragraph of the preamble of the Vienna Convention providing for another reservation which safeguards the possible relevance of any special rule which might exist as a customary rule in other areas of international law or even in treaty law. It expressly affirms the continuing force of the rules of customary international law in respect to “any questions not regulated by the provisions of the present Convention”. Therefore, to the extent that it can be shown that the question of treaties providing for “objective regimes” has not, at least partly, been regulated by the provisions of the Vienna Convention, such a special rule may still remain operative. Given the position of the International Law Commission and considering that the Convention is meant to codify the customary law of treaties and has subsequently been seen as restating custom, it is easy to see how the preamble preserves the position of any special rule not based in treaty law. It is very difficult, however, to prove that the question of “objective regimes” has not been regulated by the Vienna Convention so it is unlikely that paragraph 8 of the preamble preserves any special rule which might have existed in the law of treaties.

A third qualification is the savings clause formulated in Article 73 of the Vienna Convention, which is designed to safeguard the phenomenon of the interrelation of various branches of international law. Thus, as Sinclair notes, the special nature of the

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43 In this regard it was concluded that “in so far as the provisions of Articles 34-37 do not reflect, or come to reflect, customary international law, they cannot apply to _treaties_ concluded between two States before the entry into force of the Vienna Convention with respect to those States or to treaties concluded after the entry into force of the Vienna Convention with regard to one of the concluding State but not the other or to _unwritten treaties_ in general”. See Ch. II (3.1.) above.

44 Whether or not there is sufficient evidence of State practice to upholds the existence at that time of a customary law recognising the “objective” effects of certain kind of treaties is examined in Ch. V (2.) below.
category of treaties providing for "objective regimes" may still be regarded as signifi-
cant in the related contexts of State Succession and State responsibility.45

Consequently, it may be concluded that, subject to these qualifications, the Vi-
enna Convention rules on "treaties and third States" were intended to and do regulate
the possible effects which all treaties, including the category of "treaties providing for
objective regimes", may legally produce for third States under and in pursuance of the
law of treaties. This conclusion indicates that the seemingly contradictory views of Sin-
clair and Reuter, on the one hand, and Schweisfurth, on the other, are much the same in
truth. All appear to agree that the International Law Commission's decision not to pro-
pose a special rule on the question of "objective regimes", amounted to a rejection of
the existence, or of the need for, any special rule of treaty-law on the matter;46 and all
agree that the Vienna Convention's rules in Part III Section 4 (Articles 34-38) contain
rules of treaty-law applicable to all treaties including the category of treaties in ques-
tion. None, however, appear to deny the existence of the notion outside the realm of the
law of treaties. Thus, from the law of treaties standpoint, but from that standpoint alone,
the rule is that, in general treaties do not create either rights or obligations for third
States, whatever might be their nature, except either through the mechanisms envisaged
in Articles 35-36 or through the non-treaty-law route of custom-process (Article 38).47

3. To what extent the Convention rules can explain the case of trea-
ties regarded as providing for "objective regimes"

Now that it has been concluded that the Vienna Convention rules cover the case
of the category of treaties under consideration, the next question is how far such rules
may recognise and explain the automatic erga omnes effects which are sometime
claimed for them.

The International Law Commission's opinion, as cited above, was that the legal
effects attributed to most, but not all, of those treaties which are sometimes considered

45 See Ch. II (3.3. and 3.4.) above.
46 As can be seen from the passage cited above, Schweisfurth does not exclude explanation
from outside the law of treaties. He only concedes that the majority of the International
Law Commission denied that "objective regimes" are a "special concept or institution of
the law of treaties". See p. 141 above.
47 For more detail see Ch. II (2.2. and 3.2.) above and Ch. IV (2.3.) below.
as providing for "objective regimes" could satisfactorily be explained either by reference to the mechanism provided for in Article 36 of the Vienna Convention or by the grafting of international custom upon such treaties (Article 38).48 If the former mechanism fails to settle the question of the rights and obligations of a third State under a treaty-regime, the latter may still afford a solution. As the latter mechanism — which is fully examined below49 — does not afford an explanation of rights and obligations for third States derived automatically from a treaty immediately after its entry into force, we focus only on the former mechanism in order to determine if any automatic legal effects of treaties are recognised and what examples of "treaties providing for objective regimes" could satisfactorily be explained or accounted for by the mechanism in Article 36 of the Convention.

The mechanism in Article 36 is capable, to a limited extent, of offering a satisfactory foundation for the automatic legal effects which are frequently attributed to the category of treaties in question. As we have already seen,50 Article 36 (1) envisages a case in which parties to a treaty intend to confer a right on a third State or on a group of third States or on third States in general, which the latter States enjoy, or can claim, without the requirement of having first expressed their acceptance of that right. Paragraph 2 of the same article envisages that such a right may be accompanied by some obligations, which need not to be accepted in writing by third States if and in so far as, but if and in so far as, they constitute conditions for the exercise of the right: an obligation can be regarded as such, it was noted above,51 if it is a condition which needs to be observed when and while the third State is actually exercising the right. Therefore, two conditions must be fulfilled for a treaty to produce legal effects for third States by its own force and without more: firstly, there must be a clear intention on the part of the parties to confer a legal right, rather than a mere benefit, in favorem tertiorum; secondly, the regime concerned must involve solely the conferment of a right, or, if it also involves obligations for the third States, these obligations must be no more than

48 See the ILC's view cited in p. 139 above.
49 See Ch. IV (2.3.) below.
50 See Ch. II (2.2.2.3.) above.
51 See Ch. II (2.2.2.4.) above.
conditions for the exercise of that right. To the extent that this is so, the peculiar legal effects which are frequently attributed to the kind of treaties in question may appropriately be explained without addressing the many theoretical and practical problems which would be involved in postulating the existence of a special rule of treaty law — or a special rule of any other branch of international law — providing for treaties creating "objective regimes". In such a case, the better view is that the right in question vests automatically in the third State(s) — at least, if that is, what the treaty envisages or the parties intend. The beneficiary (third) States can always choose whether or not to claim and exercise or else to renounce the right. However, if they wish to take up the right, they must comply with any obligations attached to it while they are exercising the right. Moreover, they can at any time refrain from exercising the right and, if they do so, the obligations attached to the right will cease to fall to be performed by them.

In order to identify the kind of cases which may adequately be covered by the mechanism in Article 36, reference will first be made to some examples of treaties supposedly creating "objective regimes" which could satisfactorily be explained by that mechanism; then, to the cases which for one reason or another can not. Before examining these questions, it is important, however, to recall that the Vienna Convention, strictly speaking, only applies to treaties concluded after its entry into force between States parties thereto. Therefore, our deliberations as to the efficacy of its rules to regulate or explain the extraordinary effects which are frequently attached to this kind of treaty is solely aimed at defining the kinds of effects which might arise under the Vienna Convention from future treaties similar to the existing treaties to which reference is made here — though, as indicated earlier on, the Vienna Convention rules on the effect of treaties on third States are widely seen as codification of pre-existing, or reflecting the existing, rules of customary law. Accordingly, our reference to the existing

52 Such a right may be either irrevocable or else be subject to revocation or modification at the will of the parties to the treaty, depending on the intention of parties to the treaty. See Ch. II (2.2.3.1.) above.
53 The Vienna Convention seems to have followed this line of thought, because, as has been seen, under that convention it is always the intention of the parties which determines the creation, the continuity and the revocation or modification of a right for a third State. See Ch. II (2.2.3.2.) above.
54 See Ch. II (n. 2) above.
55 Chinkin, op. cit. above Ch. II (n. 5), pp. 43-44.
treaties which are claimed to embody "objective regimes" is without prejudice to their exact position in this regard under customary international law.

3.1. Cases which could satisfactorily be regulated by Article 36

i. The Belgrade Convention of 1948 establishing the regime of navigation on the Danube is often regarded as establishing an objective regime. It affords a good example of the kind of case for which Article 36 can satisfactorily explain the allegedly automatic legal effects of a treaty vis-à-vis third States. The important provisions of the said regime that have a bearing upon third States are as follows. Article 1 declares that:

"navigation on the Danube shall be free and open for the nationals, vessels of commerce and goods of all States, on a footing of equality in regard to port and navigation charges and conditions for merchant shipping. The foregoing shall not apply to traffic between ports of the same State." Emphasis added. The wording of this Article repeats exactly a clause included in various peace treaties concluded with Bulgaria, Romania and Hungary after the World War II. See Sinclair, loc. cit. above (n. 56), pp. 389-399. For the peace treaties see Ch V (n. 42) below.

These rights are subjected to compliance with many conditions attached thereto. The vessels using the Danube are required not only to pay tolls, but also to comply with customs, sanitary, and police regulations established in accordance with the terms of the Convention (Article 26). Moreover, a vessel flying a foreign flag is specifically required not to engage in local passenger and freight traffic between ports of the same

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56 Convention Concerning the Regime of Navigation on the Danube, Belgrade, 18 August 1948, 33 UNTS 197; 155 BFSP 146. This Convention was signed by seven riparian States and came into force on 11 May 1949. For a full account of the negotiation leading to this Convention see: Sinclair, L., The Danube Conference of 1948, BYBIL 25 (1948), pp. 398-404.

57 See: Fitzmaurice's 5th. Rep., p. 92, para. 52; Waldock's 3rd. Rep. on Treaties, pp. 28-29, para. 8. In particular, see the observation made by Bartos concerning the Belgrade Convention of 1948 (33 UNTS 181) when commenting on Waldock's proposed Draft Article 63 (YBILC (1964-I), 739th Meeting, p. 103, para. 52). For more detail see Ch. IV (1.1.1 and 1.1.2.3.) below.

58 Emphasis added. The wording of this Article repeats exactly a clause included in various peace treaties concluded with Bulgaria, Romania and Hungary after the World War II. See Sinclair, loc. cit. above (n. 56), pp. 389-399. For the peace treaties see Ch V (n. 42) below.

59 Loc. cit. above (n. 56), emphasis added.

60 Article 35 stipulates that

"in order to defray the cost of the maintenance of navigation the Danubian States may, by agreement with the Commission, levy on vessels navigation charges the scale of which shall be fixed in relation to the cost of maintenance of equipment and the cost of the works referred to in article 34." (Ibid.)
Danubian State, "save in accordance with the national regulations of that State". Assuming that the rights and obligations provided for vessels under the Belgrade Convention constitute rights and obligations for third States, now we consider how the Belgrade Convention may automatically (by its own force and without more) create legal effects for third States.

The wording of Articles 1 and 24 may be viewed as evidence of the existence of an intention to confer a legal right on third States: that is, the right to see their vessels or private vessels flying their flag be allowed to navigate through the River Danube on an equal footing in regard to port and navigation charges and conditions for merchant shipping. If all the other evidence proves that such was the intention of the parties, then the first condition required by Article 36 is satisfied. It remains to examine whether or not the restrictions, or conditions attached to such a right must be observed only when and while the third States’ vessels are actually exercising the right in question. Again, it seems that such is the case, because all the conditions laid down by the Convention are

61 Article 25, ibid.

62 It is important to clarify that the rights apparently granted to vessels of third States are in fact granted to the States whose flags those vessels fly and not to the vessels themselves. Vessels are not possess of, and do not enjoy rights in, international law. The same holds true in respect of the duties imposed by a treaty such as that under discussion here. If a dispute arises at the international level, it would be the “flag State” which would be responsible in international law, either as a original party as regards State-vessels, or as a representative on behalf of its citizens in the case of privately-owned vessels. In this respect see the statement of the Permanent Court in the Mavrommatis Palestine Concession Case, Jurisdiction, PCIJ Rep., Ser. A, No. 2, p. 12. See also Case concerning the Factory at Chorzow, loc. cit. above (n. 34), pp. 26-27. For further detail see Beckett, W.E., Decisions of the Permanent Court of International Justice on Points of Law and Procedure of General Application, BYBIL 11 (1930), pp. 1-62; Chinkin, op. cit. above Ch. II (n. 5), pp. 122-123.

63 It is, however, possible to argue that the parties have not intended to confer legal right on third States. In other words, they have bound themselves, vis-à-vis each other and among themselves only, to allow the nationals, vessels of commerce of third States to navigate the River Danube on a footing of equality in regard to port and navigation charges and conditions for merchant shipping, not as of right but as of benefit. See Ch. II (2.2.2.2.1.) above for the distinction made between rights and benefits.

64 It is questionable whether or not the duties to pay tolls or to observe sanitary or custom regulation constitute obligations at all, since they may be viewed as part of the definition of the right of passage, delimiting its scope. However, while it is possible to view these conditions as qualifications of the right of passage, it would not be wrong to consider them as obligations attached to that right.
in one way or another related to the right of passage and their observance can be re-
quired only when and while the third States’ vessels are actually exercising that right.
For instance, compliance with customs, sanitary, and police regulations or the payment
of tolls required by Articles 26 and 35 is something which is only required when and
while a vessel is actually engaged in passage and is, therefore, exercising the right of
passage. Consequently, all States have the right that their vessels at any time may start
making use of the River Danube without any need for those States first to have ac-
cepted the regime of rights and obligations established by the Belgrade Convention
subject to one condition: that those vessels comply with the obligations attached to the
right of passage. Accordingly, assuming that the provisions of the Vienna Convention
were applicable to the Belgrade Convention (which they are not *qua* treaty) and that the
parties have had the intention of conferring legal right on third States, and not mere
benefit, then the regime of navigation laid down in that treaty could be viewed as le-
gally effective, by its own force and without more, both for and against third States. In
this way the “objective effect” claimed for this regime could safely be established by
virtue of the rules in Article 36. The only point which must be remembered is that this
“objective effect” is not operative against all third States. Rather, it affects those third
States whose vessels, State-owned or private, make use of the Danube. Thus, if a third
State does not wish to claim and exercise the right granted, then, for that State, the re-
gime would be of no practical effect: a *res inter alios acta.* However, the right of pas-
sage would still remain vested in such a third State, unless and until the third State
renounced it.

ii. Another example of a case which can properly be explained by reference to the
mechanism in Article 36 is the Montreux Convention (1936). This Convention is of-
ten cited as an example of treaty providing for an objective regime. It consists of 29

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65 *Convention Regarding the Regime of the Straits*, Montreux, 20 July 1936, 173 LNTS 213.
   This Convention, which replaced the 1923 Convention (Lausanne) on the Regime of the
   Straits (see n. 68 below), is still in force. According to Article 28 of the said Convention,
   “the principle of freedom of transit and navigation affirmed in Article 1 [cited below] of the
   present Convention shall continue, ..., without limit of time”.
Articles, 4 Annexes and 1 Protocol. In the preamble, the parties\(^67\) declaring their resolve to replace the Straits Convention of Lausanne (1923),\(^68\) express their desire "to regulate transit and navigation in the Straits of the Dardanelles, the Sea of Marmora and the Bosphorus comprised under the general terms 'Straits' in a such a manner as to safeguard, within the framework of Turkish security and the security, in the Black Sea, of the riparian States, the principle of freedom of transit and navigation by sea and by air, in time of peace as in time of war" as was previously recognised and declared in Article 23 of the Treaty of Peace signed at Lausanne.\(^69\) Article 1 of the Convention stipulates that:

"the .. Parties recognise and affirm the principle of freedom of transit and navigation by sea in the Strait [for both vessels of commerce and of war]. The exercise of this freedom shall henceforth be regulated by the provisions of the present Convention."

Articles 2 to 7, Section I, of the Convention set out in details the conditions and the requirements which the "merchant vessels" must observe when and while exercising the right of transit in the Straits. These conditions are varied depending on whether the passage is taking place (1) in time of peace, or (2) in time of war, Turkey being neutral, or (3) in time of war, Turkey being belligerent, or (4) in time Turkey under threat or danger of war. The merchant vessels are required to pay certain taxes, shall stop at a sanitary station near the entrance to the Straits for the purpose of the sanitary control prescribed by Turkish law and shall follow certain other restriction regarding the manner of passage. Articles 8 to 21, Section II, outline the provisions with respect to the transit and navigation of warships through the Straits. In time of peace, light surface vessels, minor war vessels, and auxiliary vessels, whatever their flag, whether belonging to Black Sea or non-Black Sea powers, enjoy freedom of transit, without charge or tax (Article 10), subject to certain conditions enunciated in Articles 13 (which requires prior notification to be given to Turkish Government through diplomatic Channel) and 18 (which places certain limitation as to the aggregate tonnage which non-Black Sea powers may have in time of peace, as well as the duration of their stay, in that sea). The

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\(^67\) The States which actually participated in the Conference leading to the conclusion of the Montreux Convention and became party thereto were Bulgaria, France, Great Britain, Greece, Japan, Romania, Turkey, the USSR, and Yugoslavia.

\(^68\) Convention on the Regime of the Straits, Lausanne, 24 July 1923, 28 LNTS 115; UKTS 16 (1923), Cmd. 1929; 117 BFSP 543.

\(^69\) Ibid.
maximum aggregate tonnage of all foreign naval forces which may be in course of transit through the Straits is limited to 15,000 tons (Article 14): the Black Sea Powers are, however, entitled to send through the Straits "capital ships" of a tonnage greater than 15,000 tones on conditions that "these vessels pass through the Straits singly, escorted by not more than two destroyers (Article 11)." Vessel of war in transit through the Straits are prohibited from making use of, in any circumstances, any aircraft (Article 15); they are not to remain longer than necessary for transit through the Straits (Article 16). Naval forces of any tonnage or composition are allowed to pay a courtesy visit of limited duration to a port in the Straits at the invitation of the Turkish Government (Article 17). Vessels of war belonging to non-Black Sea shall not remain in the Black Sea more than twenty-one days, whatever be the object of their presence there (Article 18 (2)). In time of war, Turkey being non-belligerent, warships are to enjoy freedom of transit and navigation in the Straits under the conditions provided in Articles 10 to 18, as in peace time (Article 19). Nevertheless, the belligerent warships are not to pass the Straits except under two conditions: firstly, when they were acting in accordance with collective-security provisions of the Covenant of the League of Nations and, secondly, "in case of assistance rendered to a State victim of aggression in virtue of a treaty of mutual assistance binding Turkey, concluded within the framework of the Covenant of the League of Nations" (Article 19). In time of war, Turkey being belligerent, the passage of warships being "left entirely to the discretion of the Turkish Government" (Article 20). In time when Turkey consider herself to be threatened with imminent danger of war, she is to have the right "to apply the provisions of Article 20" of the Convention: in other words, passage of warships being left entirely to her discretion (Article 21).

Articles 23 of the Convention provides for certain provisions regarding the passage of civil aircraft between the Mediterranean and the Black See. Articles 24 and 25 stipulate certain general provisions, for instance, regarding the functions of the

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70 The Black Sea Powers have "the right to send the Straits, for the purpose of rejoining their base, submarines constructed or purchased outside the Black Sea, provided that adequate notice of the laying down or purchase of such submarines shall have been given to Turkey"; these submarines have the right to "pass through the Straits to be repaired in dockyards outside the Black Sea on condition that detailed information on the matter is given to Turkey"; in either cases, "the said submarines must travel by day and on the surface, and must pass through the Straits singly". The Montreux Convention, loc. cit. above (n. 65), Article 12.
International Commission of the Straits, established by the Lausanne Convention of 1923 which are totally transferred to Turkish Government (Article 24). Articles 26 to 29, contain the final clauses. Article 27 allows accession only by "Power signatory to the Treaty of Peace at Lausanne signed on the 24th July 1923." Article 28 specifies that the present Convention shall remain in force for twenty years; the principle of "freedom of transit and navigation affirmed in Article 1 "shall, however, continue without limit of time".

As can be seen from the above, the Montreux Convention did not establish a new regime for the Turkish Straits. It only modified the regime which was established by many bilateral and multilateral treaties,71 the last one being the Lausanne Convention of 1923. The main change was the abolition of the provisions of the Lausanne Convention on the demilitarization of the Straits.72 Moreover, as a natural waterway connecting two part of high seas, these straits were subject to freedom of navigation recognised by customary international law on straits.73 Thus, without prejudice to the true nature of the rights and obligations that States may possibly have with regard to these straits, both under customary and conventional law, and assuming that, at the time of its conclusion, the Montreux Convention was establishing a new regime for the straits in question, we now consider how this Convention may, viewed in isolation, constitute a generally binding regime on the basis of the mechanism envisaged in Article 36 of the Vienna Convention.

An examination of the terms of the Convention may prompt one to argue that the parties had intended to confer legal rights on third States — or, to be more precise, to confirm the rights granted to third States by previous treaties. Wording such as

71 See: Convention between Austria, Great Britain, France, Prussia, Russia and Turkey, respecting the Straits of the Dardanelles and of the Bosphorus, London, 13 July 1841, 92 CTS 7; 29 BFSP 703; Convention between Austria, Great Britain, France, Prussia, Russia, Sardinia and Turkey respecting the Straits of the Dardanelles and the Bosphorus, Paris, 30 March 1856, 114 CTS 409; 16 Martens (1st.) 790; 46 BFSP 18; Convention of London for the Revision of Certain Clauses in the Paris Peace Treaty of 1856, 13 March 1871, 143 CTS 99; 61 BFSP 7.

72 Rozakis, C.L. & Stagos P.N., The Turkish Straits (Dordrecht, Martinus Nijhoff, 1987), pp. 116-120.

“merchant vessels shall enjoy complete freedom of transit and navigation ..., by day and by night, under any flag” which frequently appears in the Convention and the fact that the principle of freedom of transit and navigation, affirmed in Article 1 cited above, declared to be continued without limit of time, may be invoked as evidence for the existence of such an intention. Assuming that all the other evidence proves that such was the intention of the parties, then the first condition required by Article 36 of the Vienna Convention is satisfied. What is needed to be established is that whether or not all the conditions attached to the right of passage through the Straits are conditions that third States’ vessels are required to observe when and while they are actually exercising such a right or they constitute independent obligations which third States must observe irrespective of whether or not they have engaged in such an exercise. As can be seen from above, all the provisions in Article 2 to 25 are in one way or another related to the way and the manner through which merchant and war vessels may exercise the right (or the principle) of “freedom of transit and navigation” in the Straits as envisaged in Article 1 of the Convention. The obligations to pay certain taxes or charges, to stop for sanitary control, to use pilotage (in certain circumstances) and so on, would only become applicable when a merchant vessel enters the Straits and start to make use of the right of transit through the Straits. Likewise, the restrictions imposed on war vessels — such as the requirement to give prior notification of passage, the duty to begin the transit during daylight, the duty not to make use of any aircraft while in transit and so on — would only become applicable if a State wishes one of its war vessel to navigate through the Straits (or, in other words, if it wishes to make use of the rights granted to it). So is the case with regard to restriction imposed on non-Black Sea war vessels not to remain in Black Sea for more than twenty one days. Such war vessels would be bound to observe this time-limitation if they wish to pass through the Straits. Accordingly, one can safely suggest that all the obligations imposed on third States’ vessels are of a nature amounting to conditions for the exercise of a right as envisaged by paragraph 2 of Article 36 of the Vienna Convention. In this manner, the objective effects of the Convention could satisfactorily be explained by virtue of the rules stated in Article 36 of the Vienna Convention.
iii. A third example is the regime of the Kiel Canal, as established by the Treaty of Versailles,\textsuperscript{74} which may, without prejudice to its present status,\textsuperscript{75} be regarded as another case the automatic objective effects of which can be explained by the mechanism of Article 36. As was seen earlier,\textsuperscript{76} the Kiel Canal regime is set out in Articles 380 to 386 of the said Treaty. Article 380 provides that:

"The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality."

Reading this Article in its literal meaning, one may argue, as the PCIJ appeared to do in the \emph{S. S. Wimbledon case},\textsuperscript{77} that the parties had intended to confer the right of free passage through the Kiel Canal to the vessels of commerce and war of all nations at peace with Germany. Thus, assuming that all other evidence indicate that this was the intention of the parties, then the first condition required by Article 36 of the Vienna Convention is satisfied.

An analysis of the provisions of the remaining Articles, namely 381 to 386 reveals that all the conditions attached need to be observed when and while a vessels is engaged in passage: Articles 382 and 384 formulate the amount of levies that may be imposed on vessels using the Canal; Articles 381 and 383 require them to observe those impediments "arising out of police, customs, security, emigration or immigration

\textsuperscript{74} \emph{Loc. cit.} above Ch. I (n. 67). For more detail see Ch. I (1.6.) above.

\textsuperscript{75} In 1936, the German Government by a Proclamation declared that "they no longer recognise as binding the provisions of the Versailles Treaty which concern the German waterways, nor the international acts which depend on those provisions ..." In January of the following year the German Naval High Command issued a Regulation forbidding foreign warships to pass through the Kiel Canal except with authorisation obtained beforehand through diplomatic channels. There was no definitive response from the signatories of the Treaty of Versailles. In 1950, the German Supreme Court (British Zone) suggested that "whether the Canal has remained an international waterways ... seems doubtful because the German Note on German waterways, of November 16, 1936, put an end to internationalisation, at least \textit{de facto}, and this step did not meet with any serious resistance on the part of the signatory Powers of the Treaty of Versailles ..." (See \emph{Kiel Canal Collision Case}, (Germany (British Zone), Supreme Court), 1 June 1950, 17 ILR 133-134).

In 1952, the Assistant Legal Advisor to the United States Department of States (German Affairs) argued that the terms of the Treaty of Versailles regarding the Kiel Canal were still valid despite the German renunciation and the outbreak of World War II and that no further action was necessary for such terms to be considered again fully operative. See \textit{Whiteman’s Digest}, vol. 3, p. 1260.

\textsuperscript{76} See Ch. I (1.6.) above.

\textsuperscript{77} \textit{Ibid.}
regulations and those relating to the import and export of prohibited goods". None of these conditions or duties would arise unless a vessel actually starts to exercise the right of passage envisaged in Article 380. Consequently, the effects attributed to the said treaty can properly be explained by reference to the rule in Article 36. In other words, third States would, by the force of the treaty and without more, acquire right and, at the same time, would be bound to observe the obligations attached thereto. Although, from the fact that Germany is bound to allow passage to warships and war materials of belligerent even when herself a neutral (as interpreted by the PCIJ in the Wimbledon case), third States' right may be viewed as restricted by Treaty of Versailles, that effect is incidental and should not be viewed as arising from the treaty itself.

3.2. Cases which cannot satisfactorily be explained by the Vienna Convention rules in Articles 34-37

The mechanism of Article 36 cannot explain the allegedly automatic effects which are frequently attributed to treaties of the type under consideration where the regimes they embodied do not merely involve a granting of a right (or rights) to third States, which could be accompanied with certain conditions attached to its exercise. Apart from the cases stated above, the automatic objective legal effects claimed for all other cases of treaties regarded as establishing "objective regimes" cannot properly be explained by the said mechanism. The following are the most obvious examples.

i. The first case is that in which, although the regime concerned appears to confer rights on third States, one or all the parties to the treaty allege that the regime was not intended to confer legal *right*, as distinguished from mere *benefit*, on third States — that is, when the *element of intention* of the parties required by Article 36 (1) is missing. A concrete example is the case of treaties regulating the status of the Panama Canal, which is frequently cited as an example of a treaty providing for an "objective

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78 Article 385 imposes an obligation on Germany "to take suitable measures to remove any obstacle or danger to navigation, ..." Article 386 provides for the right of "any interested Power ... [to] appeal to the jurisdiction instituted for this purpose by the League of Nations" in the event of violation of any of the conditions of Articles 380 to 386, or of disputes as to the interpretation of these Articles.

79 See Ch. I (1.6.) above.

80 See American Law Institute (*loc. cit.* above Ch. I (n. 167) where a clear distinction has been made between *benefits and rights* for the purpose third party effects of treaties. See further: Ch. I (2.2.); Ch. II (2.2.2.2.1.) above and Ch. V (3.2.1 and 3.3.4.) below.
regimes". Without prejudice to the question whether or not the Panama Canal Treaties constituted an "objective regimes", reference will be made to the position taken by the United States as regards the regime of the Panama Canal under the old Hay-Pauncefote Treaty of 1901 and Hay-Bunau-Varilla Treaty of 1903. Despite wording such as "the canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality ...", the United States has always maintained that it has not been the intention of the parties to confer legal rights on third States. It has repeatedly voiced the view that "other nations ... not being parties to the treaty have no rights under it". In other words, third States have no locus standi under the treaty and cannot invoke its provisions against the United States which is only bound vis-à-vis Great Britain and Panama. This has been the position of the United States even after the conclusion of the recent Panama Canal Treaty and the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal. Consequently, bearing in mind that all these treaties are bilateral and that one of the parties, namely the United States, has never admitted an intention to confer treaty-rights on third States, the mechanism of Article 36 fails to explain the legal effects claimed for the above-mentioned treaties, of course assuming that they do involve objective effects for third States.

ii. The second case is when the regime concerned involves the imposition of certain obligations upon third States which cannot be regarded as conditions for the exercise of the right which the treaty purports to vest. Some of these obligations may be intended to be totally independent of any rights allegedly conferred by the regime on third States. Others, though having a direct link with those rights, may not amount to conditions relating to their exercise, but may rather, represent conditions precedent to the enjoyment of right. As was seen, in both of these cases, the obligations concerned

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81 Deter (Delupis), I., Essays on law of treaties (London, 1967), p.104; Fitzmaurice's 5th. Rep., p. 92, para. 52; Waldock's 3rd. Rep. on Treaties, pp. 28-29, para. 10. See further Ch. V (3.2.1. and 3.3.4.) below.

82 This question is examined at length in Chapter V (4.) below.

83 For the reference see Ch. V (n. 253 and 259) below.

84 Article 3 (1) of the Hay-Pauncefote Treaty (1901). See further Ch. V (3.2.2.) below.

85 The United States' Secretary of State (Hughes), writing to President Harding. Hackworth's Digest, vol. 5, pp. 221-222. For more detail see Ch. V (3.2.2.) below.

86 For the reference and detailed examination of this treaty see Ch. V (3.3.5.) below.
have to be accepted in writing by third States, in accordance with Article 35, in order to be valid and effective against them.\(^\text{37}\) This is, of course, inconsistent with the automatic effects alleged.

As a concrete example, reference can be made to some of the provisions of the Antarctic Treaty (1959),\(^\text{88}\) a treaty which is often said to create an "objective regime."\(^\text{89}\) What follows is without prejudice to whether or not that treaty really does constitute an "objective regimes", a question which will be examined later.\(^\text{90}\) On the one hand, Article II of the said treaty provides that

"freedom of scientific investigation in Antarctica and co-operation towards that end ... shall continue, subject to the provisions of the present Treaty."

On the other hand, Article 1 (1) declares that:

"Antarctica shall be used for peaceful purposes only. There shall be prohibited, \textit{inter alia}, any measure of a military nature, such as the establishment of military bases and fortifications, the carrying out of military manoeuvres, as well as the testing of any type of weapon."

Assuming that the provisions of these two Articles are intended to establish rights and obligations for third States, the obligation to respect the regime of non-militarisation clearly cannot be regarded as a condition governing the exercise of the right of utilisation of Antarctica for scientific investigation. That right and that obligation seem to be intended to operate as independent regimes. The obligation seems intended to be observed by all States at all times, no matter whether or not they are actually exercising the right of scientific investigation and whether or not they have ever exercised that right. Besides, a third State, irrespective of whether or not it is conducting scientific research in the area, may at any time be engaged in activities contrary to the obligation of non-military-use. One may argue that, for the States parties, compliance with the obligation relating to non-military-use is a part of the whole deal and is a condition for access to Antarctica for scientific purposes by expeditions from third States: i.e. the obligation is a pre-condition to the enjoyment of the right. Therefore, third States must

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\(^{37}\) See Ch. II (2.2.2.4.) above.

\(^{88}\) \textit{Loc. cit.} below Ch. V (n. 362).

\(^{89}\) See Ch. V (4.1.1.) below.

\(^{90}\) See Ch. V (4.) below.
comply with the obligation if they want such access.91 But, as described above,92 in that case, a third State's written acceptance would be necessary for the obligation to become incumbent on it, and accordingly, no automatic legal effects could be attributed to the treaty. Therefore, any automatic legal effects which the Antarctic Treaty may have for third States cannot be established by virtue of Article 36.93

A similar situation exists in the case of the Suez Canal Convention of 188894 which while it appears to confer a right of passage through the canal on all nations, envisages certain obligations, such as a duty to respect the neutrality of the canal and a duty not to blockade it under any circumstances. Clearly, the obligation not to "blockade" the canal cannot be considered as condition for the exercise of the right of passage for it is possible for a State to "blockade" the canal without trying to use it if for the purpose of passage.95 Therefore, the mechanism in Article 36 fails to explain the automatic legal effects vis-à-vis third States which are claimed for the Suez Canal Convention simply because this Convention purports to impose certain obligations on third States which cannot be regarded as conditions for the exercise of the right of passage, but which must, on the basis of Article 35 of the Vienna Convention, be accepted by third States in writing in order to be valid against them — a requirement that would ipso facto negate any automatic legal effects claimed for that treaty regime.

91 The situation will become very complicated if one severed the right (and the attendant condition relating to its exercise) from the independent obligation because that would permit the opposability of the former to third States without the latter also being so opposable. Third States could then deny their obligation of non-military-use, because they have not accepted it in writing, and, at the same time, claim access to Antarctica for scientific purposes, as being a right already conferred on them (assuming that such a right did not already exist for third States). That interpretation cannot surely be acceptable.
92 See Ch. II (2.2.2.4.) above.
93 It is worth recalling that Waldock, in considering the consequence of deletion of his proposed Draft Article 63, did in fact mention the potential inability of the rules contained in what is now Article 36 of the Vienna Convention to explain the (allegedly) automatic erga omnes effects of treaties establishing a mixed regime of general utilisation and demilitarisation or neutralisation of an area of maritime or land territory, referring to the Antarctic Treaty as an example. The relevant passage is cited in p. 138 above.
94 For reference and detailed examination of this treaty regime see Ch. V (2.2.) below.
95 Ibid.
iii. The third case is when the treaty provides *solely* for a regime of "permanent neutrality"\(^{96}\) of a State. These kind of treaties are frequently cited as belonging to the category of treaties providing for "objective regimes" or treaties valid *erga omnes*.\(^{97}\) They do not normally contain any provisions purporting to confer any specific right,\(^{98}\) or to impose any specific obligation, on third States.\(^{99}\) However, they are regarded by the advocates of the doctrine of "objective regimes" as tending to involve the imposition of a sort of passive or negative obligation\(^{100}\) upon third States: for example, to recognise, respect and not to violate the status of neutrality even if the territorial sovereign consents thereto.\(^{101}\) At the same time, they are seen as investing in third States a right to the performance of that same obligation, both by the neutral State and by other States, whether parties or third States. The mechanism in Article 36 cannot cover these alleged effects for the reason that, as in the case mentioned earlier, there is normally no obvious intention on the part of the parties to this kind of treaties to accord any right to third States and, most importantly, the alleged rights and obligations of third States do not proceed directly from, and are not based on, the treaties concerned. An examination of the provisions of some of these treaties may well clarify all these points.

\(^{96}\) This phrase in its nineteenth century conception described the status of a State "whose independence and political and territorial integrity are guaranteed permanently by a collective agreement of Great Powers subject to the condition that the particular State concerned will never take up arms against another State — except to defend itself — and will never enter into treaties of alliance, etc. which may compromise its impartiality or lead it into war." (Attorney, Office of the Legal Adviser to the Legal Adviser, memorandum, *Nature of Austria's Neutrality and legal Implications for the United States Response to the Neutrality Declaration*, 16 November 1955, cited in *Whiteman's Digest*, vol. 1, p. 342.) In its modern conception the term "permanent neutrality" refers to the status of a State which is bound not to take sides with any party to a conflict, in time of war, and not to enter into any military alliance, in time of peace and, for that reason, adopt a policy to observe the rules of neutrality in all future wars. A State may acquire such a status by means of a multilateral (as in the cases of Laos and Cambodia) or bilateral treaty (as in the case of Malta) or by adopting a constitutional Statute recognised by others (as in the cases of Austria) or by unilateral Presidential Proclamation (as in the case of Costa Rica). For further detail see Ch. V (1.4.) below.


\(^{98}\) However, see the text which follows.


\(^{100}\) See: Waldock's view, *loc. cit.* above (p. 138); Kelsen, *op. cit.* above Ch. II (n. 21), p. 486.

\(^{101}\) See the passage of French Troops in Switzerland discussed in Ch. V (1.3.) below. See also McNair's *Law of Treaties*, pp. 262-263.
The Act signed at Paris on 20th November 1815, which established permanent neutrality of Switzerland, simply pointed out that "the Powers .... declare, by the present Act, 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."

There was no reference to third States except inviting them to accede to this Act. Similarly, the treaty relative to separation of Belgium from Holland, which established the permanent neutrality of Belgium, merely declared that "Belgium shall form an independent and perpetually neutral State" (Article VII). It, however, went a little further by indicating that Belgium "shall be bound to observe such Neutrality towards all other States". Almost identical wordings are found in the treaty which established permanent neutrality of Luxembourg, which, in addition, provided for a regime of non-fortification and demilitarisation of that country. A similar kinds of wordings are found in treaties establishing regimes of permanent neutrality in recent years. For example, the Declaration on the Neutrality of Laos stipulates that the parties declare that they "recognise and will respect and observe in every way the sovereignty, independence, neutrality, unity and territorial integrity of the Kingdom of Laos." They undertake in particular that

(a) they will not commit or participate in any way in any act which might directly or indirectly impair the sovereignty, independence, neutrality, unity and territorial integrity of the Kingdom of Laos;
(b) they will not resort to the use or threat of force or any other measure which might impair the peace of the Kingdom of Laos;

...
(e) they will not bring the Kingdom of Laos in any way into any military alliance or any other agreement, whether military or otherwise, which is inconsistent with her neutrality, nor invite encourage her to enter into any such alliance or to conclude any such agreement;

... 

(g) they will not introduce into the Kingdom of Laos foreign troops or military personnel in any form whatsoever ....

(h) they will not establish nor will they in any way facilitate or connive at the establishment in the kingdom of Laos of any military base, foreign strong point or other foreign military installation of any kind;

(i) they will not use the territory of the Kingdom of Laos for interference in the internal affairs of other countries;

(j) they will not use the territory of any country, including their own, for interference in the internal affairs of the Kingdom of Laos.\(^{109}\)

The Government of Laos in its turn undertook, *mutatis mutandis*, the same obligations in its separate “Statement of Neutrality”\(^{110}\). Paragraph 3 of the Declaration on the Neutrality of Laos provides that the parties

"*Appeal to all other States to recognise, respect and observe* in every way the sovereignty, independence and neutrality, and also unity and territorial integrity, of the Kingdom of Laos and to refrain from any action inconsistent with these principles or with other provisions of the present Declaration."\(^{111}\)

As can be seen from the terms of the treaties cited, all it is provided is the undertakings to be observed by the neutralised State and the parties. The neutralised State undertakes not to take sides with *any party* to *any* conflict, in time of war, and not to enter into any military alliance, in time of peace or, in brief, to adopt a policy to observe neutrality (towards all States)\(^{112}\) in all future wars. In return, the parties undertake to recognise, respect, and not to act contrary to the status of permanent neutrality concerned; they sometime undertake a further obligation to maintain, either collectively or severally, the status of permanent neutrality — in other words, not only to respect that status but *cause it to be respected* by the others (whether parties or third States). Evidently, third States would benefit from the fact that the neutralised State is bound to observe its

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\(^{110}\) *Ibid.* This Statement was incorporated into the Declaration on the Neutrality of Laos. The two instruments together were considered as constituting an international agreement. See Oppenheim, *op. cit.* above Ch. I (n. 28), pp. 320-321 (n. 9).

\(^{111}\) *Ibid.*, emphasis added. In Paragraph 4, the parties undertake to “consult jointly with the Royal Government of Laos and among themselves in the event of a violation or threat of violation of the sovereignty independence, neutrality, unity or territorial integrity of Laos”.

\(^{112}\) See Article VII of the Treaty ... *relative to the Netherlands and Belgium, loc. cit.* above Ch. I (n. 14).
neutrality towards all States and from the fact that the parties are bound not to violate that neutrality in any war between any States. As claimed by the advocates of the doctrine of "objective regimes", third States might even have a legal right to the performance of the obligations undertaken by the neutralised State and the parties — and for this reason, they could arguably¹¹³ be said to have a duty to "recognise and respect" any status of permanent neutrality and not to violate the territory of the neutralised State. Such benefits, rights and obligations could not, of course, be viewed as arising from the treaty establishing the status of permanent neutrality. They are incidental to the situation of neutrality established by the treaty and, indeed, they may well be based on the rules of neutrality law. However, they are regarded by the advocates of the doctrine of "objective regimes" as effects of the treaties concerned. In that case, the mechanism in Article 36 cannot be invoked for any of "objective effects" involved simply because they do not normally contain any provisions intended to confer any specific right, or impose any specific obligations, upon third States.

iv. The fourth case is when the treaty provides solely for a regime of "neutralisation"¹¹⁴ or "demilitarisation"¹¹⁵ of a particular territory.¹¹⁶ These kind of treaties frequently cited as paramount examples of treaties establishing "objective regimes".¹¹⁷ To

¹¹³ Cf. Ch. IV (2.1.2.) and Ch. V (1.2.) below.
¹¹⁴ The term "neutralisation" denotes the process whereby the status of a particular part of the territory of a State, or of a region belonging to no State, is excluded by treaty from the regions in which war or armed conflict may be conducted, making military operations there illegal. In this sense, it has a meaning similar to that of "demilitarisation". (see Verosta, S., Neutralisation, in Bernhardi's Ency., vol. 4, p.31). In the context of the doctrine of "objective regimes", however, it has been employed in two senses: one in the sense just stated and another as an alternative to the notion of "permanent neutrality" described earlier.

¹¹⁵ The term "demilitarisation", in the context of the theory of "objective regimes", refers to the status of a particular territory upon which, in the general interest, certain military restrictions are imposed. In military or strategic terms, the purpose of demilitarisation is to prevent — or at least to render more difficult — the outbreak of armed conflict. See Delbruck, J., Demilitarisation, in Bernhardt's Ency., vol. 3, p.150; Ronzitti, N., Demilitarization and Neutralization in the Mediterranean, Ital. YBIL 6 (1985), p. 33; Broms, B., The Demilitarization of Svalbard (Spitsbergen), in Essays in Honour of E. Castren (1979), pp. 6-18. For a definition of the term "demilitarisation" see Annex XIII (D) of the Treaty of Peace with Italy, Paris, 10 February 1947, 49 UNTS 3; UKTS 50 (1950), Cmd. 7481.

¹¹⁶ As was seen, the doctrine of "objective regimes" is heavily based on a case which involved a treaty of this kind, namely the 1856 Convention which provided for demilitarisation of Aaland Islands which is fully examined in Ch. I (1.5.) above.

¹¹⁷ See: Waldock's 3rd. Rep. on Treaties, para. 11 of Commentary on proposed Draft Article 63; Fitzmaurice's 5th. Rep., Commentary on proposed draft Article 18, pp. 97 et seq. and Ch. I (1.5, 1.10., 1.11. and 2.5.) above.
a large extent they are similar to the case of permanent neutrality mentioned earlier since they serve a similar purpose. In both cases, the purpose is to maintain and promote peace by excluding a territory from becoming a "theatre of war". However, the nature of the obligations involved is different. By a regime of "permanent neutrality", a (neutralised) State is, generally speaking, obliged not to take sides with any party to a conflict in any war and not to enter into any military alliance in time of peace without being prohibited from maintaining its own military forces and installations. By a regime of "neutralisation or demilitarisation", however, one or more States are obliged not to fortify, establish or maintain military installations or base in a particular part of the territory of a State, or of a region belonging to no State. What is the exact nature of, and the difference between, these kinds of treaties, is not much relevant here. The essential point is that, similar to the case of "permanent neutrality", treaties establishing solely a regime of "demilitarization" or "neutralisation" do not normally contain any provisions purporting to vest any particular right in third States, though in this kind of treaties the prohibitive military measures are sometime formulated in general terms capable of being interpreted as referring equally to both the parties and third States. A reference to the provisions of the regime of the Aaland Islands may well illuminate this.

As was stated in Chapter I, the regime established by the Convention of 30 March 1856 was considered by a Commission of Jurists to constitute an "International Settlement" and to have produced legal right for the interested third State, i.e. Sweden. As a result of that decision and of the subsequent recommendation of the League of Nations, a new regime was established for the islands by the Convention on the Non-Fortification and Neutralisation of the Aaland Islands 1921, which again

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118 However, when a regime of permanent neutrality has been accompanied by a regime of demilitarisation, such as the cases of permanent neutrality of Belgium and Luxembourg, a "neutralised State" has been required to demolish certain fortifications and barred from establishing any military bases in particular part of its territory. See Ch. I (n. 14 and 15) above.

119 See Ch. I (1.5.) above.

120 Convention on the Non-Fortification and Neutralization of the Aaland Islands, Geneva, 20 October 1921, 9 LNTS 211; UKTS 6 (1922), Cmd. 1680; 114 BFSP 421. Parties to this Convention are: Denmark, Estonia, Finland, France, Germany, Great Britain, Italy, Latvia, Poland, Sweden. The Convention entered into force, as between Germany, Denmark, Finland, France, Great Britain, Sweden, on 6 April 1922. On 24 July 1922, Czechoslovakia — a third State with regard to the Convention — in a note stated that she undertakes to respect
demilitarised and neutralised the Islands in time of peace and war. The Convention comprises of 10 Articles. Its substantive provisions are stipulated in Articles 1-9. Article 2 defines the areas affected by the Convention which includes certain specified “islets and reefs” and a three miles territorial waters. In Article 1, Finland confirming for her part the declaration made by Russia in the Convention of 30th March 1856 regarding the Aaland Islands and “undertakes not to fortify” this part of its territory. Article 3 in general terms stipulates that

“No military or naval establishment or base of operations, no military aircraft establishment or base of operations, and no other installation used for war purposes shall be maintained or set up in the zone described in Article 2.”

Likewise, Article 4 provides that

“Except as provided in Article 7, no military, naval or air force of any power shall enter or remain in the [Islands] . . .; the manufacture, import, transport and re-export of arms and implements of war in this zone are strictly forbidden.”

In time of peace, Finland, while having the right to send one or two light surface warships to visit the Islands from time to time, is prohibited from allowing more than one warship of any other Power at a time to enter the archipelago and to anchor there temporarily. Article 5 provides that the prohibition to send warship into the Aaland Islands zone “shall not prejudice the freedom of innocent passage through the territorial waters.” According to Article 6, in time of war, the Aaland Islands zone “shall be considered as a neutral zone and shall not, directly or indirectly, be used for any purpose connected with military operations.” Nevertheless, in the event of a war affecting the Baltic Sea, Finland, in order to protect the neutrality of the Aaland Islands, has the right to lay mines in the territorial waters of these islands. Article 7 allows the parties, individually or jointly, to apply to the Council of the League of Nations asking that body to decide upon the measures to be taken either to assure the observance of the provisions of the Convention or to put a stop to any violation thereof. Article 8 provides that the regime established by the Convention. See Gregory, *loc. cit. above Ch. I* (n. 63), p. 73. On 11 October 1940, a treaty concerning demilitarisation of Aaland Islands was concluded between Finland and the Soviet Union (144 BFSP 395). The substance of this treaty was repeated both in the Armistice Agreement of 19 September 1944, following the Finish-Soviet war of 1941-1944, and in the Peace Treaty of 1947 (48 UNTS 203). Articles 5 and 12 of the Peace Treaty of 1947 provided for the re-entry into force of the Aaland Islands demilitarisation treaty of 11 October 1940. See *British Digest*, vol. 2b, p. 771; Verzijl, J.H.W., *International Law in Historical Perspective* (Leyden, Sijthoff, 1970), vol. 3, p. 506.

Ibid.
provisions of the Convention shall remain in force in spite of any changes that may take place in the present *status quo* in the Baltic Sea." Finally, in Article 9, the parties request the Council of the League of Nations to inform the Members of the League of the text of this Convention in order that the legal status of the Aaland Islands" may, in the interest of general peace, be respected by all as part of the actual rules of conduct among Governments." This Article further states that "with the unanimous consent of the ... Parties, this Convention may be submitted to any non-signatory Power whose accession may in future appear desirable ... 

As can be seen from the terms of these articles, the regime established mostly involves imposition of obligations on the territorial State, namely Finland. Certain measures, however, are formulated in general terms leaving room for argument that the regime established is meant to be effective against parties and third States. The restriction in Article 4 that "no military, naval or air force of *any power* shall enter or remain in the [Islands]" may be interpreted in a way to include the military, ..., force of *all powers*, though it may, at the same time, be interpreted as referring to the military, ..., force of *all powers party* to the Convention. Moreover, it is possible to argue that the observation of the regime by the parties would be beneficial to the security of States of the region which are not parties and these States may have a legal right to the performance of the obligations undertaken by the parties to the Convention. However, as can be seen from the provisions cited above, there is not a single provision in the Convention which purports to confer any treaty right on third States. It is worth reminding here that in the Aaland Islands Case, the Committee of Jurists expressly refused to treat the case as one of *stipulation pour autrui* because in their view the 1856 Convention, which established a similar regime of demilitarisation for the Aaland Islands, did not embody any provision to that effect. It also confirmed that Sweden (as a third State) had a *legal right* to the performance of the provisions of that Convention, though it did not dwell on the question of the obligations, if any, of that country under the 1856 Convention or in relation to the regime of demilitarisation it established.

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122 See further Ch. I (1.5.) above.
Accordingly, the mechanism in Article 36 cannot cover any objective effects that is claimed for this kind of treaties for the reason that, like the case of treaties establishing a regime of “permanent neutrality”, they do not contain any stipulation in favour of third States and the parties do not normally have any intention to confer any specific rights on these States.

4. Conclusions to Chapters II and III

As stated earlier on, these two Chapters aimed at clarifying two questions: firstly, whether or not the rules adopted by the Convention rules can themselves fully explain the objective effects which have been claimed for the category of treaties providing for “objective regimes” (which we assume to exist); and, if they cannot, secondly, whether or not the Convention excludes the possibility of the existence of a special rule of treaty law on “objective regimes” and if there was any support, in abstracto, during the drafting of the Vienna Convention for the existence of such a special rule.

As can be seen from the above, the answer to the first question is that the Vienna Convention rules on treaties and third States can partly explain the alleged automatic objective effects of certain types, but not all, of the kinds of treaties considered as creating “objective regimes” while they can, of course, explain all such effects if, and only if, they do not arise automatically and immediately and solely by virtue of the existence of the treaty concerned — in other words, if third States were to accept them in writing. Among those treaties which are sometimes regarded as providing for and creating “objective regimes”, those which envisage a systematic or active utilisation of land or maritime territory by third States are the only cases in which any automatic legal effects vis-à-vis third States may be fully and satisfactorily explained by the mechanism of Article 36. This is so because they mainly involve a granting of rights in favour of third States, normally accompanied with some obligations to be observed by the latter States only while and if they are exercising those rights. In this sort of case, the third State’s written consent is not required for it to be subject to the such obligations.

124 See p. 22 above.
125 Reference was made to treaties concerning the regimes of Danube, Turkish Straits and Kiel Canal as examples. See Sec. 3.1. above.
However, no automatic legal effects vis-à-vis third States can be established under Articles 34-36 of the Vienna Convention for any treaty-regime which contains an obligation which is not a condition governing the exercise of a right. Such an obligation in order to be established for third States needs to be accepted by them in writing: a requirement which ipso facto negates any automatic legal effects claimed for the kind of treaties in question. No such effects may also be established in any case where the parties to the treaty do not have an intention to confer, by the provision of the treaty, a legal right to third States. Of this kind are: treaties which establish solely a regime of "permanent neutrality" for a State or provide for a regime of "demilitarisation or neutralisation" for a particular territory; and treaties which establish a mixed regime which involves imposition of obligations on third States which cannot be considered as conditions for the exercise of rights.

With regard to the second question, it is certain that the Vienna Convention rules on treaties and third States were intended to and do regulate the possible effects which all treaties, including the category of "treaties providing for objective regimes", may legally produce for third States under and in pursuance of the law of treaties. Thus, from the Vienna Convention standpoint, but from that standpoint alone, the rule is that, in general treaties do not create either rights or obligations for third States, whatever be their nature, except either through the mechanisms envisaged in Articles 35-36 or through the non-treaty-law route of custom-process (Article 38). Whether or not the Convention excludes the possibility of a special rule on "objective regimes" to exists is, however, an open question. The Vienna Convention and its provisions on treaties and third States are subject to many limitations and qualifications: the Convention as a whole limited in its scope of application; Article 73 safeguards the possible relevance

126 The position taken by the United States as to the regime of Panama Canal under Hay-Pauncefote Treaty (1901) and Hay-Bunau-Varilla Treaty (1903) was cited as an example. See Sec. 3.2. above.
127 Treaties which established permanent neutrality of Switzerland, Belgium, Luxembourg and Laos were cited as examples. Ibid.
128 As an example reference was made to the regime of the Aaland Islands, established by the Convention on the Non-Fortification and Neutralisation of the Aaland Islands of 1921. Ibid.
129 Treaties concerning Antarctica and Suez Canal were cited as examples. Ibid.
130 See Ch. IV (2.3.) below.
131 See Ch. II (3.1.) above.
of the notion of "objective regimes" in other branch of international law;\(^\text{132}\) Article 38 safeguards the possible creation of "objective regimes" by means of interplay of treaty with custom;\(^\text{133}\) finally, the Convention expressly affirms the continuing force of the rules of customary international law in respect to "any questions not regulated by the provisions of the present Convention".\(^\text{134}\) Therefore, to the extent that it can be shown that the question of treaties providing for "objective regimes" has not, at least partly, been regulated by the provisions of the Vienna Convention, such a special rule may still remain operative.\(^\text{135}\) Considering that the Convention is meant to codify the customary law of treaties and has subsequently been seen as restating custom, it is easy to see how the preamble and Article 73 preserve the position of any special rule not based on treaty law. It is very difficult, however, to prove that the question of "objective regimes" has not been regulated at all by the Vienna Convention so it is unlikely that such qualifications preserve any special rule which might have existed in the law of treaties. However, considering that the International Law Commission well understood that the rules adopted could not cover certain cases of "objective regimes" and that there was some support among its members for the notion of "objective regimes", it is possible to suggest that the Convention has not necessarily barred the possibility of creation of "objective regimes" as well as the existence of a special rule to cover its effects, though as indicated above that seems to be very unlikely. In any case, the fact that the Vienna Convention as a whole cannot, strictly speaking, be applied to almost all of the existing treaties which are regarded as examples of "treaties providing for objective regimes", the need for a determination of the existence or non-existence of that category of treaties and a special rule to account for their objective effects remains intact and deserves further consideration. It is still important to examine if the doctrine of "objective regimes" can fit in with the theories/principles of modern international law and, most importantly, if the alleged category of treaties, as a matter of fact, have, by their own force and without more, constituted "objective regimes" valid \textit{erga omnes}. These two questions are examined in Chapters IV and V, respectively.

\(^\text{132}\) See Ch. II (3.4.) above.
\(^\text{133}\) See Ch. II (3.2.2.) above.
\(^\text{134}\) See Ch. II (3.1.) above.
Chapter IV
Various Theoretical Justifications Proposed

Introduction

As has been seen, many authorities have asserted the existence of a class of treaties which are capable, by themselves and without more, of creating rights and obligations for third States. However, those maintaining this position have failed to address properly the question why and on what basis treaties of that type produce legal effects *erga omnes*. Nevertheless, several different theories may be extracted from the views expressed. In this Chapter, an attempt will be made to clarify the accuracy of these theories in order to determine if they deliver any sound explanation for the automatic *erga omnes* or *tertios* effects claimed for the category of treaties in question — this attempt is based on the assumption that such treaties do involve “objective” effects for third States or, in other words, it is based on the assumption that treaty law does contain an exceptional rule which allows that category of treaties to establish regimes with effects valid *erga omnes*.

In general, two broad tendencies or approaches can be distinguished among the writers. The first tendency considers the rights and obligations as directly emanating from, and having their legal existence by the force of, the treaties in question. The emphasis is on the special nature of this kind of treaty and the presence of some element or elements intrinsic to it for explaining the extraordinary effects for third States — such as, the participation of the “Great Powers”, the participation of the State having sovereignty over the territory concerned, the intention of the parties to create a territorial regime in the general interest of the international community or States as a whole .. etc. According to this approach, it is the treaty, rather than anything else, which by its own force establishes rights and obligations for third States — regardless of the general principle *pacta tertii* ... For that reason, this approach postulates the existence or the desirability of a special rule of treaty law which recognises the exceptional position of the category of treaties in question concerning their effects on third States. Theories fitting into this approach are the true doctrine of “objective regime”.

The second tendency considers third States' rights and obligations as arising out of elements or legal principles extrinsic to the treaty: for instance, the subsequent submission of third States to the regime (by means of their acceptance, acquiescence and recognition of it), the general duty to respect situations of law or fact created by lawful treaties, the grafting of custom upon the treaty in question, its historical consolidation and the like. In this approach, although special importance is attributed to the particular nature of the category of treaty in question, it is the external elements that cause certain rights and obligations — which are not necessarily the same as those specified in the treaty — to be established for third States. Moreover, there is no inconsistency with, nor a need for claiming exception to, the *pacta tertiis*.. rule.

In considering these theories, the focus has to be on the first above-mentioned tendency for the reason that it would not be peculiar to say that some treaty-arrangements produce legal effects for or against third States because, in part, they subsequently accept the terms of the treaty, either expressly or by acquiescence: in that case, it would be the consent of the third States which cause such legal effects to be established for them and, accordingly, no exception to the *pacta tertiis*.. rule would be involved. Nor would it be exceptional to say that rights and obligations may be created for third States because the relevant treaty provisions have acquired the status of customary law: in that case, the treaty provisions would produce effects for third States *qua* custom and again no exception to the *pacta tertiis*.. rule would be involved. It would not also be peculiar to declare that certain principles of international law (belonging to other branches of international law) allow certain kinds of treaties to produce certain legal effects for or against third States — for it is well recognised that certain policy considerations in one branch of international law may override or exclude the application of a rule in another branch of international law. Accordingly, this cannot be viewed as constituting an exception to the *pacta tertiis*.. rule.\(^1\) Finally, there would be no peculiarity in saying that certain rights and obligations may exist for third States in relations to, but not *under*, certain category of treaties. Such rights or obligations, if any, do not arise from the treaty concerned and, accordingly, no exception to the *pacta tertiis*.. rule would be involved. In essence, none of the mechanisms mentioned under

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\(^1\) For more detail see Ch. III (3.4.) above.
the second tendency may thus be regarded as upholding the doctrine that a certain kinds of treaties, by their own force and without more, create regimes of rights and obligations valid \textit{erga omnes}. However, since these theories are seen as giving support to the existence of the category of treaties which are capable of establishing "objective regimes" (though not by their own force and without more), they too are included in our examination here.\(^2\)

1. The "special nature" theories

Under this heading, three kinds of theories, put forward in the literature, will be examined. First, the so-called "public law theories" advocated by McNair and others; second, the theory suggested by Waldock in his proposed Draft Article 63 which to a large extent was discussed in Chapter III and, finally, the theory put forth by Klein which is the most recent one amongst all.

1.1. The "public law" theories

As stated in Chapter I, as a result of the arrangements made at the Vienna Congress of 1815, a practice emerged by which the Great European Powers appeared to assume for themselves the authority to make territorial and political arrangements by treaty and enforce them against smaller States. This practice is commonly referred to as the phenomenon of the "public law of Europe" or "le droit public europeen".\(^3\) The phrase "common or public interest of Europe"\(^4\) in treaties and in the diplomatic language of that era is taken as indication of the existence of a system of law in Europe

\(^2\) It is worth noting here that, as will be seen, almost all the theories proposed can be categorised as falling under the second tendency. For instance, McNair, Waldock and Klein, in one way or another, import the element of third States' acquiescence or silence — an element extrinsic to the treaty concerned — into their theories. However, as the main emphasis of their theories is on the elements intrinsic to the treaties concerned, they seem better discussed under the heading of theories which account for the allegedly automatic legal effects of such treaties by reference to factors intrinsic to the treaties concerned.

\(^3\) Gihl, T., \textit{International Legislation: An Essay on change in International Law and in International Legal Situations} (London, OUP, trans. by S.T. Charlestop, 1937), p. 57; McNair's Separate Opinion in the South-West Africa Case, \textit{loc. cit.} above Ch. I (n. 93), pp. 146-153 (see further Ch. I (1.9. and 1.10.) above); Weinschel, \textit{loc. cit.} above Ch. I (n. 5), pp. 420-421; Randelzhofer, \textit{loc. cit.} above Ch. I (n. 2), pp. 142-146.

\(^4\) For example, in Article XV of the \textit{General Treaty of Peace} ... (\textit{loc. cit.} above Ch. I (n. 16)), the parties declared that the rules laid down in the concluding Act of the Congress of Vienna regarding the traffic on international rivers "forms part of the Public Law of Europe" (emphasis added).
possessing a “semi-legislative” body, capable of prescribing general rules and regulations and making territorial and political settlements for the purpose of general peace and security.

To justify this phenomenon, several theories were developed, each involving different aspects of international legal relations. These theories, though, were not limited in application to European States. In particular, theories were pronounced which recognised a “quasi-legislative” authority on the part of a group of States in certain circumstances to make special types of treaty-regimes legally effective *erga omnes* or *erga tertios*. The classic expression of this view is found in the works of McNair. His statement in the *International Status of South West Africa* case embodies a good indication of such a recognition:

“From 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 regime 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 a great war.”

According to McNair, treaties which embody or create the above-mentioned kind of regime are not contractual, but “constitutive or semi-legislative” in nature. They are “treaties of a public law character” which “frequently embody the decisions of a powerful group of States, acting or assuming to act in the public interest”. As such, he

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5 Obviously, the general proposition that there is a certain kind of treaty which must be distinguished by asserting for them extraordinary effects is one aspect of these theories. There are many other questions of international law, such as the concept of sovereign equality and independence of States, the question of the nature of international obligations as well as the legal mechanism through which they emerged etc., which may be affected by the propositions made by the “public law theories”. However, we will not deal with such aspects except if and in so far as they may have a bearing on our principal subject of study — the legal effects of treaties on third States.

6 ICJ Rep. (1950), p. 153, emphasis added. In McNair’s opinion, the Mandate for South West Africa, established in accordance with Article 22 of the Covenant of the League of Nations, constituted a typical example of the kind of regime or status contemplated. It must be noted that, in this case, the main question was not related to the legal effect of treaties on third States. The question was whether or not the Mandate for South West Africa was still binding on South Africa despite dissolution of the League of Nations. The Court replied to this question in the affirmative. Although it recognised in brief terms that “the international rules regulating the Mandate constituted an international status for the Territory recognised by all the Members of the League of Nations, including the Union of South Africa”, it did not propose any general rules in this respect. See for more detail Ch. I (1.9.) above.

7 *McNair’s Law of Treaties*, p. 259.
suggests, they must be exempted from the application of the *pacta tertiis* .. rule.\(^8\) McNair refers to this theory as the "public law theory" and tries to justify such particularities by resorting to the kind of exposition affiliated with the phenomenon of the "public law of Europe".\(^9\)

In the same way, several other theories — such as the "internationalisation of land or maritime territory", the existence of "international de facto governments" — are found in the literature of international law\(^10\) which, to a certain extent, also recognise the "quasi-legislative" authority of certain States to make treaty regimes with legal effects *erga omnes* or *tertios*. Of course, these theories do not follow a uniform pattern as to the basis upon which the attribution of such an authority may legally be justified. Nor are they clear as to the circumstances in which such an authority may be exercised. Moreover, the advocates of these theories have in many ways qualified any outright legislative authority which may be attributed to certain States by, for example, subjecting its exercise to cases where a public interest is served. However, this variation does not prevent us from examining them under the one heading of "public law theories",\(^11\) for the emphasis of all of them is on the existence, or the need for the attribution, of the authority of certain States to make territorial arrangements valid *erga omnes* by means of treaties.\(^12\)

1.1.1. The substance of the "public law" theories

As indicated above, public law theories are distinguished as a body of opinion which contemplates a "quasi-legislative" authority being vested in certain States in certain circumstances to make a treaty regime, usually of territorial character, with legal

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\(^8\) Cf. the passage cited in p. 359 below.

\(^9\) In his examination of the relevance of the theory of State servitude in international law, McNair indicates that the public law theory can more satisfactorily explain what this theory is trying to achieve, i.e. to establish for "the territorial restrictions (made by treaty)... a sphere of operation wider than they would receive as treaty obligations of a personal character governed by the maxim *pacta tertiis*". McNair, *loc. cit.* above Ch. I (n. 78), p. 123.


\(^11\) It is only McNair who has employed the expression "public law theory" in order to explain the special effect of the category of treaties under consideration. See Ch. I (1.7. and 1.10.) above.

effectiveness erga omnes or tertios. On that ground, they propose a real exception to
the otherwise absolute character of the pacta tertiiis.. rule. Thus the core of these theo-
ries is the assumption that there exists a legal authority for certain States to establish by
treaty legal situations effective against third States. For the third States the source of the
binding force of the treaty is the competence of the party States to exercise such an
authority. According to this approach, the parties remain free in principle to terminate
or to amend the treaty establishing the “objective regime” without the consent of the
third States which may be bound by that treaty, though the suggestion has been made
that the parties would not enjoy complete freedom in this regard. Accordingly, on this
view, third States are affected if and as long as a regime is in force. The immediate
question is where this power of the contracting parties to act “in a semi-legislative ca-
pacity for the whole world”, as McNair puts it, comes from and how it may be justi-
fied. In reply to these questions, three explanations can be found in the literature. Each
of these may be viewed as a distinct “public law” theory.

The first is a relatively old-fashioned view. It refers to the special function that
the “Great Powers” had in the past in solving political and territorial problems of inter-
national relations and invokes this as the justification for the attribution to them of an
authority to act in such a way. On this view, just as the Great European Powers did in
the nineteenth century, the “Great Powers” of the present time are considered to have an
inherent authority to settle international problems by means of agreement among them-
selves in circumstances where such problems must somehow be resolved (the “Great

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13 This view is mainly based on the standpoint of the Commission of Jurists in the Aaland Is-
lands case. As was stated in Chapter I, in this case the Commission advocated this view by
saying that “every State interested” could “by reason of the objective nature of the settle-
ment, of 1856 “as a power directly interested, insist upon compliance with provisions [of
the Convention of 1856] in so far as the contracting parties have not cancelled it.” See Ch.
I (1.5.) above, emphasis added.
1-320., at p. 236.
15 McNair’s Law of Treaties, p. 266.
16 Lawrence, op. cit. above Ch. I (n. 2), p. 209; De Visscher, op. cit. above Ch. II (n. 110), pp.
145-153 and 266-268; For a renewed account of this point of view see Subedi, loc. cit.
above (n. 12), pp. 162-205 and 174-179.
Powers’ participation theory. The only thing which limits such a power is the necessity of a general agreement, or “concert, among them.” Thus the presence amongst the parties, or the agreement, of the “Great Powers” is considered by itself as sufficient for the treaty regime to be given objective validity and effects. This point of view is implicit in those propositions which claimed for the “Great Powers” of Europe in the nineteenth century a position of legal superiority as a legal institution in relation to the smaller States — a position of “primacy” or “overlordship,” as it also is in the opinion, as a corollary to the first proposition, that a conference of the “Great Powers” could legislate by treaty for the comparatively unimportant minority. It is also implicit in the position taken by Dupuy with regard to the special role of the States party to the Antarctic Treaty. He suggests that

“It is sometimes analogised with the idea of negotiorum gestio in Roman law, the Great Powers’ actions being considered as carried out on behalf, and in the interest, of all the States of the world. See Simma, loc. cit. above (n. 10), p. 198.


On this question see: Dickinson, op. cit. above Ch. I (n. 5), pp. 126 et seq.; Crawford, op. cit. above Ch. I (n. 2), at pp. 301 et seq.; Hicks, loc. cit. above Ch. I (n. 5), pp. 547-49. See further Ch. I (1.1.) above.

Bluntschli, for instance, expressly maintained that:

"an European Congress, representing the greater number of states, and all the States of first importance, can legislate by convention for the absent European States, even for a dissenting minority." (Bluntschli, Sec. 110, quoted by Roxburgh, op. cit. above Ch. I (n. 25), p. 99, emphasis added).

Roxburgh mentions Alvarez as sharing this view (ibid.).

A second view concentrates on some extra requirement(s), besides the participation, or the agreement, of the "Great Powers", in order to give more legitimacy to the authority asserted for a group of States to make territorial arrangements by means of treaty with binding effect for third States. This approach restricts such an authority to cases where the arrangement or the regime established is intended to, or actually does, serve the public interest — that is, the interest of States as a whole, rather than the interest of the parties only ("general interest" theory). Here, the intention of the parties to serve the "general interest" (whether this may be enough is a different matter), or the fact that a treaty regime or status actually does serve the common interest of States as a whole, becomes a vital precondition for a treaty regime to be binding on third States.

The view cited from McNair earlier seems to sympathise with, though impliedly, the notion that the Great Powers may have a "semi-legislative" authority to act in the "public interest". A typical example of this standpoint is, however, the view expressed by the Committee of Jurists on the question of the Aaland Islands. As was stated earlier, the Committee concluded that, since the regime of demilitarisation of the Islands "[was] laid down in European interests", it constituted "a special international status, relating to military considerations, for the Aaland Islands"; and, accordingly, until it was duly replaced by another regime, "every State interested has the right to insist upon compliance with [it]".

Finally, a third view considers the authority of the parties to act in a "semi-legislative" capacity to derive from the "participation or placet of those States that have territorial sovereignty and jurisdiction over the area" subjected to the treaty-regime concerned — regardless of whether or not the "Great Powers" are included amongst the

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23 For the desirability of the adoption of a doctrine of "community interest" in the law of treaties, especially in so far as the question of "third party beneficiaries" is concerned, see Jesup, loc. cit. above Ch. I (n. 30), pp. 386-391.
24 See McNair's view cited in p. 171 above.
25 McNair's Law of Treaties, p. 259. Mosler, after citing the above-mentioned opinion of McNair, likewise emphasises the need for the presence of a "general interest". See Mosler, loc. cit. above (n. 14), pp. 235-237; see also Ballreich, loc. cit. above Ch. III (n. 40), p. 480.
26 See Ch. I (1.5.) above.
27 Ibid. For a further example see the legal Opinion expressed by an English Law Officers in 1859 with regard to the neutrality of Switzerland and neutralisation of a portion of Sardinian territory, fully examined in Ch. V (1.3.1.) below.
28 Simma (loc. cit. above (n. 10), p. 189) cites Klein as having examined this possibility.
parties and whether or not the regime is established in the general interest (The "com­
tence of the territorial sovereign" theory). According to this view, the State or States
having territorial sovereignty or jurisdiction over a particular land or maritime territory
are entitled, or have an inherent right, under general international law to dispose of a
part of their territory by, for instance, placing it under a general regime, such as one of
common user, with effect in law vis-à-vis other States. During the International Law
Commission's debate on Waldock's proposed Draft Article 63 on the question of "ob­
jective regimes", Bartos referred to a case which can be invoked as a good example
for this position. He argued that under international river law, it is commonly accepted
that riparian States are "entitled to establish the regime applicable to a river" and that
third States are consequently bound to comply with that treaty regime "because the
States which had established it had been entitled to do so under the rules of interna­
tional law". As an example, he specifically referred to the Belgrade Convention of
1948 concerning the Regime of Navigation on the Danube.

1.1.2. "Public law" theories: an appraisal

1.1.2.1. The "Great Powers" participation

The view which invokes the place and the function of the Great Powers as a jus­
tification for the attribution of a legislative authority to certain States cannot today be
sustained as a matter of theory. Indeed, this was so even according to the standards pre­
vailing at the time that theory was originally advanced. A British Memorandum, dated
October 1818, records that the true function of the Powers in Europe was,

"without ... transgressing any of the principles of the law of nations or failing in the
delicacy which they owe to the rights of the other States ... to interpose their good of­
fices for the settlement of differences subsisting between other States, to take the initia­
tive in watching over the peace of Europe, and finally in securing the execution of its
treaties in the mode most consonant to the convenience of all the parties."
Referring to the role of the "Concert of Europe", Judge Negulesco, in the case of Jurisdiction of the European Commission of the Danube between Galatz and Brailu, indicates that

"The Concert of Europe has always been regarded as a political system and has never been considered as a legal organization; in other words, the decisions of the Great Powers, met together as the Concert of Europe, have sometimes been able to command respect by reason of the power behind these decisions, but they have never been held to be legally binding upon States not represented in the Concert."\(^{33}\)

Similarly, Gihl in his profound deliberations over the idea of "le droit public europeen", concludes

"It may be taken as generally applying to the phenomenon referred to under [the] heading le droit public europeen that, in so far as they involved consequences for others, this is due to political, not juridical, factors. They are maintained by the actual influence of the Great Powers, possibly also by the interests of third States and the ability of the latter to assert these, and the consequences cease as soon as these factors fail to make themselves sufficiently felt."\(^{34}\)

Consequently, he suggests that:

"If we define international law as the legal rules which are actually applied as such by States, it is of importance to distinguish those rules which are maintained as legal rules from the conditions which exist simply on the strength of political factors. It would in that case probably be desirable to abolish le droit public europeen from the sphere of international law in so far as it refers to treaty conditions which are considered to extend their effects beyond the sphere of the contracting powers."\(^{35}\)

Crawford dealing with the dispositive role of the "Great Powers" in the 19th Century, suggests that in general such dispositions

"were consented to be parties affected: the actual exercise of authority by the Powers — with certain exceptions — did not in fact extend beyond negotiation, conciliation and the exercise of political influence between disputants."\(^{36}\)

Similar to Gihl, Crawford concludes that


\(^{34}\) Gihl, op. cit. above (n. 3), p. 63, emphasis added. Also see: Wyrozumska (loc. cit. above Ch. I (n. 138), p. 256) who argues that "explanation of legal effectivity of treaties can not be of political nature"; in other words, it cannot rest on the notion or the power of the "Great Powers".

\(^{35}\) Ibid., p. 64, emphasis added.

\(^{36}\) Crawford, op. cit. above Ch. I (n. 2), p. 305. As to the exceptions, he enumerates three cases where the "Great Powers" acted without the consent of "smaller" Powers. These were:

"the Bessarbian controversy at the Congress of Berlin in 1878; the imposition of an International Government on Crete in 1897, and the action taken with respect to Albania in the period 1913-22." (Ibid.)
"Nineteenth-century precedents do not support the claim of the Great Powers to any legal hegemony in the territorial affairs of Europe. The competence ... to create "objective" settlements derives not from the position of the Powers per se, but from the importance of the common interests involved, and the express, tacit or implied acceptance of the States concerned."

The views cited clearly show that, contrary to the position taken by a few writers mentioned earlier, the notion of certain States having the status of "Great Powers" has never been considered as a substantive notion in public international law; nor has there been any support for the proposition that the Great Powers had any special power to settle by treaty among themselves territorial matters automatically binding on the others.

Secondly, the proposition that a conference or a congress of the "greater political powers" could legislate by convention for "a small and comparatively unimportant minority" would be in contradiction to the universally recognised legal presumption that, in law, States are equal subjects of international law, a presumption which is probably the first and most pre-eminent legal principle postulated in both the traditional and modern theories of international law. As Roxburgh accurately put it nearly seventy years ago, such an idea:

"besides being contrary to the practice of the Hague Conferences, violates the general rule that a state cannot incur obligations under a treaty to which it is not a party, and throws over the conception of the legal equality of states, and its corollary that "legally", although not politically, the vote of the weakest and smallest State has quite as much as weight as the vote of the largest and most powerful." 

Thirdly, the fundamental changes which have happened during the past seventy years make the task of rejecting the above proposition much easier. International society no longer consists of some few powerful States which can freely impose, by use of force, intimidation or by other means, their wills upon other nations and divide the

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37 Ibid., p. 308, emphasis added.
38 See (n. 16 and 20) above. See further Ch. I (1.1. and 1.2.) above.
39 Oppenheim while recognising the special role of the "Great Powers" indicates that "however important the position and the influence of the Great Powers may be, they are by no means derived from a legal basis or rule. It is nothing else than powerful example which makes the smaller States agree to arrangements of the Great Powers. Nor has a State the character of a Great Power by law." (Oppenheim, op. cit. above Ch. I (n. 22), p. 163). In a later passage, he further states that it is "a question of political influence, and not of law, whether a State is or is not a Great Power." (Ibid., p. 164).
world between themselves. Respect for the territorial sovereignty and equality of States — which guarantee the freedom of every nation to accept or reject the decisions taken by the others — constitutes one of the corner-stones of international law in modern times.\(^4\) It may possibly be argued that the situation emerging from World War II, in particular the creation of the United Nations, has transformed the political notion of the “Great Powers” into the sphere of international law\(^42\) by acknowledging as the five Great Powers the Permanent Members of the United Nations Security Council, a body in which no decision, except in procedural matters, can be taken against the vote of a Permanent Member (the so-called right of veto). However, the United Nations Charter has also firmly acknowledged the traditionally accepted principle of the equality of States. Article 2 (1) of the Charter specifically acknowledges the “principle of sovereign equality of all its members” as the first Principle of the United Nations Organisation.\(^43\) The particular privileges granted to the Permanent Members of the Security Council within the system of the United Nations could not, therefore, be taken as a denial of the sovereign equality of States in international law. That is also so because no State has been forced to join the United Nations and the States which have done so have voluntarily adhered to the United Nations system which recognises the dominant position of the Great Powers within the system — i.e. the privileged position of the Permanent is a result of the consent of the others to that position.

Finally, Dupuy’s argument that the Antarctic Treaty parties are able to enforce the regime they established and “no outside factor can ... modify their role”\(^44\) — which is essentially political in nature than legal — does not prove anything. It is obvious that, politically speaking, a group of powerful States are able to get together, make decisions and enforce them against smaller nations but that does not mean that, legally speaking, they are entitled to do so or the smaller nations are bound by those decisions. It is indisputable that, for instance, the United States together with its Western allies and Russia are perfectly capable of taking over the whole world by overthrowing the governments

\(^4\) See Ch. II (2.1.3.) and text which follows.
\(^42\) See Articles 27 (3), 108 and 109 of the Charter of the United Nations, loc. cit. above Ch. II (n. 45).
\(^43\) Article 2 (1) of the Charter of the United Nations, ibid. See also GA Res. 2625 (XXV) on this principle, loc. cit. above Ch. II (n. 45).
\(^44\) Cf. Ch. V (4.2.2.) below.
of small countries. Does that mean that all small nations must now give up their nation-
hood just because the big powers are capable of depriving them from that status? Surely not. The idea of international law is based on one important assumption that political might does not give right or rights. That assumption is inevitable for realisation of a system of law and order. Moving away from or restricting the relevance of political and military power in inter-States relations in favour of respect for law and order is a marked trend throughout the history of international law.

We may, therefore, conclude that there exists no juridical privilege for the so-
called Great Powers in international law: they possess no authority to regulate, by means of treaty or otherwise, international issues and enforce their decisions against other States — though they are perfectly free to, and indeed they very often do, use their political, military or economic power to influence the others’ decision. Whatever is done by the Great Powers of Europe under the system of “public law of Europe” in the past is not admissible in present day international law. Accordingly, this point of view does not offer a legally sound explanation for the erga omnes effects, if any, of the class of treaties under consideration. Moreover, it may be pointed out that this approach in fact involves the logic of custom; for it proposes a mechanism which is very much comparable to that of customary-law creation, as that process is understood by some writers. According to these writers, the “dominant section” of international law

45 The view expressed by Pollock is well in point here. In dealing with the relation between treaties and customary law as sources of international law, he indicates that:

“Treaties and conventions between particular states may define any portion of those rules, or add to or vary the existing rules, but any conventional rule so laid down is binding only on the parties to it.... It is, therefore, impracticable, with one exception to be mentioned, to make any general statement as to the value of treaties and similar instruments as evidence of the law of nations. The exceptional case which is increasing frequency and importance, is where an agreement or declaration is made not by two or three states as a matter of private business between themselves, but by a considerable proportion, in number and power, of civilised states at conferences held for that purpose, and they have been so framed as to admit of and invite the subsequent adhesion of Powers not originally parties to the proceedings. There is no doubt that, when all or most of the great Powers have deliberately agreed to certain rules of general application, the rules approved by them have very great weight in practice even among states which have never expressly consented to them. It is hardly too much to say that declarations of this kind may be expected, in the absence of prompt and effective dissent by some Power of the first rank, to become part of the universally received law of nations within a moderate time. As among men, so among nations, the opinions and usage of the leading members in a community tend to form an authoritative example for the whole ...” (Pollock, op. cit. above Ch. II (n. 132), pp. 511-513, emphasis added).

46 See De Visscher, op. cit. above Ch. II (n. 110), pp. 153-163; Schwarzenberger, G., Power
society may always create general custom for all if they are able and willing to impose their view of the law on the world as a whole. Thus, if the "Great Powers" (as the "dominant section" of the international society) wish a regime established by a treaty between themselves to be valid or effective *erga omnes*, such a regime may be given such a validity or effect since what is needed is the will, representativeness and the ability of these "Powers" to impose that regime on third States. In this case the third States would, however, become bound by the treaty regime *qua* custom, and not *qua* treaty and, accordingly, there would be no automatic legal effect claimed for the category of treaties in question. Looked at it this way, the "Great Powers" theory may most appropriately be considered as a custom theory discussed under sub-section 2 below which does not claim exception to the *pacta tertiis*.. principle; and, as such, it cannot furnish a sound justification for the *erga omnes* effects attributed to the category of treaties providing for "objective regimes".

1.1.2.2. The "general interest"

This theory appears to be more plausible than the first one. It is plausible because it may in a way be viewed as being in harmony with, or at least as not running totally counter to, the philosophy of the *pacta tertiis*.. rule. It is quite appropriate to maintain that, as a necessary consequence of the presumption that in law States are equal members of international society, public international law allows States to pursue and to promote their own values, but it does not enforce those values against others. Based on this premise, in the field of treaty law, the *pacta tertiis*.. rule prevents two or more States from imposing, by means of treaty, their values (or decisions) on non-party States. In

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48 See the *Reparation Case* discussed in Ch. I (1.8.) above.

49 It is interesting to note that those who have given determinative value to the views and power of the Great Powers as far as the creation of customary international law is concerned, have at the same time strongly supported the *pacta tertiis*.. rule. In particular see Cheng's view cited in p. 192 below.
the case of "objective regimes", however, the treaty regime is, allegedly, in the general interest and promotes values common to and shared by all. There is, therefore, no reason, it may be contended, why the treaty itself cannot automatically be enforced against all. Nevertheless, this point of view cannot successfully be maintained, involving, as it does, certain major deficiencies.

First of all, it is not clear what, in theory, constitutes "general interest" in present international society,\textsuperscript{50} mainly because of the fact that States, as equal members of this society, are extremely divided and diverse in their social and political aspirations.\textsuperscript{51} States, or groups of States, interpret differently legal questions affecting their legal rights and obligations, depending on their short- and long-term interests, which in turn, are influenced by many diverse ideological, economical, sociological and political factors. The situation resulting from the Deep Sea-bed regime established by Part XI of the United Nations Convention on the Law of the Sea (UNCLOS) is a good example. This part of the Convention provides that the "sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction" and their resources are "common heritage of mankind".\textsuperscript{52} It prohibits any claim of sovereignty over the area as well as its resources and it establishes an international body (the Authority) to act on behalf of mankind to make regulation with regard to exploration and explorations of minerals and other resources.\textsuperscript{53} Now the question is: "can this regime be viewed as serving public interest?" From the standpoint of socialism-communism, this regime could surely be viewed as such, because it not only places a large area of planet earth under a sort of common ownership regime, but it also provides for equitable sharing of the financial and other economic benefits derived from activities in that area.\textsuperscript{54} From the standpoint of capitalism, however, the regime in question may not be viewed as serving the "general interest", because it prevents any competition by monopolising production of sea-bed


\textsuperscript{52} UNCLOS, Article 136.

\textsuperscript{53} \textit{Ibid.}, Article 137.

\textsuperscript{54} \textit{Ibid.}, Article 140 (2).
In turn, viewing the regime from other standpoints may lead to further different conclusions as to whether or not it is in the general interest. It is not, therefore, surprising that almost all of the States belonging to the group of developing countries (the Group of 77) and the States of the former Eastern Bloc seem to have viewed the regime of Deep Sea-bed as most desirable, while a large number of States belonging to Western Bloc have viewed it in a quite opposite way. Thus, as Danilenko puts it, "judgement on the question of what constitutes general or community interests will always be subjective and political".  

The second deficiency of the theory is this. Even assuming that there exists a clear cut definition of the term "general interest" in international law, it would still be extremely hard to formulate criteria by which one could determine if a particular treaty regime established by a limited number of States is actually serving the "general interest" of States as a whole. A state of affairs may be considered by a group of States (e.g. party States) to be in the general interest of international society as a whole, while another group (non-party States) may view it in quite the opposite way. This is one of the issues currently involved in respect of the regime established by the Antarctic Treaty (1959). While the assertion is made on behalf of the parties that the regime it establishes is the best way by which the interest of international community may be served, a number of States belonging to the Group of 77 have recently argued that such a regime was made to protect only the interests of the parties and have requested the United Nations for a change. Moreover, formulating such a criterion would become even harder if one were to take into account the elements of time and political change. A treaty regime may truly be, or be viewed by all States as being, in the "general interest" at one particular period of time, but become, or be viewed, differently at another time. For instance, many of the regimes of neutralisation which were established by treaty during the nineteenth century came to be seen as no longer serving such a purpose and

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57 For more detailed consideration of this issue see Ch. V (4.2.2.) below.
accordingly were terminated. For example, the regimes of permanent neutrality of Belgium and Luxembourg, established by the Great Powers' treaties of 1831 and 1839 and of 1867, respectively, were terminated by the agreement of the victorious Powers after World War I.⁵⁸

A third deficiency is that the idea that the Great Powers or a limited group of States have the authority to establish a treaty regime valid *erga omnes* when such a regime is made to, or actually does, serve the interests of States as a whole is not in line with contemporary trends in modern international law.⁵⁹ The current tendency places special emphasis on the desirability of according a right to all States to participate in treaties with regard to the subject-matter of which they have an interest,⁶⁰ instead of recognising the right of a limited number of States to establish a treaty regime with binding effects valid *erga omnes*.⁶¹ A large number of States participating at the Vienna Conference, which concluded the Vienna Convention on the Law of Treaties, argued strongly in favour of the recognition of the right of all States to participate in treaties

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⁵⁸ *Loc. cit.* above Ch I (n. 14 and 15).
⁵⁹ Danilenko, *op. cit.* above Ch II (n. 110), pp. 62-63; Schwarzenberger, *op. cit.* above Ch. I (n. 91), pp. 458-460. See further text which follows.
⁶⁰ A brief examination of the identities and the numbers of States which have participated in post World War II treaties that have established regimes such as the permanent neutrality or demilitarisation of a State or region is clearly indicative of this trend. For example, 13 States that had, or could have, some kind of interest with regard to the status of Laos (which included all neighbouring States, as well as, all Permanent Members of the Security Council) participated in the 1962 conference which established by treaty the permanent neutrality of Laos. See *Declaration on the Neutrality of Laos*, *loc. cit.* above Ch. III (n. 107). Likewise, 19 States (including all the neighbouring States and the Permanent Members of the Security Council) participated in the conference on the Cambodian Settlement which, *inter alia*, provided for the permanent neutrality of Cambodia. See *Agreement Concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia*, Paris, 23 October 1991; UKTS 111 (1991), Cmnd. 1786; 31 ILM 200. This agreement entered into force on 23 October 1991. See Further text which follows.
which involved matters of general interest, though this right was not generally accepted, the Conference adopted a resolution which recognized the desirability of opening up such treaties to universal participation.

Accordingly, taking into account the difficulties listed above, this point of view, similar to the "Great Powers" participation theory and despite being more plausible, does not offer a legally sound justification for the *erga omnes* effects, if any, of the class of treaties under consideration. The main obstacles, as was seen, is that the present day international law admits, under no circumstance, the "semi-legislative" authority of a group of States to enforce against third States a treaty regime they alone have agreed upon, even if the arrangement seems, or in fact could be proven, to be in the general interest of the international society.

1.1.2.3. The "competence of the territorial sovereign"

Although the participation in a treaty of the State or States having territorial jurisdiction over a territory being subjected to a general regime, for example, of common user, is definitely a necessary condition for the legitimacy of the regime established, it cannot be regarded as a basis by which such a regime could, by its own force and without more, produce legal effects for third States. First of all, it is hardly conceivable that the State or States having territorial jurisdiction over a territory are entitled at all to create for it a generally binding regime unless the regime established is meant to grant rights alone to third States. As was seen in Chapter II, there is nothing in international law to prevent one or more States from unilaterally conferring a right upon another

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62 See draft article proposed by 22 States (A/CONF. 39/L. 36 and A/CONF. 39/11/Add.1, pp. 229 et seq.) which read:

"Every State has the right to participate in a multilateral treaty which codifies or progressively develops norms of general international law or the object and purpose of which are of interest to the international community of States as a whole." (Quoted in Watzel, R.G. & Rauschning, D., *The Vienna Convention on the Law of Treaties* (1969)'s Travaux Préparatoires (Frankfurt, Metzner, 1978), p. 153, emphasis added).

Cf. Schweisfurth who argues that

"A "right to participate" derived from the principle of equality can only be accepted correspondingly with a "right to decline" the establishment of treaty relations with the "third" State." (*Loc. cit.* above Ch. II (n. 30), p. 658).

In this regard see also Tunkin, *op. cit.* above Ch. II (n. 132), pp. 139-141.


64 For a concrete example see the case of Panama Canal and the position of the United States with regard to relevant treaties fully examined in Ch. V (3.2.1 and 3.3.4.) below.
State or States by means of treaty or otherwise — for example, by means of a unilateral declaration. The only limit on such a power is that rights cannot be imposed on third States against their will. Those States always remain free to avail themselves of or to renounce the right concerned. Moreover, as was there seen, the exercise of this right may be subjected to the fulfilment of certain conditions (obligations) by the third States concerned. If the third State decides to avail itself of the right granted to it, it must be prepared to fulfil the accompanying obligations. This is the extent to which the Vienna Convention allows a treaty to produce, by its own force and without more, legal effects (rights and obligations) for third States. Accordingly, it would not be wrong to postulate that States which have territorial sovereignty or jurisdiction over a particular land or maritime territory are entitled to establish by treaty a regime, for example of common user, affecting other States, but only if this effect does not involve anything more than the granting of legal rights accompanied by certain obligations as conditions for the exercise of those rights. To this extent, this point of view is quite acceptable, since it simply reproduces what is already permitted by the principles of “stipulation pour autrui” and “entailment of rights and obligations”, as incorporated in Article 36, paragraphs 1 and 2, of the Vienna Convention. However, if the regime established goes beyond the limit stated — by purporting to impose, for example, obligations which are not meant to be, and cannot be considered, conditions for rights granted — then, this approach cannot be taken as furnishing a sound basis for explaining its alleged “objective effects”. The reason is that, as mentioned earlier, while international law undeniably recognises the authority of a State or States to dispose of a territory over which they have territorial sovereignty or jurisdiction by placing it under a treaty regime which involve granting of right on third States, it contains nothing which requires the latter to observe the terms of such a regime if it involves for them undertaking of one or more obligations. As was seen in Chapter II, to say, in abstract, that two or more States may by means of treaty impose obligations on third States, even if the obligation concerned with a territory over which they have territorial jurisdiction, would be contrary to the

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65 See Ch. II (2.2.2.2. and 2.2.2.3.) above.
66 For concrete examples see Ch. III (3.1.) above.
principle of equality and independence of States. Thus, if the United States and Panama, for instance, enter into a treaty-arrangement establishing a regime of permanent neutrality for the Panama Canal, as they have done, other States are not automatically bound to observe, or to respect the terms of, such a regime. That is why a protocol is attached to the Treaty which established the Permanent Neutrality of Panama Canal, so that other States may undertake to respect the status of Permanent Neutrality of the Canal.

Secondly, even assuming that under "international river law" riparian States are "entitled to establish the regime applicable to a river" and that third States are consequently bound to comply with that treaty, as Bartos suggests, then, in that case, the binding force of the regime could not be said as arising from the treaty concerned. Third States' obligation to observe the terms of the treaty would arise from the (customary) rule of "river law" and not the treaty itself. Nor could be said that the generality of pacta tertiiς rule has been impaired; for it is well recognised that certain policy considerations in one branch of international law may override or exclude the application of a rule in another branch of international law.

1.1.3. Conclusion

The core of the public law theories is that the class of treaties under consideration becomes binding on third States because the parties are acting, or assuming to act, in the general interest of the international community and hence must be assumed to have a semi-legislative authority. The immediate questions facing these theories are where does such an authority come from and how can it be justified. As can be gathered from the above, none of the explanations given in this regard seems to be in line with contemporary legal theory or the accepted rules and principles of international law. The major obstacle is the fact that these theories contradict the principles of pacta tertiiς.

67 As was seen in Ch. II, for this very reason, both the International Law Commission and the Vienna Conference unanimously adopted the view that a treaty cannot create obligations on third States without its consent.
68 One having territorial jurisdiction and the other having territorial sovereignty over the Panama Canal. See further Ch. V (3.) below.
69 Ibid.
70 For more details see Ch. V (3.3.2.) below.
71 See Sec. 1.1.1. above.
72 See Ch. II (3.4.) above.
and *res inter alios acta*, which have themselves been incorporated into international law as a result of the assumption that all States are equal and independent subjects of international law. States are free to enter into treaty-relationships with one another; but the will or the decisions of one group of States cannot produce legal obligations (and even rights in the view of some jurists\(^3\)) for third States without the consent of the latter. Even the presence of the Great Powers of the time amongst the parties and the fact that an agreed arrangement is in the general interest cannot, by themselves, provide the required legitimacy for imposing treaty-obligations — *qua* treaty — on third States. The trend in international law is towards the universal participation of all States in treaties which settle matters of general interest.\(^4\) Therefore, for the reasons stated above, the public law approach cannot be taken as providing a sound basis upon which certain kind of treaties could produce, by their own force and without more, legal effect valid *erga omnes*. Amongst the theories discussed, the “Great Powers” theory seems to points towards custom-type thinking as the source of any *erga omnes* effects, rather than any special rule on “objective regimes” and, therefore, it may properly fit into the category of theories which does not claim exception to the *pacta tertiis ..* rule.

1.2. Waldock’s theory (proposed Draft Article 63)

As was seen in Chapters I and III, Waldock’s theory is based, like the theories discussed above, on the assumption that certain kinds of treaty possess a special nature and as such they should be treated differently in so far as their effects on third States are concerned. What makes them special, in his view, is the intention of the parties to create, in the general interest, obligations and rights relating to a territory over which one or more of them have territorial competence — or at least have consented to the provisions in question.\(^5\) The fact that in this kind of treaty the parties both have territorial competence with respect to the subject-matter of the treaty and have the intention to create a general regime in the general interest will, therefore, justify, in Waldock’s view, their exclusion from the application of the general rule that a treaty cannot create

\(^3\) Schwarzenberger, *op. cit.* above Ch. I (n. 91), p. 460.

\(^4\) Vienna Declaration on Universal Participation, *loc. cit.* above (n. 63).

\(^5\) For a detailed examination of these elements see Ch. I (1.12.) below.
rights or obligations for a third State without its consent — or, to be more precise, applying a less strict or stringent requirement when investigating a third State’s consent.\(^7\)

Convinced that the category of treaties in question must be treated exceptionally, Waldock considers various process by which third States may legally be considered as automatically deriving rights and obligations from such a kind of treaties. He rules out the “custom” process as not desirable, being necessarily a slow process. He also considers as not acceptable the formula proposed by Fitzmaurice.\(^7\) In Waldock’s view, a good solution, is

“to have recourse to the principle of tacit recognition — tacit assent — the importance of which in the law of treaties was recognized by the International Court in its advisory Opinion on Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide”.\(^7\)

Adopting this solution, paragraph 2(a) of his proposed Draft Article thus specifies that “A State not a party to the treaty, which expressly or impliedly consents to the creation or to the application of an objective regime, shall be considered to have accepted it.” Applying the principle of “tacit assent”, the next paragraph stipulates that

“a State not a party to the treaty [establishing an objective regime], which does not protest against or otherwise manifest its opposition to the regime 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 regime.”

Such a (third) State would, according to paragraph 3(a) and (b) respectively, be “bound by any general obligations” which the regime contains and would be “entitled to invoke the provisions of the regime and to exercise any general rights” which it may confer, subject to the terms and conditions of the treaty. Moreover, by the provisions of paragraph 4, such a regime could only be amended or be revoked with the concurrence of the third States which have expressly or impliedly accepted it and have a substantial interest in its functioning.

\(^{7\text{6}}\) He indicates that the crucial point is “whether that intention has special effects in the law of treaties or whether any general regime that may result is to be regarded as essentially a customary regime built around the treaty.” Obviously, he prefers the former formula.

\(^{7\text{7}}\) See Ch. I (1.12.) above.

\(^{7\text{8}}\) Waldock’s 3rd. Rep. on Treaties, p. 32, para. 17. Waldock suggests that his proposed Draft Article 63 has been formulated

“on the basis that treaties intended by the parties to provide a general regime for particular regions, States, territories, etc., constitute a special category of treaties which, in the absence of timely opposition from other States, will be considered to have objective effects with regard to them.” (Ibid., para. 18).
As can be seen from the cited provisions, the core of Waldock's theory is that since the kind of treaties under consideration purports to establish in the "general interest" a general regime of rights and obligations for a territory over which the parties, or one of them, have territorial competence, such a regime could safely be regarded as valid against third States which do not, within certain period of time, protest or manifest their opposition to its creation or operation. The questions what treaties fall within the purview of Waldock's suggested category of "treaties providing for objective regimes" and what requirements a treaty must meet for it to constitute an "objective regimes" and whether or not his proposal was satisfactory to the members of the International Law Commission for the purpose of the codification of the Law of Treaties — and for what reasons it was not adopted by the Commission — have already been thoroughly discussed in Chapters I and III.\textsuperscript{79} It is not necessary to repeat that discussion here. The following points need, however, to be emphasised here with respect to Waldock's proposed theory as a means which may justify the \textit{erga omnes} effects of the category of treaties in question.

\textbf{a.} Almost all the difficulties discussed above with regard to the determination of whether or not a treaty regime is in the "general interest"\textsuperscript{80} will become relevant here since the "general interest" factor is an important ingredient in Waldock's theory: according to paragraph 1 of his proposed Draft Article 63, "a treaty establishes an objective regime when it appears from its terms and from the circumstances of its conclusion that the intention of the parties is to create in the \textit{general interest} general obligations and rights".\textsuperscript{81} In addition, his proposed presumption unfairly shifts the burden on third States. Many States, if not most, do not have the bureaucratic resources to follow international developments resulted from the treaties concluded by a limited number of States. As was seen, this was one of the main argument against Waldock's proposed Draft Article 63.\textsuperscript{82}

\textsuperscript{79} See Ch. I (1.12.) and Ch III (1.) above.
\textsuperscript{80} See Sec. 1.1.2.2. above.
\textsuperscript{81} Emphasis added.
\textsuperscript{82} See Ch. III (1.), especially Jiménez de Aréchaga's comment in this regard, as cited in Ch. III (1.) above.
b. To the extent that, Waldock relies on third States' consent in order to justify the applicability of an "objective regimes" upon them, his theory should not be viewed as advocating any automatic legal effects for any kind of treaties. As some members of the International Law Commission argued, to that extent his theory was not extraordinary at all. Indeed, to say that the effect of a treaty towards a third State results from the consent of such State does not explain, or cannot be taken as explaining, any "objective" effect which this treaty may have, since the need for consent to be bound is in contradiction with such an effect.

c. However, Waldock's proposed presumption according to which third States were to become bound by an "objective regimes" if they did not protest against or otherwise manifest their opposition to the regime within a given period of time may well be viewed as a means through which the kind of treaties in question may, by their own force and without more, establish rights and obligations for third States: the proposition that third States acquire rights and obligations under certain kind of treaties if they do nothing within certain period of time would be identical to the proposition that these kind of treaties, by their own force and without more, establish rights and obligations for third States. Of course, whether or not "silence" may be taken as "implied acceptance" in a situation where a treaty purports to establish obligations (and rights) for third States is a different matter. As was seen in Chapter III, the majority of the members of the International Law Commission were not prepared to support the adoption of such a presumption on the conviction that States would not be ready to go along with that proposition. As it happened, these members were right because the States participating in the Vienna Conference did not even accept the International Law Commission's original draft Article 31, even though it required the "express acceptance" of the third State for an obligation to be established for it, let alone treating their "silence" as "consent". The rule as finally adopted requires written acceptance of third States.

83 See paragraph 2 (a) and (b) of Waldock's proposed Draft Article 63 cited in p. 131 above.
84 See Ch. III (1.) above.
85 Wyrozumski, loc. cit. above Ch. I (n. 138), p. 256.
86 See the argument raised against Klein's theory below.
87 For more detail see Ch. II (2.2.1.) above.
d. International Law Commission rejection of Waldock’s proposed Draft Article 63, does not, or should not be viewed as a comprehensive rejection of Waldock’s proposals. As was seen in Chapter III, his proposed presumption was incorporated in Article 36 of the Vienna Convention which in effect recognizes the ability of a treaty to create, by its own force and without more, rights — as well as obligations as conditions for exercise of such rights — for third States. As was there seen, the “objective” effects of a number of treaties regarded as constituting “objective regimes” may satisfactorily be explained by the mechanism envisaged in that article.

e. Finally, if acquiescence, or “silence or absence of protest in circumstance which generally call for a positive reaction signifying an objection” as MacGibbon put it, may play a determinative role in the formation of rules of customary international law, there is no reason, generally speaking, not to give a similar, or at least some, effect to it when a treaty purports to establish a regime of rights and obligations in the general interest. Perhaps, a good reason for not giving such an effect to “acquiescence” is that treaties and custom are different in nature and operate in two different frameworks. As Cheng argues

“[S]tates, through treaties, can come to any arrangement between themselves as they wish without having in law to extend the same treatment to any third state. Similarly, states can, from the legal point of view, safely ignore what other states may be doing by way of treaties, knowing that their own rights can, in law, never be affected by treaties to which they are not parties … In contrast to treaties, rules of general [customary] international law are made by states within an entirely different legal framework. The most important difference is of course that, while treaties are binding on only parties to them, rules of general [customary] international law are binding on all parties to the international legal system (erga omnes).”

Nevertheless, if there was a need to have a treaty rule recognising the objective effects of certain kind of treaties on third State, Waldock’s proposal could be taken as

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88 See Ch. III (3.1.) above.
90 The relevance of “tacit consent” in the formation of rules of customary law, or customary rights and obligations, seems to have been advocated generally. See: Tunkin, *op. cit.* above Ch. II (n. 132), pp 123-133; MacGibbon, *The Scope of Acquiescence ..., loc. cit.* above (n. 89), pp. 150-151.
furnishing a fair solution, since it balances the need for express "consent" of third States against the fact that a treaty regime is made to serve the interest of States as a whole rather than the parties thereto. Moreover, the third States would become bound by an "objective regime" if they remain silent for certain period of time after the registration of the treaty. Thus, there will be no question of imposition of treaty-obligations on third States without their consent, though their consent is presumed by their "silence".

1.3. Klein's theory

Klein's study of the "Statusverträge" (status treaties) or "treaties providing for territorial objective regimes" is the most recent and comprehensive study of "objective regimes". Similar to Waldock, Klein considers that "status treaties" possess a special nature and must be treated differently in so far as their effects on third States is concerned. In his view, the following characteristics must be present in a treaty for it to be considered as belonging to the category of "status treaties": firstly, it must be concerned with a land or maritime territory; secondly, the intention of the parties must be to establish a regime "in the general interest of the international community"; thirdly, the parties must not confine their intention only to acting in the general interest, their intention "must at the same time be to create a regime which is valid beyond the parties to the treaty: the parties need to decide that the regime created by treaty should be respected by third States"; lastly, the parties, or at least one of them, must possess "a territorial competence with reference to the subject-matter of the treaty, which the States not parties to the treaty do not have".

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92 Klein, op. cit. above Ch. I (n. 138). Weiss in his review of Klein's book explains that Klein uses the term "Statusverträge" as equivalent to the notion of "status treaties" in English which in turn refers to Waldock's classification of "treaties providing for objective regimes". Weiss, F., Book Review, BYBIL 52 (1981), pp. 281-86, at p. 28.

93 This feature, in his view, distinguishes "status treaties" from "treaties of an institutional nature, such as treaties creating international organizations" as well as "those treaties relating to persons or groups of persons as is the case for the conventions in favour of the protection of minorities". Klein, op. cit. above Ch. I (n. 138), p. 352 (English Summary).

94 Ibid., p. 351 (English Summary).

95 Ibid., p. 353 (English Summary).

96 Ibid., p. 352 (English Summary).
Having clarified the distinctive character of "status treaties", he then examines various mechanisms (or principles) through which a "status treaty" may, by its own force and without more, create rights and obligations for third States:

"(1) third States may submit themselves individually to the order asserted by the parties to the treaty; (2) treaty regimes may grow into customary law; (3) an historical consolidation of a regime may occur; (4) legal obligations to respect lawful acts may exist and (5) the parties to the treaty may have the power to settle a matter with immediate effect erga omnes." 

Examining every one of these mechanisms in detail, he concludes that the first option is not satisfactory because it is not adopted in the practice of States, though he admits that "tacit accession as well as the consequences arising for third States from explicit or implicit recognition, acquiescence and estoppel" may well be a "possible and theoretically sound basis to explain obligations of third State to respect a regime". The second mechanism is also not satisfactory to him because "an analysis of the interests of the parties to the treaty makes it clear that they invariably wish to retain their right to terminate the treaty and do not wish to exchange the flexibility afforded by the opportunity of treaty modification for the rigidity of customary international law". Likewise, he rejects the third mechanism as not "adequate in the case of status treaties because of the necessary lapse of time required". Similarly, the fourth mentioned mechanism is not acceptable to him because, as he put it,

"there is ... no general obligation on States to respect the internationally lawful acts of the other States. From the co-ordinating function of international law and from the delimitation of competence on the basis of the principle of territoriality, it follows only that States have to accept the lawful acts of others as being lawful, i.e. they must not have recourse to reprisals: but there follows no obligation to make these acts the basis of action of their own." 

Having found difficulties in the first four mentioned mechanisms, Klein considers as satisfactory the fifth mechanism — which similar to the "public law" theories — relies on "the power of the treaty parties to settle a matter with effect erga omnes as a competence which is attributed to them". He observes that the opinion that

97 Ibid., pp. 132 and 355 (English Summary).
98 Ibid., pp. 140 et seq.
99 Ibid., p. 355 (English Summary).
100 Ibid.
101 Ibid.
102 Ibid. p. 356 (English Summary). In a way, Klein theory may be viewed as a kind of "public
"competences have been attributed is, on the one side, adequate to cover the general interest which is involved and the special position of the parties as masters of the treaty; on the other side, it does not exclude third States from the process of becoming bound or entitled under it". Trying to justify his approved mechanism, he states that international law recognises the furtherance of certain values in the general interest, for example, through such concepts as *ordre public* and *jus cogens*, and contends that treaties too may be a proper means of securing them. Then, he argues that, "since an express attribution of the power to settle a matter *erga omnes* can only seldom be ascertained, it is, above all, decisive whether there is a presumption that the power has been attributed and under which circumstances it applies". In this regard, he maintains that

"From the assertion made by the contracting parties to serve the general interest and from the participation of the power which has territorial competence for the settlement, there results such a strong legal claim that the attribution of the asserted competence must be admitted by those States which have not objected to this claim. On this basis, the treaty itself, not the situation created by it, produces its own legal consequences towards third States as well."

As can be seen, Klein seems to suggest that, in the case of treaties apt to establish territorial "objective regimes", the fact that the parties intend, or assert, to establish a treaty regime in the "general interest" with effects *erga omnes* coupled with the fact that they have exclusive territorial competence over the territory which is subjected to such a regime makes it appropriate to draw a presumption according to which third States are assumed to have attributed an authority to the treaty parties to establish a regime with legal effects *erga omnes*. In this way, third States which do not object to the establishment or the operation of an objective regime would be bound by the terms of the treaty regime and would enjoy rights and be subject to obligations under it. On the other hand, third States which positively express their objection would not be held

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105 *Ibid.*, emphasis added. Klein refers to Article 10 of the Antarctic Treaty as an example where the parties assert their competence to establish a generally binding objective regime (*ibid.*, p. 353, English Summary).
bound by the treaty regime. As regards the position of the parties, Klein makes it clear that they retain their "special position as masters of the treaty", by which, he means, the parties remain free to modify or to terminate the regime without the need for third States' consent.

Now it is time to consider if Klein’s theory may satisfactorily explain the alleged "objective" effects of the category of treaties which is our main concern here.

As can been seen from above, Klein mainly relies on two factors in order to justify the alleged "objective" effects of the category of treaties in question. These are the elements of "general interest" and the "territorial jurisdiction of the parties", both of which have separately been invoked by others as means through which certain treaties may produce legal effects for third States. He considers that these two factors, coupled with an assertion on the part of the parties that the regime established must be respected by third States (assertion of power), justify admission of a presumption according to which the party States are assumed to have been given a power to establish a regime, or settle a matter, with effects valid erga omnes, or to be more precise, valid erga those third States which have not objected to the parties’ assertion of power.

From the theoretical point of view, Klein’s theory seems to be considerably similar to those discussed earlier on, under the “public law theories” heading, to the extent that he relies on the power of the party States to settle a matter, or establish a regime, effective erga omnes. However, his theory is different from them since when coming to justify the source of this power he relies heavily on third States’ attitude towards the “settlement” while, as was seen, the “public law” theories do not give any import or effect to such element. In Klein’s theory, third States’ silence is taken as sufficient for the presumption that they have attributed to parties a power to settle a matter, or to

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106 Here Klein seems to have made an analogy with the process of the creation and the opposability of customary rules of international law. A State which has persistently opposed the existence or the application of a rule claimed by the other States is considered by most scholars as exempt from the application of that particular rule. See Charney, J., The Persistent Objector Rule and the Development of Customary International Law, BYBIL 56 (1985), pp. 1-24; Waldock, loc. cit. above Ch. II (n. 59), pp. 49-53. The International Court of Justice in: Anglo-Norwegian Fisheries Case, ICJ Rep. (1951), p. 131; Asylum Case, ICJ Rep. (1950), pp. 277-278.


108 See Sec. 1.1.2. above.
establish a regime, with effects valid *erga omnes* while, in the "public law" theories discussed above, such a power is justified by reference to the ability, and dominant position, of the "Great Powers", the fact that a "general interest" is served and the "competence of territorial sovereign". On the other hand, Klein's theory is different from Waldock's in that in his theory third State's silence is considered as their consent to, or acceptance of, the power of the party States to settle a matter, or establish a regime, with effects valid *erga omnes* while, according to Waldock, third States' silence is treated as their consent, or acceptance of, the "settlement" or the "regime" itself. Accordingly, Klein's theory may well be viewed as mixture of the "public law theories" and "Waldock's theory", though different from them.

Klein's theory is more plausible than the "public law theories" and deserves credit, since he does not relies merely on the "power", or the agreement of, the "Great Powers" or the fact that a "general interest" is being served or the "territorial competence of the parties" in order to justify the objective effects of the category of treaties in question. Like Waldock, he tries to balances the need for third State's consent by the legitimacy of "general interest" and "territorial competence of the parties". Moreover, as third States are given the faculty to reject the power of the parties to establish a regime valid *erga omnes*, his theory does not involve imposition of any obligation on third States which have expressed their opposition thereto. As was observed in respects of Waldock's theory, if we were in need of a treaty rule recognising the objective effects of certain kind of treaties on third State, Klein's theory could be taken as furnishing a fairly sound solution. However, that does not mean that his theory is not devoid of any problems.

First of all, all the difficulties discussed above with regard to the determination of whether or not a treaty regime is in the "general interest" will become relevant here since Klein relies heavily on this element as a decisive criterion for establishing whether an "objective regimes", valid *erga omnes*, exists. In addition, a more serious

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109 Klein distances himself from the view which gives special legal authority to the Great Powers to establish territorial regimes valid *erga omnes*. He argues that "from the status of a Great Power no particular legal title follows". Klein, *op. cit.* above Ch. I (n. 138), p. 356 (English Summary).

110 See Sec. 1.1.2.2. above.

question may be raised in this respect because Klein seems to consider as sufficient the
"mere" assertion made by the contracting parties to serve the general interest" rather
than requiring if a "general interest" is actually served.

Secondly, his proposed presumption is hardly convincing for, in essence, it treats
third States silence/non-objection as sufficient for the treaty regime to produce legal ef-
facts (rights and obligations) against them. As was observed earlier, third States’ si-
ence can hardly be treated as "consent" for a treaty-obligation to be established for
them even in circumstances where the parties strongly claim that they have established
a territorial regime in the general interest or that they are acting on that account. Com-
menting on Klein’s proposed presumption, Simma rightly argues that

"the proposition that "the stronger the claim, the more rejection can be expected", is
as logical as the proposition that "the stronger the claim, the less mere silence can be
taken as consent." Moreover, as Tomuschat put it

"It is … doubtful if the construction of a burden to object is tenable and if in this re-
pect Klein has not overextended the demands to be made on third States."

Finally, serious doubts may be raised against Klein’s proposed presumption since
it recognises, in fact, the power of a limited group of States to "legislate" generally
binding rules. A power which States, especially those belonging to the group of develop-
ing countries, are very sensitive about and reluctant to give away in any manner or
under any disguise. As was seen earlier, the International Law Commission did not
adopt Waldock’s proposed presumption which did not suggest a proposal as extreme as
Klein’s. On the basis of Waldock’s suggested presumption, third States would become
bound by an “objective regime” if they would remain “silent” within a certain period of

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112 See the passage cited earlier in p. 195 above. With regard to the element of “assertion of
competence” in Klein’s theory, Brunner has argued that

“The notion of an “assertion of competence” disguised in a treaty provision is a legal fiction
incompatible with the principle of sovereign equality and irreconcilable with the requirement
of express consent.” (Brunner, S., Article 10 of the Antarctic Treaty Revisited, in Francioni,
pp. 27-51 at p. 42).

113 See pp. 191-192 above where remarks made with regard to Waldock’s presumption that si-
cence may be taken as implied acceptance of treaty obligations.

114 Simma, loc. cit. above (n. 10), p. 199. See further the arbitral awards of the Island of Pal-
mas and Frontiers Between Colombia and Venezuela cited earlier (see Ch. I (2.3.) above)
which unequivocally rejects the possibility of third States’ silence vis-à-vis a treaty be
taken as their “consent”.

115 Tomuschat, loc. cit. above Ch. II (n. 48), p. 23 (n. 15), emphasis original.
time after the entry into force of a treaty while, on the basis of Klein’s proposed presumption, third States are assumed to have delegated a power to the parties to settle a matter, or establish a regime, by means of a treaty among themselves, with effects valid *erga omnes*. The latter proposition would surely be far more unacceptable than the former one, especially in the eyes of developing countries which assert a right for themselves to be a party to any negotiation or decision-making institution which, in one way or another, touches their socio-political or legal interests.

2. Theories based on juridical elements extrinsic to treaties providing for “objective regimes”

As stated above, in order to provide a justification for the validity vis-à-vis third States of the regimes or status established by the category of treaties under consideration, some writers have offered explanations which rely on elements extrinsic to the treaty involved. In their view, although the special nature of the treaties is not totally ignored, the alleged “objective” effect of these treaties is explained without the help of, or the need for, an exceptional rule of treaty law. In other words, the solutions proposed do not envisage any special rule of treaty law applicable to the types of treaties under consideration and, hence, do not hypothesize any exception to the *pacta tertiis* rule. The characteristic feature of this approach is, therefore, the fact that the treaty regime would produce legal effects for or against third States — not because there is an exceptional rule of treaty law (which because the treaty is of a certain type) allows that — but because certain rules, of treaty or customary international law, which are not inconsistent with the *pacta tertiis* rule, prescribe so. There are three theories which may be considered as fitting into this approach. These are the formula in Article 36 of the Vienna Convention; the mechanisms proposed by Fitzmaurice and the “custom process”.

2.1. The mechanism of Article 36 of the Vienna Convention

The mechanism in Article 36 is fully discussed in Chapters II and III. As was there seen, this mechanism can well explain the alleged “objective” effects of certain cases of treaties alleged to establish “objective regimes”. What are these cases and how that kind of effects for third States may be explained are thoroughly discussed. The

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116 See pp. 169-170 above.
117 See Ch. III (3.1.) above and Sec. 1.2. of this Chapter.
only thing which may need to be emphasised here is that this mechanism is based on
the Waldock’s idea of “presumed consent” which he originally proposed in his Draft
Article 63. While the International Law Commission rejected such a formula because
of its broad scope, it found it acceptable in those cases where a treaty purports to confer
a right, or rights, to all States accompanied with certain conditions for their exercise.
This is the extent that the law of treaties as codified by the Vienna Convention allows a
treaty to create, by its own force and without more, legal effects valid \textit{erga omnes}.

2.2. Fitzmaurice’s theory

As was stated earlier on, Fitzmaurice, in his fifth Report on the Law of Tre­
ties, devoted several draft articles to the problem of the legal effects of treaties which
covered the particular category of treaties under consideration. There, he advocated the
absolute character of the \textit{pacta tertiis ..} rule by proposing a presumption according to
which “any given treaty does not have any effects either \textit{in detrimentum} or \textit{in favorem
tertiis}”, but he went on to qualify this statement by saying that the rule that a third
State has no obligations \textit{under} a treaty does not mean that such a State “has no obliga­
tions at all \textit{in relation} to the treaty, or that the treaty is wholly \textit{without legal effect} for
the third State”. Accordingly, he enumerated a number of cases which constituted, as
he put it, “apparent quasi-exceptions, or qualifications” to the \textit{pacta tertiis ..} rule.
Amongst these cases, there were treaties previously considered by other writers as

\begin{itemize}
  \item \textit{Ibid.}
  \item See Ch. I (1.11.) above.
  \item \textit{Fitzmaurice’s 5th. Rep.,} p. 89, para. 31 of Commentary on proposed draft Article 8.
  \item \textit{Ibid.,} p. 73, para. 3, emphasis added. These effects or consequences could, in his view, be
characterised as either “active or positive” or “passive or negative” which he distinguished
in the following manner:

\begin{quote}
there are, on the one hand, those effects which, in a variety of ways, lead to or consist in a
position in which the third State is found to be carrying out or enjoying, if not the very obliga­
tions and rights of the treaty itself as such, at any rate similar, analogous, or parallel ones. If
the treaty says “Do A”, the third State will in due course be found doing A, not under the
treaty as such, but for example because, through the medium of the treaty, “A” has been re­
ceived into the general body of international customary law, and has in that form, for that rea­
son, and in that way, become incumbent on all States even though they were not parties to the
original treaty. On the other hand, there is the other main category of “effects”. The third
State is not found carrying out the treaty provisions at all, either directly or by analogy, or for
any reason or in any guise. The “effect” is simply that the third State is called upon to take up
a certain attitude towards the treaty and its contents or consequences — an attitude of recogni­
tion, respect, non-interference, tolerance, sufferance, as the case may be.” \textit{(Ibid.,} p. 87, para.
22).
\end{quote}
\end{itemize}
belonging to the particular category of treaties producing legal effects *erga omnes*. In considering the question of the special legal effects claimed for this category of treaties, he very much doubted whether any treaty can produce any automatic effect *erga omnes*, "unless the system it establishes is one which third States can simply recognise and respect without having to engage in the carrying out of the specific obligations that would require their active consent".\(^{123}\) Considering the attitude of other writers in respect of the topic, he indicates that

"In the books, many individual instances or classes of concrete case are mentioned — such as those of treaties containing international settlements, or demilitarizing some area, or transferring territory, or creating a servitude; but this is often done without relating these classes of cases to any general principles, such, for instance, as that of a duty to respect valid international acts not infringing the legal rights of the third State. The principle of this duty covers respect for acquired rights, recognition of the "dispositive" effect of treaties under executed clauses, and much else. In the same way, it is often stated that "as a general rule" treaties establishing regimes for international waterways operate *erga omnes*, but without relating this fact to the principle that if use is made for purposes of passage of a waterway through the territory of another State, such use must necessarily conform to any valid treaty provisions governing the navigation of the waterway. A more or less automatic entailment — "because rights, then obligations" — is involved here, and there is really no need to have recourse to the idea of a treaty by nature *erga omnes*."\(^{123}\)

Accordingly, he treated those treaties which fall within the supposed category of treaties allegedly producing legal effects valid *erga omnes* under two separate headings:

"*Cases of the use of maritime or land territory under a treaty or international regime*" (proposed draft article 14(2)-type of case) and "*General duty of all States to recognise and respect situations of law or of fact established under lawful and valid treaties*" (proposed draft article 18-type of case). The former cases covered, *inter alia*, treaties placing a territory under an international regime of common user "for purposes, and on conditions, specified in the treaty, and in circumstances causing the treaty to have, or come to be regarded as having, effect *erga omnes*".\(^{124}\) The latter cases referred to all the other treaties considered as "*embodying international regimes or settlement*, or having a "*dispositive character"*, such as "Peace treaties, and other treaties containing political

\(^{122}\) Ibid., p. 92, para. 50.

\(^{123}\) Ibid., p. 87, para. 21.

\(^{124}\) Examples of these cases, in his view, were treaties governing such international rivers as the Rhine, Danube, and Oder, and such sea-ways as "the Suez and Panama Canals, the sounds and belts, and the Dardanelles and Bosphorus" as well as, the treaty concerning Antarctica, *ibid.*, Commentary on draft Article 14, p. 92, paras. 50 and 54.
or territorial settlements; treaties creating a general regime or status of neutralisation, or
demilitarisation, for particular territories or localities; treaties of a dispositive character,
such as treaties of cession, frontier demarcation, or treaties creating a servitude." He
asserted that the erga omnes effect claimed for the category of treaties under considera-
tion could satisfactorily be explained not on the basis of some mystique attaching to
certain types of treaties," but by resorting to the two principles formulated in his pro-
posed draft Articles 14 and 18 which, in his view, seemed to be in line with contempo-
rary standards of international law. These principles were, respectively: “entailment of
rights and obligations” and “general duty of all States to recognise and respect situa-
tions of law or of fact established under lawful and valid treaties”. Now we turn to
examine the content and value of these principles in order to see how far, if at all, they
offer an alternative explanation of the legal rights and obligations of third States under,
or in relation to, the class of treaties claimed to be capable of producing objective
effects.

2.2.1. The mechanism of “entailment of rights and obligations”

The meaning and the scope of this principle is elaborated in Fitzmaurice’s pro-
posed draft Article 5 (iii). According to this draft article, rights or obligations similar or
parallel to those contained in the treaty concerned may arise for a third State as a result
of the operation of the principle of automatic entailment, whereby “The lawful use of
the territory of another State for a specific purpose entails conformity with the condi-
tions of such use, and, reciprocally, conformity, or readiness to conform, entails a corre-
sponding right of user in the manner provided by the treaty”. In other words, as he
put it, “the exercise of rights or faculties, or the enjoyment of benefits or advantages,
gives rise to a duty to perform the corresponding disadvantages or disabilities; and

125 Ibid., proposed draft Article 18 (2).
126 Ibid., Commentary on proposed draft Article 18, p. 98, para. 71.
127 This was a corollary of a broader principle of the supposed “General duty of all States to
respect and not impede or interfere with the operation of lawful and valid treaties entered
into between other States”, which was articulated in his proposed draft Article 17. This pro-
posed draft Article is fully cited in p. 207 below.
128 Fitzmaurice’s 5th. Rep., proposed draft Article 5, sub-paragraph (A) (iii) (a).
similarly, the performance of obligations, or conformity with the conditions of the treaty, may give rise to a claim to exercise rights and enjoy benefits under it”.

What this principle means, when applied to the “Cases of the use of maritime or land territory under a treaty or international regimes” (proposed draft article 14(2)-type of case), is that third States, and their vessels or nationals, making use of a maritime or land territory of another State under a treaty regime must “conform to the conditions attached to such a use” (proposed draft Articles 13 and 14). If and when they conformed to those conditions of user, they would not only enjoy the right of user and other benefits of the treaty or regime on the conditions attached to them, but would also be entitled

“to object to any termination or modification of such treaties or regimes, unless with general international consent, whenever the rights, facilities or benefits involved have, by constant exercise and enjoyment on the part of third States, acquired an objective existence independently of the treaty or regime under which they were originally established.”

Accordingly, Fitzmaurice’s suggestion in this regard, briefly, is that obligations attached to a right of common user of land or maritime territory imposed by treaty under such a regime become incumbent upon third States if, and in the event that, they claim or try to exercise such a right, and conversely, the third States’ compliance, or their readiness to comply, would give them sufficient ground to claim the right of user, though they seem not become entitled to object to any termination or modification of.

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129 Ibid.
130 It is worth noting that, in justifying the rule in article 14, he refers only to a legal Opinion expressed by the Queen’s Advocate (of the British Government) in respect with the navigation in the river Po (quoted in McNair’s Law of Treaties, pp. 319-320).
131 Fitzmaurice’s 5th. Rep., proposed draft Article 26, emphasis added. This draft Article in full read:

“1. Subject to the terms of the treaties concerned, and their correct interpretation, States, their vessels and nationals, if conforming to the conditions of user specified in treaties or international regimes of the classes indicated in article 14 of the present text, and provided such a user is with the consent or tacit acquiescence of the parties to the treaty or regime, are entitled to enjoy the user and other benefits of the treaty or regime, on the conditions attached to them.
2. Third States are entitled to object to any termination or modification of such treaties or regimes, unless with general international consent, whenever the rights, facilities or benefits involved have, by constant exercise and enjoyment on the part of third States, acquired an objective existence independently of the treaty or regime under which they were originally established. Even where this is not the case, third States are entitled to compensation or other appropriate reparation for the loss or damage caused by the termination or modification of the treaty or regime.”
such a right unless and until it has, subsequently through practice, acquired an objective existence independently of the treaty.

Evidently, this proposed principle in itself does not raise any serious difficulties and can easily be justified. First of all, it is based on the principle of consent, because the third States, by claiming or exercising the right, impliedly, by their conduct, acknowledge their satisfaction with, and consequently their readiness to submit to, the regime as a whole. Secondly, it is a more detailed version of a principle of civil law, based on common sense, according to which “no one may at the same time claim to enjoy a right and to be free of the attendant obligations”. Thirdly, the principle of sovereign equality and independence of States may also be invoked here; for it would be inconsistent with the territorial rights of a sovereign State which has consented, by treaty, to place a part of its territory under a regime of common user if a third State could claim a right under that treaty without being prepared to observe the conditions attached to it. Finally, the suggested rule is presently an accepted rule of international law, which, has, with the full support of the International Law Commission and the Vienna Conference, been incorporated into Article 36 (2) of the Vienna Convention, as a complement to the principle of stipulation pour autrui which is contained in Article 36 (1).

However, this rule alone cannot fully by itself furnish a sound justification for the alleged effects of the category of treaties regarded as providing for “objective regimes”.

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132 This is a basic principle in Islamic (Shari‘e) Law. Similar statements can also be found in all other major legal systems. In Roman law it may be deduced from Secundum naturam est, commonda cujusque rei eum sequi, quem sequitur incommodia.

133 There are certain statements in the literature of the ICJ which firmly support the principle underlying the rule in question. Thirlway, listing the general legal maxims which are advocated by the Court, mentions a maxim which could in a way be invoked as a support for the rule in question. According to the said maxim, “the possession of rights involves the performance of the corresponding obligations”. Therefore, even assuming that no customary or treaty relationship could be established as a result of the subsequent practice of the parties to a given treaty and third States, a third State claiming a right under such a treaty must comply with the corresponding obligation(s) attached to it — at least so long as it claims the right. Conversely, a State which “disowns or does not fulfil its own obligations [under a legal relationship, e.g. a treaty] cannot be recognised as retaining the rights which it claims to derive from the relationship”. See Thirlway, H.W.A., The Law and Procedure of the International Court of Justice, BYBIL 60 (1989), p. 1, at pp. 62-63.

134 In fact, Fitzmaurice’s proposal could be regarded as the material source of the rule stated in article 36 (2). See Ch. II (2.2.2.2.) above.
It has certain deficiencies. In the first place, it does not explain on what basis third States become entitled to make use of the territory placed under the regime of common user. As Waldock has noted, the suggested principle does “not explain the third State’s right of user”. Although Fitzmaurice specifically deals with this issue in his proposed draft article 20, where the principle of stipulation pour autrui is advocated, he makes no particular or direct connexion between that principle and the principle of “automatic entailment of rights and obligations”. Secondly, the suggested principle fails to address or to explain the question of the legal effects that treaties establishing “international regimes of common user” (proposed draft Article 14(2)-type of case) may have vis-à-vis third States which have not yet started to make use of the territory concerned. It merely covers the rights and obligations of third States which have started to avail themselves of the right or benefits under a regime of common user. For example, Article 1 of the Constantinople Convention of 1888, declares that “The [Suez] canal shall never be

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136 Fitzmaurice’s proposed draft Article 20 read:

“1. Where a treaty expressly confers rights or benefits on, or makes provision for the exercise of rights or faculties, or for the enjoyment of facilities or benefits by a third State, in such a way as to indicate that the parties meant to create legal rights for the third State, or to bind themselves to grant them, or to create a legal relationship between themselves and the third State, the third State concerned thereby acquires a legal right to claim the benefit of the provisions in questions.

2...

3. In any case coming under paragraph 1... of the present article, the claiming third State has a direct right of recourse against the parties to the treaty, acting in its own name and of its own motion, if the provisions of the treaty concerning the third State are not carried out — provided always that the third State has complied, or is willing to comply, with any conditions attached by these provisions to the grant.

4. However, the third State is not entitled by virtue of the preceding paragraphs ... to require the indefinite maintenance in force of the treaty, or to object to its termination or amendment by the parties without its consent, except in the following cases:
(a) Where the parties, either in the treaty or separately, have undertaken to maintain the treaty in force indefinitely or for a specified period, or not to terminate or amend it without the consent of the third State, or where the legal relationship the treaty creates between parties and the third State is of such a nature as to entail this;
(b) Where the clauses of the treaty in favour of the third State are of a dispositive character, and have been actually executed;
(c) Where the third State, for the purpose, or in the course of, exercising its rights or faculties, or of taking the benefits or advantages resulting from the treaty, has altered its position in such a way that the termination or amendment of the treaty would affect it detrimentally over and above the natural detriment to be expected from the cession or modification of the rights, faculties, benefits or advantages concerned, by placing the third State in a worse position than before these where enjoyed;
(d) In the case [of treaty provisions removing or modifying a disability or prohibition previously existing for a third State].” Emphasis added.
subjected to the exercise of the right of blockade." On the basis of the principle proposed by Fitzmaurice, only third States which actually make use of the right of passage through the Suez Canal would become bound by this obligation: any third State which remained silent and inactive could not be held bound by such an obligation. Finally, when giving an example of the case upon which his proposed principle would be applicable, Fitzmaurice imports an automatic "erga omnes effect" (i.e. effect by nature) test into his proposed draft Article 14 which does not follow his earlier view. As was noted above, Fitzmaurice criticised prior writers for attaching a "mystique" to the category of treaties under consideration and claimed his formula to be free from any such "mystique"; but it seems that such is not the case. The proviso at the end of Paragraph 2 of his proposed draft Article 14 reads "... in circumstances causing the treaty to have come to be regarded as having effect erga omnes", yet Fitzmaurice does not give any indication as to the circumstances which cause a treaty to have "effect erga omnes". Despite these difficulties, Fitzmaurice's proposed principle of the "entailment of rights and obligations" still has its value when it is combined with the principle of stipulation pour autrui. As was stated in Chapter II, the Vienna Convention rules on treaties and third States are effectively based on these two principles, which, together, can offer a mechanism through which a treaty can, by its own force and without more, create a regime of rights and obligations valid erga tertios.

2.2.2. The mechanism of "general duty of all States to recognise and respect situations of law or fact ..."

As stated in Chapter I, the meaning of this principle and the scope of its application have been spelled out in Fitzmaurice's proposed draft Articles 17 and 18 in two

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137 For more detail see Ch. V (2.2.) below.
138 Fitzmaurice's 5th. Rep., para. 71 of Commentary on proposed draft Article 18.
139 See Waldock's 3rd. Rep. on Treaties, p. 28, para. 6.
140 Paragraph 2, draft article 14. In full, the draft Article read:

1. Where use is made of the maritime or land territory of another State, and conditions of user of that territory for that purpose are the subject of a treaty to which the third State concerned is not a party, the vessels and nationals of the State, or the State itself should the case arise, must conform to the conditions in question.
2. The same principle is applicable in regard to the use of territory placed by treaty under an international regime of common user for purposes, and in conditions specified in the treaty, and in circumstances causing the treaty to have come to be regarded as having, effect erga omnes."

141 See Ch. I (1.11.) above.
forms: one as a general principle enunciating the obligation of third States in relation to all treaties and the other as a principle specifically dealing with third States’ duties in relation to certain of the treaties which are sometimes regarded as producing legal effects valid *erga omnes*. Proposed draft Article 17, acknowledging the former, stated that

“All States are under a general legal duty in relation to [all] treaties to which they are not parties:

(a) Not to interfere with, or impede, the due performance and execution of the treaty on the part of the parties to it, provided always that the objects of the treaty are lawful and if it does not purport to deprive, or have the effect of depriving, the third State concerned of its legal rights, or of impairing such rights, or of creating legal liabilities or disabilities for such State without its consent;

(b) Subject to the same conditions, to respect, and if necessary recognise, any legal rights or interests created or established by the treaty in favour of one or more of the parties, or of another third State;

(c)...

2. Provided the conditions specified in paragraph 1(a) above are satisfied, the mere fact that a treaty operates to the disadvantage or detriment of a third State is not a ground on which its validity can be impugned, or on which the third State can refuse to recognise it.”

Likewise, proposed draft Article 18, stating the same principle, but in a more precise manner, provided that “all States are under a duty to recognise and respect situations of law or of fact established by lawful and valid treaties tending by their nature to have effects *erga omnes*”. The operation of this legal duty is subjected to the conditions specified in proposed draft Article 17, paragraph 1(a), cited above, and the terms of the relevant treaties themselves, as well as the provisions of paragraph 3 of proposed draft Article 18 itself. This latter reservation limited the scope of the principle by stipulating that the obligations specified in Paragraph 1 and 2

“do not involve or imply that the treaties specified can impose any *direct or positive obligations* on States not parties to them, but only that, subject to the conditions indicated, such States cannot deny the validity of the treaty, must respect its provisions, and must also conform to them in so far as any such States avail themselves of facilities created by the treaty, or have dealings in or relative to the locality or region which is the subject matter of the treaty.”

142 For examples of the treaties falling within the purview of this rule see p. 53 above.

143 Paragraph 3 of the proposed draft Article 18, emphasis added.
Accordingly, as regards proposed draft Article 18-type of cases, Fitzmaurice's proposal is that there exists a general principle in international law on the basis of which third States are under a legal obligation to take up certain attitudes, such as "an attitude of recognition, respect, non-interference, tolerance, sufferance, as the case may be "in relation to — but not under — lawful and valid treaties", except where the treaty deprives them of their legal rights or imposes disabilities upon them without their consent. Fitzmaurice does not discuss in detail what this duty would actually involve in concrete cases; nor does he furnish any example in this regard. Broadly speaking, from what can be inferred from his commentary on proposed draft Articles 5, 17 and 18, the duty to "recognize and respect situation of law or facts", when applied to concrete cases, would produce different effects for third States depending on the nature of "the situation of law or fact" concerned.

In the case of "treaties creating a general regime or status of neutralisation, or demilitarisation, for particular territories", the duty to "recognise and respect and not to interfere with" such a regime or status cannot realistically mean anything but observance by third States of the terms of the regime concerned. This kind of treaty normally provide that no fortification should be erected, or no troops must be stationed, in the neutralised or demilitarised area. A (third) State can only be seen as "recognising and respecting or not interfering with" such a kind of regime if that State could be seen as

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144 Paragraph B of Fitzmaurice's proposed draft Article 5 reads:

"(B) Principles giving rise to rights or obligations for the third State in relation to the treaty

(iv) The principle of respect for the lawful and valid international acts, such as treaties lawfully concluded and not infringing the rights of the other States, for rights lawfully acquired, or for statuses, regimes, settlements, or situation of law or fact lawfully established by treaty; not to impede or interfere with the due performance of a lawful treaty by the parties to it; and (on the basis of damnum sine injuria) to accept any incidentally unfavourable consequences for them resulting from such a treaty; and whereby, correspondingly, third States may enjoy such incidental advantages as may result for them from treaties to which they are not parties."

(Fitzmaurice's 5th. Rep., p. 87, para. 22).

145 Ibid., p. 87, para. 22. See Fitzmaurice's comment on the "active or positive" or "passive or negative" effects of treaties on third States cited in (n. 121) above.

146 See Paragraph 1 (a) of Fitzmaurice's proposed draft Article 17 as well as Paragraphs 1 and 3 of his proposed draft Article 18.

147 Ibid., p. 99, para. 73.

148 See the regime of neutralisation of Aaland Islands established by the Convention on the Non-Fortification and Neutralisation of the Aaland Islands 1921 discussed in Ch. III (3.2.) above.
observing the obligations — e.g. not to station their troops in the demilitarised area — articulated in the treaty. A similar situation arises with regard to treaties establishing a regime of “permanent neutrality” for a State. Accordingly, a duty to “recognise or respect or not interfere with” these kinds of treaty regimes, as envisaged for third States by Fitzmaurice’s proposed principle, would in result be the same as conceiving that these kinds of treaties impose substantive treaty-obligations on third States, as asserted by the advocates of the “special nature” theories, discussed in Section 1 of this Chapter. It is in this sense, and for this reason, that Fitzmaurice considers his proposed principle is capable of explaining the *erga omnes* effects attributed to this kind of treaties.

The duty to “recognise and respect” the arrangements embodied in the case of “treaties having a dispositive character”, such as treaties of cession, has, or produces, different consequence for third States. In this kind of case, a territory is transferred from one State to another or the territorial boundary of two or more States is delimited. Third States cannot deny the validity of the transferee’s title to the transferred territory, if they have no claim over the territory concerned, and have to live up with all the consequences arising from such a change. However, as was seen in chapter I, third States’ duties, if any, are consequential and, in the final analysis, stem from their

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149 For instance, in Article 2 of the *Agreement concerning the ... Neutrality and National Unity of Cambodia* (loc. cit. above (n. 60)), the parties undertake to recognize and to respect in every way the sovereignty, independence ... neutrality ... of Cambodia. To this end, they undertake

“(a) to refrain from entering into military alliances or other military agreements with that would be inconsistent with Cambodia’s neutrality ... (g) to refrain from the introduction or stationing of foreign forces, including military personnel, in any form whatsoever, in Cambodia and from establishing or maintaining military bases ...” (*Ibid.*)

As can be seen, the parties to this treaty interpret the duty to “recognize and to respect” Cambodia’s sovereignty ... (permanent neutrality) as involving obligations “to refrain from entering into military alliances or other military agreements with Cambodia”, introducing or stationing of foreign forces or establishing or maintaining military bases there ... etc. Moreover, the only way by which third States can be seen as “recognizing and respecting” Cambodia’s permanent neutrality is that they would be seen observing these terms. For a commentary see Ratner, S.R., *The Cambodian Settlement Agreements*, AJIL 87 (1993), pp. 1-41. In this regard see further Ch. III (3.2.) above and Ch. V (1.2.) below.

150 Cf. *Case concerning the Frontier Dispute* where the ICJ expressly held that a boundary regime established between two States, whether by means of a treaty between these States or by means of the Court’s adjudication, would not, *per se*, be binding on any third State. For further detail on this point see the Court’s view cited in Ch. I (n. 157) above.

151 See Ch. I (2.3.) above.

original recognition of sovereignty of the transferor's title over the territory — with which it carries her power to cede the territory to other States. Thus, in the case of "dis-positive treaties", the duty "to recognise and to respect and not interfere with", would involve imposition of no treaty-based obligation against third States, it rather addresses certain indirect and consequential obligations which flow from rules of general international law, rather than the treaty involved. Here, unlike the case of treaties establishing regimes of neutralisation or demilitarisation, third States would not come, or need not, to observe the terms of the treaties concerned. A similar point may be made with regard to treaties alleged to establish international servitude.153

Bearing in mind these different meanings and effects of the duty envisaged in Fitzmaurice's proposed draft Article 18, it is time to consider the questions how far his proposals are in line with modern doctrine of international law and, especially, whether or not Fitzmaurice formulated principles could satisfactorily explain the *erga omnes* effects which are sometimes claimed for the particular category of treaties under consideration.

At the outset, there are two technical problems with Fitzmaurice's proposed principles formulated in his proposed draft Articles 17 and 18. First, these proposed principles cannot, on the basis of Fitzmaurice's view on the absolute character of the *pacta tertii* rule, be seen as a mechanism which might explain the *erga omnes* or tertios legal effects claimed for the category of treaties under consideration; nor can they be viewed as involving any kind of exception to the *pacta tertii* rule. As indicated earlier, these principles do not contemplate the creation of any treaty-based right or obligation for or against third States which stems directly from the treaty itself. What they envisage is the indirect, or relational, effects that a treaty, as an international act, may have for States not parties thereto, rather than the effects that the treaty itself may produce. Fitzmaurice himself clarifies this by indicating that, in the Article 18-type of case:

"the third State is not found carrying out the treaty provisions at all, either directly or by analogy, or for any reason or in any guise. The "effect" is simply that the third State is called upon to take up a certain attitude towards the treaty and its contents or consequences, an attitude of recognition, respect, non-interference, tolerance, sufferance."154

153 See Ch. I (1.4.) above.
154 *Fitzmaurice's 5th. Rep.*, para. 71 of Commentary on proposed draft Article 5, p. 87.
Accordingly, Fitzmaurice’s proposed formula, by design, lacks the ability to explain any kind of effect that a treaty may directly generate for a third State, though it may still function as a mechanism capable of furnishing a justification for certain, if not all, of the *erga omnes* or tertios effects which are claimed for the category of treaties providing for “objective regimes”. As stated earlier on, in the cases of treaties establishing regime of “neutralization or demilitarization”, through Fitzmaurice’s proposed duty — “to recognize and to respect situations of law or of fact” — third States would, in effect, become bound to observe the terms of these treaty. Therefore, to this extent, Fitzmaurice’s proposal may be viewed as contemplating and explaining the *erga omnes* effects of this particular kinds of treaties considered as constituting “objective regimes” — despite his strong advocacy of the absolute character of the *pacta tertiis* rule.\(^{155}\)

Waldock alluding to Fitzmaurice’s rejection of the point of view that certain treaties, embodying “international settlements”, should be regarded as having an automatic effects “*erga omnes*”, rightly argues that

> “Nevertheless, by introducing the doctrine of a general duty to respect lawful treaties and to recognize and respect situations of law or fact established under lawful treaties, he [Fitzmaurice] went near to admitting by the back door the concept which he rejected at the front.”\(^{156}\)

The second problem is that Fitzmaurice’s proposed principles, like the theories discussed above, hardly resulted from an extensive examination of State practice, nor were they based on the kind of evidence by reference to which the existence of a general norm or rule of international law is usually determined. Fitzmaurice does not furnish a single piece of evidence of State practice in which party States have asserted the legal duty of non-party States to respect and to recognise the treaty-arrangements they have made; nor does he supply any evidence that a third State has regarded itself bound to respect and to recognise the treaty-arrangements of the others.\(^{157}\) Moreover,

\(^{155}\) As stated in Chapter I, Fitzmaurice advocated the absolute character of the *pacta tertiis* principle and categorically denied that any kind of treaties could by their very nature produce objective effects. *Ibid.*, Commentary on proposed draft Article 18, p. 98, para. 71.

\(^{156}\) Waldock’s 3rd. Rep. on Treaties, p. 32, para. 16.

\(^{157}\) In his commentary on proposed draft Articles 17 and 18, Fitzmaurice refers to the *Aaland Islands* case and a legal Opinion expressed by an English Law Officer in 1859 with regard to the neutrality of Switzerland and neutralisation of a portion of Sardinian territory not as precedents lending support to his proposed rules, but as examples which could satisfactorily
Fitzmaurice fails to furnish any judicial precedent in support of his proposed principles. In his commentary on proposed draft Article 17, Fitzmaurice cites some writers as having argued in favour of the existence, or the need for the recognition of, a duty on the part of third States not to interfere with or hamper the due execution of treaty-arrangements of others which only touch upon their interests. He specifically cites Roxburgh as having suggested, when dealing with the case of “treaties incidentally unfavourable to third States”, that

“although a treaty cannot impose obligations on third parties, it may incidentally be detrimental to them in various ways ... But it does not follow that, because it benefits them, they have a right to enforce it, nor that, because it is detrimental to them, they have any legal right to redress. On the contrary, they have a general duty not to interfere with the due execution of the treaty, so long as it does not violate international law or their vested rights. Even though they may suffer damage, they are without a legal remedy; they have incurred damnum sine injuria, and any attempt to interfere would be a violation of the international personality of the contracting parties.”

Inspired by this statement, Fitzmaurice argues, in his commentary on his proposed draft Article 18, that it is preferable to explain the erga omnes effects claimed for the kind treaties formulated under that draft Article:

“not on the esoteric basis of some mystique attaching to certain types of treaties, but simply on that of a general duty for States — which can surely be postulated at this date (and which is a necessary part of the international order if chaos is to be avoided) — to respect, recognise and, in the legal sense, accept the consequences of lawful and valid international acts entered into between other States, which do not infringe the legal rights of States not parties to them in the legal sense.”

This is all Fitzmaurice offers in support of his proposed principles. Obviously, a lot more is needed in order to establish the existence of a rule of international law.

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158 See Roxburgh (op. cit. above Ch. I (n. 25), p. 32) who cites Oppenheim, Fiore, Rivier, F.de. Martens, Hall, as having argued in favour of this proposition.

159 Roxburgh, op. cit. above Ch. I (n. 25), p. 32. Somewhat similarly, Hall has indicated that:

“In a secondary manner the due conclusion of an international contract also affects third parties. A state of things has come into existence which, having been legally created in pursuance of the fundamental rights of States, other countries are bound to respect, unless its legal character is destroyed by the nature of its objects, or unless it is evidently directed, whether otherwise legally or not, against the safety of a third state, and except in so far as it is inconsistent with the rights of states at war with one another. So long therefore as a contract is in accordance with law, or consistent with safety of states not parties to it, the latter must not prevent or hinder the contracting parties from carrying it out.” (Hall, W. E., A Treatise on International Law (Oxford, Clarendon Press, 8th. edn., ed. by P. Higgins, 1924), pp. 402-403).

Bearing these objections in mind, we now consider the question whether or not present-day international law allows the postulation of such a legal duty, as Fitzmaurice seems to have assumed.

As a matter of principle, Fitzmaurice’s proposed duty seems not to be quite in line with the modern doctrine of international law, which is essentially based on the principle of sovereign equality and independence of States. According to this principle, all States are in theory assumed to be equal subjects of international law and fully independent from one another. As such, they are free, under the law of treaties, subject to rules of jus cogens, to conclude whatever treaty they wish to conclude with one another. On the other hand, on the same basis, other States enjoy complete freedom of action with regard to a treaty in the conclusion of which they have taken no part. It would evidently be contrary to the assumption that States are equal, if two or more States (parties) were to be able to impose, by their own treaty-arrangement, obligations on others (third States). Again, it would be contrary to that assumption if the latter States were legally obliged to follow, respect or recognise, give effect to, or to change their position, on the basis of the terms of a treaty in the conclusion of which they have not taken part. As was seen in Chapter II, this is indeed the underlying reason for the adoption in international law of the rules pacta tertiis and res inter alios acta and their incorporation in the Vienna Convention on the Law of Treaties. In brief, the

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161 See Ch. II (2.1.3.) above.
162 Article 53 of the Vienna Convention. For another possible exception see the draft Article 27 adopted by the International Law Commission in its works on the question of State Responsibility cited in Ch. II (3.4.) above.
163 Cahier, loc. cit. above Ch II (n. 48), p. 599.
164 They may, inter alia choose whether or not to adhere to it, if that is allowed, or to disregard it, or to recognize or respect the terms of the treaty, without formally becoming a party, by co-operating with the parties in promoting their treaty objectives or totally reject the treaty by pursuing opposite values. For instance, assuming that the notion of the Common Heritage of Mankind is not customary law, those States which have not signed the UNCLOS (loc. cit. above Ch. I (n. 170) — such as the United States or the United Kingdom — could freely mine the deep sea-bed irrespective of whether, and even if, that frustrates the pursuit by the parties to the UNCLOS of their objectives in relation to the (Deep Sea-bed) Area. In this regard it must be noted the dispute over the status of Deep Sea-bed may well soon be resolved by virtue of the conclusion of the Agreement Relating to the Implementation on the Law of the Sea, adopted by the United Nations General Assembly Resolution 48/263 (33 ILM 1309).
166 See Ch. II (2.1.3.) above.
current position is that while States are free to conclude treaties which touch upon the political, economic, security or other interests of a third State, or which even violate the rights of third States, the latter States are under no obligation to recognise, respect, or not to interfere with, such treaties. In law, such treaties are *pacta tertiis* .. and *res inter alios acta* for third States and devoid of any legal effects for these States without their consent.

Accordingly, in principle, the general duties postulated by Fitzmaurice in his proposed draft Articles 17 and 18 seem not *prima facie* reconcilable with the existing rules of international law (expressed in *pacta tertiis* .. and *res inter alios acta* rules). As Waldock rightly puts it,

"the general duty ... for all States to respect and not impede the operation of lawful treaties, even when limited to treaties not impairing their rights or imposing disabilities upon them, seems to go beyond the existing law. Nor is it easy to see exactly what this duty would entail in many cases, e.g. in the case of political, commercial or fiscal treaties. The existing rule seems rather to be that, in principle, a treaty is *res inter alios acta* for a State not a party to it."

Putting to one side this argument of principle, the following arguments may further be raised in support of the submission that Fitzmaurice’s proposed legal duty of third States “to recognise and respect the situations of law or facts” established by lawful treaties is one which is not recognized by States as forming part of general international law.

a. As was seen in Chapter II, the Vienna Convention imposes a duty (in Article 18) upon “signatory” or “contracting” States to refrain from acts which would defeat the object and purpose of a treaty” pending its entry into force (a duty which seems to be, to a large extent, similar to the one postulated by Fitzmaurice); but it does not impose such a duty upon a State which has even taken part in the negotiation and drawing-up of the text of a treaty, i.e. a “negotiating State”. If there is no such a duty for a “negotiating” State, it could not *a fortiori*, be any for total stranger States.

b. As will be seen, a review of the manner by which the status of “permanent neutrality” has in recent years been established for certain States clearly shows that, contrary to Fitzmaurice’s assumption, there is no duty on third States to respect any

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167 Waldock’s 3rd. Rep. on Treaties, p. 28, para. 5.
168 See Ch. II (1.2.2. and 1.2.3.) above.
such status unless they have somehow recognised it.169 In particular, the manner by which the United States and Panama have tried to secure international recognition of the regime of permanent neutrality of the Panama Canal is revealing.170

c. An examination of State practice concerning the other kinds of treaties which fall within the scope of Fitzmaurice’s proposed draft Article 18 indicates, further, that States do not consider themselves bound to respect and to recognise the situations of law or facts established by treaties of others. This is clearly shown in Chapter V below.171 However, the position that Japan has taken with regard to the status of South Sakhalin and the Kurile Islands furnishes a good example worth citing here. These islands were occupied by the Soviet Union during the very closing days of World War II. Immediately after the termination of hostilities, this became a source of dispute between Japan and the Soviet Union. During the 1950s, the Soviets asserted that, in accordance with “the Yalta Agreement, the Potsdam Declaration and the Surrender Terms of Japan”, these islands were “decided as belonging to, and under Soviet sovereignty”.172 On the other hand, Japan recognised that although, according to the 1951 Peace Treaty,173 it had renounced any claim to these Islands, nevertheless because the Soviet Union had not consented to be bound by the peace settlement it could not invoke Japan’s renunciation of title. Moreover, she argued that, since Japan was not a party to the Yalta Agreement, there was no question of her being bound by that treaty.174 Ever since this has been the position of the two countries. From the position of Japan, it is easily

170 See Ch. V (3.3.3.) below.
171 See Ch. V (1.4.) below.
174 As recently as 1981, in reply to the question whether the Yalta Agreement, which stipulated that the Kurile Islands be handed over to the Soviet Union, was binding upon Japan, the Director-General of the European and Oceanic Affairs Bureau, Ministry of Foreign Affairs, replied that “... the Yalta Agreement was concluded as a secret agreement at the time and that Japan was not aware of the existence of such an agreement, to say nothing of its contents, at the time of her acceptance of the Potsdam Declaration. Be that as it may, since Japan is not a party to the Yalta Agreement, there is no question of her being bound by the Yalta Agreement.” (Jap. AIL, 30 (1987), pp. 162-163)
possible to conclude that this country does not consider herself as being under any international obligation to respect or to recognise the treaty-arrangements of others and, in particular, of itself vis-à-vis a third State.

d. Fitzmaurice's proposed legal duty has not been envisaged in any of those resolutions of the United Nations General Assembly which have set out, or at least have purported so to do, fundamental principles of international law. There is no reference in the "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States" (1970)\textsuperscript{175} to such a principle, whether in its exposition of non-intervention or in its treatments of sovereign equality and the duty to respect in good faith the provisions of the Charter. Similarly, the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States,\textsuperscript{176} which was specifically meant to delimit the rights and obligations of States vis-à-vis each other as far as the application of the principle of non-intervention and non-interference is concerned, contains nothing which would uphold the existence of a general duty of States to respect and recognise situations of law or fact brought about by other States' treaties.

e. As stated earlier on,\textsuperscript{177} Fitzmaurice's perception of the duty to "recognise and respect" situations of law or fact is very unclear and, in the case of treaties establishing regimes of neutralization or demilitarization, cannot realistically mean anything but observance by third States of the terms of those treaties. Whatever be the content of this duty, it would produce many unpleasant consequences. At the very least, it would impose on States the burden of investigating the content of every treaty made by other States to ascertain for themselves if they ought to recognise and respect the situations of law or fact created by the treaty concerned. Moreover, the duty to accord such respect may involve the States in a number of significant obligations. For example, the

\textsuperscript{175} GA Res. 2625, loc. cit. above Ch. II (n. 45). This resolution was adopted by General Assembly without a vote. It is recognised by the ICJ as legally binding. See Nicaragua Case, Merits, loc. cit. above Ch. I (n. 144), pp. 99-102.

\textsuperscript{176} GA Res. 36/103, 9 December 1981. This resolution is based on a series of earlier General Assembly resolutions starting with Res. 2131 (XX) of 21 December 1965 (Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty). Although Res. 2131 was not meant to create legal obligations for States, its content was substantially incorporated in Res. 2625, which as mentioned above, is recognised as binding.

\textsuperscript{177} See pp. 55-56 above.
recognition of the permanent neutrality of a State involves a series of obligations for the recognising State. Thus, the Italian declaration recognising and guaranteeing Malta's (permanent) neutrality specifies that the general duty to respect Maltese neutrality would involve for Italy the obligations, *inter alia*, "not to take any action whatsoever which could in any way, directly or indirectly endanger peace and security in the Republic of Malta" and "not to induce the Republic of Malta to enter into a military alliance, or to sign an agreement of this kind or to accept the protection of a military alliance."¹⁷⁸

f. Finally, assuming that there exists in international law a general rule obliging all (third) States to respect and to recognise situations of law or fact established by treaties, as asserted by Fitzmaurice, it would still be hard to explain why only certain kinds of treaties — namely, those enumerated in paragraph 1 of his proposed draft Article 18 — should fall within its purview. As Waldock pointed out,¹⁷⁹ every treaty sets up a situation of law between the parties and, in that sense, can properly be said to create an "international regime".¹⁸⁰ Indeed, Fitzmaurice, realising the difficulty himself, resorted to a factor which placed him in a position similar to that of those whom he criticised. As Waldock stated, to limit the application of the duty concerned to "situations or facts established by lawful and valid treaties tending by their nature to have effects *erga omnes*" was for Fitzmaurice to put himself in a position in which

"the *mystique* attaching to certain types of treaties is not altogether absent from his draft article."¹⁸¹

2.2.3. Conclusion

In so far as Fitzmaurice's proposal regarding treaties establishing a regime of common user for a land or maritime territory is concerned (proposed draft Article 14-type of Case), his proposed principle of the "entailment of rights and obligations", when combined with the principle of *stipulation pour autrui*, can explain the automatic

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¹⁸⁰ Waldock rightly argues that a treaty regulating economic co-operation between a number of neighbouring States in the form of an economic union is an "international regime" or a "situation of law" for the parties as much as a treaty regime on demilitarisation or neutralisation of a land or maritime territory. *Ibid.*
legal effects which are claimed for such treaties. This combined formula has in fact
been adopted by the Vienna Convention in its Article 36. However, his proposed draft
Article 18 is not at all satisfactory. It is utterly inconsistent with the basic doctrine of
international law which is founded on the principle of sovereign equality and independ­
ence of States. It is also not in line with what is happening in international practice.
From the co-ordinating function of international law and from the delimitation of com­
petence on the basis of the principle of territoriality, as well as the principle of respect
for the rights of others, \(^{182}\) it may follow that States have to accept the lawful acts of oth­
ers as being lawful; but there follows for them no obligation to make these acts the ba­
sis of their own actions. As Jiménez de Aréchaga has argued, in reaction to Waldock’s
proposed Draft Article 63, “States seem to prefer the present situation, in which they re­
main(ed] legally unconcerned by what constitute for them res inter alios acta, retaining
their freedom to take a position with respect to any treaty only if and when the need to
do so [arises]”.\(^{183}\) Thus while it is always possible to invoke the legality of a treaty­
arrangement against third States, it is not possible to enforce the terms of the treaty
against them or to expect them to help, or even not to thwart or hinder, the parties in
promoting their cause as agreed in the treaty concerned.\(^{184}\) That would be against the
pacta tertiis .. and res inter alios acta rules.

Nevertheless, Fitzmaurice’s suggestions may be considered of some value in two
regards. First, they have been the inspiration of the incorporation into the Vienna

\(^{182}\) A draft article (proposed by Panama) submitted in 1947 to General Assembly of the United
Nations (A/285) and used as a basis of discussion by the International Law Commission in
connection with its preparation of the Draft Declaration on Rights and Duties of States
read:

“Any State which has a right under international law, is entitled to have this right respected
and protected by all the other States, since rights and duties are correlative, and the right of
one creates for the others the duty to respect it.”

Numerous States objected to the inclusion of the words “and protected”. In particular, the
United States observed that

“Proper regard for the rights of other States underlies the whole field of international law …
However, the article provides not only that the rights of other States shall be respected but that
they shall be ‘protected by all the other States’.” Emphasis added.

This provisions was not included in the Draft Declaration on Rights and Duties of States
prepared by ILC (Report of the International Law Commission, First Session, 1949

\(^{183}\) YBILC (1964-I), 738th Meeting, p. 98, para. 22.

\(^{184}\) See Rozakis, loc. cit. above (n. 36), pp. 7-8 (n. 19).
Convention of the rule that a third State exercising a right under a treaty must observe the conditions which are attached to that right. Secondly, the distinction which he makes between the type of case which was the subject of his proposed draft Article 14 and those cases which fall within the scope of his proposed draft Article 18 seems to be of some value for the better understanding of the mechanism which is incorporated in Article 36 of the Vienna Convention. When explaining this mechanism, we concluded that, among treaties which are frequently said to create "objective regimes", those which involve a systematic or active utilisation of land or maritime territory by third States come closest to the kind of case which may satisfactorily be explained by the operation of Article 36; for these regimes typically involve a granting of territorial rights or benefits in favour of third States (Article 36(1)), accompanied with obligations which must be observed by the latter States while making use of those rights (Article 36 (2)).

2.3. The "custom-process" theory

In Chapter II, we observed that it is a very well recognised fact that treaties, in addition to declaring a pre-existing customary rule or crystallising an emerging one, may also have a generating or constitutive effect on the formation of customary law. We also observed that, in order to preserve this process from prejudice, the International Law Commission formulated the rule, now embodied in Article 38 of the Vienna Convention, which states that "nothing in Articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rules of international law, .." When examining the position of the International Law Commission with regard to Waldock's proposed Draft Article 63, we noted that some members rejected this draft article because, inter alia, they considered that the legal effect which were contemplated resulted from the operation of custom grafted, as it were, upon a treaty rather than from any institution of the law of treaties. These members did not specify
how a treaty rule, or a treaty regime, may transform itself into a customary one. This question has of course long been dealt with by writers, though not in any great detail.

Roxburgh, dealing briefly with the issue of the influence of custom on the question of treaties and third States, concluded that

"it frequently happens that a treaty becomes the basis of a rule of customary law, because all the States which are concerned in its stipulations have come to conform habitually with them, under the conviction that they are legally bound to do so. In this case third States acquire rights and incur obligations which were originally conferred and imposed by treaty, but have come to be conferred and imposed by a rule of [customary] law."^190

Fitzmaurice in his Fifth Report on the Law of Treaties emphasised the points made by Roxburgh by proposing the following provisions in his draft code (Article 16):

"1. Law-making or norm-enunciating treaties, in the nature of general multilateral conventions, codifying branches of existing customary international law, or establishing new rules by way of progressive development of international law, and in so far as they evidence, declare or embody legal rules or legal regimes which are, or eventually become, recognised as being of universal validity and application, constitute vehicles whereby such rules or regimes are or become generally mediated so as also to bind States not actually parties to the treaty as such.

2. In any such case however, it is the rule of customary international law thus evidenced, declared or embodied that binds the third State, not the treaty as such."^191

Commenting on this provision, Fitzmaurice indicated that it attempted to describe a process, rather than to formulate a rule. Whether the treaty concerned will have the effects stated must depend on a number of uncertain factors,

"such as its precise terms, the nature of its subject-matter, the circumstances in which it was concluded, the number of States subscribing to it, their importance relative to the subject matter of the treaty, the history of the treaty subsequent to its conclusion, and the topic to which it relates — and so forth."^192

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190 Roxburgh, op. cit. above Ch. I (n. 25), p. 111. Roxburgh cites Oppenheim as appearing to look forward to a time when the Panama Canal shall have been in use for such a length of time "as to call into existence — under influence and working of the Hay-Pauncefote Treaty — a customary rule of international Law according to which the Canal is permanently neutralised and open to vessels of all nations" (Oppenheim, op. cit. above Ch. I (n.75), p. 46). He also cites Lawrence as having regarded the rules contained in the Suez Canal Convention as "already accepted by all civilised powers either expressly or tacitly."

See Roxburgh, op. cit. above Ch. I (n. 25), p. 74.

191 Fitzmaurice's 5th Rep., proposed draft Article 16.

192 Ibid., p. 94.
Waldock, reflecting upon Fitzmaurice's proposed draft article, agreed that the role played by custom in expanding the effects of treaties beyond the parties is certainly important; but he suggested that

"... in the draft convention on the law of treaties ... it seems necessary to separate more sharply those obligations and rights which are generated by the treaty itself from those which are generated through the grafting of an international custom onto the provisions of a treaty. Where the latter process occurs, it is not strictly a case where the treaty has legal effects for third parties; it is rather a case where principles formulated in a treaty are binding upon other States as being an embodiment of the accepted customary law, although the treaty itself is not binding upon them. Treaty and custom are distinct sources of law, and it seems undesirable to blur the line between them in setting out the legal effects of treaties upon States not parties to them."\(^{193}\)

On the basis of Waldock's advice, the International Law Commission decided not to examine the process by which a customary rule may be grafted upon the provisions of a treaty. As stated above,\(^{194}\) it adopted the "saving clause" (now in Article 38 of the Vienna Convention) which merely recognised the existence of the process.\(^ {195}\) In its commentary on this provision, the International Law Commission stated that

"The role played by custom in sometimes extending the application of rules contained in a treaty beyond the contracting States is well recognised. A treaty concluded between certain States may formulate a rule, or establish a territorial, fluvial or maritime regime, which afterwards comes to be generally accepted by other States and becomes binding upon other States by way of custom, as for example the Hague Conventions regarding the rules of land warfare, the agreements for the neutralisation of Switzerland, and various treaties regarding international riverways and maritime waterways. So too a codifying convention purporting to state existing rules of customary law may come to be regarded as the generally accepted formulation of the customary rules in question even by States not parties to the convention."\(^ {196}\)

The Commission made it clear that

"In none of these cases, however, can it properly be said that the treaty itself has legal effects for third States. They are cases where, without establishing any treaty relation

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\(^{193}\) Waldock 3rd. Rep. on Treaties, p. 27, para. 2.

\(^{194}\) See Ch. III (3.2.2.) above.

\(^{195}\) For the discussion of the members of the International Law Commission on this provisions see YBILC (1964-I), 740th and 741th Meetings.

\(^{196}\) ILC's Draft Articles on the Law of Treaties (1966), para. 1 of Commentary on draft Article, emphasis added. cf. D'Amato who considers that treaties establishing "objective regimes", such as those referred to by the International Law Commission in the passage cited, "are incapable of giving rise to general custom" because they do not normally, in his view, contain "generalizable rules" that can rise to a rule of customary law; they are rather like some types of State act which give rise to "special custom" binding upon a particular group of States. See D'Amato, The concept of custom ..., op. cit. above Ch. II (n. 132), pp. 106 and 109.
between themselves and the parties to the treaty, other States recognise rules formulated in a treaty as binding customary law. In short, for these States the source of the binding force of the rules is custom, not the treaty. For this reason the Commission did not think this process should be included in the draft articles as a case of treaty having legal effects for third States.  

Not long after the International Law Commission adopted its final draft Articles on the Law of Treaties in 1966, the question of the role of custom in expanding the legal effect of treaties came under consideration by the International Court of Justice in the *North Sea Continental Shelf Cases*. In dealing with this matter, the Court confirmed the above-cited views by indicating that there is no doubt that the process of a treaty rule transforming into customary one is

"a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognised methods by which new rules of customary international law may be formed. But this result is not lightly to be regarded as having been attained."

The Court appeared to suggest two different sets of criteria for a new treaty rule to be transformed into a customary one. On the one hand, the Court appeared to suggest that four conditions need to be met for such a transformation. Firstly, such a rule must be a "norm-creating provisions" — that is, as later explained by the Court, "at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law". Secondly, there must be a passage of a "certain period of time", however "short it might be". Thirdly, subsequent "State practice, including that of States whose interests are specially affected, should have..."
been both extensive and virtually uniform in the sense of the provision so invoked..." — in this regard, the Court gave special importance to the conduct of third States in attempting to determine whether the treaty, in its law-creating aspect, was binding on all nations *qua* custom. Finally, such a practice should have "occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved" (*opinio juris*).

On the other hand, the Court appeared to suggest that once a treaty rule was of a "norm-creating" character, a "widespread and representative participation in the convention might ... of itself" be sufficient for transformation of the treaty rule into a customary one. This statement has caused controversy as to the need for the subsequent State practice and *opinio juris*. Some writers have argued that a "very widespread and representative participation in the Convention" may be adequate to make "generalizable norms in treaties generate equivalent norms of customary law" without need for any subsequent practice. Rejecting this point of view, Danilenko argues that

"In reality, however, when describing the transformation process of a treaty rule into a rule of general customary international law, the Court required the existence of an

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203 Ibid., p. 43, para. 74.
204 Baxter, *loc. cit.* above Ch. II (n. 132), p. 64.
205 ICJ Rep. (1969), para. 74. In this respect, the Court further stated that

"Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of requiring it." (*Ibid.*, p. 44, para. 77)

The Court also confirmed the need for *opinio juris* in *Nicaragua Case* where it held that in the field of customary international law,

"where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice." (Merits, *loc. cit.* above Ch. I (n. 144), p. 98).

For a detailed examination of the role of *opinio juris* see Cheng, *loc. cit.* above (n. 46), pp. 530 et seq.

206 ICJ Rep. (1969), p. 42, para. 73. See further Ch. II (3.2.2.) above.
208 D'Amato, *An Alternative to ...*, *loc. cit.* above (n. 207), pp. 281-282. Danilenko cites a number of other writers such as Thirlway and Haggenmacher as maintaining that, in the view of the Court, a widespread participation in the convention 'of itself' creates customary law. Danilenko, *op. cit.* above Ch. II (n. 110), p.158-159.
"extensive and virtually uniform" state practice, the passage of a certain period of time and, what is most important, "a general recognition" of a norm contained in a treaty norm [sic?] by the *opinio juris* of States.  

In addition, Jennings referring to the Court's view cited earlier, contends that widespread and representative "participation requirement, however, refers ultimately to participation in the acceptance and practice of the rule rather than of the treaty which inspired the rule. The very question at issue is the legal position of third States which have not elected to become parties to the treaty; there is no problem with those who have become parties. The requirement therefore must include widespread acceptance of the rule amongst the representative third States, including those whose interests are specially affected. Moreover, this participation must be on the basis of legal obligation as evidence of the *opinio juris* ... Obviously, the more widespread and representative the participation in the actual treaty, the easier becomes the burden of proving a new custom. However, the relevance of the number of actual ratifications can hardly be put higher than that. It would be contrary to all principle to hold that a regime established by an essentially contractual instrument could be opposable as such against representative and specially interested States which had elected not to accept the treaty. The *very existence of ratification and acceptance* clauses in multilateral treaties negatives the notion that such a treaty could of itself and without the evidences of custom become legislative for concerned States which do not ratify or accept it."  

Certainly, the wording of Article 38 of the Vienna Convention and the Court's holdings in subsequent cases, specially in the *Libya/Malta's Continental Shelf* and *Nicaragua* cases, uphold Danilenko/Jennings points of view which insists upon the need for two elements of "subsequent practice" and "*opinio juris*". As stated in Chapter II, Article 38 envisages the possibility of a treaty rule to become binding upon a third State "as a rule of customary law" if "recognized as such". As Rozakis put it,

\[\text{Ibid.}\]
\[\text{Jennings, loc. cit. above Ch. II (n. 132), p. 167, emphasis added. For a similar point of view see Baxter, loc. cit. above Ch. II (n. 132), p. 296.}\]
\[\text{In the *Libya / Malta's Continental Shelf* case (loc. cit. above Ch. II (n. 133), pp. 29-30, para. 27), the Court stated that:}\]
\[\text{"it is of course axiomatic that the material of customary international law is to be looked for primarily application in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them." Emphasis added.}\]
\[\text{In the *Nicaragua Case* (Merits, loc. cit. above Ch. I (n. 144), pp. 97-98), the Court, referring to this statement, observed that it has to "direct its attention to the practice and *opinio juris* of States" in order to consider what are the rules of customary international law applicable to the case before it. See further the passages cited in n. 205 above.}\]
\[\text{See Danilenko, op. cit. above Ch. II (n.110), pp. 156-162.}\]
\[\text{See Ch. II (3.2.2.) above.}\]
“Since ... article [38] requires that the rule must be recognized as a rule of customary law, then a treaty rule, even when it is generally recognized via participation, does not fulfill the condition of customary law recognition; it is only recognized as a treaty rule. For that rule, therefore, to be recognized as a customary rule, there should always be some additional evidence that States (parties or non-parties) recognize it as a customary rule as well. In consequence, participation in a treaty and acceptance, thereby, of its rules does not appear to constitute conclusive evidence that its rules have been transferred in the domain of customary law whatever the number of participating States.” 214

Therefore, on the basis of Article 38, the treaty rule needs to meet the normal requirements by which the existence of a customary rule of international law is ascertained in order to become — “as a rule of customary international law” — binding upon third States. In other words, there must be evidence of subsequent “State practice” and “opinio juris”, as Danilenko, Jennings and Rozakis have argued. The words “recognized as such” in Article 38 make it absolutely clear that there is no short cut. The treaty rule must first transform into “a rule of customary international law”, having “recognized as such” it would then become qua custom binding upon third States.215

For a treaty regime, such as those considered as constituting “objective regimes”, to become binding on third States through the “custom-process”, it is, therefore, necessary for the parties to adopt, subsequent to the conclusion of the treaty or from that time, a kind of attitude which indicates that the regime established should be binding on third States; and the third States must appear to acknowledge that claim in their conduct. In addition, there must be sufficient evidence of the opinio juris of the parties and the third States evincing their conviction that they are conforming to the regime as a matter of customary law and not, for instance, as a matter of treaty rights and obligations extended to non-party States.216 In a similar manner, subsequent “State practice” and “opinio juris” may evolve upon certain provisions of the regime and, thus, make it partially binding on all States: this is indeed the most frequent case where customary rules may possibly emerge from provisions of a treaty.217 Moreover, such a treaty

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214 Rozakis, loc. cit. above (n. 36), p. 33.
215 Jennings indicates that

“the words “recognized as such” make it clear that any general obligation can only proceed from custom and cannot proceed from the treaty.” (Jennings, loc. cit. above Ch. II (n.132), p. 161)

216 Cheng distinguishes these two as opinio generalis juris and opinio obligationis conventionalis. See his view cited in the text which follows.

217 For possible examples see Ch. V (4.4.) below.
regime may become binding, as a matter of "special custom", on a limited group of States, as it is upheld by the International Court of Justice, regulating the mutual rights and obligations of the States concerned. The crucial point in any of these cases, however, is how the parties claim that the regime must be binding on third States qua custom and the third States' acknowledgement of that claim, may be ascertained in concrete cases. Obviously, as Cheng put it,

"In each instance, whether such a metamorphosis has taken place or not is a question of fact to be established by concrete evidence, as in attempts to ascertain the existence of any rule of general [customary] international law."  

In other words, what must be established is the existence of "practice" (of the parties and the third States) upon the provision of the treaty and the "recognition" of it as a custom. Considering that the parties are already bound by the regime qua treaty, not much credit can be accorded to their actual subsequent practice (i.e. observation of the regime). For the same reason, it would also be difficult to establish their "opinio juris". As Cheng stated,

"parties to a treaty do not normally regard the provisions of that treaty as rules of general international law. In other words, they do not entertain an opinio generalis juris vis-à-vis the provisions of their treaty ... Their typical intention is to regard their treaty as binding within the framework of the general law of treaties, including the principle Pacta tertiis. This psychological element may characterized as opinio obligationis conventionalis (that is to say, acceptance of the rule or rules in question as a matter of treaty rights and obligations vis-à-vis the other contracting party or parties)."  

In addition, in the case of treaties providing for "objective regimes" — where the subject-matter of the treaty is a territory over which one of the parties possesses territorial sovereignty — it is very unlikely that the parties want to bind themselves beyond the treaty. Therefore, there must be cogent evidence that the parties consider the regime to be binding on third States as a matter of customary international law. Even if

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218 D'Amato, The Concept of custom ..., op. cit. above Ch. II (n. 132), pp. 233 et seq.
220 Cheng, loc. cit. above (n. 46), p.533. For a similar view see: Fitzmaurice's view, loc. cit. above (p. 221); Baxter, loc. cit. above Ch. II (n. 132), p. 73; Danilenko, loc. cit. above (n. 56 ), p. 71.
221 Cheng, Ibid., pp. 532-533.
222 As will be seen, in most cases either the treaty is closed to accession or the parties appear to dislike the idea of losing control over a matter upon which they as parties have exclusive competence. See Ch. V (3.) below.
the terms of the treaty indicate the parties' desire that it should apply to all States this is not sufficient by itself to show their recognition that the regime might be custom.

The ultimate test for that regime to become binding on third State is, however, to be found in the attitude of third States and their *opinio juris*. There must be sufficient evidence of third States' reliance, recognition, respect or acceptance of the regime in their actual conducts vis-à-vis the regime evidencing their conviction that they are bound by that regime as a matter of customary international law. Without that, such a regime could not transform into a customary one. As stated earlier on,\(^\text{223}\) when evaluating the practice of third States and their *opinio juris* there is no need to establish that every third State has observed or accepted the treaty rule as a customary law, though in certain fields especial importance is given to the practice and attitude of States directly concerned in that field\(^\text{224}\) and though in the case of "special custom" there is a need for the evidence of the practice and *opinio juris* of the States concerned.\(^\text{225}\)

Looking at the "custom-process" and the way it operates, the following points may be made with regard to this process as a mechanism which may justify the alleged *erga omnes* validity of the category of treaties which is the subject of this study. Firstly, it seems extremely hard to establish that a treaty regime — such as those considered as establishing "objective regimes" — may as a whole transform into a customary one. The reason is that, as mentioned above, the parties normally would want to remain master of the treaty. Once a treaty transformed into a "customary" one, it would divorce from it and would acquire its own independent existence. Any change in the treaty from which the regime is originated would not automatically change the validity of the regime, which might change only through the custom-process, i.e. in the same manner as

\(^{223}\) See Ch. II (3.2.2.) above.

\(^{224}\) See Oppenheim, *op. cit.* above Ch. I (n. 28), p. 29; Rozakis, *loc. cit.* above (n. 36), pp. 33-34. Rozakis believes that Article 38 Vienna Convention must be interpreted as requiring that a treaty rule must specifically be recognized by a third State as a rule of customary law in order to be binding upon it. *Ibid.*, p. 35.

\(^{225}\) As Oppenheim indicates, the existence of a "special custom", being in the nature of an exception, will be a matter of strict proof:

"It is probable, therefore, that in such a case it is necessary to establish a State's clear assent to the practice as law in order for the rule to be relied on by or against it. This would appear to be the significance of certain observations by the International Court of Justice in the Asylum and United States Nationals in Morocco cases, emphasising the need for the consent of the parties." (Oppenheim, *op. cit.* above Ch. I (n. 28), p. 30).
it was established.\(^{226}\) What this means is that the parties could no longer change the
terms of the regime by themselves and for that reason it would not be unusual if the
parties to this kind of treaty appear not ready to grant any right, especially of customary
nature, to third States.\(^{227}\) As Klein has argued, the parties

\[\text{"invariably wish to retain the right to terminate the treaty and do not wish to exchange}
\text{the flexibility afforded by the opportunity of treaty modification for the rigidity of cus-
tomary international law."}\(^{228}\)

A similar kind of difficulty arises with regard to the position that third States may
take. From their point of view, if the regime involves mainly bestowal of certain bene-
fits or rights on them, they would surely be ready to give their support to the regime
and help transform it to a customary one for the obvious reason that on that basis their
right would be more stable and would, indeed, be irrevocable without their, at least, ac-
quiescence. However, if the regime involves imposition of one or more obligations,
third States would be very reluctant to engage themselves in such burdens. If the regime
would not affect their immediate interest or would not involve them undertaking any
positive action, they may simply take a position of wait and see. In that case, their mere
silence may not be taken as "tacit recognition" (acquiescence) since there is no reason
for them to challenge the regime.\(^{229}\)

The fact the a treaty regime may not, or would be very unlikely to, transform into
a customary one does not mean that it may not become so in part. A particular rule, or
provision, of such a regime may through subsequent practice transform into a rule of
customary law binding on all States. For instance, although the possibility of the regime

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\(^{226}\) For more detail see Ch. II (3.2.2.) above.

\(^{227}\) See the United States' view on the position of third States under the Panama Canal Treaties
discussed in Ch. V (3.2.1. and 3.3.4.) below.

\(^{228}\) Klein, op. cit. above Ch. I (n. 138), p. 355 (English Summary).

\(^{229}\) In the Anglo-Norwegian Fisheries Case, the Court confirmed that "general toleration" of,
and "prolonged abstention from reaction" to, a claim challenging a legal situation or assert-
ing alleged rights may be taken as "law-making acquiescence" if that claim has been "noto-
rious" (loc. cit. above (n. 106), pp. 138-139; see also Simma, loc. cit. above (n. 10), p. 206).
This consideration — which seems to be relevant only to cases of historical consolidation
of a right (title to territory) — however, is not apt in the case of "objective regimes" which,
being established by treaty, are always overwhelmed with the pacta tertiis .. rule. (See Blum, Y.Z.,
Historic Title in International Law (The Hague, Martinus Nijhoff, 1965), pp. 38-39). As stated in Chapter II, this principle establishes a presumption according to which a
treaty cannot create any obligation for a third States without its consent and obviously its
"silence" cannot under any circumstances be taken as "consent". For further detail see Ch. I
(2.3.), Ch. II (2.2.1.2.) above and Sec. 1.2. and 1.3. of this Chapter.
established by the Antarctic Treaty 1959 having been transformed into a customary one (as whole) is seriously disputed, its provisions in many respect have widely been accepted as "established rules of international law" by States during the recent United Nations debates on the question of Antarctica. As will be seen in Chapter V, while the alleged examples of "objective regimes" seem not to have in whole transformed into customary ones, a particular part or provisions of them seem to have been recognized as rules of customary international law.

Secondly, although the International Court of Justice in the *North Sea Continental Cases* held that the passage of a considerable period of time is not needed, especially whenever there is "a very widespread and representative participation in the convention" that cannot be applied to the case of treaties under consideration for the fact that in this kind of case the parties to the treaty concerned are very limited and sometimes even the treaty is a bilateral one, e.g. the treaty between the United States and Great Britain establishing the regime of Panama Canal. As indicated above, even if there is "widespread and representative participation", there is need for "subsequent State practice" and "opinio juris". Naturally, a practice "will take time to develop and it will usually only be some time thereafter that the necessary opinio juris will grow up in relation to it." Thus the process would be a slow one: that is one of the main reasons which prompted Waldock to introduce his "presumed consent" theory as a better — and a more efficient — alternative to the "custom-process".

Thirdly, to say that a regime will become binding upon third States as a customary regime if "recognized as such" would seem not much different from saying that a treaty may establish rights and obligations for third States if they consent thereto. In other words, the main different between the mechanism adopted in Articles 35-36 and the mechanism of "custom-process" is that in the former mechanism third States need

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230 Simma, *loc. cit.* above (n. 10), pp. 202 et seq. See further Ch. V (4.2.1.) below.


232 For more detail See below Ch. V (4.).

233 *Loc. cit.* above (n. 206).


235 YBILC (1964-I), 740 Meeting, paras. 34 and 35.
to express their consent "in writing" for the establishment of a treaty-obligation while in the latter such a "consent" — though necessary — need not to be expressed "in writing". With regards to a treaty right, there seems to be no difference at all. In both mechanisms, a treaty right may be established for a third State without their consent needs to be expressed. Accordingly, by means of the "custom-process", as in the case of the mechanism adopted in Article 35, one can hardly speak of a treaty creating, by its own force and without more, obligations for third States.

To sum up, it is appropriate to suggest that the "custom-process" cannot be viewed as capable of helping, in any way, the doctrine of treaties providing for "objective regimes", for the simple reason that through that process third States are assumed to become bound by the treaty rule qua custom and because in the final analysis this would not involve the admission of an exception to the pacta tertii .. rule. As Baxter has maintained, when a treaty regime, or a particular provision thereof, transforms into a customary one, it would, qua treaty-law, only be binding on the parties thereto and would remain res inter alios acta for third States, at the same time it would be binding on both States parties and non-parties qua custom. What this means is that any change to the treaty would not automatically change the regime — which may change only through the custom-process requiring the "consent" or "acquiescence" of States in general, not just the States’ party to the original treaty. As was stated, this is the main barrier preventing a treaty regime such as those claimed to constitute "objective regimes" from transforming into a customary one binding upon all States.

236 Holloway, op. cit. above Ch. II (n. 22), pp. 584-586.
237 Baxter, loc. cit. above Ch. II (n. 132), p. 32.
Chapter V
State Practice on the Doctrine of "Objective Regimes"

Introduction

In Chapters II and III, we observed that neither the International Law Commis­sion nor States participating in the Vienna Conference opted for incorporation in draft articles or the final convention on the law of treaties of any special or exceptional rule to the effect that certain treaties might, by their own force and without more, establish regimes which are valid vis-à-vis third States without their consent thereto or recogni­tion thereof. There, we noted that the rules adopted in the Vienna Convention do not exclude the possibility that a treaty to which a limited number of States are party might establish a regime with binding effect erga omnes. However, we noted that, under the Vienna Convention, that could happen only either through the mechanism envisaged in Articles 35-36 (third States’ assent) or through the process referred to in Article 38 (the “custom-process”). Moreover, we observed that the rule in Article 36 can satisfactorily explain the alleged objective effects of this kind of treaty only if the regime in question involves the granting of a right or rights to third States, accompanied by obligations which are all conditions for the exercise of those rights.¹ In Chapter IV, the value of several theories which have been proposed in support of the doctrine under considera­tion was examined in abstracto. Assuming that the category of treaties in question do involve objective effects, we concluded that the theories proposed are not capable of explaining or justifying those effects in a satisfactory way: some run counter to the current trends in international law, while others are in fact based on element(s) which negate the very proposition that certain classes of treaties, by their own force, establish generally binding (objective) regimes. To test these conclusions further, this chapter examines certain treaties which have been alleged to constitute examples of treaties which create “objective regimes”. The aim will be to answer two questions: firstly, whether or not in practice those treaties have involved the automatic creation by treaty of legal rights and obligations for third States; and, secondly, if they have, if those effects have been or are produced in a way that requires a special rule envisaged by the doctrine of “objective regimes” in order to explain them. In dealing with these questions, reference

¹ See Ch. III (3.1. and 4.) above.
will be made to the history, the circumstance of the conclusion and the actual terms of the
treaties concerned in order to determine if they were capable of producing, by their
own force and without more, binding effects for third States and, if they were, whether
those effects if produced could be explained only by an exceptional rule of the type en-
visaged by the doctrine of "objective regimes". An examination will then be made of
the conduct of both parties and third States subsequent to the conclusion of those trea-
ties in order to ascertain if they have treated the regime established as binding in the
manner claimed by the advocates of the doctrine of "objective regimes".

Before going any further though, it should be remarked that, although an exami-
nation of all of the treaties which have been said or claimed to give rise to "objective
regimes" would be ideal, such an examination would require work in excess of what is
achievable in the confines of a Ph. D. thesis. Accordingly, reference will only be made
to the most frequently cited examples. Moreover, if most frequently cited examples are
not in fact really convincing, it would be doubtful others would be. These examples are
as follows: the status of permanent neutrality of Switzerland and the regimes concern-
ing the Suez Canal, the Panama Canal and Antarctica. As was seen, the Vienna Con-
vention rules on treaties and third States cannot explain any automatic objective effects
that these regimes might produce for third States. As such they are the most suitable
examples for the purpose of our inquiry.

1. The status of "permanent neutrality" of Switzerland

1.1. The early history: the 1815 Treaties

From 1648, when the thirteen original Swiss Cantons were recognised as a united
independent State by the Peace of Westphalia, the Swiss proclaimed themselves per-
petually neutral in the quarrels of Europe. During the French Revolution and the

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1. See Ch. III (3.2.) above.

2. However, they did not observe an attitude of strict neutrality as they did after 1815. Swit-
zerland's neutrality was qualified by military capitulation between individual Cantons and
foreign Powers, permitting the enrolment of Swiss citizens to serve in the belligerent ar-
 mies of such Powers. Both France and Austria, whilst recognising the neutral character of
the territory of the Confederation, reserved to themselves, by treaty, the right of recruiting
Swiss troops to serve in their armies and to take part in the wars which affected other por-
tions of Europe during the Seventeenth and Eighteenth centuries. See: Twiss, T., On Inter-
national Conventions for the Neutralisation of Territory and their applications to the Suez
Napoleonic wars, however, the Swiss Confederation did not succeed in maintaining her neutrality. According to a Treaty of Alliance, which was signed on 27th September 1803, the French Republic undertook to procure the neutrality of Switzerland and to defend it, if it were attacked. The Treaty, at the same time, imposed upon Switzerland the obligation of denying to the enemies of France a passage through Swiss territory and it expressly declared that, as the Treaty was absolutely defensive, it ought not to prejudice, nor should it derogate in any way from, the neutrality of Switzerland. When the possibility of war between the Allied Powers and France mounted, on 18th November 1813, the Helvetic Diet issued a proclamation affirming the neutrality of Switzerland, and notifying that fact to the Allied Powers. Austria and Russia declared that they could not respect a neutrality which was only nominal and, subsequently, disregarded that neutrality by entering the territory of Switzerland.

During the temporary peace which followed Napoleon's exile, on 20th March 1815, the representatives of the Eight Powers assembled at the Congress of Vienna took up the question of Swiss neutrality and acknowledged that "the general interest demands that the Helvetic States should enjoy the benefit of a perpetual neutrality". The Declaration was addressed to the Swiss Government for their approval. Through the Act of Adhesion of the 27th of May 1815, the Swiss Diet acceded to this Declaration.

Article 1 of this Act stipulated that

"the Diet accedes, in the name of the Swiss Confederation, to the declaration of the Powers assembled at the Congress of Vienna .. and promises that the stipulations contained in the "transaction" inserted in this Act shall be faithfully and religiously observed."

In Article 2, the Swiss Diet "... promise solemnly to acknowledge and guarantee the Perpetual Neutrality of the Helvetic Body, as being necessary to the general interest of Europe".

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4 See Twiss, ibid., p. 5.
5 The Swiss proclamation of Neutrality is reproduced in 1 BFSP 1160.
6 Twiss, op. cit. above (n. 3), p. 5-6.
7 Declaration of 8 Powers at the Congress of Vienna relative to the Affairs of the Helvetic Confederation, 20th March 1815, (signed by Austria, France, Great Britain, Portugal, Prussia, Russia and Spain), 64 CTS 5; 2 BFSP 142, emphasis added.
8 Ibid., p. 147.
9 Ibid., emphasis original. See also Wicker, op. cit. above Ch. III (n. 99), pp. 15-16.
10 Ibid., emphasis original.
Before the Declaration of 20th March 1815 was ratified by the Allied Powers, negotiations broke down as a result of Napoleon’s returning to Paris. The Allied Powers urged Switzerland to abandon her neutrality temporarily and to permit unobstructed passage across her territory to their armies. At the same time, though, they declared that that should not “establish a precedent”. Switzerland could not refuse and the Allied Powers’ armies entered France through Switzerland’s territory.¹¹

Once peace was finally established, the Powers once more assembled at Vienna on 9th June 1815, their representatives signed a treaty recognising and guaranteeing the integrity and permanent neutrality of Switzerland. Seven States — Austria, France, Great Britain, Portugal, Prussia, Russia and Sweden — signed this Treaty. Spain which was not a signatory, later consented to be bound by the treaty by means of an Act of Accession dated 17th June 1817. According to Article 84 of this Treaty,

“The declaration of the 20th March 1815, addressed by the Allied Powers who signed the Treaty of Paris to the Diet of the Swiss Confederation, and accepted by the Diet through the Act of Adhesion of 27th of May, is confirmed in the whole of its tenor; and the principles established, as also the arrangements agreed upon, in the said Declaration, shall be invariably maintained.”

This Article together with other provisions regarding neutrality of Switzerland and its guarantee, were in turn confirmed in the final Declaration of Paris, signed on the 20th of November 1815. The five Powers signatory to this Declaration — Austria, France, Great Britain, Prussia, and Russia — expressed 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 . . ."¹²

They further acknowledged “in the most formal manner ... that the Neutrality and Inviolability of Switzerland, and her Independence of all foreign influence, enter into the true interest of the policy of the whole of Europe”.¹³ In the same Declaration, the afore-mentioned Powers equally recognised and guaranteed “the Neutrality of those parts of Savoy designated by the Act of the Congress of Vienna of the 20th May, 1815, and by the Treaty of Paris this day [i.e. Chablais, Faucigny, etc.], the same being

¹¹ Wicker, op. cit. above Ch. III (n. 99), p. 16.
¹² Act ... for the Acknowledgement and Guarantee of the Perpetual Neutrality of Switzerland, loc. cit. above Ch. III (n. 103), emphasis added.
¹³ Ibid., emphasis added.
entitled to participate in the Neutrality of Switzerland, equally as if they belonged to that country”. Finally, the Declaration invited “all the Powers in Europe ... to accede” to it.\footnote{There is no report of any State having acceded to this Declaration.}

Having described the legal history and the circumstances in which the permanent neutrality of Switzerland was established, we turn to consider the question whether the treaties described above can be viewed as having been intended to constitute, by themselves and without more, a generally binding regime, or, in other words, a regime involving the automatic establishment of rights and obligations for third States.

1.2. The effects on third States

As stated in Chapter III, treaties establishing a regime of permanent neutrality do not normally embody any provisions purporting to establish any specific rights or obligations for third States — for that reason we concluded that the mechanism in Article 36 of the Vienna Convention cannot explain their effects on third States.\footnote{See Ch. III (3.2.) above.} There, the regime of permanent neutrality of Switzerland was cited as a typical example. The question arises in what manner then are such treaties seen as constituting “objective regimes” affecting third States and what are the effects? As we noted before,\footnote{Ibid.} the advocates of the doctrine of “objective regimes” appear to consider that the purpose of this kind of treaty is to create a permanent condition of things, i.e. the status of permanent neutrality. Such a status could, by the nature of the things, be attained if the neutralised State was to observe her neutrality in all wars and towards all belligerents and the States parties were to observe such neutrality in any war between any States.\footnote{Bindschedler, R., L., Permanent Neutrality of States, in Bernhardt’s Ency., vol. 4, p. 133. Cf. Gihl, op. cit. above Ch. IV (n. 3), p. 59.} A status of permanent neutrality is, therefore, bound to affect all States in an objective manner.\footnote{Arias, H., The Panama Canal (1911), pp. 88-93; Kunz, J.L., Austria’s Permanent Neutrality, AJIL 50 (1956), pp. 418-425, at p. 418; McNair’s Law of Treaties, p. 261; Lachs, comment on Waldock’s proposed Draft Article 63, YBILC (1964-1), p.108. Subedi, loc. cit. above Ch. IV (n. 12), pp. 176-177.} The effects for third States are that they would be under an obligation, just like the
States Parties, to recognise, respect and not commit any act which might violate the status of permanent neutrality concerned. At the same time, they would be entitled to insist upon the performance of that same obligation by the parties or other third States.

This seems to be what the parties have intended to result from the situation of permanent neutrality of Switzerland. Accordingly, although treaties which established the status of permanent neutrality of Switzerland did not contain any stipulation purporting to establish rights and/or obligations for third States, they can be seen as giving rise to rights and obligations valid erga omnes, as alleged by the advocates of the doctrine of "objective regimes". Whether or not third States treated it that way in practice will be seen shortly.

Before that, it should be noted here that the function of the institution of permanent neutrality and its effects, especially from the political point of view, were far from those described above; and, indeed, are totally different now. During the nineteenth century when resort to war was lawful, all States — especially smaller States — could benefit from the status of "permanent neutrality" in that they could, for instance, count on the fact that a neutralised State would not attack them or that military forces of another State could not lawfully pass through the territory of the neutralised State for the purpose of attacking their territory. However, the role and the significance of the institution has, to a large extent, diminished as a result of transformation in the legal

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19 The effect for third States is not necessarily the same as those of the States Parties. States Parties normally not only undertake to respect the neutrality of the neutralised State but further bind themselves to maintain that status either collectively or severally — in other words, they bind themselves not only to respect the status of permanent neutrality but cause it to be respected by the others (whether parties or third States). They sometimes even guarantee the territorial integrity of the neutralised State, as in the case of Switzerland. Graham, M.W., Neutralization as a Movement in International Law, AJIL 21 (1927), pp. 79-94, at pp. 88-91; Modjorian, L.A., Legal Aspects of Neutrality in the Modern World, Review of Contemporary Law (1964), No. 1, pp. 42-51.

20 See Ch. III (1.3. and Ch. IV (2.2.2.) above.

21 See Wheaton' s Elements of International Law where it is argued that "the neutralization of Switzerland, Belgium and Luxembourg, may legitimately be held to have been binding on minor States from the outset without adherence or express consent ...." (Berredale Keith, A. (ed.), Wheaton's Elements of International Law (London, Stevens, 6th ed. 1929), vol. I, p. 520, emphasis added).


22 See Lachs' comment, loc. cit. above (n. 18).
position of war and neutrality\textsuperscript{23} and introduction of the systems of collective-security under the League of Nations and United Nations.\textsuperscript{24} With the prohibition of aggressive war, under the United Nations system and general international law,\textsuperscript{25} every State can now be sure that no other State may \textit{lawfully} wage an \textit{aggressive war} against her. And every State is obliged to \textit{respect and not to violate the territorial integrity} of any other State.\textsuperscript{26} Moreover, permanently neutral States are no longer required to follow a policy of strict impartiality. They can join systems of collective-security which may involve their participation in at least economic sanctions against an aggressive State — under the United Nations Charter, all members, including permanently neutral States,\textsuperscript{27} are obliged to abandon a position of neutrality if the Security Council decides to take measures against an aggressor State.\textsuperscript{28} Despite these changes, though, neutrality has not


\textsuperscript{25} See Article 1 of the \textit{Treaty Providing for Renunciation of War as an Instrument of National Policy}, loc. cit. above Ch. I (n. 131); Article 2 (4) of the Charter of the United Nations, loc. cit. above Ch. II (n. 45); para. 1 of the General Assembly's \textit{Declaration on Principles of International Law ...}, GA Res. 2625, loc. cit. above Ch. II (n. 45); Articles I-IV of the Declaration on Principles Guiding Relations between States Participating in the Conference on Security and Co-operation in Europe, loc. cit. above Ch. II (n. 45); the ICJ in \textit{Nicaragua Case, Merits}, loc. cit. above Ch. I (n. 144), pp. 98 \textit{et seq.} For a detailed examination of the contemporary prohibition of the use of inter-State force see Dinstein, Y., \textit{War, Aggression and Self-defence} (1988), pp. 81-111.

\textsuperscript{26} \textit{Ibid.}


\textsuperscript{28} See Articles 25, 27 and 41-43 of the United Nations Charter, loc. cit. above Ch. II (n. 45). Under the League of Nations system (Article 16) participation against a Covenant law breaking State was automatic. A member of the League could hardly remain neutral. A British Government Memorandum (presented to Parliament on 13 December 1929 with respect to the signature on behalf of the British Government of the optional Clause of the
faded away and resort is still being made to the institution of permanent neutrality.\(^{29}\) In fact, since the creation of the United Nations several States have become permanently neutral,\(^{30}\) though not necessarily by means of multilateral treaties to which all the major Powers are parties.\(^{31}\) Accordingly, the basic question as to whether or not there is a duty on third States to respect status of permanent neutrality established by treaties and whether that duty arises automatically and without more remain relevant.

1.3. Evidence of State practice

1.3.1. From 1815-1919

The available digests of State practice are silent as to the subsequent attitude of States party or non-party to the above-mentioned Acts and Treaties in years immediately after the establishment of the Swiss permanent neutrality. The reason for such a silence is not difficult to understand. All the Powers, including all the principal Powers, which could have an interest in the status of Switzerland were parties to the treaties concerned. Sardinia was the only State neighbouring Switzerland which was not party to any of the instruments relating to Swiss permanent neutrality, though it was actively involved in the territorial arrangements affecting Switzerland.\(^{32}\) However, by the Treaty of Turin concluded with Switzerland on 16th March 1816 respecting the neutrality of

Statute of the PCIJ) stated that:

"As between Members of the League, there can be no neutral rights, because there can be no neutrals." (Hackworth's Digest, vol. 7, pp. 670-671).

\(^{29}\) This is mainly due to the fact that the system of collective security established by the United Nations Charter has not, at least until the collapse of the Soviet Union, functioned as was originally intended. See Tucker, R.W. *The Law of War and Neutrality at Sea* (Washington, US Government Printing Office, International Law Studies Series (1957), p. 178; Komarnicki, T., *The Place of Neutrality in the Modern System of International Law*, RDC 80 (1952-I), pp. 399-510, at pp. 399, 468 and 482.


\(^{32}\) See the Treaty concluded on 20 March 1815 between the five Great Powers and Sardinia relative to guarantee of the neutrality of Chablais, Faucigny and part of Savoy cited in *British Digest*, vol. 2b, p. 752.
Savoy, Chablais, Faucigny, etc., Sardinia formally recognised the permanent neutrality of Switzerland. As regard the smaller nations, they were not yet considered by the Great Powers as fully independent States; nor could they possibly take any negative position in the matter of Swiss permanent neutrality. Nevertheless, there are two reported instance of State practice which may be examined here.

**a. Passage of French Troops (1859).** In 1859 the nature and the validity of Swiss neutrality, for the first time, became the subject of legal controversy as a result of an incident which occurred during the war between France and Sardinia, on the one hand, and Austria, on the other. At that time, the French troops attempted to pass through certain territories (i.e., the provinces of Chablais and Faucigny and part of Savoy) which were part of the Switzerland for the purpose of permanent neutrality, though were under the sovereignty of Sardinia. The French Government expressed the view that the Governments of Sardinia and Switzerland were at liberty to permit passage across the neutralised territory and argued that

"the neutralisation of that territory is optional or discretionary as regards both Sardinia and Switzerland; and not in any manner binding upon them as a matter of strict right (obligation de plein droit) in the general interest of Europe."

The Law Officers of the British Government strongly disputed such a position on the ground that

"(1) The Neutrality of Switzerland was established and guaranteed on the ground of the general interest of Europe, quite independently of Switzerland herself, or of Sardinia; and by an Instrument to which they were not originally parties.
(2) That the Territory in question ... is “quoad” such Neutrality, to be considered as if it belonged to Switzerland, although in all other respects Sardinian Territory.
(3) That Sardinia and Switzerland, which were not parties to the Treaty (which first established and guaranteed the Neutrality of Switzerland in the “general interest”) cannot

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33 *Treaty of Territorial Cession and Delimitation between Sardinia and Switzerland, Turin, 16 March 1816, 65 CTS 447; 3 BFSP 763. On 20 July 1819, a General Treaty was signed by Plenipotentiaries of Great Britain, Austria, Prussia and Russia to complete the territorial arrangements of Europe; and the Treaty of 16th March 1816 between Switzerland and Sardinia was formally annexed thereto, and declared to form an integral part thereof. Ibid.

34 Ibid.

35 These territories were part of Savoy which belonged to Sardinia but, as a part of 1815 European settlements, they were neutralised by virtue of Article xcii of the *General Treaty of Vienna Congress* (loc. cit. above Ch. I (n. 7)). According to this Article they should "form part of the Neutrality of Switzerland, as it is recognised and guaranteed by the Powers". See also the *Act ... for the Acknowledgement and Guarantee of the Perpetual Neutrality of Switzerland*, loc. cit. above Ch. III (n. 103).

36 *British Digest*, vol. 2b, p. 752.
by agreement "inter se", made for their separate interest, as opposed to the general interest of Europe, retain to themselves any optional or "facultative" power of actually de-neutralizing, or permitting the de-neutralization either of any portion of Switzerland (proper) or of any portion of the Territory in question, which is (quoad Neutrality) considered as if it belonged to Switzerland. As against other European Powers (especially Austria) this has however been done improperly in the existing war. Switzerland and Sardinia could not rightfully, either as against the other Powers [emphasis added], or as against Austria, have permitted French Troops to pass (say) through the Canton of Ticino — such an act would have been a clear violation of the Neutrality of Switzerland; but the territory in question is to be considered as if it belonged to Switzerland."

Reference has been made to this legal opinion by McNair, and other advocates of the doctrine of "objective regimes" relying on his commentary, as evidence in support of the doctrine that treaties establishing a regime of neutralisation entail automatic effects (i.e. a duty to respect) for States not parties thereto. At first sight, one may reject such a proposition since all the States concerned were, either through subsequent accession or recognition, bound by the treaty-arrangements establishing the regime of permanent neutrality for Switzerland and the provinces in question. Both France and Great Britain were parties to the Acts and Treaties of the Vienna Congress relating to the Swiss neutrality. So were Switzerland and Sardinia: the former as a result of her subsequent Accession to the Declaration of the Great Powers and the latter as a result of a special treaty concluded on 16 March 1816 with Switzerland and the Canton of Geneva respecting the neutrality of the provinces of Chablais, Faucigny and part of Savoy. Thus, strictly speaking, there was no third State involved. For that reason, the Opinion cannot be regarded as an evidence in which a treaty regime has been invoked against or in favour of a third State. However, it may well be viewed as indicating that, generally speaking, a regime of permanent neutrality established by the collective agreement of (European) Great Powers had to be respected by all States, or at least by the European States. The language used indicates that the fact that the attempted passage was by a State party (i.e. France) did not seem an important matter to the Law Officers in reaching their conclusion. What seemed to be important for them was the fact that the status

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37 Ibid., emphasis original. Before the foregoing report of the Law Officers had been communicated to the French Government, France had, for other reasons, stopped the passage (ibid.).
39 Loc. cit. above (n. 33).
of permanent neutrality was made and guaranteed by the Great Powers on the ground of the “general interest of Europe” and as such it could not, by its nature, be “optional”; but it was rather a definitive status which required to be respected in all circumstances. Accordingly, although the Opinion of the Law Officers of the British Government might be counter-balanced with the opposite view expressed by the Government of France, it may still be invoked as a piece of evidence upholding the view that the status of permanent neutrality of Switzerland constituted a definitive status for that country in the “general interest of Europe” and as such, was to be respected from the outset by all European States.

b. The position of the United States (1917). The question of the permanent neutrality of Switzerland was once again come up during the First World War. In a letter (dated 30 November 1917) which was to be communicated to the Swiss Government through its Embassy in Berne, the United States maintained that:

“In view of the presence of American forces in Europe engaged in the prosecution of the war against the Imperial German Government, the Government of the United States deems it appropriate to announce for the assurance of the Swiss Confederation and in harmony with the attitude of the co-belligerents of the United States in Europe, that the United States will not fail to observe the principle of neutrality applicable to Switzerland and the inviolability of its territory, so long as the neutrality of Switzerland is maintained by the Confederation and respected by the enemy.”

From this position of the United States several conclusions may be drawn. Firstly, it is clear that the permanent neutrality of Switzerland was hardly a matter of concern for that country prior to its engagement in a European war. In other words, the permanent neutrality of Switzerland could hardly have had any practical bearing on non-European States if these States were not to involve themselves in any war in Europe. Secondly, that, in the opinion of the United States, permanent neutrality of Switzerland was a principle which, while applicable to Switzerland, and probably valid among the European States, was not, per se, valid vis-à-vis the United States. The conditional pledge that the United States would respect Swiss neutrality if it be “respected by the enemy” was based on the presupposition that the United States did not consider herself already bound by, or obliged to respect, Switzerland’s status of permanent neutrality. Moreover, if that status was valid erga omnes, then the United States had to

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40 Secretary Lansing to Mr. Wilson (telegram), 30 November 1917, reproduced in Hackworth’s Digest, vol. 1, p. 67, emphasis added.
respect regardless of the position of other (belligerents) States. Finally, that the United States did not seem to consider herself bound to respect the permanent neutrality of Switzerland even as a matter of custom despite the fact that such a status was in force for nearly a century. These conclusions may further be reinforced by the fact that there was no claim on the part of the Swiss Government or any other European State that her status was binding on the United States or any other third States.\textsuperscript{41}

1.3.2. From 1919 -

Aside from the foregoing, no further evidence can be found involving the question of the validity of the status of permanent neutrality of Switzerland and its effects on third States. This may most probably be accounted for the fact that by the peace treaties concluded in 1919,\textsuperscript{42} the permanent neutrality of Switzerland was formally recognised by all, both old and newly emerged, European States as well as a large number of non-European States — almost the whole of international community at that time.\textsuperscript{43} Indeed such a recognition was accompanied with an assertion that the permanent neutrality constituted “international obligations for the maintenance of peace”\textsuperscript{44} and was part

\textsuperscript{41} The Swiss Minister for Foreign Affairs in a note addressed to the American Chargé d’affaires in Berne thanked the Government of the United States and regarded that country’s pledge as a “new proof of the sentiment for friendship that the United States has always manifested towards Switzerland” and renewed the Swiss Government’s “firm and unswerving determination to maintain and defend its neutrality and inviolability of its territory ... against any person.” See US For. Rel. (1917), suppl. 2, vol. I, p. 758.

\textsuperscript{42} See: Article 435 of the Treaty of Versailles fully cited in n. 44 below; Article 375 of the Treaty of Peace between the Allied and associated Powers and Austria, St. Germain, 10 September 1919, (known as the Treaty of St. Germain), 226 CTS 196; 112 BFSP 527; UKTS 11 (1919), Cmd. 400; Article 291 of the Treaty of Peace between the Allied and associated Powers and Bulgaria, Neuilly, 27 November 1919, (known as the Treaty of Neuilly), 226 CTS 332; 11 Martens (3rd.) 692; 4; UKTS 5 (1920), Cmd; 522; and Article 357 of the Treaty of Peace between the Allied and associated Powers and Hungary, Trianon, 4 June 1920, (known as the Treaty of Trianon), 113 BFSP 486; UKTS 10 (1920), Cmd. 896.

\textsuperscript{43} The parties to the Treaty of Versailles (\textit{loc. cit.} above Ch. I (n. 67)) were: the United States of America, The British Empire, France, Italy and Japan (as the Principal and Associated Powers), Belgium, Bolivia, Brazil, China, Cuba, Ecuador, Greece, Guatemala, Haiti, The Hedjaze, Honduras, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Romania, The Serb-Croat-Slovene State, Siam. Czechoslovakia, Uruguay and Germany.

\textsuperscript{44} According to Article 435 of the Treaty of Versailles the “High Contracting Parties .. recognize the guarantees stipulated by the Treaties of 1815, and especially by the Act of November 220, 1815, in favour of Switzerland, the said guarantees constituting \textit{international obligations} for the maintenance of peace ...” (Treaty of Versailles, \textit{loc. cit.} above Ch. I (n. 67), emphasis added).
of the law of nations\textsuperscript{45} — an assertion which may be taken as a good example of the kind of \textit{opinio juris} which these days is viewed as a necessary element, or even sufficient in itself,\textsuperscript{46} for the creation of a norm of customary international law. The Council of the League of Nations’ resolution adopted in connection with Switzerland admission to the League of Nations explains all these:

“The Council of the League of Nations, while affirming that the conception of neutrality of the Members of the League is incompatible with the principle that all Members will be obliged to co-operate in enforcing respect for their engagements, recognises that Switzerland is in a unique situation, based on a \textit{tradition of several centuries} which has been explicitly incorporated in the \textit{Law of Nations}; and that the Members of the League of Nations signatories of the Treaty of Versailles have rightly recognised by Article 435 that the guarantees stipulated in favour of Switzerland by the ‘Treaties of 1815 ... constitute \textit{international obligations} for the maintenance of peace ...’\textsuperscript{47}”

Accordingly, one may well argue that by its formal recognition in treaties of 1919, the status of permanent neutrality of Switzerland became part of general international law opposable against all States irrespective of the lack of formal recognition on the part of certain States not party to Treaties concluded the first World War. The International Law Commission in its comment on the interaction of treaty with custom expressly referred to the treaties which established permanent neutrality of Switzerland as an example in which a treaty may subsequently become binding upon other States by way of custom\textsuperscript{48} In other words, the Commission considered that the permanent neutrality of Switzerland was part of customary law in 1960s and as such valid \textit{erga omnes}. A similar view has been expressed by some writers.\textsuperscript{49}


\textsuperscript{48} See Ch. IV (2.3.) above.

\textsuperscript{49} For instance, McNair in his book published in 1961 argues that the Treaty of 20 March 1815 which established permanent neutrality of Switzerland “now forms part of the public law of Europe and that the status created possesses universal validity, though the guarantee of that status binds only the actual guarantors.” \textit{(McNair’s Law of Treaties}, p. 260). See further \textit{Waldock’s 3rd. Rep. on Treaties}, p. 30.
1.4. Conclusion

From the examination of the history, the circumstances of the conclusion and the terms of the treaties involved, and evidence of State practice the following conclusions can be drawn concerning the status of permanent neutrality. Without any doubt the status of permanent neutrality of Switzerland was meant to be effective *erga omnes* and was capable of giving rise to similar rights and obligations for both parties and third States. However, there exists no conclusive evidence confirming that non-party States had to respect Swiss neutrality as a result of the 1815 Treaties nor is there, on the other hand, any evidence to the contrary. The Opinion of the Law Officers of the British Government indicates that, because such a status was made in the “general interest of Europe”, it had to be observed in all circumstances, thus impliedly suggesting that it was to be respected by all States from the outset. However, the position of the United States weakens this point of view, at least in so far as it concerned the non-European States. The general validity and respect accorded to Switzerland’s permanent neutrality prior to 1919 may well be accounted for the fact that almost all of the European States were treaty bound to that effect and the smaller nations were not yet treated as fully independent States. After 1919, the Swiss neutrality was formally recognised by a large number of States and was expressly incorporated into the realm of general international law binding on all States, including even future States. Thus, it is hard to draw any clear-cut conclusion from the case of permanent neutrality of Switzerland in support of the proposition that a status of permanent neutrality would automatically and *qua* treaty become binding on third States. It is worth adding here that according to some writers the Treaties of 1815 did not establish a new regime for Switzerland but “merely confirmed and perpetuated a state of affairs in existence for nearly three centuries ..”\(^5\) This surely sheds further doubts over the possibility of the 1815 Treaties having constituted, by its own force and without more, a status valid *erga omnes*.

A review of State practice and the manner by which States have sought to establish the status of permanent neutrality after the foundation of the United Nations indicate that, in fact, there is no duty on third States to respect any such status unless these States have somehow recognised it. The case of the permanent neutrality of Austria is a

\(^5\) Wicker, *op. cit.* above Ch. III (n. 99), p. 3; Ross, *op. cit.* above (n. 24), p. 42
good example. The so-called Moscow Memorandum of 15 April 1955, which envisaged the permanent neutrality of Austria, provided, *inter alia*, that Austria must (1) "make a declaration in a form which will oblige Austria internationally to practice in perpetuity a neutrality of the type maintained by Switzerland"; (2) "submit this Austrian declaration, .. to the Austrian Parliament for confirmation .."; and (3) "take all suitable steps to obtain international recognition of this declaration". On 26 October 1955, a Constitutional Federal Statute on the permanent neutrality of Austria was enacted in fulfilment of the obligation envisaged by point 2 mentioned above. Subsequently, Austria communicated this Statute to all States with which it had diplomatic relations asking for the international recognition of its permanent neutrality. This clearly shows that the Soviet Union and Austria were not convinced that there existed a rule in international law requiring third States to "recognise and respect" a status of neutrality. Otherwise, they would not have needed to take the steps which they did to obtain international recognition for Austria's permanent neutrality.

A similar trend can be seen in all the other cases. For instance, the parties to the Declaration on the Neutrality of Laos, while solemnly undertaking to recognise and to respect in every way the neutrality of Laos, appeal to "all other States to recognise, respect and observe in every way the sovereignty, independence and neutrality, and also unity and territorial integrity" of Laos and refrain from any action inconsistent with the provisions of the Declaration. Exactly the same words are found in the "Agreement concerning the Sovereignty, Independence, Territorial Integrity and Inviolability,

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53 A large number of States, including all the Permanent Members of the Security Council except China, responded positively to the Austrian Government's request. For detail see Kunz, *loc. cit.* above (n. 18), p. 420. A list of 57 States which recognised the Austrian neutrality is given in Ermacora, *Osterreuchs Staatsvertrag und Neutralität* (1957). On permanent neutrality of Austria see further authorities cited in n. 27 above.
54 Cf. Fitzmaurice's alleged general principle examined in Ch. IV (2.2.2.) above.
55 *Declaration on the Neutrality of Laos, loc. cit.* above Ch. III (n. 107).
56 Whiteman's Digest, vol. 1, p. 357, emphasis added.
Neutrality and National Unity of Cambodia". Again, in the case of the permanent neutrality of Malta, both Italy and Malta have individually pledged to "invite all other States to recognise and respect the sovereignty, neutrality, unity and territorial integrity of the Republic of Malta ... and to refrain from any action which is incompatible with those principles". Ronzitti, referring to this matter, rightly indicates that

"the aim of such an "invitation" is clear. Third States are not obliged by the unilateral declaration of neutrality. They are obliged to respect [Malta's] neutrality only if they recognise it through an ad hoc declaration. Malta's neutrality is opposable, then, only to the States which have recognised it."

Thus, it is possible to conclude that even if we were to assume that, prior to the foundation of the United Nations there was a rule of treaty law which allowed treaties establishing status of permanent neutrality to produce automatically binding effects for third States, that rule has changed and is no longer valid now. The contemporary State practice shows that a duty to respect a status of permanent neutrality stems from recognition rather than the particular nature of the treaty, which is not any more the only means by which status of permanent neutrality is established — the cases of Austria and Costa Rica show that such kind of status can be established by means of unilateral declaration.

This leads us to another conclusion, that is, that the question of permanent neutrality and its effect in international law is no longer, and probably has never been, a matter falling within the purview of the law of treaties. As stated before, treaties which have established the status of permanent neutrality, whether those concluded in the nineteenth century or those concluded in the recent years, contain no stipulations purporting to establish any right or obligation for third States. The alleged duty to respect

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57 Loc. cit. above Ch. IV (n. 60). In Article 4 party States

"call upon all other States to recognize and respect in every way the sovereignty, independence, territorial integrity and inviolability, neutrality and national unity of Cambodia and to refrain from any action inconsistent with these principles or with other provisions of this Agreement." Emphasis added.


59 See para. 3 of Malta's Declaration of Neutrality, as well as para. 3 of the Italian Declaration Recognising and Guaranteeing Malta's Neutrality. Both cited in Ronzitti, loc. cit. above Ch. IV (n. 169), pp. 188 and 189, respectively. It must be noted that Malta's Declaration only invites Mediterranean States to recognise and guarantee her neutrality by a declaration similar to that of Italy.

60 Ronzitti, loc. cit. above Ch. IV (n. 169), p. 193. For a similar point of view see Kunz, loc. cit. above (n. 18), p. 418.

61 See authorities cited in n. 31 above, especially Espiell (ibid.), at pp. 665-666.
and the alleged right to insist upon performance of that duty are incidental and arise from the situation of permanent neutrality and as such may more appropriately be dealt with from the standpoint of the law of neutrality or general international law rather than as a matter of "effects of treaties on third States". Accordingly, we may conclude that the case of permanent neutrality of Switzerland, and permanent neutrality in general, cannot be invoked in support of the existence of a special rule of treaty which allows certain kind of treaties to produce effects valid *erga omnes*.

2. The Regime of the Suez Canal

2.1. The legal history and status during 1854-1888

The legal history of the Suez Canal starts with the Concession which the Viceroy of Egypt granted to M. Ferdinand de Lesseps on 30 November 1854, to cut through the Isthmus of Suez a canal fit for ocean navigation. According to the terms of the *Firman* (decree) of Concession, the Universal Suez Maritime Canal Company under the direction of de Lesseps was to build the Canal. The grant was limited to 99 years from the day of opening of the Canal. According to article 6 of this Concession the rates of the transit charges of the Suez Canal was to be "always the same for all nations" and no special advantage was to be "ever stipulated for the exclusive benefits of any of them". On 5 January 1856, the Viceroy granted Lesseps a second Concession, which clarified, for all purposes, the one formerly granted in 1854. In Article 14 of this new Concession, the Viceroy of Egypt solemnly declared, for himself and his successors, that

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62 Up until the outbreak of the World War I, Egypt was a case of double or ambiguous sovereignty. Nominally, she was an autonomous Province of the Ottoman Empire, ruled by Khe­dive or Viceroy. The Khedives admitted the suzerainty of the Sultan of Turkey, to whom they paid an annual tribute. Any international engagement to which Egypt was a party had to be ratified by the Sultan of Turkey. At the outbreak of the World War I the British de­posed the unfriendly Khedive and established a definite status for Egypt by making her a British Protectorate. See *Handbook for the Diplomatic History of Europe, op. cit.* above Ch. II (n. 54), vol. 1, p. 145; 109 BFSP 436.


64 See *Moore’s Digest*, vol. 3, pp. 262-263.
"subject to ratification by His Imperial Majesty the Sultan, that the great maritime canal from 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 the other, 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."\(^{65}\)

As can be seen, the Concession was subject to the approval of the Sultan of Turkey (or the Ottoman Government). Before giving its consent, the Ottoman Government sent identical Despatches to London and Paris, stating the essential conditions for the solution of the Suez Canal question. In the despatch of 4 January 1860, the Ottoman Government stated that one essential condition was

"... the guarantees to be asked and obtained from the Great Maritime Powers, guarantees which must be accepted by all the High Powers, allies of the Sublime Porte, so as to secure the Government of the Sultan against the consequences of any conflict between these Powers, and to give to the navigation of the Canal a security based on the particular interests of Turkey, and on the general interest of Europe.\(^{66}\)

On 6 April 1863, in another Despatch sent to the same countries, the Ottoman Government stated that

"... when some years ago the Sublime Porte was informed of the Suez Canal question it reserved to itself the power of imposing its conditions on the other parties to the draft scheme which was submitted to it, and declared that it desired to see a previous understanding established between the two greatest Maritime Powers with regard to the external guarantees which the opening of so important a channel would demand... It does not enter into the mind of the Sublime Porte to wish to prevent the realisation of an undertaking which might be one of general utility. But it cannot consent to it except with the certainty of obtaining international stipulations which, as in the case of the Straits of the Dardanelles and Bosphorus, would guarantee absolute neutrality."\(^{67}\)

At this stage, the international stipulations envisaged by the Ottoman Government with regard to the neutrality of the canal had not materialised. The Sultan gave his official approval by a Firman issued on 19 March 1866 which incorporated the final Agreement of 22 February 1866 between the Viceroy and the Company. As a result, the only legal instrument guaranteeing freedom of navigation in the canal at the time of its inauguration in 1869, was Article 14 of the 1856 Concession, which had been expressly included and approved in the Sultan's Firman.

\(^{65}\) See The Society of Comparative Legislation, *op. cit.* above (n. 63), pp. 4-10; also reprinted in *Moore's Digest*, vol. 3, p. 262.

\(^{66}\) *Parl. Papers*, Egypt No. 20 (1883), C. 3734, pp. 6-7.

The questions of the status of the Suez Canal and the effect of these instruments are fully examined by writers. Obieta, examining the status of the Suez Canal during the period 1854 to 1888, states that the following views have been expressed on these questions. Some authorities have regarded these instruments, being acts of internal government and not concluded between persons of international law, without any value for the purpose of international law and have categorically denied any international character to the Canal. Accordingly, they have considered that "the passage of ships was not a right but a privilege granted by the Ottoman Empire to other nations". A second view, while accepting that international rights can be established by means of unilateral declaration, have considered that in the case of the Suez Canal a limitation could not lightly be inferred from the terms of the Concessions. A third view has maintained that all the States acquired, by the Concessions, a right to use the canal vis-à-vis the territorial sovereign, but that owing to the unilateral character of the declaration, the regime thus established did not offer the same guarantees for the users of the canal as if it had been the result of a mutual undertaking. Obieta, examining this question in detail, indicates that

"the lengthy negotiations .. between the Ottoman Government and the Governments of other States, have shown beyond peradventure the Sultan's intention of concluding international conventions that would guarantee absolute freedom of navigation in the canal to merchant vessels... [W]hen he decided to grant the Firman and with it accepted the 1856 Concession, he ipso facto also accepted the declaration of Article 14 and gave its full meaning, which was so much in accord with his intention at the time. On the other hand, ... there was thus established a tacit understanding between both parties [Turkey and European Powers], whereby the rights granted by Sultan and so clearly

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71 Obieta cites P. Visscher (Les Aspects Juidiques Fondamentaux del la Question de Suez, RGDIP 29 (1958-III), pp. 400-443, at p. 405) as having expressed this view. See Obieta, op. cit. above Ch. II (n. 94), p. 49.
expressed in the declaration of Article 14 were quietly accepted by the other States. When at long last the canal was inaugurated in 1869 ... no government made any request for a formal convention, for everyone of them knew exactly where it stood with regard to the canal. And there the matter lay for a number of years, and might have lain even longer had not the British occupation of Egypt made the Constantinople Convention of 1888 a practical necessity."

Obieta strengthens his view by invoking the fact that, on 1 January 1873, the Ottoman Government invited all the Great Powers to establish a commission which would determine the rules for measuring the tonnage of all vessels passing through the canal and fixing the tolls to be exacted from them. To deal with these matters, a Conference was held at the end of the year 1873. A declaration, made by the Ottoman Delegate to the assembled representative, stated that

"It is understood that no modification, for the future, of the conditions for the passage through the Canal shall be permitted, whether in regard to the navigation tolls or the dues for towage ... etc., except with the consent of the Sublime Porte, which will not take any decision on this subject without previously coming to an understanding with the principal Powers interested therein."

This declaration was inserted verbatim in the Final report of the Conference, which was "unanimously adopted" at its last session, and thus became the standard norm accepted by all for the handling in the future of all problems connected with the canal. Referring to this declaration, Obieta argues that

"the conclusion, then seems inescapable that the express granting of rights to the Powers, made by the declaration of the Ottoman Government, presupposes former rights of transit, enjoyed by the international community, to which the new ones are now spontaneously added by the Sublime Porte."

Accordingly, Obieta concludes that by Article 14 of 1856 Concessions (cited above):

"... the Viceroy of Egypt, and later on the Sultan of Turkey, was addressing himself to the nations of the world, to which he was offering a right of passage through the Canal. ... Once the offer was tacitly accepted by the Powers, Article 14 without losing its internal character became the object of an international transaction. The Article had thus given rise to international rights, which transcend, without transmuting, the

73 Obieta, op. cit. above Ch. II (n. 94), p. 54.
75 Obieta, op. cit. above Ch. II (n. 94), p. 55. At this Conference, the rule was officially established that vessels of war were to have in the future the right to pass through the Canal, although this was purposely excluded by the Sultan from all the Concession. See Handbook for the Diplomatic History of Europe, op. cit. above Ch. II (n. 54), vol. 1, p. 105; Obieta, op. cit. above Ch. II (n. 94), p. 58.
76 Obieta, op. cit. above Ch. II (n. 94), p. 56.
essentially private nature of the act of Concession. In the future, the territorial sovereign of the Canal would have, with regard to freedom of navigation, a double obligation, one of a private nature vis-à-vis the Company, and another of an international character toward the international community.”

Based on properly examined and well documented facts, Obieta’s view seems to be convincing. It is quite appropriate to suggest that there was a right of transit in the Canal for merchant vessels of all States in peace-time. A statement made by Mr Gladstone in the House of Commons on 23 July 1883, after the British had been in occupation of Egypt for a year, clearly underlines the accuracy of this viewpoint:

“I wish to announce that we cannot undertake to do any act inconsistent with the acknowledgement … that the canal has been made for the benefit of all nations at large, and that the rights connected with it are matters of common European interest.”

Whether or not the canal was to be treated as a “neutral passage” was not yet clear. Article 14 of the Concession proclaimed the canal open forever as a “neutral passage”. Although the Ottoman Government tried to procure a kind of “international stipulations which, as in the case of the Straits of the Dardanelles and Bosphorus, would guarantee absolute neutrality” for the Canal, such stipulations was not substantiated — though the Governments of France and Great Britain (both having particular interests in the Suez Canal Company) were in favour of such an idea. However, from the time of its inauguration, the neutrality of the canal was de facto respected. During the Franco-Prussian War in 1870, ships of war as well as merchant ships of both belligerents were permitted to pass through the canal in accordance with the rule in Article 14 of the 1856 Concession cited above. In a similar manner, at the time of the Russo-Turkish War in 1877 (one of whom was the territorial sovereign of the Canal), the canal not only remained open to the merchant vessels of belligerents but even to their

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77 What was the basis of the right is not important to our inquiry which is to consider the Suez Canal’ regime under the 1888 Convention, but one may freely invoke the tacit agreement theory suggested by Obieta or, alternatively, relies on the theory of unilateral declaration as it is recently confirmed by the International Court of Justice in the Nuclear Test Cases (loc. cit. above Ch. II (n. 62)), in order to establish the right of passage through the canal prior to the 1888 Convention. See Baxter & Triska, op. cit. above Ch. I (n.143), pp. 182-183. See further authorities cited in Ch. II (n. 62) above.

78 Cf. Avram, op. cit. above (n. 70), p. 31; Khadduri, loc. cit. above (n. 70), p. 149.

79 Obieta, op. cit. above Ch. II (n. 94), p. 56, emphasis added.

80 Loc. cit. above (p. 248).

81 See Wilson, op. cit. above (n. 68), pp. 89-90. See also the British proposal cited in p. 252 below.

82 Obieta, op. cit. above Ch. II (n. 94), p. 58; Avram, op. cit. above (n. 70).
warships. Great Britain gave notice to both parties that any attempt to blockade or otherwise to interfere with the canal or its approaches would be regarded by the British Government as a grave injury to the commerce of the world. The Turkish reaction to the British Government's note is not known. But the Russian replied that

"The Imperial Cabinet will neither blockade, nor interrupt, nor in any way menace the navigation of the Suez Canal. They consider the canal as an international work, in which the commerce of the world is interested, and which should be kept free from any attack."

Consequently, no act of hostility took place in the canal or its approaches, either out of respect for the status of the canal or out of the fear of the British Navy. The British note and the Russian response well indicate a tendency that, despite not having already been placed under a regime of neutralisation, the canal was to be treated as a "neutral passage" and was not to be attacked or blockaded in the interest of the commerce of the world.

However, the Arabi's rebellion of 1882 changed all this. In order to protect the Canal, Great Britain sent an expeditionary force to Egypt, closing the canal for a short time, and thereafter remained in military occupation. In 1883 the British Government proposed to the European Powers an agreement "to put upon a clearer footing the position of the canal for the future". At the same time, they suggested the following proposals to the principal European Powers that

"1. The canal should be free for the passage of all ships in any circumstances.
2. In time of war, a limitation of times as to ships of war of a belligerent remaining in the canal should be fixed, and no troops or munitions of war should be disembarked in the canal.
3. No hostilities should take place in the canal or its approaches, or elsewhere in the territorial waters of Egypt, even in the event of Turkey being one of the belligerents.
4. (2) and (3) not to apply to measures necessary for the defence of Egypt.
5. Any Power whose vessels of war happen to do any damage to the canal should be bound to bear the cost of immediate repair.
6...
7. No fortifications should be erected on the canal or its vicinity."

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83 Wilson, op. cit. above (n. 68), p. 90.
84 See Parl. Papers, Russia No. 19 (1877), C. 1770, p. 1; British Digest, vol. 2b, pp. 230-231.
85 Ibid., emphasis added.
86 British Digest, vol. 2b, pp. 249-257.
87 See Earl Granville's Circular of 3 January 1883, Parl. Papers, Egypt No. 2 (1883), C. 3462, p. 34, also reproduced in 75 BFSP 676-679.
8. Nothing in the agreement shall be deemed to abridge or affect the territorial rights of Egypt further than is therein expressly provided.*

Nothing came of this proposal. On 17 March 1885, the Powers signed the Declaration of London relative to the Free Navigation of the Suez Canal, in which they

"agreed to recognise the urgent necessity for negotiating with the object of sanctioning, by a Conventional Act, the establishment of a definitive regulation guaranteeing at all times, and for all Powers, the freedom of the Suez Canal."*

As a result of this Declaration an International Commission convened in Paris, on 30 March 1885, and drew up a draft Treaty, which with slight modification became the Constantinopole Convention.* The British Government agreed to this draft Treaty subject to a general reservation,

"as to the application of its provisions in so far as they would not be compatible with the present transitory and exceptional condition of Egypt, and might fetter the liberty of action of Her Majesty's Government during the occupation of Egypt by the force of Her Britannic Majesty."*

Due to a change of Government in Britain, the question of Suez Canal was put aside till 1887 when it was raised again at Constantinopole. After lengthy negotiations, the Constantinopole Convention was signed on 29th October 1888 by nine States — Austria-Hungary, France, Germany, Great Britain, Italy, Holland, Russia, Spain and Turkey.*

To sum up, the history of the Suez Canal prior to the 1888 Convention indicates that the canal was under a sort of international regime, based on the Concession granted by the Egyptian Viceroy, confirmed by Sultan of Turkey and tacitly agreed by the European Powers, in which the right of free passage was guaranteed for the merchant vessels of all nations. The canal was not yet under any regime of "neutralisation" or "international guarantee".* However, there was a tendency to consider the canal as a

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* Dispatch dated 3rd. January 1883, Parl. Papers, Egypt No. 10 (1883), C. 4305; also cited in Wilson, op. cit. above (n. 68), p. 91.
* Parl. Papers, Egypt No. 6 (1885), C. 4339, p. 9.
* For a general overview of the different position of the European Powers which participated in this Conference see: Obieta, op. cit. above Ch. II (n. 94), pp. 64-65; Wilson, op. cit. above (n. 68), pp. 89-93.
* For a complete review of the question of neutralisation of the Suez Canal prior to the conclusion of the Constantinopole Convention 1888 see British Digest, vol. 2b, pp. 208-221 and 257-263.
"neutral passage", though there is no conclusive evidence that the passing of merchant vessels in war-time, as well as warships in time of peace and of war, which took place during the wars in 1870 and 1877, was allowed as a matter of law. As Obieta put it,

"the status of Suez Canal before 1888 may be described as a practical blending of law and usage; a legal regime of internationality, guaranteeing freedom of transit for merchant vessels in time of peace, to which certain other practice were added by tolerance of the territorial sovereign. For a number of years the system worked tolerably well, until the crisis of 1882 showed how frail and unsatisfactory it really was. It then became evident that a Convention was needed to "complete" the legal regime already in existence by adding to it a new one — not of tolerance and usage but of law — in order to give to the canal the "definitive system", as a result of which all vessels of all nations would be assured at all times of free passage through the Canal."

2.2. The regime established by the Constantinopole Convention 1888

As indicated earlier, what mainly prompted the conclusion of a convention was to complete a "system" derived from the Concessions, which, moreover, needed to be placed on a more "clear footing". The Preamble of the Convention illustrates this in the following words

"... [the Powers] desirous of establishing, by a 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 to 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, ...").

In securing these objectives, Article 1 (para. 1) provides, as a basic principle, that

"the Suez maritime Canal shall always be free and open, in time of war as in time peace, to every vessel of commerce or of war, without distinction of flag." The Convention thus broadened the right of passage — which was, under the old regime, recognised for only merchant vessels in peace-time — to include both merchant and war vessels in peace- and war-time. Certain conditions, however, are attached to the passage of both war and merchant vessels. Sanitary measures in force in Egypt have to be respected (Article 15); dues are to be paid before a passage is authorised (though

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94 According to Obieta, "the passing of merchant vessels in time war, as well as warships in time of peace and of war, which had taken place ... must be considered the result of a system of tolerance and mutual understanding rather than of law." Obieta, op. cit. above Ch. II (n. 94), p. 64.

95 Obieta, op. cit. above Ch. II (n. 94), p. 64, emphasis added. The ending sentences refers to the Preamble to the Constantinopole Convention of 1888, loc. cit. above (n. 92).

96 Emphasis added.

97 Emphasis added.
this is not specified in the Convention). Moreover, particular restrictions are envisaged for war vessels and the manner in which they may conduct their passage in different circumstances. For instance, in time of war, “vessels of war of belligerents shall not take on fresh supplies or lay in stores in the canal and its ports of access, except in so far as it may be strictly necessary” (Article 4); their passage “shall be effected as quickly as possible ... and without stopping except for the necessities of the service”; their stay at Port Said and in the roadstead of Suez shall not exceed twenty-four hours, except in case of distress. In such a case they shall be bound to leave as soon as possible. An interval of “twenty four hours shall always elapse between the sailing of a belligerent ship from one of the ports of access and the departure of a ship belonging to the hostile Power”. In time of war, belligerent Powers shall not “discharge or take on either troops, munitions, or war materials in the canal and its ports of access ”(Article 5).

To insure the principle of freedom of navigation, the Convention envisages several provisions which in effect “neutralised” the Suez Canal: a status contemplated earlier but which had not materialised. The parties “agree not in any way interfere with the free use of the Canal, in time of war as in time of peace” (Article 1, para. 2). They undertake “not to interfere in any way with the security of .. [the] Canal and its branches, the working of which shall not be the object of any attempt at obstruction” (Article 2) and “to respect the equipment, establishments, buildings and work of the Maritime Canal ...”(Article 3). Most importantly, as a general principle, Article 4 proclaims that

“the Canal remaining open in time of war as a free passage, even to ships of belligerents even to ships of war of the 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 a radius of 3 nautical miles from those ports, even though the Ottoman Empire should be one of the belligerent Powers.”

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98 This was specifically dealt with in Article 17 of 1856 Concession, loc. cit. above (n. 65).
99 Article 4.
100 Ibid.
101 Ibid.
102 See pp. 250-254 above.
In addition, Article 1 (para. 3) categorically declares that “The canal shall never be subjected to the exercise of the right of blockade.” For the purpose of further consolidation of the regime of neutrality, Articles 7 and 11, respectively, prohibit completely stationing of war ships, building or possessing of military bases, and erection of any permanent fortifications on the Canal zone, though no mention is made of stationing of troops. Besides, as stated above, certain restrictive measures are to be followed with respect to the passage of warships in war-time. The measures regarding the security and neutrality — except the provision concerning non-blockade — of the Canal (embodied in Articles 4, 5, 7, and 8) are not, however, to stand in the way of the measures necessary either for enforcing the execution of the Convention, or for the “defence of Egypt and maintenance of public order”. However, these measures “shall not interfere with the free use of the canal” (Article 11); in addition, Signatory Powers of the Declaration of London (1885) are to be given notice of any such measures (Article 9, para. 2).

The provisions of Articles 8, 9, and 10 envisage a system of international supervision, according to which the Agent of the parties in Egypt are charged to watch over the execution of the Convention and to inform the Egyptian Government of any danger that may threaten the security and free passage of the Canal. According to Article 13,

“ Aside from the obligations expressly provided for by the clauses of the ... [Convention], the sovereign rights of His Majesty the Sultan and the rights and immunities of His Highness the Khedive based on the Firmans are in no way affected.”

Finally, in Article 16 the parties

“undertake to bring the present Treaty to the knowledge of those States which have not signed it, inviting them to accede thereto.”

2.2.1. Entry into force of the 1888 Convention

According to Article 17 of the 1888 Convention instruments of ratification were to be exchanged “within a month or sooner if possible”. It is doubted, however, if the

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103 Article 9, emphasis added.
104 Article 10, emphasis added.
105 See p. 256 above.
106 According to Article 8, the Agents in Egypt of the Signatory Powers were charged with watching the execution of these provisions. They especially entrusted with the duty to demand the removal of any installations and dispersion of any assemblies which ... might have the aim or consequence of violating the freedom and full security of navigation. As mentioned in the text which follows, the British Government when formally withdrawn its objection to coming into force of the 1888 Convention, excluded the coming into force of the provisions of this Article.
Convention came into force upon the exchange of ratifications. This is because British delegate reserved the right of his Government regarding the whole Convention for as long and in so far as its terms were inconsistent with the exceptional and transitory period of the British occupation of Egypt. The reservation was to end on the evacuation of Egypt by British troops or through unilateral renunciation by Great Britain. According to the interpretation given at the time by France and approved by the British Minister, the effect of the reservation was to suspend the application of those provisions only that were incompatible with the actual situation in Egypt. Lord Curzon, however, speaking to the House of Commons on 12 July 1898, stated that “the Convention ... is certainly in existence, but .. has not been brought into practical operation”. The Anglo-French Declaration of 1904 respecting Egypt and Morocco would seem to confirm this last interpretation. Article 6 of the Declaration stipulated that

“In order to ensure the free passage of the Suez Canal, His Britannic Majesty’s Government declare that they adhere to the stipulations of the treaty of 29th October 1888, and that they agree to their being put in force.”

However, as will be seen, Great Britain seemed, in practice, to have considered the Convention as valid, at least from 1898 when Lord Salisbury on behalf of the British Government interpreted it as if it was in force. Whatever be the correct date of the entry into force of the Convention, by Article 6 of the Anglo-French Declaration 1904, and similar stipulations agreed with the other Powers, Great Britain formally agreed to the 1888 Convention though with a partial alteration — according to Article 6 of the

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108 See Obieta, op. cit. above Ch. II (n. 94), p. 71.

109 Moore’s Digest, vol. 3, p. 266.

110 Declaration between France and Great Britain respecting Egypt and Morocco, London, 8 April 1904; 195 CTS 198; UKTS 24 (1911), Cmd. 5969, emphasis added.

111 See Broms, B., The Legal Status of the Suez Canal (1961), p. 61; Obieta, op. cit. above Ch. II (n. 94), pp. 70-71.

112 On 8 August 1904, the British Government announced that they had made agreements with Germany, Austria-Hungary and Italy similar to that made with France. See Handbook for the Diplomatic History of Europe, op. cit. above Ch. II (n. 54), vol. 1, p.145.
Anglo-French Declaration, the stipulation in Article 8 of the 1888 Convention concerning the regime of supervisions should “remain in abeyance”.

2.2.2. The effects on third States

As stated above, the 1888 Convention completed the imperfect regime of the Suez Canal as was established by the Concessions and grew through practice during the period 1869-1888. Under the old regime, Turkey, as the suzerain of Egypt, was bound to allow merchant vessels of all States to use the canal in peace-time. In return, these States were not under any obligation vis-à-vis Turkey except to make sure that their vessels complied with conditions attached to the right of passage. The 1888 Convention changed all that. In Article 1, it stipulated categorically that the “Canal shall always be free and open, in time of war as in time peace, to every vessel of commerce or of war, without distinction of flag.” On the other hand, having guaranteed that the canal must remain open in time of war, even to vessels of belligerents, it provided 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 ...”. As can be seen, these provisions are formulated in general (objective) terms (as is the prohibition relating to the non-blockade of the canal and the obligations relating to the manner that warships can use the canal in time of war). From the terms of the treaty and the circumstances of its conclusion, it is clear that the parties intended the general provisions of the Convention, or the regime established, to be binding on all States. This conclusion may further be warranted by the fact that a regime of neutralisation could hardly materialise if it were not to be respected by all States, and the fact that the Convention was to be communicated to non-signatory States for the purpose of accession.

Thus the 1888 Convention can be seen as affecting third States in three ways. First, it appears to grant them a right to use the canal for the passage of their merchant and war vessels in all circumstances, even if they were at war with Turkey: a right which was, under the old regime, limited to merchant vessels and only in peace-time. Secondly, it seems to impose upon them an obligation to respect the neutrality of the

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113 The provisions in full read:
“The free passage of the Canal being thus guaranteed, the execution of the last sentence of paragraph 1 as well as of paragraph 2 of article 8 of that treaty will remain in abeyance.”

114 Broms, op. cit. above (n. 111), p. 111.
canal in all circumstances, and consequently to refrain from committing any war-like
acts in the canal and its approaches, even in the case of a war being waged against Tur-
key. Finally, from the obligation to respect the regime of neutrality, there arises for
third States, incidentally, a right to the performance of the very same obligations by the
parties or other third States and an obligation (when belligerent) not to demand Turkey
(when neutral) to observe her neutrality by preventing passage of belligerent warships.
As was seen earlier on, in the S.S. Wimbledon case, the PCIJ appeared as if it re-
garded that the 1888 Convention and treaties concerning the Kiel and Panama canals do
produce these kinds of effects for third States. Accordingly, it may appropriately be
argued that although certain provisions in the Convention are meant to be applicable
only to Turkey and the parties (or a certain group of them), the Convention can pro-
perly be seen as intended to establish a permanent regime or status for the Suez Canal
involving similar rights and obligations for both States party and third States, as
claimed by the advocates of the doctrine of “objective regimes”. It fully fits into Wal-
dock’s definition of “objective regimes”: there existed a clear intention to create a re-
gime of general rights and obligations in the general interest with the consent of the
territorial sovereign. How this regime was to, or could, become binding on third States
is a question which is the main purpose of our inquiry here.

115 See Ch. I (1.6.) above.
116 See Sec. 3.3.1. below as well as Ch. I (1.6.) above.
117 For instance, Article 9 and 10 required the Ottoman Government to give notice to “Signa-
tory Powers of the Declaration of London of 17 March 1885” of the measures taken for en-
forcing the execution of the Convention or of the measures taken for the “defence of Egypt
and maintenance of public order”.
118 Article 14 of the 1888 Convention specifies that “... the engagements resulting from the pre-
sent Treaty shall not be limited by the duration of the Act of Concession of the Universal
Suez Canal Company” which was to be expired 99 years after the inauguration of the Canal
(i.e., in 1968).
119 The PCIJ in the S.S. Wimbledon, loc. cit. above Ch. I (n. 66), p. 22; McNair’s Law of Trea-
120 By undertaking to communicate the Convention to third States and to invite them to accede
to it, the parties seem to consider that an objective validity or effect could ensue through
third States’ accession. This may cast doubt as to whether the parties intended to see other
States legally affected by means other than “accession”. However, as no such invitations
were actually sent away, no clear conclusion can be drawn from this accession clause. Cf.
Baxter & Triska, op. cit. above Ch. I (n. 143), p. 179; Roxburgh, op. cit. above Ch. I (n. 25),
pp. 49-51.
Earlier on, we observed that the formula in Article 36 of the Vienna Convention, while capable of explaining automatic creation for third States of the right to use the canal for passage of their vessels, cannot explain the automatic effect for third States of the obligations relating to the neutrality and non-blockade of the canal — for these obligations are meant to operate independently of the right of passage and cannot be considered as conditions for the exercise of that right. Accordingly, the doctrine of "objective regimes" may present itself as a means which can possibly justify these effects. However, it is the very existence of this doctrine which is in question here. The appropriate question is, therefore, whether or not in actual practice States parties to the 1888 Convention and third States have acted under the impression that the regime established by the 1888 Convention was, *ab initio*, binding on third States by its own force and without more, as is claimed by the advocates of the doctrine of "objective regimes". This doctrine may then be considered as warranted if we could find sufficient evidence indicating that the parties, in subsequent practice, have considered third States entitled, *ab initio*, to the use of the canal *in all circumstances* and, at the same time, bound to observe the obligations relating to the neutrality and non-blockade of the Canal. The ultimate test is, however, the reaction of the third States themselves. They must also appear to act as if they were entitled to claim such a right and/or were bound to observe those obligations.

### 2.2.3. Evidence of State practice

#### 2.2.3.1. From 1888-1913

Hardly any evidence is to be found in the digests of State practice during the first decade after the conclusion of the 1888 Convention in which reference is made to the question of the validity and effects of the regime established by that Convention.

**a. The United States inquiry (1898).** The Spanish-American War in 1898 furnished the first test in which the point in question was directly addressed — though, as was seen, the Convention was not yet fully in force. On June 25 1898, the United States, which was not a signatory to the 1888 Convention, caused inquiries to be made of the British Government, through its Embassy in London, concerning the latter’s

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121 See Ch. III (3.2.) above.

122 See Sec 2.2.1 above.
attitude toward the use of the Suez Canal for the passage of United States warships. \(^{123}\)
The United States Ambassador reported back the results of his interview with the Brit­ish Foreign Minister in the following words,

"I gathered from his remarks that he had no idea that any power would make any pro­test against our use of the Canal, nor that any protest would hold if it were made. The attitude of the British Government is that we are unquestionably entitled to the use of the canal for warships."\(^{124}\)

In its acknowledgement of the receipt of the Ambassador’s report, the United States Department of State, describing the object of its inquiry, indicated that

"1. It was desired to avoid even the possibility of objection being made to the use of the canal by our ships of war ...
2. The Department, while recognising the general and unrestricted purpose of the con­vention of October 29, 1888, was not disposed wholly to rely upon it or formally to ap­peal to it, since the United States was not one of the signatory Powers.
3. The Department was not disposed, by formal appeal to the convention, to recognise a general right on the part of the signatories to say anything as to the use of canal in any manner by the United States."\(^{125}\)

The following conclusion can be drawn from these views. As suggested by Obi­eta, it is hard to believe that the United States Government would have made such an inquiry if they had been under the impression of bearing rights and obligations under the 1888 Convention by the force of the Convention and without more. On the other hand, the British response may well be interpreted as signifying the conviction that third States were entitled to use the canal on the basis of the 1888 Convention, though it is not clear whether these States enjoyed such a use as a right or as a mere benefit.\(^{126}\)

The British response also indicates indirectly that the neutrality of Egypt was not im­paired by permitting the warships of the United States in its war against Spain, one of the signatory Powers,\(^{127}\) but it does not indicates whether or not third States were bound by the obligations arising from the regime of neutralisation and prohibition of the blockade. However, the second paragraph of the Department of State’s acknowledge­ment casts grave doubts as to third States’ rights arising from the Convention. It makes

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\(^{124}\) Ibid. emphasis added.

\(^{125}\) Moore’s Digest, vol. 3, p. 267, emphasis added.

\(^{126}\) For the different meanings of these two phrases see Ch. I (2.2.), Ch. II (2.2.2.2.1.) and Ch. III (2.2.) above and Sec. 3.1.1. and 3.3.4. below.

\(^{127}\) Twenty years later, this was pointed up by the Permanent Court in the Wimbledon case (see Ch. 1 (1.6.) above).
it clear that the United States did not consider itself entitled to invoke the Convention, for the fact that she was not a signatory thereto. This position of the United States rejects not only the possibility of the 1888 Convention being seen as having constituted an "objective regimes" but also undermines the possibility of it having created rights in favour of third States. Paragraph 3 of the acknowledgement reinforces this conclusion by rejecting the authority of the States signatory to the 1888 Convention with respect to the use of the canal by the United States. This paragraph may further be interpreted as rejecting the possibility of the 1888 Convention to create any obligation for the United States. As concluded by Obieta:

"In the opinion of the American Government then, non-signatory powers were believed to be in quite a different position from the signatories, and their rights and obligations, in a rather vague and ill-defined state. Such an opinion is not compatible with a belief in the binding character of the Convention as an international Settlement [i.e., objective regime]."

b. The Russo-Japanese War (1904). The outbreak of hostilities between Russia and Japan in 1904 put the 1888 Convention again on trial. On 10 and 12 February 1904, the Egyptian Government published regulations on a policy of neutrality in regard to both belligerent parties, one of whom (Japan) not a party to the 1888 Convention. It also enacted some Rules regarding Coaling by Belligerent Warships in the Suez Canal, which were based on the provisions of the 1888 Convention. These regulations were equally applied to both belligerents. The British authorities allowed Russian warships to pass through the canal, despite the fact that they were on their way to fight Japan, Great Britain's ally. From this it may be concluded that Great Britain and Egypt considered that Japan had a right to pass and that letting Russian warships pass did not compromise Turkey and/or Egypt neutrality vis-à-vis Japan. In other words, Great Britain and Egypt seem to have thought that the regime of the canal was opposable to Japan, since otherwise Turkey and/or Egypt would have been in breach of their neutrality vis-à-vis Japan. As was stated earlier on, the Permanent Court recognised in the

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128 Obieta, op. cit. above Ch. II (n. 94), p. 79.
129 102 BFSP 592. There is nothing on record as to the position of Japan with regard to the 1888 Convention.
131 *British Digest*, vol. 2b, pp. 271-279; *Hackworth's Digest*, vol. 2, p. 825.
132 See Ch. I (1.6.) above.
Wimbledon case this exceptional situation in the case of international canals dedicated to international navigation. However, since there is no evidence as to Japan's position in any of these matters, the most that can be said is that there was a belief on the part of Great Britain and Egypt that the neutral status of the canal was opposable against Japan in the sense that this country could not consider Egypt in breach of her neutrality for letting Russia's war vessels pass through the Suez Canal.

c. The Italo-Turkish War of 1911-1912. The war between Italy and Turkey provided another test for the Convention. Five Turkish gunboats, which failed to leave Port-Said after 24 hours, as required by the Convention (Article 4), were boarded and disarmed by the Egyptian authorities without any protest being made by Turkey. However, the fact that both belligerents were party to the 1888 Convention makes this case irrelevant to our inquiry.

Summary. Summing up the practice of States before the World War I, it may be concluded that, during the period between 1888-1914, the Constantinopole Convention was generally observed and enforced in time of peace as well as in time of war: no merchant or warship, belonging to States parties or third States, were denied passage; nor did any State commit acts contrary to the neutral status of the Canal. Moreover, Great Britain appeared to act in the belief that the passage of a belligerent's warships would not compromise the neutrality of Egypt. However, there is no evidence to show that non-signatory States had accepted the 1888 Convention as having established an "objective regime"; nor is there any evidence to show that they acted under the conviction that they were, ab initio, bound by its provisions or derived rights from it. The American inquiry clearly shows that country, a third State with regard to the 1888 Convention, was not ready to give effects to that Convention — at least at the time when the inquiry was made. As Obieta rightly put it,

"If, generally speaking, they [third States] believed in their right to navigate the Canal, the belief was ill-founded in so far as it was wholly divorced from the other provisions of the Convention, especially those on neutralization, and must rather be considered the result of a usage of long standing, confirmed in their minds later on by Article 1 of the 1888 Convention."

Obieta, op. cit. above Ch. II (n. 94), p. 80.
Considering that during the Franco-Prussian War in 1870 and the Russo-Turkish War in 1877 warships of all belligerents were allowed passage, without such passage being considered as compromising Egypt neutrality and that the Constantinople Convention was mainly stipulated or crystallised the previously accepted rules or usage, it can well be argued that general observation of the terms of the Constantinople Convention during the period in question was most probably out of respect for a customary law which was growing up rather than the nature of the Constantinople Convention.

2.2.3.2. From 1914-

2.2.3.2.1. During the two World Wars (1914-1945)

The terms of the Constantinople Convention were seriously broken for the first time in 1914 when the First World War broke out. For several days, before Great Britain entered the War on the side of France, the Egyptian government faithfully respected the terms of the Convention. Belligerent vessels were allowed to enter the canal without interference. Things, however, changed when Great Britain joined the war. Certain measures were taken regulating the movement and behaviour of vessels in Egyptian ports. A Declaration issued by the Egyptian Government on 5 August 1914, allowed British naval and military forces to exercise acts of war on Egyptian territory and in the harbours, while the ships captured or the goods seized could be brought to judgement before British Prize Courts. The right of British forces to commit acts of war in Egyptian harbours was, however, interpreted as subject to Articles 4, 5, 7 and 8 of the Constantinople Convention. Nevertheless, in practice the Egyptian authorities ordered that the canal should be cleared of enemy shipping. Protection of the canal and fear of sabotage were invoked as justification for that act. Twelve German and three Austrian vessels, which shortly upon the outbreak of the war were within the Egyptian territorial waters, were first requested to leave voluntarily. They refused as they faced apparent capture by British warships. Eventually, they were taken outside the three-mile limit and were captured in Prize and brought back to be tried by the British Prize Court. This procedure did not constitute a formal violation of the terms of the Constantinople

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134 Declaration issued by the Presidency of the Egyptian Council of Ministers on 5 August 1914, cited in Avram, op. cit. above (n. 70), p. 83.
135 Article 13 of Egyptian Declaration, ibid.
136 For an analysis of the judgements of the Prize Court see Avram, op. cit. above (n. 70), p. 90.
Convention as "hand of violence", which constituted an act of war, was exercised outside the canal waters. However, it violated the spirit of the Convention as it rendered impossible transit of all ships at all times, without discrimination.

In a note dated 23 October 1914 addressed to representatives of the Naval Powers in London, the British Government stated that it could not admit that the conventional rights of free access to the canal and its ports should be abused by the waterway being used as a place of refuge to escape capture. They explained that the obvious result of such a course would be to hamper and even stop the use of the canal by other ships. They maintained that the Egyptian Government had been justified in the steps it had taken to remove enemy vessels from the Canal. In a series of decisions delivered by the British Prize Court of Egypt, the measures taken by the Egyptian authorities and the acts of war committed in carrying them out were justified on grounds similar to that given by British Government in their note of 23 October 1914. Having examined various decisions of the British Prize Court, a commentator concludes that

"The interpretation given to the Constantinople Convention by the British Prize Court resulted in the "de facto" exclusion of certain ships [i.e. enemy ships] from the Canal. This could hardly be regarded as acts not intended to obstruct the free use of the Canal."  

The apparent observance of the Convention by the British authorities in the early stage of the war did not, however, last long. On 5 November 1914, when the Ottoman Empire entered the war on the side of the Central Powers, Egypt joined the Entente and allowed Britain to exercise all rights reserved by the Constantinople Convention to the territorial Power (i.e. Turkey). Later on Great Britain declared war against Turkey and

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137 See the decision of the British Prize Court, cited in Avram, op. cit. above (n. 70), p. 88.
139 108 BFSP 154.
140 Ibid. Further see Avram, op. cit. above (n. 70), p. 85.
141 In the SS/ Gutenfels case, the Prize Court held that “the object of the Convention is to ensure a free passage through the Canal, and nothing else, and all prohibitions against acts of hostility within the Canal precincts are framed with that object and that alone”. (See B.C. Prize Cases (1916), vol. 1, p. 111, confirmed later by the Privy Council, ibid., vol. 2, p. 43). Obieta referring to this passage concludes that “it follows that, if the Convention was not applicable, the Canal and its ports of access reverted, in all respects, to their original positions as parts of Egypt, and consequently, were to be considered “enemy territory” as far the Central Powers were concerned, since Great Britain was in occupation of Egypt”. See Obieta, op. cit. above Ch. II (n. 94), pp. 81-82.
142 Avram, op. cit. above (n. 70), p. 91, emphasis original.
unilaterally terminated the suzerainty of Turkey, and proclaimed her Protectorate, over Egypt. British land forces and the Allied navies heavily fortified the Canal, turning it to one of the most formidable defence lines in the Middle East. In return, Turkey while attacking the Canal, accused Britain of violating provisions of Articles 1, 8 and 11 which prohibited act of war in the Canal. The British Government considered itself a successor to Turkey and thus entitled to take measures necessary for the defence of Egypt as were permitted by Articles 9 and 10 of the Constantinople Convention of 1888. It thus construed these Articles as authorising Great Britain “to deny passage of the Suez Canal to all enemy ships, be they commercial or military vessels”.

As can be seen, although Egyptian and British Authorities tried to keep the letter, if not the spirit, of the Convention, at least in early stages of the War, the regime of free navigation for all was not respected. Nor were the provisions on neutrality and non-fortification of the Canal. However, apart from the Central Powers’ protest, there is no evidence as to the position of other States with regard to the measures taken by the Egyptian and British Authorities. Nor any evidence can be found indicating the position of these States with regard to the interpretation placed upon its provisions. It may freely be concluded that there was a general acquiescence in the measures taken, or interpretation given, though they might have been in contradiction to the terms 1888 Convention.

In 1922, as the power of the Egyptian nationalist movement was growing, Great Britain reservedly declared Egypt as an independent sovereign State. By the

108 BFSP 185 and 109 BFSP 436. This action was of course in line with Great Britain fixed policy that was keeping the Canal safe for access to her Middle and Far East Colonies.

144 There was doubt as to accuracy of the British interpretation. The reason was that, firstly, the protectorate was not based on an international agreement and thus there was uncertainty as to the presumed succession of Great Britain in place of Turkey. Secondly, even assuming that Great Britain was a legal successor to Turkey, measures taken on the basis of Articles 9 and 10 were not in any way to “interfere with the free use of the Canal” nor to affect the prohibition made in Article 7 on “erection of permanent fortifications”. Furthermore, there was no reservation whatsoever to the general rule in Article 1. Thus Great Britain could not legally deny passage to enemy war and merchant vessels, though in terms of practicality allowing such a passage was hardly possible. Broms, op. cit. above (n. 111), p. 69.

145 Broms, ibid., p. 70.

146 The Declaration of Independence excluded the full authority of Egypt as regards the defence of Egypt and the Suez Canal, policing in Cairo and Alexandria and some other administrative matters. For the Declaration of Independence of Egypt, see Parl. Papers, Egypt No. 1 (1922), Cmd. 1592, pp. 29-31.
Lausanne Peace Treaty, Turkey gave up all her rights over Egypt as from 5 November 1914, but did not recognise the British Protectorate. It recognised the State of Egypt without prejudice to the future status to be given to that country (Article 19). In Peace Treaties concluded with Germany, Austria and Hungary, these Powers expressly recognised and gave consent to the transferring of all the powers conferred by the Constantinople Convention upon His Imperial Majesty the Sultan to Great Britain. By Articles 234 (10) of the Treaty of St. Germain and 217 (10) of the Treaty of Trianon, respectively, Austria and Hungary, as the successors to the former Austro-Hungarian Empire, agreed to be bound by the provisions of Constantinople Convention of 1888 and to stand, in relation thereto, in the same position as original signatory Powers.

Egypt and the Suez Canal remained under British military occupation and control until 1936 when by Article 1 of the Treaty of Alliance between United Kingdom and Egypt (26 August 1936) "The military occupation of Egypt by the forces of His Majesty the King and Emperor [was] terminated". Article 8 of the same treaty, however, "authorises His Majesty the King and Emperor to station forces in Egyptian territory in the vicinity of the Canal ..." until such time as the High Contracting Parties agree that the Egyptian Army is in a position to ensure by its own resources the liberty and entire security of navigation of the Canal. It is doubtful whether giving such a privilege to Great Britain was lawful, considering that under Article 12 of the 1888 Convention all the signatory Powers were bound not to "seek, with respect to the Canal, territorial or commercial advantages or privileges in any international arrangements that may be concluded". Once Egypt had become independent, all signatory Powers stood in exactly the same position in relation to Egypt, and no privilege could be granted to any one of them, as was envisaged by Article 12. However, there is no evidence indicating any State, whether parties to that Convention or not, having made any protest to the grant of such a privilege to Great Britain.

See Ch. III (n. 68) above.

Germany by Article 152 of the Treaty of Versailles; Austria by Article 107 of the Treaty of St. Germain; Hungary by Article 90 of the Treaty of Trianon. For these treaties see (n. 42) above.

Treaty of Alliance between United Kingdom and Egypt, 26 August 1936, 171 LNTS 401.

During the Italo-Ethiopian War in 1936, the possibility of closure of the Suez Canal to Italian vessels were contemplated as part of League of Nations sanction against that country. However, as Egypt was not a member of the League of Nations the idea did not gain any support.¹⁵¹

In 1938, Egypt formally associated herself with the British-Italian reaffirmation that they would always “abide by the provisions of the Convention signed at Constantinople on 29th October 1888, which guarantees at all times and to all powers the free use of the Suez Canal”.¹⁵² Accordingly, it ended any doubts as to whether Egypt was bound by the obligations of the 1888 Convention to which she was not a signatory State. ¹⁵³

From the first days of World War II in 1939, the British authorities put into effect again all the measures applied in the Canal zone during World War I. This time “not even a pretence was made, as was done in the World War I, to keep to the letter of the Constantinopole Convention”.¹⁵⁴ On the basis of the Anglo-Egyptian Treaty of Alliance (1936) cited above, Egypt offered to Great Britain all it wanted to protect the canal for the purpose of securing the free navigation of allied Powers and the security of the waterway itself. At the outbreak of the War, no Axis ships sought refuge in the canal ports, being aware of the extensive interpretation given by the British Prize Courts to the Constantinopole Convention.¹⁵⁵ The British, with the agreement of Egyptian government, fortified the canal heavily and set up on its shores military base which served during the whole war as a supply centre to the Allied armies in the area. British warships were stationed in the canal waters and used its ports of access for the embarkation and disembarkation of military troops and war materials.¹⁵⁶ At the beginning of the war, neutral merchant ships were allowed passage; but later, passage was sometimes refused. Only Allied ships, mostly military, used the waterway. In return, German and Italian

¹⁵¹ Broms, op. cit. above (n. 111), pp. 76-89.
¹⁵⁴ Obieta, op. cit. above Ch. II (n. 94), p. 84.
¹⁵⁵ Avram, op. cit. above (n. 70), p. 92. Throughout the War, the only reported case of seizure near the Canal zone was of the SS/Verbania, an Italian ship which arrived at Port Said on 9 June 1940 at a moment when Italy’s entry into the War had become imminent. Ibid., p. 93.
¹⁵⁶ Obieta, op. cit. above Ch. II (n. 94), p. 84; Broms, B., Suez Canal, in Bernhardt’s Ency., vol. 12, pp. 360-364.
aeroplanes repeatedly bombed the canal on several occasions and made effort to destroy
it, or at least, to put it out of order for the rest of the war. This was even contemplated
by the Allied Powers in the event that Great Britain lost control of the canal district.\textsuperscript{157}
In general, none of the participants in the War cared to respect the canal Convention.\textsuperscript{158}

\textbf{Summary.} The examination of State practice during the World War I and II, indicates that the canal was effectively closed to enemy vessels and was strongly fortified
by British forces, though, at the early stage of the First World War, the British Govern-
ment tried to avoid breaching the terms of the 1888 Convention. In response, Turkey in
World War I and Germany together with Italy in the Second World War, did not hesi-
tate to attack the Canal. Without any doubt, the measures taken by Great Britain and the
responses of the latter States were in violation of the letter and spirit of the Constan-
tinople Convention of 1888, especially Articles 1, 4 and 11, which together were
meant to keep the canal open and exclude the canal from theatre of war-like operations
in all circumstances. However, there is no record as to the position of neutral States not
party to the Convention with regard to the above-mentioned violation of the Constan-
tinople Convention — "they were either too weak or too disinterested to raise any ob-
jections".\textsuperscript{159} Accordingly, it is hard to draw any conclusion as to whether or not and
how the 1888 Convention was considered, during the period in question, as having been
treated as an "objective regimes". An important conclusion which can be made, how-
ever, is that the consistent practice of the British Government in closing the canal to its
enemies may well be considered as a kind of practical interpretation and accordingly a
modification of the rules of the 1888 Convention to the effect that, in war-time and
whenever Egypt is a belligerent, the canal can be closed to war and merchant vessels of
a State or States at war with Egypt or one of its allies.\textsuperscript{160} As will be seen,\textsuperscript{161} Egypt, in
support of its argument that it had a right to close the canal to Israeli shipping, indeed

\textsuperscript{157} See a telegram drafted by President Roosevelt despatched to General Marshal and the latter's reply, cited in Obieta, \textit{op. cit.} above Ch. II (n. 94), p. 84.
\textsuperscript{158} Even the Suez Canal Company openly took the side of the Allied Powers.
\textsuperscript{159} Obieta, \textit{op. cit.} above Ch. II (n. 94), p. 84; Avram, \textit{op. cit.} above (n. 70), p. 94.
\textsuperscript{160} Baxter examining State practice under the international waterways, including the Suez Ca-
nal, rightly concludes that
"the practice … indicates that the recognition of any right of passage through international wa-
terways for enemy warships when the littoral State is a belligerent would be altogether un-
thinkable …" (Baxter & Triska, \textit{op. cit.} above Ch. I (n. 143), p. 208.)
\textsuperscript{161} See Sec. 2.2.3.2.2. below.
referred to these practices and, indeed, introduced in its subsequent wars measures similar to those taken during the two World Wars. If the protection of the canal and defence of the territory of Egypt were sufficient reasons for closure of the canal to enemy vessels, as well as their seizure in the canal area, there remained no reason for the enemy vessels not to commit similar acts or not to attack Egypt from that part of her territory. For this reason, the regime of neutralisation can be considered as having lost its force, at least whenever Egypt was a belligerent. Referring to this point, Obieta rightly indicates that

"... as a result of the practice followed in the wars of 1914, 1939 and 1948 [war between Egypt and Israel], and acquiesced in, if not approved, by all concerned, when she [Egypt], as a territorial sovereign of the Canal, is a belligerent, the Convention must be deemed suspended for the duration of the war, even if all the other belligerent are signatory Powers."

As a result, it may well be argued that the Convention, as modified in practice, was no longer capable of imposing obligations on third States to respect the neutrality of the canal or giving them right to use the canal for the passage of their vessels whenever Egypt was at war. This is indeed even the position between the parties to the 1888 Convention vis-à-vis Egypt.

2.2.3.2.2. Egypt-Israel Conflict (1948-1979)

Simultaneously with the withdrawal of the British troops from Palestine on May 15, 1948, the State of Israel was proclaimed and the Egyptian Government together with other Arab States took action in support of the Arabs in their fight against the Zionist State. As part of a state of emergency, the Egyptian Government instituted shipping inspection at Alexandria, Port Said, and Suez. According to Article 3 of the

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162 As another example of a practical modification of the Convention, reference can be made to the Egyptian Government’s Note (dated May 28, 1947) addressed to Diplomatic Missions in Cairo, requiring all warships wishing to pass through the Canal to notify the Egyptian Authorities ten days in advance. No State made any protest to this new condition. See Avram, op. cit. above (n. 70), p. 104.

163 Obieta, op. cit. above Ch. II (n. 94), p. 88; Smith, R.H., Beyond the Treaties: Limitations on Neutrality in the Panama Canal, Yale Studies in World Public Order (1977), vol. 4, pp. 1-37. The latter writer, after examining State practice under treaties concerning Suez, Panama and Kiel canals concludes that “internationally recognised rules of neutrality are applicable to those canals only when the State exercising sovereignty over the canal is not participating in hostilities”. Ibid., p. 22.

164 Obieta, op. cit. above Ch. II (n. 94), p. 88.

Egyptian Government Proclamation No. 5, every ship was required to submit to an examination before entering any of the above-mentioned ports. Proclamation No. 13, 10 May 1948, further provided that "munitions or merchandise of any kind destined directly or indirectly to institutions or persons residing in Palestine" might be confiscated "in accordance with the rules established by international public law". Ships belonging to the State of Israel, Israeli Companies or Israeli residents were subject to immediate confiscation. The legal position of the two conflicting States, which was repeatedly the same in subsequent years until the Treaty of Peace of 1979, was as follows: Israel, a third State with regard to the Convention of 1888, from the outset claimed the right of passage through the Suez Canal and that the restrictive measure against its shipping were illegal. In a letter addressed to the President of Security Council in the early years of the conflict, it stated that, first, Egypt had violated the general principle of international law on the right of nations to navigate freely on the high seas, through international waterways that connect high seas and through international rivers. This right was a "corner-stone of International Law" and could not be denied to her as one of the members of the community of nations. Secondly, the right of passage through the canal had been recognised in the 1888 Convention which, moreover, prohibited any discrimination between ships in transit through the Canal. Thirdly, the Armistice Agreement of 1949 prevented both Parties carrying out any act of war against each other, had ended the state of war between the two countries and thus the measures

167 Treaty of Peace between Egypt and Israel, 210 UNTS 300; 18 ILM 362.
168 UN Doc. S/2241.
169 This argument seems to, somewhat illogically, confuse the freedom of passage through international straits with that applicable to international canals. In the latter kind of case, the waterway is cut through the territory of a particular State and remain part of that State. There is no obligation upon the territorial sovereign to allow others to use the Canal. In the former kind of case, the waterways is formed by nature and, as such, there is a right of passage for all, under customary international law. See Part III, Section I of the UNCLOS (Articles 34-36). For detail see Churchill & Lowe, op. cit. above Ch. III (n. 73), pp. 87-97.
170 On many occasion the Western Powers protested against the extraordinary measures against their ships by arguing that there was no state of war between the two countries. For examples, see the United States' protest against the detention of S.S. Flying Trader; its protest against Egypt's restrictive measures on oil tankers (Whiteman's Digest, vol. 3, pp. 1088-89); Denmark's protest on the detention of the Danish ship Inge Toft (ibid., p. 1096).
taken were in violation of the Armistice Agreement.\textsuperscript{171} Finally, given the fact that no third States, apart from Arab States, recognised a state of war between the two countries, the restrictive measures against Israeli ships and trade in transit constituted an act of war in the canal waters, in violation of Article 1 and 4 of the 1888 Convention.\textsuperscript{172}

During the debates which followed in the Security Council, the Egyptian Representative responded that, first, the Armistice had not resulted in a state of peace between Egypt and Israel\textsuperscript{173} and that it had merely put an end to hostilities between the two parties.\textsuperscript{174} Secondly, as to the 1888 Convention, he stated that Articles 10 and 11 had reserved the full rights of Egypt vis-à-vis the provisions of Articles 4, 5, 7 and 8 with regard to the measures Egypt might find it necessary to take for ensuring the defence of her territory, public order and carrying out the provisions of the 1888 Convention.\textsuperscript{175} Thirdly, Israel had no right to claim anything under the Convention, not being a Signatory.\textsuperscript{176} Finally, Egypt with the strong support of the Soviet Union, further challenged the competence of the Security Council to deal with Israel's complaints on the ground that they related to the Constantinople Convention of 1888 and that the procedure provided for in Article 8 of the Convention must be utilised. In this regard, the representative of Egypt said that

"it is Article 8 which you should bring into operation, not the Security Council. *Apply to the signatories' representatives in Cairo. You are perfectly entitled to complain of obstacles to the free passage of shipping through the Canal. I believe you know that the signatories are France, Germany, ... etc. ... Take your complaint to them."\textsuperscript{177}

\textsuperscript{171} UN Doc. S/2241. See also Khadurri, M., *Major Middle Eastern Problems in international Law* (1972), p.72.

\textsuperscript{172} SCOR, 658th meeting, paras. 12-14.

\textsuperscript{173} Prior to the Armistice Agreement, the Egyptian Government maintained that the measures taken were for the protection of its military forces in the field and the reduction of supplies to the enemy and that they were based on the rights of Egypt as stipulated by the 1888 Convention in Articles 10 and 11.

\textsuperscript{174} SCOR, 549th Meeting, paras. 56, 64 and 67.

\textsuperscript{175} *Ibid.*, 661th Meeting, para. 56; See also *The Flying Trader* (Egypt, Prize Court of Alexandria), 2 December 1950, 17 ILR 440.


\textsuperscript{177} *Ibid.*, 662nd Meeting, p. 47, emphasis added. For the remarks of the former Soviet Union representative see *ibid.*, 664th Meeting, p. 10, paras. 52-56. A draft Resolution proposed by New Zealand calling upon Egypt to comply with Security Council Resolution of 1 September, 1951, to terminate the restrictions and to cease interference with shipping was vetoed by the USSR (UN Doc. S/3188/Corr.1.). *Whiteman's Digest*, vol. 3, p. 1092.
In another debate in the Security Council, which took place following another Israeli complaint, the two opposing States mainly repeated their earlier stands. The Egyptian representative restating his country’s position, emphasised again that Articles 1, 4, 5, 7 and 8 of the 1888 Convention provided for freedom of passage in the Suez Canal. Articles 9 and 10, however, reserved the full rights of Egypt vis-à-vis the provisions of Article 4, 5, 7 and 8. Because of this the sole interpretation of the 1888 Convention could be that “the Convention enacted the principle of freedom of passage, without in any way proclaiming the neutrality of Egypt or any of its parts”. In support of this interpretation he referred to the measures taken under the Egypt’s authority, by the British, in the Suez Canal during the two World Wars. In response the Israeli representative pointed out that the Egyptian interpretation meant that Article 11 of the 1888 Convention was inadvertently lost sight of.

A glance at the positions of the two States indicates that neither of the two considered the 1888 Convention as having constituted, ab initio, an objective regime binding erga tertios. It is true that Israel repeatedly claimed the right of passage through the Canal, but it did not appear as, at the same time, considering herself bound by the obligations relating to neutrality and non-blockade of the Canal. Beside, Israel mainly rested its argument on the existence of a general principle of international law on the basis of which all States have the right to navigate freely on the high seas and between them — in other words, she seemed to consider the Suez Canal as being under a legal regime similar to the one applicable to international straits. Of course, Israel did invoke the terms of the 1888 Convention in its arguments; but it did so only in support of its claim that there is general right of passage through international canals for all nations, and not as a basis from which it directly derived rights — probably because that would

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178 Another argument put forward by the Prize Court of Alexandria, following the official position of the Egyptian Government, was that “the prohibitions contained in those articles [Articles 4, 7 of the Convention of 1888] cannot interfere with the natural right of a State to preserve its own existence”. That “the provisions of Articles 11 of the Convention ... cannot be construed as a restriction upon the rights of Egypt”. Their only purpose being “to confirm what is said in Article 1 about free passage through the Canal”. See The Flying Trader, loc. cit. above (n. 175), pp. 446-447.

179 SCOR, 661st Meeting, p. 12.

180 Ibid.

imply recognition of the obligation regarding the neutralization and non-blockade of the Canal. If there was any conviction on the part of the Israeli Government that the Constantinopole Convention of 1888 was applicable to them in an objective manner, or in other words was the source of rights and obligations in respect of Suez Canal, they would not hesitate to interpret it in that manner. Moreover, if the Constantinopole Convention constituted an “objective regimes” it ought to be considered as automatically binding on Israel through succession: either as a successor to Turkey because the territory of Palestine was a part of Ottoman Empire when the 1888 Convention was concluded in 1888 or as successor to Great Britain because that territory was a part of British Mandate when Israel proclaimed her independence in 1948. However, neither Israel nor Egypt nor any other State raised that possibility. The position of Egypt is, of course, unequivocal in this regard. Egypt expressly adhered to the principle of res inter alios acta, by saying that Israel has no right to “claim anything under the Convention, not being a Signatory” and further by referring Israel to the Signatories in pursuing their claim. Here the Egyptian Government seems to have assumed that Israeli may be entitled to the benefit of free navigation as an advantage rather than as a right.

Accordingly, it may be concluded that Israel or Egypt did not treat the 1888 Convention as constituting, or containing, an “objective regimes” valid erga omnes or tertios. It may further be suggested that Israel, and other third States, most probably had a right to use the canal for the passage of their merchant vessels in peace-time, as existed for all States prior to the 1888 Convention and always respected in practice, but there was no right of passage for them in war-time whenever Egypt was a belligerent. This last conclusion can further be substantiated by reference to the argument put forward by Israel,\(^2\) and some of the States\(^3\) whose vessels were subjected to the Egyptian Government’s extraordinary measures. These States argued that Egypt was not justified in taking those measures because there was no state of war between the two countries. In other words, they seem to have a conviction that Egypt was entitled to take those measures if and as long as there was a state of war between Egypt and Israel.\(^4\) The position of these States may well be invoked as another evidence in support of the conclusion

\(^{2}\) See p. 272 above.

\(^{3}\) For example, see the United States and Denmark’s protests, loc. cit. above (n. 170).

\(^{4}\) Broms, op. cit. above (n. 111), p. 209.
made earlier on\textsuperscript{185} that the 1888 Convention was practically modified to the effect that the canal could be closed, even to vessels of States party to the 1888 Convention, when \textit{Egypt was herself a belligerent}.

2.3.3.2.3. The nationalisation of Suez Canal Company (1956-1957)

In 1953, as a result of national-liberation movement the Egyptian Government annulled the 1936 Treaty with Great Britain. In 1954, a new treaty, the "Anglo-Egyptian Agreement regarding the Suez Canal Base",\textsuperscript{186} was concluded under the terms of which Great Britain was to withdraw its forces from Egypt within twenty months from the date of signature of the Agreement. In the meantime Egypt was to "afford to the United Kingdom such facilities as may be necessary in order to place the Base on a war footing and to operate it effectively".\textsuperscript{187} With the signing of this Treaty, Egypt gained its full sovereign rights and became the sole defender of the canal and the only body responsible for guaranteeing the freedom of navigation.

On 26th July 1956, once the British troops had been withdrawn, the Egyptian Government nationalised the Suez Canal Company and assumed responsibility for the functioning of the Canal. The Egyptian nationalisation decree did not as such affect freedom of passage\textsuperscript{188} but it was not satisfactory to the Company’s mostly British and French shareholders. The reaction of other States was co-ordinated by the two mainly interested States of France and Great Britain. A week after the Decree of Nationalisation was announced, in a Tripartite Statement,\textsuperscript{189} the two mentioned States together with the United States, a third State with regard the Convention of 1888, charged that the Egyptian action

"threatens the freedom and security of the Canal as guaranteed by the Convention of 1888. This makes it necessary that steps be taken to assure that the parties to that Convention and all the \textit{other nations entitled to enjoy its benefits}, in fact, be assured of such benefits."\textsuperscript{190}

\textsuperscript{185} See p. 269 above.
\textsuperscript{186} 210 UNTS 3.
\textsuperscript{187} \textit{Ibid.}, Article 4.
\textsuperscript{188} For the text of the Decree see \textit{Whiteman’s Digest}, vol. 3, p. 1097.
\textsuperscript{189} 162 BFSP 751.
\textsuperscript{190} To this, the Egyptian President replied that
"every attempt to link the Suez Canal with freedom of navigation through the canal gives rise to suspicion, as the Suez Canal Company has never been at any time responsible for freedom..."
They initiated an international Conference¹⁹¹ to which were invited, not only the eight States Parties to the 1888 Convention,¹⁹² but also sixteen other States which in the opinion of the Three States had a large interest in the operation of the canal.¹⁹³ All the States invited attended the Conference (held at London) except Egypt and Greece.¹⁹⁴ The most widely accepted proposal in the London Conference, the Eighteen-Nations Proposals,¹⁹⁵ submitted that

"an adequate solution must, on the one hand, respect the sovereign rights of Egypt ... and, on the other hand, safeguard the Suez Canal as an international waterway in accordance with the Suez Canal Convention of 29th October, 1888."¹⁹⁶

According to this proposal, the final settlement must be on the establishment of a "definite system" as was contemplated in the Preamble of the Convention of 1888 in order to "to guarantee at all times, for all the Powers, the free use of the Suez Maritime Canal".¹⁹⁷ To achieve this objective, it proposed a new Convention to be negotiated with Egypt in which the responsibility of the administration of the canal was given to a Suez Canal Board consisted of the nationals of many States.¹⁹⁸

In response, Egypt expressed the view that it was willing to sponsor a conference to which all the governments whose ships use the canal could be invited for the reviewing the 1888 Convention and considering the conclusion of "an agreement between all

¹⁹¹ This Conference was held in London from 16 to 23 of August 1956.
¹⁹² It is interesting that Austria and Hungary, which had formally accepted to stand, as the successors to the former Austro-Hungarian Empire, in relation to the Constantinople Convention of 1888 in the same position as original signatory Powers (see p. above), were not invited at all.
¹⁹³ These States were Australia, Ceylon, Denmark, Ethiopia, the Federal Republic of Germany, Greece, India, Indonesia, Iran, Japan, New Zealand, Norway, Pakistan, Portugal, Sweden and the United States. 162 BFSP 752-753.
¹⁹⁴ Held from 16 to 23 August 1956. See Whiteman's Digest, vol. 3, p. 1102.
¹⁹⁵ The so-called Eighteen Nations Proposals was approved by 6 States (France, Italy, the Netherlands, Spain, Turkey and the United Kingdom) party to the 1888 Convention and 12 States (Australia, Denmark, Ethiopia, the Federal Republic of Germany, Iran, Japan, New Zealand, Norway, Pakistan, Portugal, Sweden and the United States) not party thereto. See: UN Doc. S/3665; 162 BFSP 756.
¹⁹⁶ Ibid.
¹⁹⁷ Ibid., para. 1.
¹⁹⁸ Ibid., para. 3 (a) and (b)
these governments reaffirming and guaranteeing the freedom of passage through the Suez Canal”. However, it rejected any control or management of the operation and development of the canal by anybody other than itself. Consequently, a second Conference was held in London. This Conference, while basically regarded the earlier Eighteen-Nations Proposal as offering a fair basis for a peaceful solution of the Suez Canal problem, agreed on the establishment of a Suez Canal Users Association. This body was, inter alia, to “… to assist the members in the exercise of their rights as users of the Suez Canal in consonance with the 1888 Convention, with due regard for the rights of Egypt”. Egypt also rejected this plan on 15 September 1956.

Great Britain and France subsequently brought the question to the attention of the Security Council. The Council by a unanimous Resolution agreed on six principles as the basis of any settlement of the Suez Question. The resolution did not make any reference to the 1888 Convention. It declared, inter alia, that “there should be free and open transit through the canal without discrimination, overt or covert — this covers both political and technical aspects; the sovereignty of Egypt should be respected; the operation of the Canal should be insulated from the politics of any country …”

A recommendation to Egypt to accept the Eighteen-Nations Proposals and to cooperate with the Suez Canal Users Association was vetoed by the Soviet Union. Nearly two weeks after the Security Council passed this resolution (on 29 October 1956), Israel invaded Egypt. A day after, France and Great Britain gave a 12-hour ultimatum requesting both belligerents to stop all war-like operations. Egypt refused to accept the ultimatum and Anglo-French Forces occupied the banks of the Canal.

199 Letter from President Nasser to the Chairman of the Suez Committee, 9th September 1956, 162 BFSP 780.
200 Ibid.
201 Final Communiqué Issued by the Second London Conference (21 September 1956), reproduced in 162 BFSP 786-789.
204 UN Doc. S/3645 and S/3654.
205 SC Res. 118 (13 October 1956), UN Doc. S/3675.
206 Ibid.
action was denounced by many States, including the United States, which requested the Security Council to consider the matter. Two draft resolutions proposed by the United States and USSR were vetoed by the United Kingdom and France. As a result, the Security Council called for an emergency special session of the General Assembly to break the deadlock. The General Assembly passed several Resolutions, as a result of which Egypt and Israel agreed to a cease-fire and France and Great Britain agreed to withdraw their forces. The canal was subsequently reopened in April 1957. At the same time, on 24 April 1957, the Egyptian Government, in order to appease the fears expressed by some countries, published a Declaration, addressed to the United Nations Secretary-General which was generally meant to elaborate an earlier Memorandum notified to the Diplomatic missions in Cairo which was meant to be a response to the six principles adopted earlier by the Security Council.

The Declaration expressed Egypt's pledge to respect "the terms and the spirit of the Constantinopole Convention of 1888 and the rights and obligations arising therefrom". It further indicated the Egyptian Government determination to abide by the Charter and the principles and purposes of the United Nations and expects the other States parties to the Convention of 1888 and all others concerned to be guided by the same resolve. As to the freedom of navigation, it stated that the Government of Egypt were more particularly determined

"To afford and maintain free and uninterrupted navigation for all nations within the limits of and in accordance with the provisions of Constantinopole Convention of 1888."

Paragraph 9 of the Declaration provided that

"(a) Disputes, disagreements or differences arising out of the Convention of 1888 or this Declaration shall be settled in accordance with the Charter of the United Nations.

208 Ibid., p. 1109.

209 See UNYB 10 (1956), pp. 25-34.


211 Their withdrawal was completed on 22 December 1956, see Whiteman's Digest, vol. 3, pp. 1123-1125.

212 UN Doc. S/3818/Add. 1; 265 UNTS 299; 18 ILM 362; AJIL 51 (1957), p. 673. Also reproduced in Whiteman's Digest, vol. 3, pp. 1123-1124. The Declaration was registered by Secretary General of the United Nations as an "engagement of an international character" falling within the scope of Article 102 of the Charter. See UNYB, 1956, p. 46.
(b) Differences arising between the parties to the said Convention in respect of interpretation or the applicability of its provisions, if not otherwise resolved, will be referred to the International Court of Justice. The Government of Egypt will take necessary steps in order to accept the compulsory jurisdiction of the International Court of Justice in conformity with the provisions of Article 36 of its Statute.\footnote{Ibid., emphasis added.}

The Declaration concluded with the Egyptian Government’s statement that the

“Declaration, with the obligations therein, constitutes an international instrument and will be deposited and registered with the Secretariat of the United Nations.”

On the date Egypt made the afore-mentioned declaration, it adopted the Code of the Suez Canal Authority, which once again confirmed the validity of 1888 Convention.\footnote{UN Doc. A/3576 and S/3818 and Add. 1.} The Authority was entrusted with all matters concerning the management, maintenance and improvement of the Canal. The Authority was not to take measures contrary to the terms of the 1888 Convention or the Declaration of 24 April 1957;\footnote{Code of Suez Canal Authority confirmed by the Law of Egypt on 24 April 1957.} nor was it to grant any vessel, company, or other party any advantage or favour not accorded to others on the same conditions. On 18 July 1957, Egypt accepted compulsory jurisdiction of the International Court of Justice, as was promised in paragraph 9 (b) of the (24 April) 1957 Declaration.\footnote{The letter embodying Egypt’s acceptance, addressed to the Secretary General of the United Nations, reads

“... the Government of the Republic of Egypt accept as compulsory ipso facto, on condition of reciprocity and without special agreement, the jurisdiction of the ICJ in all legal disputes that may arise under ... paragraph 9 (b) of the ... Declaration dated 24 April 1957, with effect as from that date.” (See ICJ YB 12 (1957/1958), p. 211).}

In the discussion which took place at the Security Council on 26 and 27 of April 1957, the Declaration was considered by several countries as a sufficient and final settlement of the Suez Canal question.\footnote{SCOR, 776th Meeting, p. 12 (Philippines), and 777th Meeting, pp. 21-22 (USSR)} On the other hand, France and the United Kingdom, rejected the Declaration as insufficient and “in flagrant contradiction with the six principles approved by the Security Council”.\footnote{Ibid., 777th Meeting, p. 20 (United Kingdom). See also the Communiqué of the Council of Ministers of France of 15 May 1957, UN Doc. S/3829 and S/3839/Rev.1.} In between these extreme positions, the representative of the United States expressed what was the view of the great majority of States, when he said that “perhaps no final judgement can be made regarding the
regime proposed by Egypt until it has been tried out in practice". In a communiqué issued on 9 May 1957, the Suez Canal Users Association stated that

"the Egyptian Declaration is insufficient and falls short of the six requirements for the settlement of the Suez Canal question, .... Insofar as 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 Suez Canal question. Accordingly the member States reserve (their) existing legal rights under the Convention of 1888 and otherwise with respect to the operation of the Suez Canal."  

Shortly after, France and the United Kingdom came to agreement with Egypt after a final settlement was agreed between the United Arab Republic (U.A.R.) and the Universal Suez Canal Company on 30 April 1958. However, despite the Egyptian Declaration of 1957, the U.A.R. continued to enforce the existing restrictive measures against Israeli shipping once the canal was reopened in April 1957. Many ships were detained and their cargoes confiscated. On every occasion the Egyptian action met with the protest of the flag State. The operation of the canal lasted until 1967, when the Six Day War broke out between Egypt and Israel. The canal was completely closed as a result of the blockage caused by ships sunk in its waters. After nearly nine years, the canal was reopened again for navigation on June 1975. In the Peace Treaty with Israel concluded in 1979, Egypt formally recognised the State of Israel and the right of Israeli shipping to pass through the Suez Canal. Since the reopening in 1975, the

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219 SCOR, 776th Meeting, p. 3, para. 11.
221 On 22 August 1958, a general Agreement was signed between the U.A.R. and France resuming financial and commercial relations between the two countries.
222 This was consisted of the two united States of Egypt and Syria.
223 In 1959, following Denmark's protest on the detention of the vessel Inge Toft, the U.A.R. sent an instruction to its Embassies concerning its position, which read, inter alia:

"1. State of war between U.A.R. and Israel continue to exist. This gives the U.A.R. the indisputable right not to permit passage through the Suez Canal of any Israeli-flag vessels or Israeli-chartered vessels regardless of nationality flags flown by latter. ...

3. Under provisions of the 1888 Convention, the U.A.R. has the right to take any measures necessary to guarantee its security in wartime.

7. ... the U.A.R. will never permit passage [of] Israeli-flag or Israeli-chartered ships through the Canal no matter what consequences ...." (Whiteman's Digest, vol. 3, p. 1096).

For a full report on the ships subjected to detention, confiscation, etc. after 1957 see Obieta, op. cit. above Ch. II (n. 94), pp. 111-122.

225 According to Article 5 of this Treaty

"Ships of Israel, and cargoes destined for or coming from Israel, shall enjoy the right of free..."
main developments have been several new regulations, issued by the Canal Authority, concerning the procedure of passage by ships, especially those carrying dangerous goods, the matter of pollution in the canal waters, and other regulatory matters.\(^{226}\)

From the attitude of various States and the event which followed nationalisation of the Suez Canal, it can easily be seen that a large number of States not party to the 1888 Convention expressed their concern regarding freedom of passage through the Canal.\(^{227}\) They repeatedly invoked the Convention as having guaranteed to *all nations* freedom of passage without discrimination, and, accordingly, they expressly claimed a *right of passage* through the Canal. In return, Egypt did not deny in any way that claim: in fact, it showed her willingness even to go into treaty relationship with these so-called *Users of the Canal* in order to reaffirm the rules stipulated in the 1888 Convention. By 1957 Declaration, Egypt once again formally recognized the Constantinopole Convention to apply to it. It also bound herself to act in conformity with its provisions. Now the question is whether the third States reliance on the Convention can be taken as evidence giving support to the doctrine of "objective regimes". If not, how may third States reliance be explained.

The fact that the act of nationalisation and subsequent reactions took place nearly seventy years after the conclusion of the 1888 Convention makes it difficult to infer from third States’ reliance any support for the doctrine of "objective regimes". It is obvious that such a reliance by itself cannot be invoked as an evidence for the proposition that the 1888 Convention was, *ab initio*, immediately and without more, binding on all States or created rights and obligations for all. Of course, this does not mean that they could not possibly cast legal opinion with regard to their legal position under the

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\(^{227}\) For instance, on 21 January 1957, the Prime Ministers of Iran, Iraq, Pakistan (all third State with regard to 1888 Convention), and Turkey issued a communiqué which stated, *inter alia*, "... They expressed the hope that the question of freedom of navigation in the Suez Canal, consistent with sovereignty, should be insured in accordance with the Convention of 1888 and that the canal should be insulated from the national policy of any one power." (*Whiteman’s Digest*, vol. 3, p. 1094).
Convention in the past. However, as was seen, nowhere did these States claim that the 1888 Convention was, from the very beginning, applicable to them: that is, that it was automatically creative of rights and obligations for them from the day of its entry into force. Moreover, in claiming their right to use the Canal, no States referred to the doctrine of "objective regimes" or "treaties valid erga omnes". Even if third States had, in 1950s, claimed that they had acquired, ab initio, a right under the Convention, that claim would not alone indicate a support for the existence a special rules claimed by the advocates of the doctrine of "objective regimes". Finally, on no occasion did any third State appear to have considered herself bound by the obligation relating to neutrality and non-blockade of the Canal. Thus, the events following the act of nationalisation are not good evidence for the proposition that the 1888 Convention had constituted an "objective regimes", automatically and without more, effective against third States. On the other hand, third States' reliance may well be accounted for by mechanisms other than that suggested by the doctrine of "objective regimes". In the first place, their reliance may be explained by the fact that they had the right to use the canal for their merchant ships in peace-time prior to the conclusion of the 1888 Convention. As was seen, this right was based on the dedication made through Concession granted by the Egyptian Viceroy, confirmed by Sultan of Turkey and tacitly agreed by the European Powers. What third States appeared to claim in 1950s was a right which, although stipulated in the 1888 Convention, already existed, independently of the Convention, and, accordingly, their reliance could be seen as merely a matter of reinforcement of their pre-existing rights. Secondly, their reliance may also be accounted for a newly formed conviction that the 1888 Convention had vested in them right to use the canal in accordance with its stipulation. In other words, they were possibly acting as if they were, on the basis of the stipulation pour autrui (incorporated in Article 36 of the Vienna Convention), entitled to rely on the stipulation made in the 1888 Convention and claim rights under it. Finally, their reliance on the Convention may be explained by their conviction that it stipulated rules which safeguarded their customary rights with regard to the use of the Canal. As was seen, the Convention incorporated the rights, usage or practices which existed prior to 1888: then merchant and war vessels allowed to use the canal from the first day of its inauguration even at a time Turkey was at war. It may
also be argued that the rules envisaged in the 1888 Convention with some modification had received respect and recognition through times and as such could be relied upon by non-party States in 1950s (after almost sixty years of its operation).

2.3. Conclusion

The above study demonstrates that the 1888 Convention can properly be seen as having established a permanent regime or status for the Suez Canal involving similar rights and obligations for both States party and third States and even intended to become binding on third States — as claimed by the advocates of the doctrine of “objective regimes”. However, there is no evidence to show that that regime is treated as having created, ab initio, immediately and without more, rights and obligations for third States. The United States seems to have rejected such a possibility in 1898. An evaluation of the evidence of State practice under the 1888 Convention in early period after its conclusion indicates that the terms of the Convention was generally observed and applied to all, but this could not be taken as evidence of third States’ conviction that the said convention embodied an “objective regimes” applicable erga omnes, the reason being that, prior to the 1888 Convention, the Canal had been dedicated to international use — as a “neutral passage” — by the territorial sovereign and in two occasions the warships were allowed passage without the neutrality of the territorial sovereign being jeopardised. Therefore, third States might have been exercising the right of passage already granted to them or they might have been considered the rules in the Convention as customary rules of international law on the matter. During the two World Wars, the protection of the canal and the defence of Egypt were invoked by the Egyptian and British Governments for abandoning the terms of the Convention regarding the neutrality of the Canal. The same reason was given by the Egyptian Government in closing the canal to Israeli shipping. This amounted to a modification of the Convention to the effect that there exists no right of passage for enemy vessels nor any obligation to respect the neutrality of the canal whenever Egypt is a belligerent. The events followed the Arabs-Israeli conflict and the act of nationalisation in 1950s shows that States not party to the 1888 Convention did not consider themselves as having rights and obligations similar to the States parties, though they did, of course, claim the right to use the canal for passage as defined by the Convention. The express claim by
third States since 1956 to have a right to use the canal again cannot be taken as evi-
dence that the 1888 Convention regime constituted an “objective regimes”. At most, it
indicate that, from 1956, third States and States parties to the Convention believed that
the rules established by this Convention were the solution to the conflict of interests be-
tween the right of the territorial sovereign to the canal and the international right of pas-
sage through the Canal. Therefore, we may conclude that States have started to assume
a general validity for the 1888 Convention since the 1957 settlement of the dispute,
though still not as a matter of “objective regimes” but, most probably, as a regime re-
fecting rules which safeguarded the customary rights and obligations of all States con-
cerned. Finally, the general effects of 1888 Convention may to a large extent be
explained by the mechanism in Article 36 of the Vienna Convention since the 1888
Convention, as modified in practice, no longer impose any obligation on any State to
respect the neutrality of the canal when Egypt is a belligerent and, secondly, the obliga-
tion to respect the neutrality of the canal when Egypt is a neutral may be considered al-
ready covered by the provisions the Charter of the United Nations according to which
every State is to refrain from threat or use of force against territorial integrity of all
other States, though the mechanism in Article 36 still remains incapable of explaining
the obligation relating to non-blockade of the Canal.

3. The Regime of the Panama Canal

3.1. The early history (1850-1900)

The idea of building a canal across the isthmus of Central America goes back to
the beginning of the 19th century. In 1826, the United States representatives to the
meeting of the Panama Congress placed before the meeting the idea that if a maritime
canal was to be built between two oceans, “the benefit of it ought not to be exclusively
appropriated to any one nation, but should be extended to all parts of the globe upon the

228 Chinkin, op. cit. above Ch. II (n. 5), pp. 84-86.
229 Moore’s Digest, vol. 3, pp. 2-7; Rubin, H.M., The Panama Canal Treaties: Keys to the
230 New Granada (Colombia and Panama), Venezuela, Ecuador, and the Central American re-
publics gathered to discuss common interests in a meeting called the Panama Congress. See
payment of just compensation or reasonable tolls". On 12 December 1846, the United States signed a treaty with the predecessor to the modern State of Colombia which guaranteed a right of way across the territory of that country (which included the isthmus of Panama) in return for a United States guarantee of the "perfect neutrality" of this passage "with the view that the free transit from one to the other sea may not be interrupted or embarrassed ..."

A few years later, the United States, in order to prevent any exclusive control of Great Britain over any such a means of communication, concluded the so-called Clayton-Bulwer Treaty with Great Britain in 1850. Article I of the treaty — which later became a source of the United States' objection to the treaty — provided that the two Governments agreed "that neither the one nor the other will ever obtain or maintain for itself any exclusive control over" any inter-oceanic means of communication (including a ship-canal to be built through Nicaragua or across the isthmus which connects North and South America), nor do they "ever erect or maintain any fortifications commanding the same, or in the vicinity thereof, or occupy, or fortify or colonize, or assume or exercise any dominion over ... any part of Central America ..." By Article V the two States engaged that

"... when the ... canal shall have been completed, they will protect it from interruption, seizure, or unjust confiscation, and that they will guarantee the neutrality thereof, so that the said canal may forever be open and free, and the capital invested therein secure ..."

In Article VI, the Parties engaged to

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231 Instruction from the United States Secretary of State John Clay to Messrs Anderson and Sargeant, representatives to the Panama Congress (8 May 1826), quoted in Moore's Digest, vol. 3, p. 2.


233 Ibid., Article XXXV.


235 Ibid.
invite every State with which both or either have friendly intercourse, to enter into stipulations with them similar to those which they have entered into with each other ...

Finally Article VIII provided that the two Governments

having not only desired, ..., to accomplish a particular object, but also to establish a general principle, ... they hereby agree to extend their protection by Treaty stipulations to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America, and especially to the interoceanic communications, should the same prove to be practicable ... [that the envisaged canal or railway shall be] open on like terms to the subjects and citizens and of every other State which is willing to grant thereto such protection as Great Britain and The United States engage to afford.

In 1878, Colombia conferred a concession for constructing a canal on a French company, which was subsequently bought by the Compagnie Universelle du Canal Interoceánique de Panama under the direction of F. de Lesseps. In 1881, the Company started its works at Panama, but failed to make progress because of financial difficulties. A new French Company Compagnie nouvelle du Canal de Panama, founded in 1894, also encountered setbacks. The United States, unhappy about these developments, started to enhance its efforts for securing "a canal under American control" without foreign participation. The Spanish-American War of 1898 proved to the American officials the urgency and the importance of the canal and the need for the revision of the Clayton-Bulwer Treaty. As a result, the United States proposed a new treaty to Great Britain to replace the Clayton-Bulwer Treaty of 1850.

On 5th February 1900, a Convention was signed between John Hay, Secretary of State of the United States, and Lord Pauncefote, British Ambassador to the United States. The substantive provisions of the Convention were set out in three Articles. Article I provided for the construction "under the auspices of the United States", either directly or indirectly, and for the regulations and management, of an isthmian canal. Article II stated that the parties

"desiring to preserve and maintain the principle of neutralisation envisaged in Article VIII of the Bulwer-Clayton Convention ... adopt, as the basis of such neutralization, the following rules, as substantially embodied in the [1888 Constantinopole] Convention ... [concerning the] Suez Canal, that is to say:

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238 94 BFSP 476. Also reproduced in Moore's Digest, vol. 3, pp. 210-211.
1. The canal shall be free and open, *in time of war* as in time of peace, to vessels of commerce and of war of all nations, on terms of entire equality, so that there shall be no discrimination against any nation, or its citizen or subjects, in respect of conditions or charges of traffic, or otherwise.

2. The canal shall never be blockaded, nor shall any right of war be exercised, nor any act of hostility be committed, within it.\(^{239}\)

Paragraphs 3 and 4 placed certain restrictions on the manner by which vessels of war were to use the canal in time of war. Paragraph 5 provided that

"the provisions of this Article shall apply to waters adjacent to the canal, within 3 miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time ..."

Paragraph 6 declared the plants, establishments, buildings, and all works necessary to the construction, maintenance and operation of the canal as an integral part of the canal for the purpose of the Convention. Paragraph 7 provided that

"no fortifications shall be erected commanding the canal or waters adjacent. 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."\(^{240}\)

Finally, Article III provided that

"The High Contracting Parties will, immediately upon the exchange of the ratifications of this Convention, bring it to the notice of the other powers and invite them to adhere to it."\(^{241}\)

The United States' Senate did not, however, ratify this draft Convention for three reasons: firstly, it did not totally abrogate the Clayton-Bulwer Treaty of 1850; secondly, it prohibited the erection of fortification at the canal; and, finally, it specifically allowed third States to adhere to the Convention. Accordingly, it approved the Convention with the incorporation of the amendments which envisaged the total abolition of the Bulwer-Clayton Treaty; the authority of the United States to take measures necessary for "securing by its own forces the defence of the United States and maintenance of public order"; and, deletion of Article III, which invited other Powers to adhere to the Convention.\(^{242}\)

The Convention as amended by the Senate was communicated to the British Government for their approval. In a message which was to be communicated to the United

\(^{239}\) Emphasis added.

\(^{240}\) Ibid.

\(^{241}\) Ibid.

\(^{242}\) 94 BFSP 474-475.
States Secretary of State, Lord Lansdowne made objections to the Senate’s proposed amendments. With regard to the second proposed amendment, i.e. the right of the United States to use force for her defence, Lord Lansdowne argued that

“If it were to be added, the obligation to respect the neutrality of the canal in all circumstances would, so far as Great Britain is concerned, remain in force, the obligation of the United States, on the other hand, would be essentially modified. The result would be a one-sided arrangement under which Great Britain would be debarred from any warlike action in or around the canal while the United States would be able to resort to such action to whatever extent they might deem necessary, to secure their own safety ... Such an [amendment] would strike at the very root of that “general principle” of neutralization upon which the Clayton-Bulwer Treaty was based, and which was reaffirmed in the Convention as drafted.”

He further contended that the import of the (second) “amendment stands out in stronger relief when the third proposal is considered”, which deleted the provision relating to adherence by third Powers. According to Lord Lansdowne

“If that adherence were given, the neutrality of the Canal would be secured by the whole of adhering Powers. Without that adherence, it would depend only upon the guarantee of the two Contracting Powers. The (Senate) amendment, however, not only removes all prospect of the wider guarantee, but places this country [i.e. Great Britain] in a position of marked disadvantage compared with other Powers which would not be subject to the self-denying Ordinance which Great Britain is desired to accept. It would follow, were His Majesty’s Government to agree to such an arrangement, that while the United States would have a Treaty right to interfere with the canal in time of war, or apprehended war, and while other Powers could with a clear conscience disregard any of the restrictions imposed by the Convention, Great Britain alone ... would be absolutely precluded from resorting to any such action, or from taking measures to secure her interests in and near the Canal.”

The British Government, however, indicated their willingness to negotiate further. Subsequently, a new draft was proposed by the Government of the United States which tried to accommodate the Senate’s amendments while meeting Great Britain’s objections. The new draft, inter alia,

“1. Provided by a separate Article that the Clayton-Bulwer Convention shall be superseded.
2. Omitted the reservation of the freedom of action of the United States in time of war or apprehended war.
3. Omitted the Article inviting other powers to adhere.

243 The massage from Marquess of Lansdowne to Lord Pauncefote, 22 February 1901, Ibid., p. 474.
244 Ibid., pp. 482-483.
245 Ibid., p. 483, emphasis added.
4. Omitted the words “in time of peace as in time of war” in rule I of Article III (governing the right of passage).

5. Omitted the provision “no fortifications shall be erected commanding the canal or water adjacent” in rule 7 of Article III.

6. Inserted the latter portion of the provision in rule 7 of Article III of the old draft treaty (i.e., the provision for military police to protect the canal against lawlessness and disorder) to the rule 2 of Article III in the new draft.\(^\text{246}\)

The new draft treaty was communicated to the British Government for their consideration. In return, the British Government showed their willingness to accept the United States position on total abrogation of the Bulwer-Clayton Treaty as well as the defence of the canal which was, under the new draft treaty, the sole responsibility of the United States.\(^\text{247}\) However, they could not still accept the absence of any provision for the adherence of other powers. Lord Lansdowne argued that the British Government could not be bound by “stringent Rules of neutral conduct” which were not “equally binding upon other powers”.\(^\text{248}\) Consequently, he proposed

“insertion in Rule 1, after the word “all nations”, of the words “which shall agree to observe these Rules”. This addition will impose upon other Powers the same self-denying ordinance as Great Britain is desired to accept, and will furnish an additional security for the neutrality of the Canal.”\(^\text{249}\)

As to this proposal, Secretary Hay’s memorandum to the Senate explained that:

“The president, however, could not consent to this amendment, because he apprehended that it might be construed as making the other powers parties to the contract and giving them contract rights in the canal, and that it would thus practically restore to the treaty the substance of the provision which the Senate had struck out as Article III of the former treaty.”\(^\text{250}\)

As a result of the above considerations, the United States submitted an amendment to the British Government’s proposal. The American amendment called, firstly, for striking out the words “which shall agree to observe these Rules” in the first line of

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\(^{246}\) The memorandum prepared by the Department of State and sent by Secretary Hay to the Senate Committee on Foreign Relations, 18 January 1911, is reproduced in Whiteman’s Digest, vol. 3, pp. 1229-1235.

\(^{247}\) As Lord Lansdowne interpreted, under the new arrangement

“supposing that the United States, as the power owning the canal and responsible for the maintenance of its neutrality, should find it necessary to interfere temporarily with its free use by the shipping of another power, that power would thereupon at once and ipso facto become liberated from the necessity of observing the Rules laid down in the new treaty.” (Notification as to amendments; Lord Lansdowne’s memorandum, 3 August 1901, cited in Moore’s Digest, vol. 3, pp. 212-216, at p. 215).

\(^{248}\) Ibid., p. 216.

\(^{249}\) Ibid.

\(^{250}\) Whiteman’s Digest, vol. 3, pp. 1235-1236.
the British proposed draft and substituting for them the word "observing these Rules" and, secondly, striking out the words "so agreeing" in the second line of the draft and inserting the word "any such" before the word "nation". This American amendment was fully accepted by the British Government. Expressing the British Government's view on the new American amendment, Lord Lansdowne wrote:

"His Majesty's Government were prepared to accept this amendment, which seemed to us equally efficacious for the purpose which we had in view, namely, that of insuring that Great Britain should not be placed in a less advantageous position than other Powers, while they stopped short of conferring upon other nations a contractual right to the use of the Canal."\(^{251}\)

As a result of the terms of the treaty coming to a form upon which there was complete agreement, the two Governments proceeded to sign the so-called Hay-Pauncefote Treaty on 18 November 1901. The United States' Senate approved the new treaty, without any changes, on 16 December 1901.\(^{252}\) The treaty entered into force upon the exchange of the instruments of ratification on 21 February 1902.\(^{253}\)

3.1.1. The 1901 (Hay-Pauncefote) Treaty between the United States and Great Britain

The substantive provisions of the treaty as finally ratified are embodied in Articles 1 to 4. Article 1 specified that "the present Treaty shall supersede" the Clayton-Bulwer Treaty of 1950. Article 2 provided for the sole authority of the United States to build the canal, to have all rights incident to its construction and exclusive right of providing for the regulation and management of the canal. Article 3 embodying the most important rules stipulated that

"The United States adopts, as the basis of the neutralisation of the canal the following Rules, substantially as embodied in the Convention of Constantinople, signed the 29th October 1888, for the 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, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

\(^{251}\) Lord Lansdowne to Lord Pauncefote, 23 October 1901, Moore’s Digest, vol. 3, pp. 217-218, emphasis added.

\(^{252}\) Ibid.

2. The canal shall never be blockaded, 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.  

Paragraphs 3 to 6 of Article 3 repeated the same provisions as were originally agreed upon in the 1900 (first) treaty of Hay-Pauncefote, as cited above. According to Article 4, "no change of territorial sovereignty or of the international relations of the country or countries traversed by ... the canal shall affect the general principle of neutralisation or the obligation of the High Contracting Parties under the present Treaty."

Having removed the Clayton-Bulwer Treaty restrictions, the United States sought to buy the concession of the French Company and to acquire a strip of land as necessary for the construction of the Canal. A year later, the so-called Hay-Herran Treaty was drafted between the United States and Colombia. This draft treaty granted the exclusive right to the United States to buy the concession already conferred on the French Company and to construct, maintain and protect the maritime canal for 100 years, renewable at the sole and absolute option of the United States. The sovereignty of Colombia was, however, preserved. Colombia, in return, was to receive compensation of $250,000. This draft treaty was rejected by the Colombian parliament, mainly on financial grounds. As the United States could not gain its objective by a treaty with Colombia, it paid special support to Panamanian rebels in their quest for autonomy from Colombia.

3.1.2. The 1903 (Hay-Varilla) Treaty between the United States and Panama

A few days after the State of Panama was proclaimed, the United States concluded with it the so-called Hay-Bunau-Varilla Treaty. The treaty was signed on 18 November 1903 and ratified by Panama (on 2 December 1903) and by the United States

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254 Ibid., emphasis added
255 See pp. 286-287 above. As was seen, reference to the fortification of the Canal was omitted. It was the understanding of the two States that the United States was not inhibited from fortifying the Canal. See Secretary Knox to Mr. L. James, 21 January 1911; The British Ambassador (Bryce) to Secretary Knox, 18 July 1911, reproduced in Hackworth's Digest, vol. 2, p. 791.
256 192 CTS 324; Rubin, loc. cit. above (n. 229), pp. 164-165.
258 The declaration of independence of the Republic of Panama was proclaimed on 4 November 1903 and was immediately followed by United States recognition.
Senate (on 23 February 1903), and entered into force on 26 February 1904. Article I of the Treaty begins by stating that the United States guarantees and will maintain the independence of the Republic. The other 25 Articles dealt with the various grants agreed upon, the mutual rights of the parties in respect of the Canal Zone, the neutrality of the canal and its entrance, and so on. Most importantly, under the Treaty the United States acquired in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation ... and so on, 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 constructed (Article 2). For that purpose, Panama, by Article 3, conferred on the United States "all 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 or authority.”

In return, the United States was to pay Panama a lump sum of $10,000,000 and subsequent annual amounts of $250,000 (Article 14). Moreover, according to Article 19, 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”. Finally as to the neutrality and the navigation through the Canal, Article 18 stipulated that:

"The Canal, when constructed, and the entrance thereto shall be neutral in perpetuity, and shall be opened upon the terms provided for by Section I of Article three of, and in conformity with all the stipulations of, the treaty entered into by the Governments of the United States and Great Britain on November 18, 1901.”

3.2. The regime established by the 1901 and 1903 treaties

3.2.1. The effects on third States

As can be seen from above, the regime envisaged by the two treaties was to be essentially similar to that established by the 1888 Convention for the Suez Canal. Viewed in isolation, this regime may well be viewed, like the Suez Canal regime, as affecting third States in two ways. On the one hand, all nations appear to have been given a right (or an advantage as asserted by the United States and Great Britain) to use the canal for passage of their vessels without any discrimination “in respect of the conditions or

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259 Treaty to Facilitate the Construction of a Ship Canal, 18 November 1903 (between the United States and Republic of Panama), 194 CTS 263; TS No. 431; 33 Stat. 2234; 31 Martens (2nd.) 599; 96 BFSP 553.
charges of traffic, or otherwise”. On the other hand, States using the canal are required to observe certain rules regarding the manner in which they can exercise that right or advantage as well as the rules regarding the neutrality of the canal. As such, it is possible to consider these treaties as establishing a regime of general rights and obligations affecting third States in an objective manner. Of course, that interpretation is only possible if one considers the terms of those treaties without giving due regard to their Travaux Préparatoires and, most importantly, without considering the intention of the parties thereto.

As stated before,260 for the purposes of the doctrine of “objective regimes” as well as the creation of third party rights both under the Vienna Convention and customary international law,261 it is imperative to ascertain that the parties have an intention to confer actual rights to a third State or third States in general. The determination of the intention of the parties for either purposes is not a matter of treaty interpretation: the goal is not to ascertain the meaning of the provisions of the treaty, but rather to ascertain if the parties actually intended to grant any right to, or impose any obligation on, third States. The existence of such an intention could, accordingly, be determined by reference to any pieces of evidence including the terms of the treaty itself.262 On this basis the question whether or not third States were to acquire any right or to incur any obligation under the 1901 and 1903 treaties has to be determined by reference to the intention of the United States, Great Britain and Panama — though this last mentioned State simply adhered to the rule as was already established by the treaty between the former two States and its position could not be of much relevance here.

The above examination of the Travaux Préparatoires shows clearly the intention of the United States and Great Britain. As was seen, the United States took utmost care to prevent any third States from acquiring treaty rights vis-à-vis the United States in respect of the Panama Canal. It was not ready to accept a clause which allowed third States to adhere to the treaty; nor was it ready to accept a clause which could indirectly create legal rights for them. This clearly shows that the United States had no intention

260 See Ch. I (2.2.) and Ch. II (2.2.2.1.) above.
261 Ibid., Moreover see the pronouncement of the Permanent Court in the Free Zone case cited in p. 296.
262 Ibid.
to grant to third States an actual right as distinguished from a mere benefit. The position of Great Britain was that the provisions regarding neutrality of the canal could not be effective against third States unless through their adherence or unless it was expressly laid down that the observance of that neutrality was a condition of free passage. The United States, however, did not accept either of these propositions. The satisfactory solution arrived at with regard to the position of third States was that third States were allowed to use the canal as an advantage, but not to acquire any right, on condition that they would observe the provisions of the treaty. This is what the United States and Great Britain intended by the terms “the canal shall be free and open to vessels of all nations observing these rules”. It is worth recalling that these words were accepted by the British Government because they were

“efficacious for the purpose which ... [they] had in view, namely, that of insuring that Great Britain should not be placed in a less advantageous position than other Powers, while they stopped short of conferring upon other nations a contractual right to the use of the Canal.”

As a result, third States could not invoke the terms of the 1901 and 1903 treaties directly and on their own account to insist on their applications. Nor did they have any locus standi vis-à-vis those treaties or the parties thereto. Nor were they, of course, obliged in any way to respect the provisions relating the neutrality and non-blockade of the canal. However, if they wished to use the canal they had to observe those provisions. The United States was only bound vis-à-vis Great Britain and Panama to allow passage and only the latters countries were entitled to invoke the term of those treaties against the United States.

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263 *Loc. cit.* above (p. 290).
264 See Ch. I (1.6.) and Ch. II (2.2.2.1.) above.
266 See the United States’ Secretary of State memorandum, commenting on the position of third States vis-à-vis the canal under the Hay-Pauncefote Treaty, where it is stated that:

“there was a strong national feeling against giving to the other powers anything in the nature of a contract right in an affair so peculiarly American as the canal; that no other powers had now any right in the premises or anything to give up or part with as consideration for acquiring such a contract right; that they are to rely on the *good faith* of the United States in its declaration to Great Britain in this treaty; and that it adopts the rules and principles of

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Given the position of the United States and Great Britain that they did not want in any way to affect third States in law, the question of whether third States were affected by virtue of a rule on "objective regimes" or because of some other legal device could not even arise. However, some authorities seem to have regarded the 1901 and 1903 treaties as having constituted an international regime for the canal affecting third States. For instance, the Permanent Court appeared, in the S.S. Wimbledon case, to consider treaties concerning the Kiel, Suez and Panama canals as producing certain effects for third States.\(^\text{268}\) The Court viewed Article 380 of the Treaty of Versailles, which declared almost identical rule to that stipulated in Article 3 (1) of the Hay-Pauncefote Treaty, as having transformed the status of the Kiel Canal as a "national navigable waterway into an international waterway ... for the benefit of all nations of the world".\(^\text{269}\) It spoke of the great maritime canals as artificial waterways "permanently dedicated to the whole world ..."\(^\text{270}\) These language of the Court has been taken as giving support to the idea that treaties establishing a regime of common user for inter-oceanic canals constitute "international settlements" or "objective regimes".\(^\text{271}\) This point of view, however, does not seem appropriate. As stated before,\(^\text{272}\) the issue before the Court was not whether third States acquired rights under Articles 380-386 nor whether they incurred any obligation thereunder. The Court did not, and did not need to, consider these questions because all the States involved in the proceedings were parties to the Treaty of Versailles.\(^\text{273}\) When it proclaimed that Germany was bound to maintain the canal open for passage of vessels of all nations, the Court did not indicate in any way that third States were to enjoy such a passage as an actual right as we distinguished it from mere benefit.\(^\text{274}\) Indeed, in the Free Zones case,\(^\text{275}\) the Court made it clear that

\(^{268}\) See Ch. I (1.6.) above.

\(^{269}\) PCIJ, Ser. A, No. 1, p. 28, emphasis added.

\(^{270}\) Ibid., emphasis added.


\(^{272}\) See Ch. I (1.6.) above.

\(^{273}\) For a criticism of the Court's approach see Schwarzenberger, op. cit. above Ch. I (n. 91), pp. 223-226.

\(^{274}\) See Ch. I (2.2.) and Ch. II (2.2.2.1.) above.
"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. There is however nothing to prevent the will of sovereign States from having this object and this effect. The question of the 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 which have stipulated in favour of a third State meant to create for that State an actual right ..."276

The only point made by the Court in the S. S. Wimbledon case which directly affected the position of third States under treaties relating to inter-oceanic canals was that their rights under customary law (namely, the right to have Germany, if it was neutral, deny passage to material of war destined to one or other belligerent) was restricted as a result of the international regime established. Even in this regard, the Court relied on the existence of an exception in customary law rather than the theory that a certain class of treaties, or treaty regimes, by their nature would bind third States. Accordingly, as Waldock has cautioned,

"in appreciating the implications of the Court's language, however, it has to be borne in mind that all parties in the case were parties to the Versailles Treaty, so that the Court may not have addressed itself to the question of the interests of third States so fully as if it might otherwise have been required to do."277

McNair, referring to the 1888 Convention and the 1901 and 1903 treaties concerning, respectively, the Suez and Panama canals, has also suggested that

"it seems probable that other States not parties to those treaties have acquired certain rights for their ships, whether public or private, to make use of these waterways ... [on the basis of a principle] recognized by private law of some countries, namely a dedication orbi et urbi of some natural advantages or facilities, with the intention that the securing of these facilities for the pubic use is effected by their becoming a part of the general public law of the world."278

However, McNair's suggestion cannot be maintained at least as far as it concerns treaties relating to the Panama Canal. He seems to have ignored the fact that the United States and Great Britain did not want to see third States acquire, in any way, legal right

277 PCIJ Rep., Ser. A/B, No. 46, pp. 147-148, emphasis added. See also the case of Certain German Interests in Polish Upper Silesia where the Permanent Court held that

"A treaty only creates law as between the States which are parties to it; in case of doubt, no rights can be deducted from it in favour of third States ..." (loc. cit. above Ch. 2 (n. 9), p. 29, emphasis added).
278 McNair's Law of Treaties, pp. 259-260, emphasis added. For a kind of "dedication-reliance" theory which is largely similar to the mechanism of creation of right through "custom-process" see Baxter & Triska op. cit. above Ch. I (n. 143), pp. 182-84.
against them or vis-à-vis the canal. Nor, indeed, could they make any dedication in the public interest, for neither of them at the time had any territorial sovereignty or jurisdiction with regard to the land territory over which the canal was to be constructed.  

Similarly, Fitzmaurice seems to have ignored that fact when submitted that

"it is certainly true that as a matter of practice and fact, the instruments governing the use of ... such seaways as the Suez and Panama Canals ... have all come to be accepted or regarded as effective erga omnes, and this is of course still more so as regards the question whether they confer universally available rights of passage."  

Accordingly, contrary to what is sometimes presumed, the 1901 and 1903 treaties cannot be regarded as having constituted an "objective regime" involving legal rights and obligations for third States for the very reason that the parties thereto did not want that to happen. In fact, the position of the United States and Great Britain during the negotiation of the 1901 Treaty clearly shows that neither of them believed that there was any exception to the pacta tertiis ... rule allowing a treaty, such as that they were contemplating for Panama Canal, to affect third States by their own force and without more. Of course, nothing could prevent them to change their position subsequently. We now consider whether there was any such change in their subsequent practice and if any third State claimed any right under the treaties in question.

3.2.2. Evidence of State practice  

a. The early silence. From 1901, when the Hay-Pauncefote Treaty was concluded, until 1914, when the Panama Canal was opened for use, there is no evidence indicating that the United States or Great Britain had changed their position. Nor is there any evidence indicating that third States had considered themselves bound by the rules of that Treaty.  

That silence, of course, is not surprising because the Hay-Pauncefote

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281 On 6 April 1914 the United States signed a treaty with Colombia for the settlement of the differences arising out of the event in 1903 which resulted in the separation of Panama from Colombia (entered into force on 30 March 1922). Clause 1 of Article 1 of this treaty gave Colombia the perpetual right of transporting through the inter-oceanic canal "its troops, materials of war and ships of war without paying any charges to the United States". Prior to this, in a confidential memorandum addressed to the British Ambassador, dated 8 January 1914, Secretary Root explained the reason for special concession envisaged for Colombian ships of War. In reply, the British Ambassador stated that Great Britain would not
Treaty could hardly have produced any legal effect for or against States not parties thereto until the time when the projected canal was built. However, one could presume that third States would normally have made some reaction if they had considered themselves legally affected by the Hay-Pauncefote Treaty. In particular, when the United States tried to exempt American vessels from the payment of Canal tolls, no other State except Great Britain made any comment (objection) as to the important question of the legality of the proposed exemption. The lack of any reaction may rightly be taken as evidence of the belief of the States concerned that the Hay-Pauncefote Treaty did not create, and had not created, legal rights and obligations for them. It is worth adding here that, during this controversy, the United States authorities, purposely employed the term “privilege” when referring to the position of third States and referred to “moral duty” of the United States to grant that privilege.

b. 1915-1977. The position described above remained the same from 1914 till the new regime established in 1977. From the first day of its opening the United States kept the canal open to public and private vessels of all nations. During the two World Wars, vessels of both neutrals and belligerents allowed to use the canal on the basis of the rules embodied in the 1901 and 1903 Treaties. In both occasions, however, when the United States entered the war, it prohibited her enemy’s vessels from the use of the

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282 On 28 August 1912, the United States enacted the Panama Canal Act which provided, *inter alia*, that “no tolls whatever shall be levied upon vessels engaged in the coasting trade of the United States ...” Great Britain, but no other nation, protested against such an exemption on the ground that it violated the equality rule in Article 3 (1) of the Hay-Pauncefote. Great Britain argued that the phrase “all nations” means all nations including the United States. The United States accepted the British Government’s interpretation. For detail see *Hackworth’s Digest*, vol. 2, pp. 772-780.

283 A memorandum attached to the Panama Canal Act stated that:

“The right to the use of the Canal and to equality of treatment in the use depends upon the observance of the conditions by the nations to whom the United States has extended that privilege.” (See Memorandum signed by President Taft and attached to the Panama Canal Act of 1912, examined by Oppenheim, *op. cit.* above Ch. I (n. 75), pp. 7-9, emphasis added).

284 When discussing the Panama canal tolls, Secretary of State Root pointed out that “third States had no legal rights under the Hay-Pauncefote treaty but that the United States was morally obligated to them”. See *Hackworth’s Digest*, vol. 5, p. 222, emphasis added.
Canal.285 On 13 October 1921, The United States renewed its old position by maintaining that "other nations ... not being parties to the treaty have no rights under it"286 while it continued to apply the rules in the 1901-1903 Treaties to vessels of all States without any discrimination.287 On the other hand, during the period specified above, third States seemed to have been ready to comply with the rules and regulations established in accordance with the 1901-1903 Treaties without taking any position as to the question whether they enjoyed the passage through the canal as of right or as mere advantage. This silence again can surely be taken as an evidence of third States' belief that the 1901-1903 Treaties did not grant them any legal right. Otherwise, they would have been expected to have raised some objection to the United States' long-standing position renewed by the United States authorities on every occasion when the question of third States' rights under those treaties came up. Accordingly, we can firmly conclude that there is no evidence indicating that the United States or third States have in their practice treated the 1901-1903 Treaties as having constituted a regime creative of rights and/or obligations for States not party thereto.

3.3. The Panama Canal regime after 1977

Since the 1960s tension grew between the United States and Panama over the canal and the harsh terms of the Hay-Bunau-Varilla Treaty.288 In 1964, a drastic series of events, resulting from a misunderstanding as to which flag-Panamanian or United States was to be flown in schools located in the Canal Zone, caused rioting and led to a three-month break in diplomatic relations between the two countries.289 Organization of American States (OAS) mediation did not produce any fruitful result. However, after resuming diplomatic relations on 3 April 1964, both countries agreed to negotiate a new treaty concerning the Panama Canal. Panama's demand was a complete revision of the

285 See Padelford, op. cit. above (n. 266), pp. 177-179. In 1917, the American authorities seized German vessels once the United States entered in the war. Similarly, in 1941 certain Italian vessels were seized. See Ibid.

286 Secretary Hughes to President Harding, 13 October 1921, cited in Hackworth's Digest, vol. 5, p. 222. For a counter-argument see Baxter & Triska, op. cit. above Ch. I (n. 143), p. 176.

287 For a full account of the attitude of the United States with regard to position of the Panama Canal both in time of peace and in time of war see Padelford, op. cit. above (n. 266), pp. 100 et seq.


existing treaty-system, while the United States desired the *status quo*. A Resolution of the United Nations Security Council in 1973 asking for the withdrawal of the United States from Panama was obstructed by the American veto. In 1974 the outline of a new treaty was agreed in a joint statement of the foreign ministers of the United States and Panama (the Kissinger-Tack Joint Statement), according to which: the treaty of 1903 and its amendments would be abrogated by the conclusion of a new canal treaty; the Canal Zone would be returned to the jurisdiction of Panama; and Panama would participate in the administration of the canal and gradually assume total responsibility therefor. The subsequent negotiations between the two countries resulted in the signing of two treaties — the Panama Canal Treaty and the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal (the Neutrality Treaty).

3.3.1. The Panama Canal Treaty (1977)

The Panama Canal Treaty establishes a framework for the Canal’s operation which is to continue until the treaty expires, December 31, 1999. The purpose of the Treaty is to set up guidelines for gradual transfer of administration of the canal to Panama. Its most important provisions are: (1) explicit recognition of Panama’s sovereignty over the Canal Zone and the canal itself; (2) abrogation of the Hay-Varilla Treaty and the subsequent related instruments concerning the Panama Canal; (3) the grant to the United States of all rights necessary “to manage, operate, maintain, improve, protect and defend the Canal” until the year 2000; (4) elimination of the Panama Canal Company and the Canal Zone Government; (5) the creation of a Panama Canal Commission to operate the canal as an agent of the United States; (6) gradually increased Panamanian participation in the operation and maintenance of the Canal; (7) retention by the United States of “primary responsibility to protect and defend the Canal” for the duration of the treaty; (8) increased payments to Panama from canal revenues; (9) explicit provisions concerning the functions of the new Commission.

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292 13 ILM 90; also reproduced in Rubin, *loc. cit.* above (n. 229), p. 189, as Appendix A.
294 See Articles 1, 3, 4, 10, 11, 12 and 13, respectively.
3.3.2. The Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal (1977)

Article I of this treaty provides that the Republic of Panama declares that “the Canal, as an international transit waterway, shall be permanently neutral in accordance with the regime established in this Treaty ...”\(^{295}\) Article II provides that

“Panama declares the neutrality of the Canal in order that both in time of peace and in time of 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 nation, or its citizens or subjects, concerning the conditions or charges of transit, or for any other reason, and so that the Canal, and therefore the Isthmus of Panama, shall not be the target of reprisals in any armed conflict between other nations of the world ...”\(^{296}\)

As before, vessels using the canal must pay tolls and other charges for transit and other ancillary services; they must comply with applicable rules and regulations and must “not commit any act of hostility in the Canal”.\(^{297}\) According to Article III (e) “Vessels of war and auxiliary vessels of all nations shall at all times be entitled to transit the Canal, irrespective of their internal operation, means of propulsion, origin, destination or armament, without being subjected, as condition of transit, to inspection, search or surveillance. However, such vessels may be required to certify that they have complied with all the applicable regulations relating to health, sanitation etc. ..”\(^{298}\)

As a special privilege, the vessels of war and auxiliary vessels of the United States and Panama are given the right “to transit the Canal expeditiously”.\(^{299}\) According to Article IV “the United States and Panama agree to maintain the regime of neutrality ... which shall be maintained in order that the Canal shall remain permanently neutral ...” On the basis of Article V, “after the termination of the Panama Canal Treaty in

\(^{295}\) Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, Washington, 7 September 1977, 33 UST 1; 1161 UNTS 183; 16 ILM 1021. Hereinafter referred to as the Neutrality Treaty.

\(^{296}\) Emphasis added.

\(^{297}\) Article II (c). They may be required to establish clearly the financial responsibility and guarantees for payment of reasonable and adequate indemnification ... for damages resulting from acts or omissions of such vessels when passing through the Canal. They may also be required to certify that they comply with all relevant health regulations (Article III (c)).

\(^{298}\) Emphasis added.

\(^{299}\) Article VI of the Neutrality Treaty. The United States Senate Amendment, which was accepted by Panama, to this Article interprets the cited provisions to mean that the vessels of war and auxiliary vessels of the United States and Panama will be entitled to transit through the canal “as quickly as possible, without any impediment, with expedited treatment, and in case of need or emergency, to go to the head of the line of vessels in order to transit the Canal”. Rubin, loc. cit. above (n. 229), p. 219
1999, only Panama shall operate the Canal and maintain military forces, defence sites and military installations within its territory". The Joint Statement of 14th October 1977, by President Carter and General Torrijos and an amendment to the Neutrality Treaty added by the United States Senate clarify the nature of the respective obligations of the two parties

"each of the two countries shall, in accordance with their respective constitutional process, defend the canal against any threat to the regime of neutrality, and consequently shall have the right to act against any aggression or threat directed against the canal or against peaceful transit of vessels through the canal ....

This does not mean, nor shall it be interpreted as a right of intervention of the United States in the internal affairs of Panama. Any United States action will be directed at insuring that the Canal will remain open, secure and accessible, and it shall never be directed against the territorial integrity or political independence or sovereign integrity." [1]If the Canal is closed, or its operations are interfered with, the United States and .. Panama shall each independently have the right to take such steps as it deems necessary .. including the use of military force in Panama, to re-open the Canal ...

Finally, and most importantly for the purpose of our inquiry, Article 7 specified 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 regime of neutrality set forth herein."

The two treaties were accepted by a referendum in Panama. The United States ratified the treaties adding two amendments, two conditions, four reservations and five declarations to the Panama Canal Treaty, and six reservations and six declarations to the Neutrality Treaty. Although these modifications added by the United States Senate constituted changes to the treaties, no referendum was held on them as required by Article 274 of the Panamanian constitution for all agreements concerning the Canal. However, all the modifications were accepted by the Panamanian Government on the exchange of ratifications. Before going any further, it must be noted here that the Government of the United Kingdom was informed of the text of the 1977 treaties and, in

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300 Ibid.
301 Emphasis added.
302 For the texts of the treaties and related documents see 16 ILM 1022-1098. The two treaties entered into force on 1 October 1979. For the instruments of ratifications, see 17 ILM 817-835.
response, they agreed that these treaties were consistent with the Hay-Pauncefote Treaty of 1901.303

3.3.3. The Protocol to the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal

On 1 October 1979, the date when the Neutrality Treaty entered into force, the Protocol envisaged by Article VII of that treaty was declared by the OAS open to accession to all States. The Protocol provides that

"Whereas the maintenance of the neutrality of the Panama Canal is important not only to the commerce and security of the United States .. and Panama, but to the peace and security of the Western Hemisphere and to the interests of world commerce as well; Whereas the regime of neutrality .. will ensure permanent access to the Canal by vessels of all nations on the basis of entire equality; Whereas the said regime 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 regime of permanent neutrality for the Canal established by [the Neutrality Treaty] ... and associate themselves with its objectives.

Article II. The Contracting Parties agree to observe and respect the regime of permanent neutrality of the Canal in time of war as 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 instrument of accession with the Secretary General of the Organization of American States."304

Contrary to what is wrongly assumed by some writers,305 the United States and Panama are not party to this Protocol. The Protocol is meant to be totally independent from the 1977 Neutrality Treaty between the United States and Panama. It is designed to secure the international recognition of the regime of permanent neutrality in a formalistic way without allowing acceding States acquiring treaty rights against the United States or Panama. The idea is that States acceding to the Protocol bind themselves, inter se, to respect the regime of permanent neutrality of the canal which the United States and Panama have undertaken to maintain without being treaty bound vis-à-vis the former


304 *Protocol to the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal*, 7 September 1977, 1161 UNTS 205; UKTS 11 (1983), Cmnd. 8833; 16 ILM 1042, emphasis added.

305 Subedi, *loc. cit.* above Ch. IV (n. 12), pp. 177-178; Oppenheim, *op. cit.* above Ch. I (n. 28), p. 598.
States. This seems useless because there is no point in the duty to respect the regime of neutrality if the acceding States were not to be bound vis-à-vis Panama or the United States and if the latter States were not bound towards them. However, as will be seen, the United States Government was keen not to allow other States to acquire treaty rights with respect to the Panama Canal while hoping that the Panama Canal neutrality would gain international recognition. That is the underlying reason for the expedient of the Protocol.

3.3.4. The effects on third States

As can be seen from the provisions of the two treaties set out above, the Panama Canal regime established by the 1977 Treaties is different from the regime already in force in two respect. Firstly, under the old regime there was no reference to the canal as being open in time of war. Therefore, the United States, could close, as it did in both World Wars, the canal to the vessels of its enemy. Under the new regime, however, Panama bound herself to leave the canal open to all vessels “both in time of peace and in time of war”. In other words, the canal is to be open permanently for transit even if Panama herself is a belligerent; whether or not that is possible is aptly disputed by some writers given the fact that nothing can bar a State from protecting its territory in self-defence. The second difference is the device envisaged in Article VII of the Neutrality Treaty, i.e. the Protocol, through which all States are invited to “acknowledge the regime of permanent neutrality ... and to associate themselves with its objectives” and, further, to agree “to observe and respect” that regime “in time of war as in time of peace”. As in the old regime, viewed in isolation the new regime may be viewed as affecting third States in an objective manner: the vessels of all States are allowed to use the canal for transit at all times; besides, all States are expected to respect the regime of

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306 Although the idea seems to be odd and pointless, it is not impossible to imagine that two or more States cannot undertake, inter se, to respect an arrangement made by a treaty between two or more other States. That arrangement may well become binding on all States even if the former States may formally remain in the position of third States with regard to the treaty concluded by the latter States. This seems an especially workable mechanism in the cases of permanent neutrality.

307 See Smith, loc. cit. above (n. 163), pp. 28-32. “[The right of Self-defence] is inherent in every sovereign State and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion.”, Address by the United States’ Secretary of State Kellogg before the American Society of International Law, 28 April 1928, quoted in Whiteman’s Digest, vol. 5, pp. 971-972, emphasis added.
permanent neutrality and the rules and regulations relating to passage of public and private vessels. However, despite the fact that third States are invited to “respect and to observe” the status of neutrality of the canal in a formal way and contrary to what is suggested by some writers, there is no evidence indicating that the 1977 treaties were or are intended to affect third States in any way in law, let alone creating an “objective regime”. Indeed, as can be seen from the following section, all the evidence underlines the lack of an intention, at least on the part of the United States, to affect third States in any manner in law.

3.3.5. Evidence of State practice

a. The United States view as to third States’ rights. While the Panama Canal Treaties were under consideration by the United States Senate Committee on Foreign Relations, the question arose as to whether third countries would derive rights under the 1977 treaties, either through accession to the Protocol to the Neutrality Treaty or through some other means. The Committee’s Legal Counsel, Michael J. Glennon, and the Legal Adviser for the Department of State, Herbert J. Hansell, pronouncing the United States Government’s position, agreed that no such rights would be, or had been, created in favour of third States. Mr. Glennon’s letter to Mr. Hansell (5 January 1978) sets forth the reason why the Hay-Pauncefote Treaty did not confer rights upon third States and Mr. Hansell’s reply to that letter explains why such also is the case under the new treaty-arrangement. Mr. Glennon’s letter states that

"Under customary international law, as reflected by Articles 35 and 36 of the Vienna Convention on the Law of Treaties (May 23, 1969), neither rights nor obligations for third parties are created by a treaty unless the parties to the treaty so intend. The negotiating history of the Hay-Pauncefote Treaty demonstrates that neither Great Britain nor the United States intended to confer rights on third party nations. An earlier version of this 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 stated 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”. Several commentators have interpreted this language as a bilateral declaration of intentions by

308 See Subedi, loc. cit. above Ch. IV (n. 12), p. 177.
the contracting parties. Secretary of State Hughes wrote to President Harding on October 13, 1921, that "other nations ... not being parties to the treaty have no rights under it". This position has been endorsed by the ILC.

In reply, Mr. Hansell referring to the question of third States rights under the new regime established by the Panama Canal Treaty and the Neutrality Treaty states that

"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."  

b. The expedient of the Protocol. As stated above, the Protocol to the Neutrality Treaty is purposely designed to prevent third States acquiring legal rights vis-à-vis the United States or Panama with respect to the canal while it is meant to secure international recognition of the status of permanent neutrality of the canal. The United States' position as to the function of the Protocol and the legal consequence of adherence by third States thereto is set forth in Mr. Hansell's letter, cited above. According to Mr. Hansell:

"Adherence to the Protocol to the Neutrality Treaty would not establish in third countries any legal rights with respect to canal passage or any right or obligations to take action in order to maintain the regime of neutrality. In adhering to the Protocol, third countries would not enter into a treaty relationship with the US or Panama but rather, in recognition of the benefits they mutually derive from the treaty, would commit themselves inter se to respect the regime of neutrality and to ensure that vessels of their registry observe applicable rules of passage."  

In 1980, the United States confirmed this position in a diplomatic correspondence exchanged with China. In response to the invitation to adhere to the Protocol, China through its Ambassador informed the American authorities that "it could become party [to the Protocol] ... only if it received assurances that the Taiwan authorities would not be permitted to accede". In a diplomatic note, dated 13 May 1980, the Department of State informed the Embassy of the Republic of China, that

"... the Department is not able to assure the Embassy that the Taiwan authorities will not be permitted to accede to the Protocol, because the Government of the United

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310 Here, the author mentions the following references as example: Roxburgh, op. cit. above Ch. 1 (n. 25), p. 69 and Knapp, loc. cit. above (n. 265), p. 314.
312 Ibid., p. 702, emphasis added.
313 See p. 303 above.
States is not a party to the Protocol. The United States and Panama are parties to the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal. However, the Protocol to that Treaty is international in scope and is intended to permit other nations of the world to express their support for the regime of neutrality created by the Treaty. Therefore neither the Government of the United States nor the Government of Panama is eligible to be party to the Protocol. As the Embassy is aware, international law requires that any significant question regarding the acceptability of an accession to a multilateral Treaty such as this Protocol must be forwarded by the depository ... to the parties for decision. The United States is therefore unable to provide the desired assurance, which can only come from the parties ..."\textsuperscript{316}

c. The silence of Third States. From the time of the conclusion of the 1977 treaties until the present time, there is no evidence of any reaction or protest by third States to the United States' interpretation of the question of rights and obligations of third States under the 1977 Treaties and with regard to the Panama Canal as a whole. Considering the fact that the United States' position is well publicised and considering that a large number of States have actually acceded to the Protocol to the Neutrality Treaty,\textsuperscript{317} the silence of third States may be taken as acquiescence to the United States' proposition that neither the old treaty regime nor the new regime confer any legal right, and surely impose no obligation, on third States. If third States were convinced that they had acquired legal rights under the old treaty regime, they could have been expected to have sought some sort of participation in the negotiation of the 1977 treaties, or to have made some sort of protest regarding the United States' interpretation of the matter. Thus third States' acquiescence here may well be taken as an evidence of their belief that they did not and do not have any treaty-right against either the United States or Panama, nor, of course any treaty-obligation to respect or observe the rules established by the Neutrality Treaty except that they ought to respect or to observe those rules if they wish to use the canal for passage of their vessels.

\textsuperscript{316} Ibid., emphasis added.

\textsuperscript{317} Shortly after the Neutrality Treaty entered into force on 1 October 1979, the United States and Panama undertook a series of parallel demarches in world capitals to encourage other States to accede to the Protocol. Within the first year, Bolivia, Chile, El Salvador, Guatemala, Honduras, Republic of (South) Korea, Malawi, Nicaragua, Taiwan and Vietnam adhered to the Protocol. Costa Rica, Denmark, Egypt, Israel, Norway, Philippines, St. Vincent, Spain, Tunisia, the United Kingdom, Venezuela Argentina, Barbados, Belize, Dominican Republic, Ecuador, Equatorial Guinea, Finland, Germany, Jamaica, Liberia, Morocco, Netherlands, Paraguay, Saudi Arabia, Sweden, USSR and Uruguay have also adhered to the Protocol in later years. At the end of 1994, there were 38 parties to the Protocol. See Bowman & Harris, \textit{op. cit.} above Ch. I (n. 166), 11th Cumulative Supplement (1995), p. 289 (Treaty No. 712).
3.4. Conclusion

As can be seen from above, treaties relating to the Panama Canal were never meant to affect third States in any manner in law. Therefore, the question of whether third States were affected by virtue of a rule on “objective regimes” or because of some other legal device could not even arise. For that reason, the case of the Panama Canal can hardly be instructive as to whether or not there exists a special rule on “objective regimes”. The attitude of the United States and Great Britain during the negotiation of the Hay-Pauncefote Treaty, and the acquiescence of third States thereto, marks unequivocal approval of the absolute character of the pacta tertiis .. rule and, accordingly, the inability of any kind of treaty to establish, by its own force and without more, rights and obligations valid erga omnes. The attitude of the United States and other States towards the new regime established by the 1977 treaties affirms that conclusion. The expedient of the Protocol to the Neutrality Treaty and the United States’ interpretation of the status of States adhering to it together with the acquiescence of third States to that interpretation show these States’ awareness and approval of the pacta tertiis .. rule and its absolute character, at least, with regard to bilateral treaties even if their object is a matter of general interest such as the status of the Panama Canal. Finally, it must be noted here that the conclusion just made does not mean that third States are altogether barred from claiming right vis-à-vis Panama or the United States. Although, they cannot invoke custom because of the lack of opinio juris on the part of the United States, they may, on the basis of the Nuclear Test Cases, directly invoke Panama’s promise — declared not only in the treaty but in other places — that it will keep the canal open to vessels of all nations in all times, as having established an obligation for her and,

accordingly, an enforceable right for them. Of course, they would still need to prove that Panama was meant by that promise to bind herself vis-à-vis third States.

4. The Antarctic Treaty regime

4.1. The early history

The legal history of Antarctica starts with Great Britain's claim of territorial sovereignty over part of Antarctica by letter's patent of 21 July 1908. Long before, though, there was controversy over its discovery. Great Britain, the former Soviet Union and the United States have each claimed that their nationals discovered Antarctica first.

Great Britain's original claim covered all areas and islands between 20 and 50 degrees West longitude and south of 50 degrees South latitude, as well as those of 58 degrees South latitude and between 50 and 80 degrees West longitude. Great Britain later extended its territorial claim in 1923. It claimed the Ross Ice Shelf and its surrounding coasts and placed them under the administration of the Governor-General of New Zealand. This was followed by the claiming of the Australian Antarctic Territory in 1933, which was placed under the administration of the Commonwealth of Australia. In 1924, France formally annexed Adelie Land, part of which is located in the area claimed by Australia. In 1927 Norway annexed the sub-Antarctic Bouvet Island and 1939 claimed the mainland coast between the Australian and the British sectors. Chile and Argentina

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319 Another alternative for third States is to invoke the principle of estoppel by relying on the Panama's unilateral promise and/or the fact that the canal has been open to them for decades. Of course, they may do so if and when they have actually incurred damages (i.e., the canal is closed to them) and such damages are directly resulted from Panama's failure to fulfill her promise. See: American Law Institute, loc. cit. above Ch. II (n. 86), Sec. 156, p. 479; Bowett, D.W., Estoppel Before International Tribunal and its Relation to Acquisition, BYBIL 33 (1957), pp. 176-202, at pp. 183 et seq. (Estoppel by conduct); MacGibbon, The Scope of Acquiescence ..., loc. cit. above Ch. IV (n. 89), pp. 147-150; Chinkin, op. cit. above Ch. II (n. 5), p. 141. In particular, see North Sea Continental Shelf Cases (loc. cit. above Ch. I (n. 131), p. 27) where the Court reflected upon the possibility of Germany having been precluded from denying the applicability of the conventional regime (Article 6 of the Geneva Convention on the Continental Shelf), "by reason of past conduct, declaration, etc., which not only evinced acceptance of that regime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice." Of this, the Court held, there is no evidence whatever in the case in hand. Ibid.

320 Given the position of the United States, such a task would surely be easier than proving the existence of an intention on the part of Panama and the United States to confer right on third States for the purpose of Article 36 of the Vienna Convention.

321 Auburn, F., Antarctic Law and Politics (London, 1982), p. 2. According to some writers Antarctica was first discovered by a Polynesian, Ui-te-Rangoria, around A.D. 650.
in 1940 and 1942, respectively, claimed parts of Antarctica. These claims not only overlapped each other, but they also partially conflicted with Great Britain's claim.\footnote{Triggs, G.D. (ed.), \textit{The Antarctica Treaty Regime} (Cambridge, CUP, 1987), pp. 51-52. See also the United Kingdom's unilateral applications submitted to the International Court of Justice on 4 May 1955 against Argentina and Chile which were not successful because of the failure of the latter States to litigate. See ICJ Rep. (1956), pp. 12 and 15.}

Other States, including the United States, Japan,\footnote{Japan had a claim to part of Antarctica but was forced by Article 2 (e) of the Peace Treaty of San Francisco of 1951 (136 UNTS 45) to renounce it. See Verzijl, \textit{op. cit.} above Ch. III (n. 120), vol. IV, p. 275.} Belgium, and the former Soviet Union, did not recognise the legal validity of these claims made with respect to Antarctica.\footnote{On the United States' non-recognition of claims to sovereignty over Antarctica see \textit{Whiteman's Digest}, vol. 2, pp. 1245-1254. For the Soviet Union's position see \textit{ibid.}, pp. 1254-1256.} The principal reason given for their stance was that the traditional requirements for the acquisition of territory were not fulfilled. According to the non-claimant States, mere discovery could not confer title.\footnote{In 1924, the United States' Secretary of State Hughes stated that "the discovery of lands unknown to civilization, even when coupled with formal taking of possession, does not support a valid claim of sovereignty unless discovery is followed by actual settlement of the discovered country." (Quoted in Wolfrum, R. & Klemm, U., \textit{Antarctica}, in \textit{Bernhardt's Ency.}, vol. 12, pp. 10-19, at p. 11).} The United States Government did not, accordingly, make any claim to certain portions of Antarctica discovered by its nationals Ellsworth and Byrd in the 1930s,\footnote{See \textit{Whiteman's Digest}, vol. 2, pp. 1245-1250.} but it reserved all rights in that regard. A similar position was taken by the Government of the former Soviet Union concerning the rights derived from the discoveries and explorations of Russian navigators during the nineteenth century.\footnote{See the \textit{Memorandum of the Soviet Government on the Question of the Regime of the Antarctic}, 8 June 1950, communicated to the Governments of Great Britain, France, Norway, Australia, Argentina, New Zealand and the United States, translated in Toma, P.A., \textit{Soviet Attitude Towards the Acquisition of Sovereignty in the Antarctic}, AJIL 50 (1956), pp. 611-626, Appendix I; also cited in \textit{Whiteman's Digest}, \textit{ibid.}, pp. 1257-1258.}

The conflict between the claimant and non-claimant States gained momentum after World War II as a result of the general deterioration of political relations between the new Blocs of East and West. In 1948, the United States took certain initiatives which contemplated the establishment of an international regime for Antarctica based on internationalisation, condominium, trusteeship or some similar arrangement.\footnote{Hanessian, J., \textit{The Antarctic Treaty 1959}, ICLQ 9 (1960), pp. 436-480, at pp. 437-439.} The
United Kingdom did not consider these ideas acceptable. In 1950, the United States proposed a treaty which provided for, *inter alia*, a moratorium on territorial claims and the right of the party States, and their nationals, "to conduct exploration and scientific research in any part of ... [Antarctica]", and exchange of scientific information regarding Antarctica. The United States' initiatives did not become a reality. But they caused the Soviet Union to take diplomatic action with regard to the status of Antarctica, especially because of the fact that the United States and Great Britain tried to exclude the Soviet Union from the negotiations on the status of Antarctica. A resolution of the All-Soviet Geographical Society (a non-governmental body), adopted on 10 February 1949, asserted the "indisputable and historic right of the Soviet Union to participate in solving the Antarctic problem". It warned that "no solution of the problem of a regime for the Antarctic without participation of the Soviet Union can have legal force, and the USSR has every reason not to recognise any such solution". The Government of the Soviet Union itself officially entered the scene on 7 June 1950 by addressing a Memorandum to the Governments of Argentina, Australia, France, Norway, New Zealand, the United Kingdom and the United States. In the Memorandum, the Soviet Government while reiterating most of the points raised in the Geographical Society's resolution and the economic and scientific importance of the Antarctic, proposed that

"in accordance with international practice all countries concerned should be invited to take part in discussing the regime of any sphere of international importance. The Soviet Government holds that this international practice should be observed in settling question of the Antarctica."

Argentina and Chile responded to this Memorandum by reaffirming their claims to portions of the Antarctic territory and rejecting any Soviet right to similar claims and to

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333 *Loc. cit.* above (n. 327).

participation in Antarctic negotiations. Other claimant-States and the United States did not, however, reply to the Soviet Union’s Memorandum.

The United States’ initiative subsequently faced further setbacks as a result of the Korean War — which deepened the conflict between the Western and Eastern Blocs — and as a result of the divergence of opinions between the claimant-States, which in general were not prepared to surrender their claims and accept instead the idea of internationalisation of Antarctica. In 1956, and again in 1958, the Indian Government requested the General Assembly of the United Nations to put on its agenda the question of Antarctica. This request was not accepted because of the objections of Argentina and Chile and the lack of support from the United States and the United Kingdom.

A new opportunity to resolve the Antarctic question came about with the preparations for the International Geophysical Year (IGY). Sixty-four nations undertook to assist the IGY-program but of this only twelve nations decided to actually participate in Antarctic activities (all seven claimant-States in Antarctica: Argentina, Australia, Chile, France, Norway, New Zealand, the United Kingdom and, in addition, Belgium, Japan, South Africa, the United States and the USSR). The IGY officially lasted from 1 July 1957 until 31 December 1958 and largely focused on scientific work in the polar regions, especially the Antarctic. Under an informal arrangement, all of the nations involved agreed that no IGY activities could constitute the basis for new claims in Antarctica. Moreover, delegations accepted a declaration by Chile and Argentina that the IGY activities would not affect the status quo. During the IGY, claimant-States tolerated the installation of bases and the activities of the nationals of non-claimant-


336 UN Doc. A/3118. See also Hanessian, loc. cit. above (n. 328), p. 451; Ahluwalia, K., The Antarctic Treaty: should India become a party to it?, Ind. JIL 1 (1960-61), 473-483.

337 Ibid.

338 These States organised expeditions to Antarctica and, together, they established 40 scientific research stations.

339 Wolfram & Klemm, loc. cit. above (n. 325), p. 11.

340 This is commonly referred to as a sort of “gentlemen agreement”. See Auburn, op. cit. above (n. 321), p. 89.

States in the claimed zones. These developments were further welcomed in a series of joint announcements made by the United States and several other participating States, which provided for bilateral co-operation in Antarctica.\textsuperscript{342} There, it was agreed that, inter alia,

"In harmony with the spirit of the International Geographic Year, scientists from all countries are cordially invited to participate in the scientific program ... [at various stations set up by announcing States] at any time, subject to limitations of space, transportation ... The administrative arrangements which have been agreed upon ... have no effect on the rights or claims asserted ... in Antarctica. Each Government maintains its traditional position in regard to such matters."

While the preparations for the IGY were going on the Soviet Union established its first station, Mirnyy, in the Australian sector. The Mirnyy was followed by the inland year-round station Vostok, 1410 kilometres from Mirnyy at the south geomagnetic pole.\textsuperscript{344} The establishment of these stations caused serious anxiety in Western capitals, especially because of the news that the Soviet Union had launched the first orbiting artificial satellite, i.e. Sputnik, successfully.\textsuperscript{345} The Australian Government, in whose sector the first Soviet station was established, was especially concerned about the military potential of these stations.

4.2. The 1958-1959 negotiations: the Washington Conference

It was in this atmosphere of anxiety that the United States renewed its efforts for convening a conference to negotiate a legal regime for Antarctica. In 1958, the United States started negotiations with the countries having conducted activities in Antarctica during the IGY.\textsuperscript{346} The essence of the United States proposal, as summarised by Hanes-sian, was

"(i) free access to Antarctica by all nations interested in carrying out scientific research;
(ii) the growth of scientific co-operation ...;"

\textsuperscript{342} See: the joint announcement made on 15 July 1958, between the United States and Argentina; the joint announcement made on 6 May 1958, between the United States and Australia, the joint announcement made on 23 December 1958, between the United States and New Zealand, all cited in Whiteman's Digest, vol. 2, pp. 1239-1241.

\textsuperscript{343} Ibid.


\textsuperscript{346} For the list of participating States see text which follows.
(iii) the use of Antarctica for peaceful purposes only;
(iv) non-militarization of the area;
(v) guaranteed rights of unilateral access and inspection by all participating States to all parts of Antarctica;
(vi) the freezing of the legal status, so no one need renounce any claims or rights currently held;\(^{347}\) and
(vii) the creation of an administrative unit in which all participating States would have an equal footing.\(^{348}\)

Once sure that the discussion had a good chance of success, the United States Government invited the countries having a "direct interest in Antarctica" — meaning, in practice, all countries which had participated in the IGY and conducted activities in Antarctica\(^ {349}\) — to participate in a conference on Antarctica. Certain States, such as Brazil and Poland, protested against their exclusion.\(^ {350}\)

On the occasion of announcing the conference, the President of the United States acknowledged that "the United States is dedicated to the principle that Antarctica ... shall be used only for peaceful purposes" and that the conference is to seek an effective means of keeping Antarctica "open to all nations to conduct scientific research or other peaceful activities there" under "joint administrative arrangements" which would "ensure the successful accomplishment of these and other peaceful purposes".\(^ {351}\) In its invitation note, the United States emphasised that "the interests of mankind would best be served, if the countries which have a direct interest in Antarctica were to join together in the conclusion of a treaty" based on the provisions mentioned above.\(^ {352}\) The subsequent negotiations were carried out in complete secrecy. There were several issues which needed to be resolved. Although there was some support for the internationalization of Antarctica, Chile and Argentina were absolutely opposed to any derogation of their sovereignty.\(^ {353}\) There was also disagreement over the participation in the treaty.

\(^{347}\) This was originally proposed by Chile in 1948. see Bush, *op. cit.* above (n. 329), vol. III, p. 471 (Doc. US1950).


\(^{349}\) For the list of participating States see text which follows.


\(^{353}\) France and Australia also supported this point of view. New Zealand, the United States, the United Kingdom and the USSR appeared to favour some sort of internationalisation. See Auburn, *op. cit.* above (n. 321), p. 94.
Although the USSR and Japan pushed for the widest possible participation, Australia asked for a limited group. The United Kingdom was agreeable to the accession of a wide range of States, but wanted a limitation on the number of countries involved in the actual administrative arrangements. Some nations felt that India should be asked to participate because of its United Nations proposals. Others felt that, if India were invited to join, the USSR would bring in one or more of its satellite States. A draft article proposed by the United States on the right of non-participants, which attempted to emphasise the non-monopolization policy of the negotiating States, read:

"The administrative measures which become effective pursuant to Article VII of the present Treaty shall apply equally to all countries and shall be carried out in a uniform and non-discriminatory manner, with equal treatment being accorded to countries which are parties to the present Treaty and to countries not parties thereto, and their respective nationals, so long as such countries and nationals respect the principles embodied in the present Treaty."

Despite many differences during the preliminary conversation, there was considerable optimism and agreement among the negotiating States. On 28 May 1959, the United States announced that the Antarctic Treaty Conference would be held in Washington commencing on 15 October 1959. The conference was deliberately held in private. However, the delegates made public statements at the opening session. And the documents of the conference have subsequently been published. As the purpose of the present inquiry is limited to the question of the possibility of the Antarctic Treaty having established an "objective regime" valid _erga omnes_ or _tertios_, a reference to some statements which have a bearing on this matter will be appropriate here. Some of the statements are interesting because they acknowledge the lack of any intention to establish a generally binding regime for — or to settle the international status of — Antarctica; others indicate the conviction that the contemplated treaty was not intended to impose, by its own force and without more, any obligations on third States. For instance, Argentina’s delegate to the conference maintained:

"This Conference ... has not been convened to institute _regimes_ or to create _structures_. It is not its mission to change or alter anything."

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354 Shapley, _op. cit._ above (n. 345), p. 98. Similarly, Belgium expressed the opinion that "There was no question of monopoly of the Antarctic continent". _Ibid._


356 Quoted in Hayton, R.D., _The nations and Antarctica_, OZFOR 10 (1959/60), pp. 368-412, at p. 402, emphasis added.
Similarly, the Chilean representative, while agreeing with Argentina on the "limited" purpose of the Conference, indicated that Chile could “not accept any formula that might imply the internationalization of its Antarctic Territory ...”357 Most interesting of all, the New Zealand delegate stated that although New Zealand had no doubts as to the validity of her claim, her Government

“would be prepared to consider the relinquishment of national rights and claims in Antarctica ... The establishment of a completely international regime for Antarctica would require countries to forgo their national claims ... it is only on this basis that a fully effective administration of the whole of Antarctica could be achieved.”358

Although the United Kingdom representative strongly supported the maintenance of the legal status quo as a prerequisite for an international agreement, stated for the benefit of other States, which might, “question the right of any single group of countries even to give appearance of legislating on a matter of world-wide concern”, that the

“Treaty is, in fact, to be almost entirely a self-denying ordinance on the part of the signatories, who will derive from it virtually no privilege but only obligations.”359

As will be seen, the rules finally adopted give effects to the position of the majority which was non-internationalization, preservation of the legal position of both claimant and non-claimant States, a machinery which allowed participation of other States (i.e. accession clause in Article XIII) and devices which ensured the effective application and general validity of the Treaty as a whole (i.e.. Article IX and X).360 However, it is important to emphasise here that, by opposing “internationalization”, the claimant-states (except perhaps New Zealand) were denying the right of use even to non-claimant States, let alone third States. Their agreement to “freezing” their claims does not change that position. It simply stops them from asserting that position so long as the treaty remained in force. A second point which needs to be highlighted here is that the claimant-States were not ready to bind themselves beyond the terms of the contemplated treaty. In other words, they were ready to bind themselves by a treaty provision which, inter alia, allowed all States having access to their claimed territory for scientific research without their prior authorisation, but only if and so long as the treaty remained in force. As will be seen, this position of the claimant-States which seemed to

357 Quoted in Hanessian, loc. cit. above (n. 328), p. 464, emphasis added.
358 Quoted in ibid., p. 465.
359 Quoted in Hayton, loc. cit. above (n. 356), p. 403, emphasis added.
360 See the next section.
have been accepted by the non-claimant States (since they all have agreed to the freezing of legal the *status quo*) is one of the main obstacles for treating the Antarctic Treaty as having established a regime for Antarctica valid, automatically and without more, *erga omnes* or *tertiis*. Such a position is also a barrier for transforming the Treaty provisions into customary law since for that to happen there is a need for *opinio juris* of the parties which is clearly lacking, at least on the part of the claimant-States.

The Conference ended its work on 1 December 1959 when the agreed text of the Antarctic Treaty was signed by the 12 participating States: Argentina, Australia, Chile, France, New Zealand, Norway, United Kingdom (claimant-States) and Belgium, Japan, South Africa, The United States, the Union of Soviet Socialist Republics (non-claimant-States). On 23 June 1961, the Antarctic entered into force upon ratification by all the signatory States.

4.3. The Antarctic Treaty (1959)

The Antarctic Treaty consists of 14 Articles, mainly incorporating the principles proposed by the United States. In the Preamble, the parties express their objectives and the purpose of the Treaty, declaring that

"it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord."

To achieve this objective, the Treaty provides for three basic principles:

i. **Principle of non-militarization.** In the first place, the Antarctic Treaty establishes a regime of "non-militarization" for the whole area of Antarctica. Acknowledging this principle, Article I (1) stipulates that

Antarctica shall be used for peaceful purposes only. There shall be prohibited, *inter alia*, any measure of a military nature, such as the establishment of military bases and

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361 See Sec. 4.3.1. below.
363 Emphasis added.
364 Article VI defines the area of the application of the Treaty. It states that the Treaty provisions apply to the

"area south of 60 degrees South Latitude, including all ice shelves, but nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within the area."
fortifications, the carrying out of military manoeuvres, as well as the testing of any
type of weapon. \(^{365}\)

Article V broadens these restrictions by prohibiting “any nuclear explosions in
Antarctica and the disposal there of radioactive waste ...”. The observance of this re-
gime is secured through an inspection system (Article VII) and the obligation to publish
the results of the research carried out (Article III). According to Article VII, each original
Contracting Party plus acceding States genuinely active in the area (i.e. the Consultative Parties)\(^{366}\) are entitled to “designate observers to carry out inspection”. Each
observer “shall have complete freedom of access at any time to any or all areas of Ant-
arctica”. Paragraph 3 of Article VII further stipulates that

“all areas of Antarctica, including all stations, installations and equipment within those
areas, and all ships and aircraft at points of discharging or embarking cargoes or per-
sonnel in Antarctica, shall be open at all times to inspection [by the designated
observers].”

Aerial observation is also authorised “at any time over any or all areas”.\(^{367}\) The
officially designated observers and scientific personnel exchanged under the provisions
of the treaty are “subject only to the jurisdiction of the Contracting Party of which they
are nationals ...”\(^{368}\)

**ii. Principle of freedom of scientific research.** Secondly, the Treaty provides for
a regime of freedom of scientific investigation applicable to the whole area of Antarc-
tica, including the claimed sectors. In this regard, Article II declares that

freedom of scientific investigation in Antarctica and co-operation towards that end, as
applied during the International Geophysics Year, shall continue on the basis of the
present Treaty.”

Promotion of such co-operation is then detailed in Article III, including the
exchange of “information regarding plans for scientific programs”, the free exchange of
scientific plans, observations, results and personnel in order to promote international
coop-eration in scientific investigation in Antarctica.\(^{369}\) The parties are under an

\(^{365}\) Article 1. Paragraph 2 of this Article permits the use of military personnel or equipment for
scientific research or for any other peaceful purpose.

\(^{366}\) See Article IX examined below.

\(^{367}\) Article VII (4).

\(^{368}\) Article VIII (1).

\(^{369}\) Article III (1) in full reads:

“1. In order to promote international co-operation in scientific investigation in Antarctica, as
provided for in Article II of the present Treaty, the Contracting parties agree that, to greatest

obligation to inform all other parties in advance of all expeditions to and within Antarc-
tica on the part of its ships or nationals, of all expeditions organised in or proceeding
from its territory, of all stations in Antarctica occupied by its nationals and of any mili-
tary personnel or equipment intended to be introduced into Antarctica.\textsuperscript{370} Scientific in-
vestigation is under no limitation, although the Consultative Parties may issue
restrictive measures by means of recommendation envisaged under Article IX.

iii. Principle of freezing of status quo. Thirdly, the treaty provides for the prin-

ciple of freezing of status quo of the legal positions of the claimant and non-claimant par-
ties existing in December 1959. Article IV acknowledges this principle in the following
words:

"nothing contained in the present Treaty shall be interpreted as:
(a) a renunciation by any Contracting Party of previously asserted rights of or claims
to the territorial sovereignty in Antarctica;
(b) a renunciation or diminution by any Contracting Party of any basis of claim to ter-
ritorial sovereignty in Antarctica which it may have whether as a result of its activities
or those of its nationals in Antarctica, or otherwise;
(c) prejudicing the position of any Contracting Party as regards its recognition or non-
recognition of any other State's rights of or claim or basis of claim to territorial sover-
eignty in Antarctica."

Moreover, paragraph 2 of this Article IV stipulates that no acts or activities taking
place while the Antarctic Treaty is in force shall "constitute a basis for asserting, sup-
porting or denying a claim to territorial sovereignty in Antarctica or create any rights of
sovereignty in Antarctica. The paragraph ends with a general statement that "no new
claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall
be asserted while the present Treaty is in force."

In order to safeguard the effective application of the above rules and principles as
well as the advancement of the Treaty's objectives, the Treaty provides for certain de-
VICES. First, Articles IX envisages a system of regular, periodic (biennial) meetings of
representatives (Consultative Meetings) "for the purpose of exchanging information,

\textsuperscript{370} Article VII (5).
consulting together on matters of common interest pertaining to Antarctica, and formu-
lating and considering, and recommending to their Governments, measures in further-
ance of the principles and objectives of the Treaty. According to Article IX, such
measures should include measures regarding the:

“(a) use of Antarctica for peaceful purposes;
(b) facilitation of scientific research in Antarctica;
(c) facilitation of international scientific co-operation in Antarctica;
(d) facilitation of the exercise of the right of inspection provided for in Article VII of
the Treaty;
(e) questions relating to the exercise of jurisdiction in Antarctica;
(f) preservation and observation of living resources in Antarctica.”

According to Article IX (1), full Consultative membership is reserved for the
original twelve “Contracting Parties” and any acceding State during such time as it
demonstrates its interest in Antarctica by conducting substantial scientific research ac-
tivity there, such as the establishment of a scientific station or dispatch of a scientific
expedition. Paragraph 4 of Article IX clarifies the decision-making formula accord-
ing to which “measures” recommended by the meetings (which take decision on the ba-
sis of unanimity) “shall become effective when approved by all the Contracting Parties
... entitled to participate in the meetings held to consider those measures [i.e. Consulta-
tive Parties].” Approved recommendations are viewed as international agreements, sup-
plementing the obligations which flow from the Antarctic Treaty.

A second device envisaged for the purpose of the effective application of the
Treaty as a whole is the provision in Articles X. According to this Article,

“Each of the Contracting Parties undertakes to exert appropriate efforts, consistent
with the Charter of the United Nations, to the end that no one engages in any activity
in Antarctica contrary to the principles or purposes of the present Treaty.”

As will be seen, this Article has been interpreted in different ways. The simple mean-
ing of this provision is that every party is bound vis-à-vis other parties to make its ut-
most effort so that no one — which could be another party or a third State or their
nationals — would engage in any activity in Antarctica “contrary to the principles or

371 Article IX (1).
372 See p. 317 above for the list of the original parties.
373 The States entitled to participate in the Consultative Meetings are commonly referred to as
Consultative Parties.
374 See Sec. 4.1.1. below.
purposes” of the Treaty. As such it may well be seen as a device intended to enhance the validity of the Treaty and its objectives, though, as will be seen, it cannot be “used as a vehicle for third party effects”.

Finally, another device which is to serve the same purpose is the accession clause in Article XIII. According to this Article, the Antarctic Treaty is open for accession by any State which is a Member of the United Nations, or by any other State which may be invited to accede to the Treaty with the consent of all of the Consultative Parties. A State which accedes to the Treaty will become bound by all the provisions of the Treaty and enjoy all the rights and benefits granted. However, it is not entitled to participate in the decision-making of the Consultative Meetings, unless and until it qualifies as a Consultative Party (i.e. conducts “substantial scientific research activity” in Antarctica).

**Termination and modifications.** The treaty is of unlimited duration. There is, however, a complex procedure for its modifications. According to Article XII, the Antarctic Treaty may ordinarily be “modified or amended at any time by unanimous agreement” of the Consultative Parties. Any such modification would enter into force when the depository Government has received notice from all such States that they have ratified it. All other Contracting Parties [acceding States not qualified as a Consultative Party] may either also ratify it or be deemed to have withdrawn from the Treaty if they fail to do so within a period of two years from the date of entry into force of the modification or amendment. However, 30 years after entry into force of the Treaty (i.e. in 1991) any one of the Consultative Parties may call a Conference of all the [Contracting] Parties to review the operation of the Treaty. Any modification or amendment to the Treaty approved at such a Conference by a majority of the Contracting Parties there represented, including a majority of the Consultative Parties, will enter into force when all Consultative Parties have ratified it. If this is not the case within a period of two years any Consultative Party may give notice of its withdrawal from the treaty.

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375 Brunner, _loc. cit._ above Ch IV (n. 112), p. 44. For further detail see Sec. 4.3.1. below.
376 Article XII, emphasis added.
4.3.1. The effects on third States

As stated above, prior to the conclusion of the Antarctic Treaty, Antarctica was treated by some States as *terra nullius* susceptible of appropriation. Seven States claimed territorial sovereignty over a large part of Antarctica while others did not recognise their claims. From the point of view of the claimant-States, other States could not engage in any kind of activities in the claimed areas without their authorisation. On the other hand, from the point of view of the non-claimant States, they were free to engage in such activities because they had not recognised the claims of the claimant-States. The two rival powers, i.e. the United States and the former Soviet Union, were amongst the latter group. The situation was, therefore, one of international conflict and uncertainty. The Antarctic Treaty was concluded to avert such a potentially dangerous and unique situation. The solution there agreed upon may be viewed as having introduced rules of behaviour capable of affecting party and non-party States alike. As hinted earlier on, before the conclusion of the Antarctic Treaty, there was no restriction on any State using the Antarctic for non-peaceful purposes. Under the Antarctic Treaty, the carrying out of any "measures of a military nature" are totally prohibited. The prohibitions are formulated in objective terms indicating that third States must respect the regime of non-militarization. Moreover, the parties, especially the claimant-States, could have hardly agreed to undertake the obligations of non-military use if they themselves alone were to be bound by those obligations. This may further be deduced from the fact that each party has undertaken to prevent any one from carrying out acts contrary to the purposes of the Treaty. Thus, the Antarctic Treaty may, in the first place, be viewed as purporting, or having been intended, to impose the obligations relating to the regime of non-militarization on both parties and third States in an objective manner. Of course, in that case, third States, if bound to respect the regime of non-

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377 See Sec. 4.1. and 4.2. above.
379 See Sec. 4.1. above.
380 However, see text which follows.
militarization, ought to have a right to the performance of the very same obligations by the parties and, probably, other third States.\textsuperscript{381}

Secondly, the system of inspection is formulated in a manner which gives the Consultative Parties an authority to inspect, and to a large extent control, the activities of each other as well as third States if they were to become active in the Antarctic. The right of the Consultative Parties to inspect the Antarctic region amounts to the imposition of a burden on third States which, prior to the Antarctic Treaty, could arguably exist only with regard to the claimed sectors and not the whole of Antarctica.\textsuperscript{382}

Thirdly, the prohibition on making new claims is also formulated in general terms; it may, therefore, be viewed as purporting to prohibit both parties and third States from making such claims — though it is possible to argue that the prohibition is meant to affect the parties only.\textsuperscript{383} Finally, the freedom of scientific investigation seems to have been intended for the benefit all States alike.\textsuperscript{384} It is arguable whether or not, in theory, the Antarctic Treaty is, or can be, the source of a right of scientific research in Antarctica, due to the fact that the Parties themselves did not have universally recognised territorial sovereignty or jurisdiction with regard to Antarctica. It is self-evident that one or a group of States cannot grant a right relating to a territory over which they do not have title. Besides, if it was proven, as appeared to be the case from the IGY experience in mid-1950s, that there existed before the conclusion of the Antarctic Treaty a practice recognising the right of scientific research for all States, then it could hardly be conceivable to view the provisions of Article II and III as granting rights to third States. However, these provisions can be considered as embodying a formal recognition by the States parties of the right of all States to scientific investigation in Antarctica. To this


\textsuperscript{382} Ibid., p. 253.

\textsuperscript{383} The relevant provisions reads: “No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.” Considering that it make a linkage between the prohibition and the life of the treaty, it is possible to view the prohibition as referring to the parties only. Charney considers this provision as “susceptible of universal applications”. See Charney, J., \textit{loc. cit.} above Ch. IV (n. 231), p. 69 (n. 28). See further Birnie, \textit{loc. cit.} above (n. 381), pp. 253-254.

extent, the regime of free scientific research can be seen as conferring, or at least consolidating, the right of all States, including third States, to use Antarctica for scientific purposes — though, given the position of the claimant-States,\textsuperscript{385} it would still be questionable whether the parties had intended by the freedom of scientific investigation to confer actual right, as distinguished from mere benefit, on third States.\textsuperscript{386}

Moved by the above features of the Antarctic Treaty, some writers have considered it as having constituted an "objective regime"\textsuperscript{387} — indeed, the issue of "objective regimes" in recent years has inextricably been bound up with the question of the Antarctic Treaty.\textsuperscript{388} As indicated before,\textsuperscript{389} Fitzmaurice treated the Antarctic Treaty as a prime example of an international regime of common user involving automatic creation of rights and obligations for third States under his proposed draft Article 14(2)-type of case.\textsuperscript{390} He states that the Treaty

"makes provision for accession by other countries, but at the same time does not seem to exclude non-parties from the area within the limits of the concept of use for scientific and geographical purposes. Nor does it purport specifically to impose any obligation on non-parties."\textsuperscript{391} Yet it is difficult to believe any non-party which, for instance, sent a scientific expedition to Antarctica ... would not consider itself, and be regarded, as bound to conform to the conditions of the user of Antarctica laid down by the Treaty, such as demilitarization of the area, prohibition of nuclear tests, provisions for inspection of bases, etc., immunity from jurisdiction of all inspectors, etc. There is also a significant clause ... by which the parties undertake to "exert appropriate efforts ... to the end that nobody [sic. "no one"] engages in any activity in Antarctica contrary to the principles or purposes" of the Treaty. At the root of such a position, as a

\textsuperscript{385} See concluding remarks made under Sec. 4.2. above.
\textsuperscript{386} See text which follows. As to this distinction see Ch. I (2.2.), Ch. II (2.2.2.1.) above.
\textsuperscript{387} See the opinion of the writers cited in the text (which follows) and the relevant footnotes. Boczek states that the major Soviet textbook on international law (\textit{Kurs Mezhdunarodnovo Prava}, at p. 402) declares that "The Antarctic Treaty must be considered valid "\textit{erga omnes}". See Boczek, \textit{loc. cit.} above (n. 344), p. 842. See also Holloway, \textit{op. cit.} above Ch. II (n. 22), pp. 593-596. For detailed analysis of the question whether or not the Antarctic Treaty constitutes an "objective regime" see Simma, \textit{loc. cit.} above Ch. IV (n.10), pp. 189-209. He concludes that it does not. See further also authorities cited in n. 418 below.
\textsuperscript{388} Tomuschat, \textit{loc. cit.} above Ch. I (n. 135), at p. 245.
\textsuperscript{389} See Ch. I (1.11.) and Ch. IV (2.2.1.) above.
\textsuperscript{390} \textit{Ibid.}
\textsuperscript{391} This argument is based on his general theory that treaties establishing regimes of demilitarisation and/or neutralisation for a territory do not impose any obligations on third States but rather require third States to recognise, respect and not to act contrary to such regimes. For detail see Ch. IV (2.2.2.) above.
causative element affecting the attitude of the third State, lies the existence of a simple
if indirect sanction ...”\textsuperscript{392}

Thus, according to Fitzmaurice, third States by making use of Antarctica for sci-
entific purposes would automatically become bound to respect the regime of non-
militarization and other restrictions envisaged by the Treaty. Of course, the problem
with Fitzmaurice’s contention is that, first of all, he does not address the question of the
basis upon which third States could claim right of user in Antarctica — supposing that
they did not have such a right at all; secondly, he fails to show if and how the treaty
constituted an “international regime of common user”; and, finally, somewhat illogi-
cally, he contends that the treaty did not impose any specific obligations on third States
but immediately he enumerates a list of third States’ obligations though, of course, un-
der the veil of “conditions of user”. We have already seen that the obligations relating
to regime of non-militarization cannot be considered as conditions attached to the right
of use of Antarctica for scientific purposes.\textsuperscript{393}

Likewise, Waldock considered the Antarctic Treaty as having been intended to
constitute an “objective regime”. Commenting on the Treaty, he maintains that it
“... provides for ... a right of accession. Although the parties evidently contemplated
that States desiring to use Antarctica for scientific purposes would normally accede to
the Treaty, their intention to create an objective legal regime for Antarctica seems
clear, both from the Preamble to the Treaty and from objective formulation of the ba-
sic principles of the regime in articles 1 and 2. Moreover, in article 10 each contract-
ing party undertakes to exert appropriate efforts ... to the end that no one engage in
any activities in Antarctica contrary to the purposes of the Treaty.”\textsuperscript{394}

A short response to Waldock’s treatment of the Antarctic Treaty is that he does
not seem to have applied his own proposed criterion by which a treaty can be seen as
constituting an “objective regime”. According to paragraph 1 of his proposed Draft Ar-
ticle 63, a “treaty establishes an objective regime when it appears \textit{from its terms} and
\textit{from the circumstances of its conclusion} that the intention of the parties is to create in
the general interest general rights and obligations.”\textsuperscript{395} He overlooks one of the main ar-
ticles of the Treaty (i.e. Article IV) and seems to have ignored the circumstance of the

\textsuperscript{392} Fitzmaurice’s 5th. Rep., pp. 93-94, para. 55. Nevertheless, Fitzmaurice suggests that the

\textsuperscript{393} See Ch. III (3.2.) above.

\textsuperscript{394} Waldock’s 3rd. Rep. on Treaties, p. 30, para. 11.

\textsuperscript{395} Emphasis added.
The conclusion of the Treaty which, in his own view, is vital for determination of the intention of the parties. As stated above, Article IV is exactly designed to preserve the legal position of the claimant and non-claimant States at the time of the conclusion of the treaty. The position of the former States, before and at the time when it was “frozen”, was that certain zones of Antarctica were part of their territory and, of course, subject to their exclusive jurisdiction. Their agreement to “freeze” their claim did not and does not change that position. It simply stops them from asserting their sovereignty claims so long as the treaty remained in force. Thus, the Treaty could not be viewed, at least from their point of view, as having meant to establish any right of user for the non-claimant States party to the Treaty, let alone all third States. Besides, we observed that there was strong opposition to the idea of internationalisation of Antarctica. An objective regime of the sort contemplated by Waldock could become a reality if, as the representative of New Zealand argued during the Conference on Antarctica, the claimant-States were ready “to forgo their national claims.” That, of course, did not happen, nor is likely to happen due to the constant renewal by the claimant-States of their sovereign rights in Antarctica. Moreover, it is arguable if the Antarctic Treaty satisfies the second condition required by Waldock, that is, the presence of a State, or States, having territorial jurisdiction with regard to the subject-matter of the treaty. We have seen that there were conflicting claims and uncertainty in this regard. Finally, according to paragraphs 3 and 4 of Waldock’s proposed draft Article, third States that expressly or impliedly (i.e. remained silent for certain period of time after the conclusion of the treaty) accept an objective regime would not only be entitled to invoke the provisions of the regime and to exercise any general right which its terms and conditions may confer, but also to participate in the amendment or revocation of the regime. As Simma put it, “it is obvious that the Contracting Parties of the Antarctic Treaty never intended to grant third States such sweeping rights”. The amendment procedure formulated in

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3. See Sec. 4.1. and 4.2. above.
397 Ibid.
398 Ibid.
400 Cahier, highlighting this aspect of the Antarctic Treaty, concludes that this treaty does not provide the basis for an objective regime. Cahier, *loc. cit.* above Ch II (n. 48), pp. 663-665.
401 Simma, *loc. cit.* above Ch. IV (n. 10), p.195.
Article IX of the Antarctic Treaty does not even allow acceding States to participate in the amendment of the Treaty, at least during the first 30 years period after its entry into force.

Like Fitzmaurice and Wallock, Klein's treatment of the Antarctic Treaty is not satisfactory. Placing his emphasis on Article X, he seems to suggest that that Treaty constituted an "objective regime". The provision of this Article, in his view, reflects an "assertion of competence" on the part of the parties to create an "objective regime". He indicates that such kinds of "assertions are legal assertions, i.e., they contain the claim to have authority to settle a matter on the international level. In this context, the difference between status treaties and law-making treaties is explained by the difference between a concrete settlement relating to a certain territory and formulation of abstract and general rules."

In Klein's view, non-party States that have not objected to the parties' "assertion of competence" would then be assumed to have submitted to it and, accordingly, be bound by the regime. Many objections may be broached against this attribution of "legislative competence" even if it is limited in cases when the parties can be seen as acting in the "general interest". In the first place, he seems to have ignored, like Wallock, the important provisions of Article IV. We have repeated this many time before, the Antarctic Treaty was not to create a generally binding regime; nor was it meant to be, and may be seen as embodying, a "settlement". As Simma rightly argues, the treaty is "a modus vivendi on the surface of an unresolved but 'frozen' dispute."

Second, Klein requires, again like Wallock, the existence of a territorial jurisdiction element which, as we have seen, is lacking or disputed in the case of Antarctica.

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403 Klein, ibid., p. 353 (English Summary), emphasis added.
404 Ibid.
405 See Ch. IV (1.3.) above for the requirements other than "assertion of competence".
406 See Brunner, loc. cit. above Ch IV (n. 112), p. 43.
407 Simma, loc. cit. above Ch. IV (n. 10), p. 201.
408 See further Ch. IV (1.3.) above.
Third, as argued before, if acceding States that are not Consultative Parties are not bound by the “legislative competence” of the Consultative Parties through Recommendations, adopted under Article IX, except with their express consent (i.e. by means of ratification), how could third States be held bound by their silence.\textsuperscript{409}

Fourth, Article X is not to impose obligation on third States. Some writers have argued that Article X will be superfluous if it would be interpreted as only imposing obligations on party States “since it goes without saying that the Treaty provisions have to be respected by the signatories [sic] in virtue of the Treaty itself, and no necessity exists for a special article specifying it”.\textsuperscript{410} The response to this argument is simple. As Brunner accurately put it, the Article is not superfluous, “because it is one thing when an obligation, which is owned to you and others, is breached, and quite another thing when you are obliged to actively prevent or to react to such a breach.”\textsuperscript{411}

Article X type provisions were not unknown at the time of the conclusion of the Antarctic Treaty. Indeed, Article X followed the provision of Article 2(6) of the United Nations Charter. As briefly mentioned earlier on,\textsuperscript{412} the majority of writers have regarded that article as not having bound the Non-Members States, \textit{by its own force}, despite all the legitimacy and political weight attached to the Charter and the United Nations itself. Accordingly, as Simma put it, Article X must be construed as “establishing a special treaty obligation concerning sanctions operating only \textit{inter partes}”.\textsuperscript{413} This is almost exactly how the United States, which was the main architect of the Antarctic Treaty, interpreted the article at the time. In a Report prepared by the United States Secretary of State (C.A. Harter), transmitting the text of the Antarctic Treaty and the final act of the Conference to President Eisenhower with a view to receiving the advice and consent of the Senate, the objective of Article X is explained in the following words:

“Its aim is not only to prevent such activity by nationals and organizations under the jurisdiction of the Parties but to \textit{deter} countries which are not parties to the treaty and their nationals and organizations, from engaging in non-peaceful activities in Antarctica. In effect it pledges the \textit{Parties} not only to refrain from giving assistance to


\textsuperscript{411} Brunner, \textit{loc. cit.} above Ch IV (n. 112), p. 28.

\textsuperscript{412} See Ch. II (n. 110) above.

\textsuperscript{413} Simma, \textit{loc. cit.} above Ch. IV (n. 10), p. 197.
persons or countries which might engage in nonpeaceful activities or atomic tests in Antarctica, but to take active steps to discourage any such activity. 414

Consequently, Article X serves two purposes. It imposes, firstly, a legal obligation on every party to act positively so that no one would engage in any activity in Antarctica "contrary to the principles or purposes" of the Treaty. Secondly, it expresses a political assertion, directed against third States, by which the parties proclaim their policy, during the time of the Treaty, that third States will be in danger of being subjected to various sanctions — of course, within the limits allowed by the Charter of the United Nations and custom — if they or their nationals commit acts contrary to the objectives or principles of the Treaty. 415 This does not in any way imply a claim on the part of the Parties that third States are legally bound by the Antarctic Treaty. 416

Finally, Klein fails to furnish any evidence indicating that the parties have actually asserted any sort of "legislative competence". In this regard, it is worth referring to the statement of the United Kingdom delegate to the Washington Conference on Antarctica cited earlier. 417 He stated, for the benefit of non participating States, which, in his view, might "question the right of any single group of countries even to give the appearance of legislating on a matter of world-wide concern," that the Antarctic Treaty was "entirely a self-denying ordinance". How far this statement reflected, or still reflects, reality is not a question of our concern. The important point is that the United Kingdom delegate appears to have expressly denied both the "legislative role" of the States participating in the Conference on Antarctica and the character of the Antarctic Treaty as a piece of "legislation".

Accordingly, we may conclude that, contrary to the position taken by the above-mentioned writers, the Antarctic Treaty cannot in itself be viewed as having constituted an "objective regime". 418 The provisions in Article IV are intended to ensure that there


415 Thus, as Charney accurately put it, Article X "functions as a commitment by the states parties to promote the norms established in the Treaty within the international community by all appropriate means — legal and political." (Charney, loc. cit. above Ch. IV (n. 231), p. 96).

416 See Auburn, op. cit. above (n. 321), pp. 118-119

417 See p. 316 above.

418 The following writers have also shared this view: Pinto, M.C., The International
would be no “objective regime”. Moreover, there exists no independent evidence indicating that the parties intended to impose the treaty on third States as an “objective regime”. A statement delivered by Tunkin, during the course of the ILC discussion on Waldock’s proposed Draft Article 63, indicates the lack of such an intention. Speaking from his recollection as the Soviet representative at the Washington Conference — and while rejecting the proposition that the Antarctic Treaty constituted an objective regime — Tunkin stated that:

"the intention had been to create a regime which could become universally accepted. But there had been no intention of imposing that regime; any attempt to do so would have been illegal."

The suggestion that the Antarctic Treaty did not constitute an “objective regime” does not, of course, mean that it did not, or could not, affect third States at all. As stated above, the provisions relating to non-militarization, inspection, freedom of scientific research and prohibition of new claims are formulated in objective terms and they may be viewed as intended to be binding on party and non-party States alike. However, in order to bring about the third party effects of these provisions, or to secure third States’ compliance, the parties seem to have relied on two means stipulated in the Antarctic Treaty itself: first, to allow third States to accede to the treaty and, second, to use their political muscle to force any State contemplating activities in Antarctica to accede to the treaty or to comply with its provisions without acceding or, if it did not, to face certain lawful situations.


Cf. Guyer who argues that

"I continue to believe that the legislators at Washington established an omni-comprehensive system of general application for the defence of the Antarctic region. It is for this reason that the Antarctic Treaty is a legislative agreement that covers non-signatories as well.” (Guyer, E., The Antarctica’s Role in International Relations, in Orrego Vicuña, F., Antarctic Resources Policy (1983), p. 267, at p. 278, emphasis added).

The 740th Meeting of the ILC, YBILC (1964-I), p. 107, para. 16, emphasis added.
sanctions as contemplated in Article X — one may call this a kind of dual (accession-political pressure) policy.\textsuperscript{421}

These are all recognised means through which States are allowed under international law to promote their treaty-arrangements by extending the sphere of their application, and are perfectly consistent with the \textit{pacta tertii} rule. As it will be seen subsequently, the parties have exactly taken these steps whenever a third State has shown an interest to become active in Antarctica. Moreover, as has been stated before, another recognised way through which treaty rules may become binding on third States is the mechanism of “custom-process”. In Chapter IV, we have explained how a treaty regime, or a particular part of it, may transform into a customary one binding third States: one of the requirements is that the provisions of the treaty should potentially be of a “fundamentally norm-creating character”, another requirement is that there must be sufficient evidence of the \textit{opinio juris} of the parties and the third States evincing their conviction that they are conforming to the regime, or the particular part of it, as a matter of customary \textit{law} and not as a matter of treaty rights and obligations extended to non-party States.\textsuperscript{422} It is evident that neither of these requirements exist in the case of the Antarctic Treaty. The provisions of Article IV combined with the right to withdraw from the treaty — envisaged by Article XII, thirty years after the Treaty’s entry into force, that is, in 1991 — make the whole treaty a provisional arrangement. The regime of non-militarization, freedom of scientific research and management of Antarctic affairs are all measures which the claimant-States have agreed if and so long as the treaty remained in force and, as such, they can hardly be viewed as norm-creating rules — despite the fact that they are formulated in objective terms. Besides, activities carried out during the life of the Treaty are to be devoid of any legal effect in so far as the legal position of the parties is concerned. Thus, there can be no \textit{opinio juris} even between the parties themselves. Another element which weakens the norm-creating character of the Treaty is the fact that the Treaty is open for revision by the Consultative Parties.

\textsuperscript{421} Indeed, Fitzmaurice, Waldock, Klein and those who have followed their view have failed to take into account the position of the parties as to the question of the manner by which they wished third States to derive rights and obligations, if at all, under the Antarctic Treaty. They have invoked all the legal and political means but there is not a single evidence in which they have invoked the doctrine of “objective regimes”. See text which follows.

\textsuperscript{422} See Ch. IV (2.3.) above.
(Interestingly, without participation of States which subsequently accede to the Treaty) and subject to withdrawal. Furthermore, there is abundant evidence indicating that the claimant-States did not want to bind themselves beyond the Treaty either towards other parties or towards the world at large. The claimant-States accepted the freezing of the status quo formula within the framework of the Treaty. As Simma rightly argues,

"they wanted to retain the option of asserting their interest "by all means" should the Treaty operation and co-operation break up. This feature of the Antarctic Treaty seriously reduce the possibility that both the Treaty itself and the subsequent activities of the Consultative Parties qualify as "states practice" or as expression of an opinio juris on the part of states whose interests are specifically affected."

Thus, the Antarctic Treaty cannot be viewed as capable of binding third States through "custom-process" unless one can prove that either the parties have in their subsequent practice rendered the provisions of Article IV obsolete; or all the claimant-States have abandoned their territorial claims in favour of other regimes, i.e. non-militarization, scientific research, protection of environment and international co-operation; or a situation has arisen which makes it impossible for the claimant-States to assert and maintain their territorial claims. The Antarctic Treaty may then be treated as capable of growing norms of customary nature valid erga omnes.

Having concluded that the Antarctic Treaty cannot be regarded as capable of constituting an "objective regime", we now examine the evidence of subsequent State practice in order to determine how the Treaty has been treated in practice both by the parties and third States. Effort will be made here to determine, firstly, whether or not the parties have merely relied on their declared policy (i.e. accession-political pressure) or whether they have gone further by invoking the doctrine of "objective regimes" in order to bring about third party effects of those aspects of the Treaty which are meant to be applied generally; and, secondly, how third States have reacted thereto.

4.3.2. Evidence of State practice

4.3.2.1. 1961-1971

During this period, little evidence of State practice can be found in which the question of the position of third States with regard to the Antarctic Treaty was specifically discussed. The reason for such a deficiency is not difficult to understand. Firstly,

423 Simma, loc. cit. above Ch. IV (n. 10), p. 204.
almost all of the States having a direct or an indirect interest in Antarctica were already parties to the Antarctic Treaty; and secondly, the less developed nations — busy with their struggle to gain their independence and to develop — were not much concerned with a matter so remote as Antarctica. These latter States did not, moreover, have sufficient resources to send expeditions to or set up bases in Antarctica. Accordingly, disputes were unlikely to arise from the existence or the operation of the Antarctic Treaty between party and non-party States. However, there exists certain evidence which negates the possibility of the Antarctic Treaty having been regarded as binding on third States, automatically and without more. Child, describing the “History of Antarctic Interest” of various South-American States, names the following countries (not party to the Antarctic Treaty) as having contemplated making territorial claims over Antarctica in the 1960s: Brazil (which acceded to the Antarctic Treaty on 16 May 1975), Peru (which actually proceeded to claim territorial right over part of Antarctica in 1971 10 years before it acceded to the Treaty, i.e. on 10 April 1981), Uruguay (which acceded to the Treaty on 11 January 1980) and Ecuador (which like Peru made its territorial claim in 1967 and acceded to the Treaty on 15 September 1987). Although these States did not challenge the Antarctic Treaty Parties by carrying out activities in Antarctica, the very fact that they made new territorial claims contrary to the provisions of Article IV-(2), can be invoked as evidence of their conviction that they were not bound by the Antarctic Treaty whether as a matter of “objective regimes” or in any other way. There is no evidence of the reaction of States parties to the Antarctic Treaty — only Chile protested against the Ecuadorian claim because Ecuador’s claim included Chile’s claimed sector. However, the Consultative Parties seem to have, on the basis of their declared policy been able to insure these States accession to the Treaty.

424 Child, op. cit. above (n. 350), pp. 138-139, 160-161, 171-172 and 176-177, respectively.
425 Ibid., p. 176.
It is worth mentioning here that during this period, the following States acceded to the treaty: Poland (1961), Czechoslovakia (1962), Denmark (1965), The Netherlands (1967) and Romania (1971).

4.3.2.2. 1972-1982

The relative silence of the first decade of the operation of the Antarctic Treaty was ended in 1972 when some of the South-American States mentioned above, such as Brazil and Uruguay, developed plans to carry out activities in Antarctica. Moreover, the possibility of third States making territorial claims and the possibility of Antarctica having natural resources potential provided further reasons for discussions of the position of Antarctica in international law and politics including the position of non-party States vis-à-vis Antarctica and the Antarctic Treaty. Being concerned with the ever increasing possibility of third State involvement in Antarctica, the Consultative Parties started to deliberate on the question of the “activities of countries not Contracting Parties”. At the Seventh Consultative Meeting (1972) the question of possible “substantial or continuing activities or territorial claims in the Antarctic Treaty Area by States that are not Contracting Parties to the Treaty” was examined seriously. The Consultative Parties agreed that:

“In such circumstances, it would be advisable for Governments to consult together as provided by the Treaty and to be ready to urge or invite as appropriate the state or states concerned to accede to the Treaty, pointing out the rights and benefits they would receive and also the responsibilities and obligations of Contracting Parties."

The Meeting recalled the principles and purposes of the Treaty, in particular that the Antarctic Treaty Area should continue to be a zone of peace and scientific co-

426 In their Third Consultative Meeting (1964), the Consultative Parties agreed on the so-called Agreed Measures for the Conservation of Antarctic Flora and Fauna, a set of guidelines for protection of indigenous animal and bird populations. Article X of the Agreed Measures, echoing the provisions of Article X of the Antarctic Treaty, requires “each participating Government” to “exert appropriate efforts … to the end that no one engages in any activity in the Treaty Area contrary to the principles or purposes of these Agreed Measures”. See Bush, op. cit. above (n. 329), vol. I, p. 146 (Doc. AT02031964B). The Agreed Measures entered into force in 1983 after being ratified by all Consultative Parties.

427 Being concerned with the fact that acceding States were not ipso facto bound by the Recommendation adopted in the Consultative Meetings, the Consultative Parties urged the acceding States to accept them. See Recommendation III-VII quoted in Bush, op. cit. above (n. 329), vol. I, p. 143 (Doc. AT02061964A.08). This was amplified in 1966 at the Fourth Consultative Meeting: see ibid., p. 195 (Doc. AT03111966.30).

operation and should not become the scene or object of international discord. In this connection the Meeting drew attention to the provisions of Article IV of the Treaty. 429

This position of the Consultative Parties, which was confirmed and acknowledged in the ninth and tenth Consultative Meetings, 430 clearly underlines the conclusion made earlier that the parties to the Antarctic Treaty did not regard the Treaty as binding on third States as a matter of "objective regime" or in any other way. If there was a slight possibility in the minds of the representatives of the Consultative Parties that third States were legally obliged to observe the Antarctic Treaty, they would not have spoken of "invitation" or "accession". It also confirms our conclusion that they considered accession as the appropriate means by which third States could derive rights and obligations under the Antarctic Treaty. The Consultative Parties, by resorting to the notion of "accession", seem to have rejected, or at least disregarded, the theory of "objective regimes" and, conversely, have recognised the relevance of the pacta tertiis .. principle. 431

Parallel to the policy of encouraging interested third States to accede to the Antarctic Treaty, the Consultative Parties did their best to prevent any attempt which could, in their view, undermine the principles and purposes of the Antarctic Treaty, and especially their exclusive authority to manage Antarctica. During the period in question, the Consultative Parties, using their political influence, blocked several moves which envisaged the involvement of various organs and specialised agencies of the United Nations such as the Economic and Social Council, the United Nations Development Program and the Food and Agricultural Organization, in the matters concerning Antarctica's natural resources and environmental impacts. 432 They also managed to neutralise,

429 Bush, op. cit. above (n. 329), vol. I, p. 266 (Doc. AT30101972.01), emphasis added.

430 Ibid., Doc. AT09061975.18 sec. 14 and Doc. AT17091979.01 sec. 15.

431 It is worth noting here that when the EEC contemplated a European Antarctic expedition, proposed by a Polar research Working Party of the Committee on Science and Technology of the Council of Europe, the Executive Committee of the Scientific Committee on Antarctic Research (SCAR) — whose membership is reserved for the representatives of the Consultative Parties — recommended that the five members of the EEC not parties to the Antarctic Treaty should regard themselves as parties for the purpose of the expedition. See Capelle, J., Explanatory memorandum, Consultative Assembly, Council of Europe, Doc. 3257 (29 January 1973), p. 5 at p. 15. The SCAR view provides a good example of the observance and the application of the pacta tertiis .. principle.

through behind the scenes efforts, attempts to introduce the question of Antarctica at the Law of the Sea Conference in its early stages. However, they never appear to have behaved as if the Antarctic Treaty was binding on third States. In fact, their treaty practice during 1972-82 shows clearly their conviction that the Antarctic Treaty was not opposable against third States. For instance, Article III of the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), concluded on 20 May 1980, stipulates that

"The Contracting Parties, whether or not they are Parties to the Antarctic Treaty, agree that they will not engage in any activities in the Antarctic Treaty area contrary to the principles and purposes of that Treaty and that, in their relations with each other, they are bound by the obligations contained in Articles I and V of the Antarctic Treaty."

Likewise, Article IV (1) provides that

"With respect to the Antarctic Treaty area, all Contracting Parties, whether or not they are Parties to the Antarctic Treaty, are bound by Articles IV and VI of the Antarctic Treaty in their relations with each other."

Again Article V (2) specifies that

"The Contracting Parties which are not Parties to the Antarctic Treaty acknowledge the special obligations and responsibilities of the Antarctic Treaty Consultative Parties for the protection and preservation of the environment of the Antarctic Treaty area."

These provisions clearly underline our conclusion that the Antarctic Treaty could not — and was not meant to — bind, ipso facto or otherwise, third States, except through formal means such as accession or recognition as envisaged by the provisions of the cited articles.

As to the attitude of third States, there is no evidence of any such States having taken any position vis-à-vis the Antarctic Treaty or the role of Consultative Parties. As a result of the Consultative Parties policy of "urging or inviting" third States to accede,

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433 Several Arab countries contemplated the inclusion of the Antarctic within the jurisdiction of the proposed International Seabed Authority. See Beck, ibid., p. 126
434 Convention on the Conservation of Antarctic Marine Living Resources, 20 May 1980, Canberra, UKTS 48 (1982), Cmd. 8714; 19 ILM 841. Although this Convention was negotiated and adopted under the aegis of the Antarctic Treaty, the area of its applications is larger than the area covered by the Antarctic Treaty (see Article I). The Convention embraces a provision similar to Article X of the Antarctic Treaty (see Article XXII). The Convention entered into force on 7 April 1981.
435 Emphasis added.
12 countries acceded to the Antarctic Treaty during the period 1961-1983. In 1977, the status of Consultative Party was granted to Poland and to the Federal Republic of Germany in 1981. However, the newly formed group of developing nations (the so-called Group of 77) — having successfully introduced the legal-political concepts of the New International Economic Order (NIEO) and “Common Heritage of Mankind (CHM)” began to pay attention to the question of Antarctica which had common features to outer space and the deep-seabed. In a speech delivered in October 1975 to the General Assembly, the representative of Sri Lanka, Amerasinghe, who was also the President of the ongoing United Nations Conference on the Law of the Sea, stated that:

“There are still areas of this planet where opportunities remain for constructive and peaceful co-operation on the part of the international community for the common good of all rather than for the benefit of a few. Such an area is the Antarctic continent .... Antarctica is an area where the now widely accepted ideas and concepts relating to international economic co-operation, with their special stress on the principle of equitable sharing of the world’s resources, can find ample scope for application.”

These States are in order of accession: German Democratic Republic (19 November 1974), Brazil (16 May 1975), Bulgaria (11 September 1978), German Federal Republic (5 February 1979), Uruguay (11 January 1980), Italy (18 March 1981), Peru (10 April 1981), Papua New Guinea (16 March 1981: by succession after becoming independent from Australia in 1975), Spain (31 March 1982) and China (8 June 1983). The acceding States must have had a reason to accede. But it is certain that none of them was ready to admit that it was bound by the Antarctic Treaty prior to its formal accession thereto.

It is important to note here that when Antarctic Treaty was referred to as an example of the emerging concept of “common heritage of mankind”, both Australia and Argentina made statements denying that “Antarctica was an international domain” and emphasised that they were exercising “sovereignty over a substantial part of the Antarctic continent”. See GAOR, 26th Session, First Committee, Verbatim Records of Meeting, 22 September to 17 December 1971, vol. I, 1831th meeting, p. 11.

Similar to the Antarctic Treaty, both the Outer Space Treaty (1967) and the Moon Treaty (1979) contained provisions on non-militarization, freedom of scientific research, exchange of information and inspection. But they also contained stipulations which were based on, and underlined, the CHM theory. Article I of the Outer Space Treaty stipulates that outer space should be regulated “for the benefit and in the interests of all countries ... and shall be the province of all mankind” and Article II provides that outer space “is not subject to national appropriation by claims of sovereignty”. Likewise, Article II of the Moon Treaty stipulated that “the moon and its natural resources are the common heritage of mankind” and envisaged rules for the orderly and safe development of resources and the equitable sharing of benefits. Respectively, see: Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, London, 27 January 1967, 610 UNTS 205 and Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 5 December 1979, 1363 UNTS 3. The former entered into force on 10 October 1967 and the latter on 11 July 1984. See Bowman & Harris, op. cit. above Ch. I (n. 166), 11th Cumulative Supplement (1995), pp. 233 and 305 (Treaty No. 500 and 766, respectively).

A few years later, during September 1979, Alvaro de Soto, a Peruvian diplomat, launched a strong attack upon the secretive and exclusive Antarctic Treaty System. He argued

"The silence of the (international) community regarding the Treaty can hardly be understood as a form of acquiescence. Nor is it possible to say that there is any statute of limitation in respect of the options open to the rest of mankind ... a comprehensive political debate on the question of Antarctica is inevitable ... and may well be desirable."

It was against this background that the Malaysian Prime Minister raised the question of Antarctica in the United Nations General Assembly, to which I refer now.

4.3.2.3. 1983-1995

a. The Malaysian Challenge. In September 1982, the Malaysian Prime Minister, Dr. Mahithir, speaking before the United Nations General Assembly, stated that,

"There remain certain areas in the world which are not covered by any international agreement ...
It is now time that the United Nations focus its attention on these areas, the largest of which is the continent of Antarctica ... these uninhabited lands do not legally belong to the discoverers in as much as the colonial territories do [sic.] not belong to colonial powers ...
Like the seas and sea-beds, these uninhabited lands belong to the international community. The countries presently claiming them must give up so that either the United Nations administer these lands or the present occupants act as trustees for the nations of the world ...
Now that we have reached agreement on the Law of the Sea, the United Nations must convene a meeting in order to define the problem of uninhabited lands, whether claimed or unclaimed, and to determine the rights of all nations to these lands."

Referring to the Antarctic Treaty, Dr. Mahithir stated that

"we are aware of the Treaty of Antarctica concluded by a few nations which provides for their co-operation for scientific research and prohibits non-peaceful activities. While there is some merit in this Treaty, it is nevertheless an agreement between a select group of countries and does not reflect the true feelings of members of the United

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441 For a work presenting the position of the developing States see Hamzah, B.A., *Antarctica and the International Community*, in Hamzah, B.A. (ed.), *Antarctica in International Affairs* (Malaysia, 1987), pp. 1-20.

442 UN Doc. A/37/PV/10, pp. 17-20; also reproduced in Hamzah, loc. cit. above (n. 441), p. 143.
Nations or their just claims. A new international agreement is required so that histori­
cal episodes are not made into facts to substantiate claims.”

Support for the Malaysian position was immediate. During the UNCLOS signing
ceremony, held at Montego Bay (Jamaica), certain delegates urged that
“It is time now to focus our attention on another area of common interest ... I refer to
Antarctica, where immense potentialities exist for the benefit of mankind.”

This statement emanated from the Malaysian delegate and developed a point
made the previous day by the Tanzanian representative regarding the “unfortunate”
omission of Antarctica from the Convention. Malaysia’s initiative gained more sup­
port at the Seventh non-aligned Summit Meeting in New Delhi in March 1983. There
the Malaysian Prime Minister suggested that Antarctica “should be regarded as a com­
mon heritage of mankind and not just the exclusive preserve of a few nations that have
access to it” and sought both an alternative to the Antarctic Treaty and a United Na­
tions study of the Antarctic question. However, because of the behind-the-scenes lobby­
ing by Argentina (the only Consultative Party represented at the summit), the Economic
Declaration issued at the close of the summit scaled down Malaysian demands, for the
Heads of State and Government “considered that the United Nations should undertake a
comprehensive study on Antarctica” and merely noted rather than condemned the Ant­
arctic Treaty. Further support for the United Nations’ involvement in Antarctica came
from a summer 1983 meeting of the Organization of East Caribbean States and the Car­
ibbean Community and Common Market, under the leadership of Antigua and

On 11 August 1983, Malaysia, joined by Antigua and Barbuda, quoting the State­
ment of the Heads of State or Government of the non-aligned Countries, formally re­
quested that the Secretary General to include an item on Antarctica in the coming

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443 Ibid.
446 Statement by Prime Minister of Malaysia at the 7th Summit of Non-Aligned Countries in
New Delhi, India, reproduced in Hamzah, op. cit. above (n. 441), p. 145.
447 Non-Aligned Countries Resolution, UN Doc. A/38/193, pp. 2-3. See also UN Doc.
A/38/132, para. 123.
session of the General Assembly. The request indicated that despite the scientific progress made through the Antarctic Treaty,

"there is need to examine the possibility for more positive and wider international concert through a truly universal framework of international co-operation through the United Nations, to ensure that activities carried out in Antarctica are for the benefit and in the interest of mankind as a whole."450

The Antarctic Treaty Parties' response was immediate. The United Kingdom's Foreign Minister tried to persuade Antigua and Barbuda to abandon the request. Likewise, the Australian, Soviet and United States Governments took certain steps to discourage other Caribbean nations.451 In September 1983, in an attempt to reinforce their position, the Consultative Parties granted the status of Consultative Party to Brazil (which acceded to the Treaty on 16 May 1975) and India (which acceded to the Treaty in the same year: on 19 August 1983) despite the fact that neither country had fulfilled the traditional requirements of this status.452 For the same purpose, they also invited the acceding States to participate as observer in the Consultative Meetings of September 1983 (this was to defuse the criticism about the closed and exclusive nature of the treaty system). Moreover, acting on behalf of the Consultative Parties, the Australian Government in a note, dated 5 October 1983, expressed the opposition of the Consultative Parties to the Malaysian initiative. While emphasising the merits of the treaty and the solidarity of the Consultative Parties, the note stated that

"The Antarctic Treaty, which is open to all countries of the world, and is of unlimited duration, establishes Antarctica as a region of unparalleled international co-operation in the interest of all mankind … The revision or replacement of the Treaty which now being suggested by Malaysia and Antigua and Barbuda would undermine this system of international law and order in Antarctica with very serious consequences for international peace and co-operation … This initiative inaccurately represents the Antarctic Treaty of 1959. It implies that there is a need for revision or replacement of the Antarctic Treaty, something which could only be achieved under international law by the Parties to the Treaty."453

449 Letter of 11 August 1983 by Jacobs and Omardin, United Nations Representative of Antigua and Barbuda, and Malaysia, respectively. UN Doc. A/38/193.

450 Ibid.

451 See Beck, op. cit. above (n. 432), p. 287.

452 Ibid.

In deciding on the joint Malaysian-Antigua and Barbuda request, the General Committee recommended “without a vote” that the Antarctica question be inscribed in the agenda despite the non-participation in the decision of the Antarctic Treaty Consultative Parties that were General Committee members. The Plenary formally confirmed without a vote the decision of the General Committee and referred the item to the First Committee. The First Committee discussed the question of Antarctica in five meetings. Malaysia and a number of other developing countries, all third States with regard to the Antarctic Treaty, criticised the Treaty system as being secretive, exclusive and unaccountable and advocated the management of the continent by the international community, urging the application of the CHM concept to the area concerned. In response, as before, the Antarctic Treaty Parties together stressed the achievements, advantages, and openness of the Treaty system and pointed out the dangers of either revising the Treaty or establishing an alternative regime to replace it. The Australian representative rejected the relevance of the concept of CHM to Antarctica. He said that Antarctica is not, at least for the seven claimant-States, an area “beyond national jurisdiction”. He warned that “any new instrument would not as effectively protect important international interests in the Antarctic as does the current Treaty, and any attempt to revise this situation would ... risk reopening the very contention and competition which the Treaty was created to do away with”. No reference was, however, made to the possibility of the Antarctic Treaty having bound third States in any manner. Indeed, Australia’s representative emphasised that “the best way of broadening of the management of Antarctica and taking account of the interest of all would be to encourage more accessions to the Treaty and to work out ways of improving the working of the Treaty without, however, affecting the Treaty itself”. As no agreement could be reached by consensus, the first Committee adopted without vote a resolution drafted by Antigua

454 GAOR, First Committee (42-46th Meetings), UN Doc. A/C.1/38/PV.42-46.
455 See the view expressed by the representatives of Antigua and Barbuda, Egypt (42th Meeting); Indonesia, Sudan, Ghana (43th Meeting); Bhutan, Philippines, Pakistan, Sri Lanka (44th Meeting); Tunisia, Yugoslavia, Jamaica, Algeria (45th Meeting); Zambia, Bangladesh (46th Meeting)
457 Ibid., emphasis added.
458 Ibid., emphasis added.
and Barbuda, Bangladesh, Malaysia, Pakistan, Philippines, Singapore, Sri Lanka, Thailand. Likewise, the Plenary adopted this resolution without vote at its 97th plenary meeting on 15 December 1983 (GA Res. 38/77).459

General Assembly Resolution 38/77 affirmed “the conviction that in the interest of all mankind, Antarctica should continue to be used exclusively for peaceful purposes, and that it should not become the scene or object of international discord”. Recalling the statement of the Heads of State and Government of non-aligned countries, it requested the Secretary General “to prepare a comprehensive, factual and objective study on all aspects of Antarctica, taking fully into account the Antarctic Treaty System and other relevant factors”, and to “seek the views of all member States in the preparation of the study”, and to “report to the 39th session of the General Assembly in 1984”.460

From the Malaysian challenge and from the position of the Antarctic Treaty Parties and the States which supported Malaysia, the following conclusions may readily be drawn:

In the first place, the very fact that the Antarctic Treaty was being challenged after twenty two years of its operation evinces the lack of any conviction on the part of the Malaysian group that the Antarctic Treaty was binding on them whether as a matter of “objective regime” or otherwise. The Malaysian group’s challenge furnishes a good example for the rejection of the presumption, proposed by Waldock and Klein, that “silence” of third States vis-à-vis the alleged category of treaties providing for “objective regimes” can be taken as an evidence of their “acceptance” of, or “submission” to, those regimes.461 Secondly, the Malaysian challenge presupposed outright rejection of the view that the Antarctic Treaty constituted an objective regime and was, as such,
binding on third States. The assertion, put forward by Malaysia and advocated by other developing countries, that the Antarctic Treaty is "an agreement between a select group of countries,"^46^ which, as such, must be replaced or modified, clearly indicates the conviction of the challenging States that they were not bound by the Antarctic Treaty, obviously because of the *pacta tertiis* .. rule. Thirdly, the Antarctic Treaty Parties' arguments were also based on the assumption that the Treaty was not binding on third States even at the time of the debate. Indeed, the statement delivered by the United Kingdom representative (Dr. Heap) during the 38th session debate expressly refers to the *pacta tertiis* .. rule for denying any third party effect of the Antarctic Treaty:

"The Antarctic Treaty Consultative Parties, in managing Antarctica, are *denying no one's freedom in Antarctica other than their own*. The law of treaties requires that no country can be bound by an international agreement to which it is not a party or to which it does not *accede*. As I have said, the Antarctic Treaty system overwhelmingly consists of obligations and not rights. The Treaty Powers can claim, with a considerable measure of justice on their side, that in what they have done in managing Antarctica they have acted in the interests of all mankind. However — and this is the important point — that was not their primary intention. In each case they saw an activity that might go on, or that was going on, which, from their knowledge of Antarctica and its history, they appreciated ought to be regulated. The threat driving them on was that of politically more difficult problems for themselves in the future if they failed to act. So they did what they deemed necessary *as between themselves*. They were *binding no one else.*"^46^3

Finally, the Consultative Parties' emphasis that the Antarctic Treaty is open for accession and their efforts to block the Malaysian initiative by various means, such as exertion of political pressure on the challenging States, granting Consultative Parties status to Brazil and India and inviting acceding States to participate as observer in the Consultative Meetings, confirm the conclusion made earlier that, in the view of the Consultative Parties, accession is the legal means through which they wanted to bring about third party effects of the Treaty and political pressure is means which will insure that to happen.

**b. Government's response to the Secretary General's request.** As required by the 38/77 resolution, in 1984 the Secretary General submitted to the 39th session of the

^46^ See the statement of the Malaysian Prime Minister cited in p. 338 above.

^46^ UN Doc. A/C.1/38/PV.43, pp. 16 and 21, emphasis added. See further the comment of the Government of German Democratic Republic which is as unequivocal as the cited view. See *Secretary General Report on Antarctica*, Part II, p. 69.
General Assembly a Report consisting of two parts: Part I embodied the analysis of the physical, legal, political, economic and scientific aspects of Antarctica and Part II consisted of the views of 54 States which had responded to the Secretary General’s requests. The Secretary General’s request required States to express their view on all aspects of Antarctica. As expected, the views on the Antarctic Treaty were divided. Generally speaking, all the Antarctic Treaty Parties and all the developing States which supported the Malaysian initiative reiterated their respective positions as elaborated above, though with different degrees of emphasis. As before, the main areas of conflict concerned the question of the relevance of the concept of CHM to Antarctica; the interest of the international community in Antarctica’s mineral resources and the manner by which that interest could be protected; the two-tier system of participation and decision-making in the Treaty system; and the (exclusive) role of the Consultative Parties in the management of Antarctica. As to the question of the effect of the Treaty on third States, certain States in both camps expressed their point of view in a manner which is worth giving more attention here.

In the first place, it is worth mentioning the view expressed by Brazil which seems to regard the Antarctic Treaty as valid *erga omnes* in unequivocal terms. Commenting on the Antarctic Treaty, the Brazilian Government submitted that:

“26. By 1975, after 16 years of existence, the treaty had established a considerable record of co-operation among countries interested in Antarctica. It had substituted a potentially explosive situation of unilateral and divergent claims and policies for an objective juridical framework, valid *erga omnes*, and for a workable system based on freedom of access and of scientific research.”

This view is seen as giving support to the proposition that the Antarctic Treaty constituted an “objective regime”. However, that does not seem to be convincing because it is not clear whether or not the drafter of this statement is asserting an objective validity, or effectiveness, for the Antarctic Treaty against all existing and future States

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645 *Ibid.*, Part II, p. 10, emphasis original. Similarly, the Belgian Foreign Minister, at the opening of the 13th meeting of the Consultative Parties, has suggested that

“The Antarctic Treaty has succeeded in replacing a potentially explosive situation, involving unilateral and divergent claims and policies, with an objective framework, valid *erga omnes*, and a flexible system based on freedom of access and to carry out scientific research ...” (UN Doc. A/C.1/40/PV. 53, pp. 39-40, emphasis original.

646 Charney, *loc. cit.* above Ch. IV (n. 231), p. 65.
or whether s/he is trying to say how nicely the Antarctic Treaty substituted a dangerous situation by establishing a legal framework valid _erga omnes_: against all the "countries interested in Antarctica". There is no reason for interpreting the phrase "erga omnes" as meaning "against all (third) States". Besides, the phrase "objective", could be used just in contrast to the "subjective" claims made prior to 1959 by all and each of the "States interested in Antarctica". Moreover, reading the paragraph prior to the one cited\(^\text{467}\) may lead one to argue that the Brazilian drafter is trying to praise the 16 years of "considerable record of co-operation" between the Consultative Parties by attributing "valid _erga omnes_" effect to the Antarctic Treaty in order, at the same time, to justify Brazil's decision to accede to the Antarctic Treaty in 1975. In addition, even if we assume that the Brazilian drafter is saying that the Antarctic Treaty binds all States, the question is left open as to how that was supposed to come about — it need not necessarily be because of any doctrine of "objective regimes".

Another compelling view is the suggestion made by some of the Antarctic Treaty Parties that there was no legal vacuum in Antarctica which needed to be filled with new law.\(^\text{468}\) Taking the proposition on its own might be viewed as treating the Antarctic Treaty regime as the international law for the region, and, accordingly, binding on all States. However, a careful and comprehensive examination of the views expressed shows that such is not what they are really asserting. Firstly, this view was expressed as a counter-argument against the relevance of the concept of CHM which presuppose Antarctica as a territory which was not or could not be subject to national appropriation. Secondly, they seem to emphasise that the Antarctic Treaty has been in force a long time for States active in the area and is readily capable of regulating third States activities if they wished to become active, which in that case, they would be encouraged to

\(^{467}\) Paragraph 25 reads:

"Brazil's decision to adhere to the Antarctic Treaty in 1975 was not only the natural outcome of a long-standing interest in Antarctica ... it was also the result of a careful and realistic assessment of the Treaty and of the mechanism created under it, of its importance as an instrument designed to regulate and to foster international co-operation in Antarctica and of its significance as an institution aspiring to maintain Antarctica as an area devoid of international conflicts." (Secretary General Report on Antarctica, Part II, p. 10).

\(^{468}\) See the views expressed by Chile (Secretary General Report on Antarctica, part II, p. 31), Argentina (ibid., p. 25), and Federal Republic of Germany (ibid., p. 82); Belgium (UN Doc. A/C.1/38/PV.45, p. 21).
accede to the Treaty. To give an example, we cite the view expressed by the Federal Republic of Germany:

"Antarctica is not a legal vacuum. For over 20 years now, joint and effective administration which is geared to the well-being of the whole of mankind ... has been practised in the Antarctic Treaty area. In the opinion of the Federal Republic of Germany, a system has evolved in this area which has engendered not a distribution of interests, but a special form of shared responsibility entailing substantial obligations. Furthering this responsibility for the benefit of all mankind and obtaining the participation of other States are in line with the objectives of the Antarctic system."  

Thus it is hard to believe that by arguing that there was a system of law applicable to Antarctica, these States were claiming ipso facto validity of that system against third States. This is more so because all the Antarctic Treaty Parties, including those which put forward this argument, repeatedly pointed out that the Antarctic Treaty was open for accession by third States and indeed encouraged them to do so. Finally, as can be deduced from the passage cited, it might be argued that these States are stressing the possibility of the Treaty having generated rules of customary law.

A third interesting argument was the assertion that the Antarctic Treaty represented customary international law and as such was binding on the international community as a whole. In its response to the Secretary General's request, the Chilean Government oddly suggests that

"80. ... The [Antarctic] Treaty represents the codification of State practice, as reflected in customary international law and as very widely recognised by the international community."  

Our examination of the history and the negotiations leading to the conclusion of the Antarctic Treaty clearly showed that the claimant-States, especially Chile, agreed to the Treaty because it froze the legal status quo and, in effect, it allowed them to go back to the position prior to 1959 if the Treaty co-operation was not successful. There was certain practice during the IGY which allowed freedom of scientific research in the claimed area but that was also on the understanding that such a activity would be without prejudice to the territorial claims of the claimant-States. While it is possible to argue that the Antarctic Treaty formulated the practice of the States which carried out activities in Antarctica during the IGY, it is impossible to maintain that that amounted

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469 Secretary General Report on Antarctica, part II, p. 82, emphasis added.
470 Ibid., p. 30, emphasis added.
to codification of rules of customary law. There was no conviction (opinio juris) on the part of the parties, especially the claimant-States and Chile in particular, to bind themselves beyond the terms of the Treaty. Besides, the Chilean Government does not give any indication as to when and how the Antarctic Treaty is, or has been, widely recognised by the international community (prior to 1983). Also, the very challenge of the developing countries denies that assertion. In its response, the Chilean Government put forward another bizarre argument which is worth dealing with whilst we are discussing the relevance and the role of custom. The Chilean Government suggests that

"89 (e). By virtue of its tacit or express recognition of the Antarctic Treaty, the entire international community is also bound by the provisions governing claims in Antarctica. It is significant that no country has ever attempted to undermine the political bases of the Washington Treaty in this respect and that both signatories and non-signatories [sic.] to the Antarctic Treaty have refrained from asserting any new territorial claims in Antarctica." 471

This statement is bizarre for many reasons. Firstly, it disregards certain facts about which the Government of Chile must have had first class information because they themselves were involved. As indicated above, in the 1970s certain South-American States contemplated making territorial claims over part of Antarctica and, indeed, the national assemblies of Peru and Ecuador adopted declarations which formally asserted their territorial claims. The Government of Chile, in fact, protested against Ecuador's claim because it included areas already claimed by Chile. Secondly, it presupposes third States' silence and inactivity during the early years after the conclusion of the Antarctic Treaty as their consent to be bound by the rules on freezing of the territorial claims and prohibitions on asserting new territorial claims (Article IV). We have shown that this presumption is not tenable. Finally, the obligation to be bound by the rules in Article IV cannot work only against third States. If the international community has become bound by the rules in that Article, then the claimant-States should also be held bound vis-à-vis the international community in that regard. In that case, the international community (third States) could invoke the provisions of Article IV against claimant-States regardless of the Treaty. In effect, the claimant-States then would be barred from returning to the pre-1959 situation — something that none of the claimant-

471 Ibid., p. 32, emphasis added.
States, especially Chile,\textsuperscript{472} intended originally; nor do they appear to have admitted subsequently, at least until 1983.\textsuperscript{473} As we have said this many times before, as long as the provisions of Article IV remain in force and as long as the claimant-States continue to keep their claims alive, it would be very difficult to extend the provisions of the Antarctic Treaty by means other than third States’ accession.

On the other hand, Pakistan’s response to the General Assembly’s request is interesting in that it totally rejects the possibility of the Antarctic Treaty having bound third States in any manner. Referring to an earlier debate in the First Committee, it stated that:

"The United Nations debate also demonstrated clearly that the system established by the Antarctic Treaty does not enjoy the support of a large number of countries, especially those from the Third World, and, therefore, could not be regarded as constituting a regime for the international community as a whole …

The Antarctic Treaty was concluded between seven [sic. five] States having no claims of sovereignty or ownership over Antarctica and seven other States with such claims over different parts of the continent …

Any agreement between such parties regarding the continent of Antarctica, which does not belong to any State, \textit{cannot be the basis of a legal regime binding} the international community as a whole …

The Government of Pakistan is, therefore, of the considered view that the Antarctic Treaty should be replaced by an international regime freely negotiated between the members of the international community under the auspices of the United Nations…"\textsuperscript{474}

c. Subsequent developments. What has happened after 1983-1984 is not particularly important for the purpose of our study because the views cited above clearly confirm the conclusion made earlier that the Antarctic Treaty did not constitute an “objective regimes”. However, it is worth noting here that the two opposing camps have done their best to promote their objectives while they seem to move closer to compromise. The 39th session, having before it the Secretary General’s study, could not reach

\textsuperscript{472} See Orrego Vicuña, \textit{op. cit.} above Ch. IV (n. 21), p. 422.

\textsuperscript{473} All the claimant-States have, in one place or another, continued to emphasise their sovereignty claims in recent years. For instance, see the position taken by Australia (\textit{Secretary General Report on Antarctica}, part II, p. 87); Chile (\textit{ibid.}, p. 32); France (\textit{ibid.}, p. 66); Argentina (discussed by Auburn, \textit{op. cit.} above (n.321), pp. 107-110). The claimant-States also have, despite the provisions of Article IV (2), extended their territorial claims by claiming the 200 mile EEZ. See Triggs, \textit{loc. cit.} above (n. 378), pp. 91 and 103.

\textsuperscript{474} \textit{Secretary General Report on Antarctica}, part II, pp. 33-34.
any consensual solution. The Malaysian group, while it continued to criticise the Antarctic Treaty system favoured the establishment of an ad hoc committee to examine the Secretary General’s study in detail and to make recommendations for measures to be taken by the General Assembly. They appeared to acknowledge the achievements of the Antarctic Treaty and tended to advocate a modification of the Treaty rather than pressing for an alternative or parallel regime, as previously. On the other hand, the Antarctic Treaty Parties continued fully to endorse the adequacy of the Treaty. A draft resolution submitted by Malaysia and several other States did not call for the General Assembly to take any action but merely expressed the General Assembly’s appreciation to the Secretary General for his study and requested the inclusion of the Antarctic Treaty System in the agenda of its 40th session. The 40th Session of the General Assembly adopted three resolutions, without the participation of the Antarctic Treaty Parties, which requested the Secretary General to “update and expand the study on the question of Antarctica” and affirmed that “any exploitation of the resources of Antarctica” should ensure “equitable sharing of the benefits of such exploitation”. The Antarctic Treaty Parties were invited to inform the Secretary General of their negotiations to establish a regime regarding Antarctic minerals. In the 41st Session, these resolutions were adopted again without the participation of the Antarctic Treaty Parties. The only important change was in Resolution 41/88 B, which called upon the Consultative

475 The First Committee discussed the question of Antarctica in five meetings. See GAOR, 39th Session, First Committee (50-55th Meetings), UN Doc. A/C.1/39/PV., pp. 50-55.
476 Malaysia withdrew this idea at the end of the debate. Ibid.
477 GA Res. 39/159.
478 Apart from the Antarctic Treaty Parties, a number of States not parties to the Antarctic Treaty, such as Afghanistan, Albania, Barbados, Greece, Israel, Nicaragua also did not participated in the voting. Resolution 40/156/A was adopted by 96 in favour, none against, 11 abstaining with 41 States not participating. The same 41 States plus Honduras and Morocco, similarly announced non-participation in the vote on Resolution 40/156 B which was adopted by 92 in favour, none against, 14 abstaining and 43 not participating.
479 GA Res. 40/156/A,B. The 40/156/C Resolution urged the Consultative Parties to “exclude the racist apartheid regime of South Africa from participation in the meetings of the Consultative Parties at the earliest possible time.”
480 Ibid. In response to this Resolution, Australia by a letter dated 30 April 1986, on behalf of the Consultative Parties, informed the Secretary General that these States were not able, unless the consensus was somehow restored, to respond to the 1985 resolutions in the adoption of which they did not participate. Letter dated 30 April 1986 from the Representative of Australia, on behalf of the Consultative Parties, to the Secretary General of the United Nations (A/41/688/Add.1); also reproduced in UNYB 40 (1986), p. 372.
Parties “to impose a moratorium on the negotiations to establish a mineral regime until such time as all members of the international community can participate fully in such negotiation”.

The above situation has been repeated ever since. The States supporting the Malaysian initiative have continued to keep the question of Antarctica alive on the agenda of the United Nations General Assembly as well as other international fora. In response, the Consultative Parties have been reluctant to change their position: that the Antarctic Treaty system should not be undermined and that it is functioning properly and successfully and that the United Nations is not the right body to administer Antarctica. They have continued not to participate in the voting in the General Assembly on resolutions on Antarctica.

However, in order to meet the criticism that the Antarctic Treaty system is “exclusive, unaccountable and secretive”, the Consultative Parties, ever since 1983, have co-operated with the Secretary General in terms of transmitting the information to the United Nations. For the same reason and in accordance with their old policy of “persuasion to accede”, they have since 1984 managed to secure the accession to the Antarctic Treaty of a large number of States. These are in order of accession: Hungary (27 January 1984), Finland (15 May 1984), Sweden (25 April 1984), Cuba (16 August 1984), China (8 June 1985), Republic of (South) Korea (28 November 1986), Greece (8 January 1987), Republic of (North) Korea (21 January 1987), Austria (25 August 1987), Ecuador (15 September 1987), Canada (4 May 1988), Colombia (31 January 1989), Switzerland (15 November 1990), Guatemala (31 July 1991), Ukraine (28 October

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484 Secretary General Report on Antarctica, part II, p. 110.
1992), the Czech and the Slovak Republics (1 January 1993: as Czechoslovakia's successor). Moreover, they have granted the status of Consultative Parties to 11 more States of different socio-political groups: Uruguay and China (1985), the German Democratic Republic and Italy (1987), Spain and Sweden (1988), Finland and Republic of Korea (1989), Peru, Ecuador and The Netherlands (1991). In addition, by the Madrid Protocol (1991), the Consultative Parties have diminished the gravity of the criticisms raised by Malaysia, and other developing countries, by declaring Antarctica as "a natural reserve, devoted to peace and science", as well as by prohibiting any act of exploration and exploitation of Antarctica's mineral resources for next fifty years.

4.4. Conclusion

From the foregoing it is apparent that, contrary to the view taken by some writers, the Antarctic Treaty cannot be viewed as having constituted an "objective regime" or an "international settlement" binding on generality of States from the date of entry into force. This is because the treaty in its inception established a provisional framework for the parties' co-operation and was not a "settlement" at all. Moreover, the claimant-States did not want to bind themselves beyond the framework of the treaty which included provisions which safeguarded their legal position and allowed them to return back to the pre-1959 situation if the treaty co-operation proved to be impossible for them. Thus, the provisions of the Treaty excluded the possibility of its constituting a regime that was binding on generality of States even through the "custom-process".

Secondly, and most importantly, there is no evidence to show any conviction on the part of the parties that third States were from the outset bound by the Treaty on the

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486 Taken together with original twelve Consultative Parties, and allowing for the merger of the two German in 1990 and succession of the two Czech Republic and the Slovak Republic in place of Czechoslovakia, there were 42 parties as at 31st December 1995. See Bowman and Harris, op. cit. above Ch. I (n. 166), 11th Cumulative Supplement (1995), p. 210 (Treaty No. 390).

487 As at 31st December 1995 there were 26 Consultative Parties.


489 The same conclusion is arrived at by almost all writers who have thoroughly examined the question. See n. 418 above.
basis of the doctrine of "objective regime" or by any other legal device. Instead, there is clear evidence of their conviction that "accession" was the only legal means through which third States were to acquire rights and/or to assume obligations under the Treaty. Of course, to insure third States accession or compliance with the provisions of the Treaty they could rightfully use all legitimate means, including political pressure. That cannot be taken as an assertion of legal competence to legislate for third States.

Finally, the Malaysian initiative in 1983 and strong opposition to the Treaty by a large number of developing countries furnished further evidence to the effect that even if the parties had intended the Antarctic Treaty to constitute an "objective regime" that intention could not have made third States bound by the regime despite their early silence. Therefore, the case of the Antarctic Treaty does not give any support to the doctrine of "objective regime". In fact, all the evidence of State practice examined above presupposes the absolute character of the *pacta tertiis* rule and the non-existence of a special rule of treaty-law which would allow a special kinds of treaties, such as the Antarctic Treaty, to bind, by their own force and without more, States not party thereto.

The Malaysian challenge in 1983 and subsequent developments have, of course, changed the legal situation in Antarctica. During the course of the debate in the General Assembly and in their response to the Secretary General's study, almost all States gave unreserved support for preservation of certain rules declared in the Antarctic Treaty. In expressing their official positions, all States, including the claimant-States, supported the rules on non-militarization, non-nuclearization, freedom of scientific research and protection of Antarctic environment. Although the Treaty States favoured the preservation of these rules under the existing regime and the developing countries wanted them to be incorporated into a new regime, they all appeared to treat those rules as constituting *rules of law* applicable in Antarctica. Thus, their position may well be qualified as their *opinio juris* vis-à-vis those rules for the purposes of customary law applicable in Antarctica. In parallel, there is another important development, that is, the change in the number of States entitled to participate in the Consultative Meetings. Since 1983, a large number of States have acquired the status of Consultative Party.

489 For a detailed list of States which have expressed their views on these regards see Charney, *loc. cit.* above Ch. IV (n. 231), pp. 71-75 and 85-96.
Every one of these States is able to veto any move which may help the revival and/or the survival of the sovereignty claims of the claimant-States. The internal pressure of the non-claimant States and the external pressure of the developing countries resulted in a situation in which it would be impossible for the claimant-States to go back to the pre-1959 situation. The prohibition of exploration and exploitation of Antarctica's mineral resources for next fifty years will confirm such an impossibility. It can be argued that the claimant-States have been stripped of all symbols of sovereignty — if they possessed any. Thus, it is possible to suggest that Article IV is no longer a barrier to the emergence or transformation of the provisions of the Antarctic Treaty into norms of customary law binding on all States — though, obviously, not as treaty rules but as rules of customary international law for the region.  

490 See Charney, ibid., pp. 92-94
Conclusions

As was stated in the introduction, this study was not intended to solve all of the problems arising from or surrounding the alleged category of treaties providing for “objective regimes”. Nor was it aimed at proposing any formula by which the possible effects of such treaties on third States might be explained. The purpose has been to determine whether or not international law acknowledges the existence of a special rule which allows certain kinds of treaties to create, by their own force and without more, regime(s) binding on the generality of States, regardless of and in derogation from the general principle *pacta tertiis nec nocent nec prosunt*. With a great degree of certainty, the study establishes that such a rule has never existed, nor has it been considered desirable. In other words, the study proves that the doctrine of “objective regimes” and the special rule it envisages is neither *lex lata* nor a good *lex ferenda*. Throughout the foregoing chapters, we have given specific reasons and made specific arguments to substantiate these conclusions. It would not seem necessary to reproduce them here. However, the following general points might be highlighted.

1. As was stated in Chapter I, the doctrine of “objective regimes” emerged as a result of a desire on the part of certain writers to introduce into the international legal system a means by which the lack of a supranational authority capable of enacting rules of general validity could be filled. Inspired by the role that the Great Powers played in Europe during the nineteenth century, these writers envisaged the existence of a rule of international law which would allow certain treaties to produce binding effects *erga omnes*. Evidently, this amounts to, in one way or another, a recognition of the authority of a certain group of States to legislate for the others. As such, it conflicts with the fundamental principle of the equality and independence of States, which is the underlying reason for the incorporation into international law of the principles *pacta tertiis nec nocent nec prosunt* and *res inter alios acta*. To qualify or derogate from these principles, compelling jurisprudential reasoning coupled with substantial evidence of State practice would be required.¹ This study clearly establishes that the doctrine of “objective regimes” does not fit in with the above-mentioned principles, which inform and underpin modern international law. Nor does it command any support in State practice.

¹ Schwarzenberger, *op. cit.* above Ch. I (n. 91), pp. 458-459.
2. Examination of the various theories which have been or may be proposed in support of the existence of the special rule envisaged by the doctrine of "objective regimes" shows that none of those theories furnishes sufficient reason to qualify the *pacta tertii* ... rule. The participation of a group of powerful States in a treaty or the fact that they have the ability to enforce the terms of the treaty on third States cannot appropriately constitute legitimate justification for granting those States an authority to impose their treaty-arrangements on third States, even if they appear to be acting in the general interest of States as a whole. To recognise such an authority would be utterly inconsistent and irreconcilable with the basic presumption that all States are equal subjects of international law. Likewise, the mere fact that a treaty-arrangement is intended, or even does appear, to serve the general interest of States as a whole is not sufficient reason to make third States bound by that arrangement. Not only is it debatable what constitutes the "general interest" of States and not only would there be considerable difficulty in establishing whether or not a particular treaty regime established by a limited number of States is actually serving the "general interest" of States as a whole, but the current pluralism of the international system makes it difficult, if not impossible, to imagine, on a more than *de minimis* basis any coherent and incontestable measure of what constitutes the "general interest". More importantly, there is no good reason to accord a power to a limited group of States to decide upon a matter in which others conceivably have an interest. Finally, the presumption that third States' silence could be invoked as their "consent" to be bound by a treaty arrangement of the kind in question is not plausible, firstly, because that would impose a heavy burden on third States to investigate every treaty entered into between other States in order to determine when they would need to make their position known — a burden unacceptable to many States which do not have the necessary bureaucratic resources — and, secondly, silence has scarcely been given any effect in treaty-law, where express consent is a pre-condition for the establishment of treaty-obligations. Accordingly, there are major theoretical problems in the way of admitting the rule envisaged by the doctrine of "objective regimes". It was for such reasons as these that the majority of the members of the International Law Commission dismissed Waldock's proposed draft Article 63, despite the fact that the
draft article did not advocate an outright legislative effect for the category of treaties in question.

3. A thoroughly conducted examination of the history, circumstances of conclusion and actual terms of — as well as subsequent State practice under — some of the most frequently cited examples of "objective regimes" clearly shows that none of the treaties concerned have, in fact, produced legal effects of a type and in the manner claimed by the advocates of the doctrine of "objective regimes". There cannot be found any evidence of State practice which indicates that any of those treaties have been treated as constituting a regime that was, by its own force and without more, binding on the generality of States, either from the outset or from a period dating some years after its conclusion. In the case of Switzerland, the parties to the 1815 treaties, which established the status of permanent neutrality of Switzerland, had the desire to see such a status be part of the European system of international law. However, there can be found no evidence which indicates that third States have treated it as such. Indeed, during World War I, the United States appeared as if it did not consider itself bound by that status. The general validity which has been attributed to Switzerland's status of permanent neutrality from 1919 is due to the fact that, through the peace treaties concluded in that year, nearly all States recognised her status as a part of general (customary) international law. Similarly to the case of Swiss neutrality, States party to the 1888 Convention desired to see the regime established for the Suez Canal become binding on the generality of States. However, there exists no concrete evidence which indicates that they considered that third States were ipso facto bound by that regime. Moreover, there is considerable evidence which suggests that third States did not treat the regime as binding on them. Besides, the 1888 Convention mostly confirmed what was already practised on the basis of the freedom of passage which had unilaterally been granted by the territorial sovereign. Therefore, any general validity or respect which the regime enjoyed might have been out of respect for the status of the canal outside the framework of the 1888 Convention; i.e. the possible existence customary rights and obligations. The case of the treaties relating to Panama Canal is an even better example of the rejection of the doctrine of "objective regimes". The parties themselves did not want to confer any right or impose any obligation on third States in any manner. The United States
consistently invoked the *pacta tertiis* .. rule in order to deny any third party effects for the treaties concerned — a position which has never been challenged by third States. Finally, the case of the Antarctic Treaty furnishes a good example of the awareness of States of the absolute validity of the *pacta tertiis* .. rule and their uneasiness about the doctrine of “objective regimes”. Despite the fact that the doctrine of “objective regimes” was very well known when the treaty was concluded, the parties did not show any inclination to rely upon it, nor did they invoke it when the treaty was challenged two decades later.

The survey of State practice further upholds all the theoretical objections raised against the doctrine of “objective regimes”. It shows that the mere fact that the terms of a treaty are written in objective terms does not mean that the parties want the treaty to confer legal rights — as distinguished from mere benefits — or impose obligations on third States. The cases of the Panama Canal treaties and the Antarctic Treaty are perfect examples. It further shows that the mere fact that the parties to a treaty appear or purport to act in the interest of States as whole may not be viewed as any evidence of their conviction that the treaty should be binding on third States; nor does it mean that they want to bind themselves vis-à-vis those States. The case of the Antarctic Treaty clearly demonstrates that, although the parties considered that the arrangement they agreed upon was in the interest of mankind, they did not want to bind themselves beyond the framework of the treaty. For them, the only way through which third States could become bound by the terms of the treaty was by their accession to it. Finally, the study of State practice shows that the silence of States vis-à-vis a treaty to which they are not party could not be taken as their consent to be bound by the treaty or a particular part of it. Again the case of the Antarctic Treaty furnishes a good example. When the Malaysian group challenged the Antarctic Treaty, both the parties to the treaty and the States challenging then acted on the presupposition that the treaty had not become binding on third States, even if the latter had been silent for almost two decades.

4. Apart from not being supported in State practice and not being in line with the principles, paradigms and theory of contemporary international law, there are further reasons to reject the doctrine of “objective regimes”.
Firstly, advocates of the doctrine confusedly invoke all sort of elements — the participation of a group of powerful States and their ability to maintain a treaty-situation, the fact that certain treaty-arrangements have been maintained for a long period of time, the fact that certain areas of State activity are regulated, the fact that third States appear to have raised no objection to the regime and so on — to prove that a certain treaty-situation should be regarded as valid *erga omnes*. These elements may surely help a treaty-arrangement, or a particular part of it, to become binding on the generality of States as a matter of custom. However, by blurring the line between treaty and custom, the advocates of the doctrine do not seem to have appreciated this fact properly. The mere fact that a treaty-arrangement has come to be regarded as binding on the generality of States does not mean that that arrangement was binding on all States from the outset; nor does it mean that third States were necessarily bound by the treaty concerned. For instance, it would be wrong to invoke the case of the permanent neutrality of Switzerland as evidence of the existence of a rule by which any status of permanent neutrality established by treaty should automatically be considered binding on third States. As stated above, the permanent neutrality of Switzerland acquired a general validity and respect when it was formally recognised in 1919 as a part of customary international law.

Secondly, the advocates of the doctrine of "objective regimes" are putting together, with a view to creating a single theory or rule, treaties of widely varying natures and characteristics which really have little in common. Treaties relating to demilitarisation or neutralisation of a particular territory are different from those establishing status of permanent neutrality for a State and both of these are totally different from those pertaining to international waterways or rivers. Besides, there is little similarity between these treaties as to the kind of effects which they produce for third States. With regard to treaties establishing a status of demilitarisation or neutralisation for a particular territory, third States are expected to recognize, respect and not to commit act which might violate such a status — a duty that may exist under general international law at least in so far as the inviolability of the particular territory is concerned — while treaties relating to international canals enable third States to make use of a State territory over which the canal has been built. Likewise, treaties governing navigation through
international rivers are different from those regarding international canals. A canal is a part of the territory of the State through which it crosses while an international river does not belong to any single State — third States may, therefore, have a right to the use of international rivers under customary law. All these treaties, of course, are totally different from the Antarctic Treaty of 1959 which is *sui generis* in every respect.

Finally, it is noteworthy that the advocates of the doctrine themselves have been very hesitant in propounding it. For instance, McNair who is widely cited as the champion of the doctrine of “objective regimes” indicates, in referring to “constitutive or semi-legislative treaties”, that:

“Strictly speaking, a treaty of this kind ... binds *at first* the parties thereto and no other States. But it is undeniable that after a period of time, to which no fixed duration can be attributed, the mere *lapse of time* and the *acquiescence of other States* in the arrangements thus made have the effect of reinforcing the essential juridical element of the treaty and of *converting* what may at first have been a partly *de facto* situation into a *de jure* one.”

This statement not only shows McNair’s wavering position about his doctrine of “treaties valid *erga omnes*”, but also proves the point made earlier: that the advocates of the doctrine of “objective regimes” have blurred the line between treaty and custom. A similar kind of uncertainty and ambiguity can be found in the opinion of all other advocates of the doctrine of “objective regimes”.

From the foregoing it is evident that the International Law Commission was perfectly justified in dismissing the doctrine of “objective regimes” and allowing the kind of treaties regarded as creating “objective regimes” to be governed by the general rules on the effect of treaties on third States. The present study further substantiates the International Law Commission’s opinion that the legal effects attributed to most of those treaties which are sometimes considered as providing for “objective regimes” could satisfactorily be explained either by reference to the mechanism provided for in Article 36 of the Vienna Convention or by the grafting of international custom upon the treaties in question — a process safeguarded by Article 38.

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In conclusion, we may safely submit that there is no place for the doctrine of "objective regimes" in the law of treaties and it is best to disregard it when dealing with the effect of treaties on third States.
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1923 *The S.S. Wimbledon* (United Kingdom, France, Italy, and Japan / Germany), PCIJ Rep., Ser. A, No. 1 (Judgment, 17 August 1923).


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1927 *The Case of S.S. Lotus* (France / Turkey), PCIJ Rep., Ser. A. No. 10, (Judgement, 7 September 1927).

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1928 *Island of Palmas Arbitration Case* (United States / the Netherlands), 2 RIAA 829 (Award, 4 April 1928).

1928 *Case concerning the Factory at Chorzow* (Germany / Poland), Merits, PCIJ Rep., Ser. A, No. 17 (Judgment, 13 September 1928).

1929 *Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder* (Czechoslovakia, Denmark, France, Germany, Great Britain, Sweden / Poland), PCIJ Rep., Ser. A, No. 23 (Judgment, 10 September 1929).


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### Table of Treaties

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1904  Declaration between France and Great Britain respecting Egypt and Morocco, London, 8 April 1904; 195 CTS 198; UKTS 24 (1911), Cmd. 5969.


1919  Treaty of Peace between the Allied and associated Powers and Bulgaria, Neuilly, 27 November 1919, 226 CTS 332; 11 Martens (3rd.) 692; 4; UKTS 5 (1920), Cmd; 522; 112 BFSP 781.

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1923  Convention on the Regime of the Straits, Lausanne, 24 July 1923, 28 LNTS 115; UKTS 16 (1923), Cmd. 1929; 117 BFSP 543.


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