INTERNATIONAL TREATIES AND THIRD STATES

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International treaties, whether general, regional or particular, lay down rules of conduct binding upon the States -contracting parties who must refrain from acts inconsistent with their treaty obligations.

According to the well-known maxim widely used in Civil Law and deriving from Roman Law *pacta tertiis nec nocent nec prosunt* agreements concern the contracting parties only; they can neither impose obligations nor confer rights upon third persons. As a result of the quoted principle legal effects of an agreement should be strictly limited to the circle of the contracting parties. This rule, having its justification in Civil Law resting simply on the general concept of the law of contract,[1] in International Law has additional support in the rules of the sovereignty and independence of States. Hence international treaties ought to concern the contracting States only; neither rights nor duties, as a rule, arise under treaties for third States which are not parties to them.

There is wide evidence of the recognition of this principle in State practice and in decisions of international tribunals as well as in the writing of jurists,[2] which are based on the general rule of consent as being the foundation of the treaty obligation[3]. Examples of the application of the underlying rule can be found in relation to rights as well as to obligations which cannot arise for or be imposed on the third States.

In the case of "German Interests in Polish Upper Silesia", for instance, the Permanent Court of International Justice said, in relation to various instruments terminating hostilities after the First World War:

> "It is, however, just as impossible to presume the existence of such right at all events in the case of an instrument of the nature of the Armistice Convention - as to presume that the provisions of these instruments can ipso facto be extended to apply to third States. A treaty only creates law as between the States which are Parties to it"[4]

In accordance with this statement the Court held that, as Poland was not a party to the Armistice Agreement, she was not entitled to avail herself of that instrument.

Similarly, in the case concerning the "Factory of Chorzow", the Permanent Court held that Poland could not avail herself of the provisions of the Armistice Convention to which she was not a party.[5]

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1. See other well-known rules of the Roman private law of contracts as expressed in the maxims: Obligatio tertio non contrahitur; Pacta non obligant nisi gentes inter quas initia. Cf. Article 1952(1) of the Ethiopian Civil Code.
2. Ch. E. Rousseau, *Principes généraux du droit international public*, Paris 1944, vol. 1, p. 453. See also R.F. Roxburgh, *International Conventions and Third States*, Boston 1971, p. 19. A Cavaglieri, "Règles Générales du Droit de La Paix", *Recueil des Cours*, Academie de Droit International (The Hague, 1929) vol. 26, p. 257. D. Anzilotti, Cours de Droit International (G. Gidel trans., Paris 1929), p. 414; L.F.L. Oppenheim, *International Law- a Treatise* (8th ed. by H. Lauterpacht, London - New York 1958) vol. 1, p. 925.
3. "Both legal principle and common sense are in favour of the rule" *Pacta tertiis nec noncent nec prosunt*", because as regards States which are not parties (commonly referred to as "third States"), a treaty is *res inter alios acta.*" Lord McNair, *The Law of Treaties*, (London, 1961), p. 309.
4. Publications of the Permanent Court of International Justice; Judgments, Orders and Advisory Opinions (1926), Series A. No. 7, pp. 24-29.
5. P.C.I.J. Publications (1928), Series A. No. 17 pp. 43-46. See also Annual Digest 1927-28, Case No. 286, pp. 416-417.

On the other hand, in relation to an eventual obligation of third States, in the case of "Territorial Jurisdiction of the International Commission of the River Oder", the Permanent Court declined to regard a general multilateral treaty the Barcelona Convention on the Régime of Navigable Waterways of International Concern - as binding upon Poland, who was not a party to the treaty. The Court stated: "Even having regard to Article 338 of the Treaty of Versailles,[6] it cannot be admitted that the ratification of the Barcelona Convention is superfluous, and that the said Convention should produce the effects referred to in that article independently of ratification."[7]

Analogically, in the case of the "Free Zones of Upper Savoy and the District of Gex", the Permanent Court held that Article 435, paragraph 2, of the Treaty of Versailles, providing the abrogation of the free zones, ". . is not binding upon Switzerland, who is not a party to that Treaty, except to the extent to which that country accepted it"[8].

The same principle was affirmed by the Arbitrator, Judge Max Huber, in the well-known Island of Palmas case, dealing with a supposed recognition of Spain's title to the island in treaties concluded by that country with other States, in which he said:

> "It is evident that whatever may be the right construction of the treaty it cannot be interpreted as disposing of the rights of independent third Powers. . It appears further to be evident that treaties concluded by Spain with third Powers recognizing her sovereignty over the Philippines could not be binding upon the Netherlands."[9]

Article 18 of the Harvard Research Convention on the Treaties stated the principle as follows: "A treaty may not impose obligations upon a State which is not a party thereto."[10]

In modern International Law the principle *pacta tertiis nec nocent nec prosunt* is directly connected with the principel of non-interference with internal matters of third States[10a]

The Vienna Convention on the Law of Treaties of 1969, based on the draft prepared by the International Law Commission,[11] provides in its Article 34 as follows:

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6. This article provided that the regime set out in articles 332-337 of the Treaty was to be superseded by such regime as might be "laid down in a General Convention drawn up by the Allied and Associated Powers, and approved by the League of Nations, relating to the waterways recognized in such Convention as having an international character", and that this Convention was to apply in particular, among others, to the Oder.
7. P.C.I.J. Publications (1929), Series A, No. 23, p. 21.
8. Ibidem (1932) Series A/B, No. 46, p. 141.
9. Reports of International Arbitral Awards (U.N. Publication) vol. 2, p. 831.
10. "Research in International Law of Treaties" *American Journal of International Law* (1935) vol. 29, supplement.

10a *Encyklopedia prawa miedzynarodowego i stosunkow miedzynarodowych* (Encyclopedia of international law and international relations) (Warsaw, 1976), p. 253.

11. It is necessary, in considering the problem of international treaties and third States, to recall significant work made in preparing the Vienna Convention by the United Nations International Law Commission. The Commission placed the law of treaties among the topics listed in its report as being suitable for codification, as early as at its first session in 1949. However, until 1960, because of its work on other subjects, the Commission was not in position to give all the time and attention required for this question. In 1961, at its thirteenth session, the Commission appointed Sir Humphrey Waldock as Special Rapporteur on the Law of Treaties and decided to prepare draft articles on the law of treaties intended to serve as a basis for an appropriate convention, instead of an expository code as had been provided by previous Rapporteurs. At its fourteenth (1962), fifteenth (1963) and sixteenth (1964) sessions, on the basis of the reports submitted by the Special Rapporteur, the Commission adopted the first three parts of its provisional draft articles on the law of treaties. Taking into consideration the comments of Governments, the Commission modified the parts, sections and order of articles of the provisional draft in adopting in 1966 the final text of its draft articles on the law of treaties. See Report of the International Law Commission on the work of its Eighteenth Session - Geneva, 4 May - 19 July 1966 - Draft Articles on the Law of Treaties - Gen. As. Off. Rec. XXI, suppl. No. 9 (A/6309/Rev. 1). These draft articles created the bases for the Diplomatic Conference in Vienna in 1968 - 1969, at which the Law of Treaties was finally codified in the form of convention.

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

The title of this article, which, as provisionally adopted by the International Law Commission in 1964, was "General rule limiting the effects of treaties to the parties," has been finally changed to "General rule regarding third States". Also the former provision of this article, "A treaty applies only between the parties. " has been replaced by the above-mentioned simple statement, in order not to appear to prejudge in any way the question of application of treaties with respect to individuals.

The problem whether the rule *pacta tertiis nec nocent nec prosunt* admits any exceptions in International Law was always a controversial one. It was also the point which divided the Commission. Although there was complete agreement amongst the members that there is no exception in the case of obligations because a treaty never by its own force alone creates obligation for non-parties, the division of opinion related to the question whether a treaty may of its own force confer right upon a non-party.

This is undoubted evidence that in some cases treaties, independently of the above mentioned general rule, really have an effect upon third States. The problem arises over the question in which cases and to what extent such exceptions are justified and lawful. In practice, the exceptions may be divided into two groups: 1) treaties providing for obligations for third States *(pacta in detrimentum tertii)*; and 2) treaties providing for rights for third States *(pacta in favorem tertii)*.

Before taking into consideration these two groups, it may be useful to consider also some cases in which it may seem that States are to be bound by provisions of treaties, not being parties to them, although such cases do not create in fact any one of two preceding kinds of exception.

A commercial treaty, for instance, conceding more favourable conditions than have been conceded by the parties thereto, has an effect upon all such third States as have previously concluded commercial treaties containing the so-called most-favoured-nation clause with the one of the contracting parties. But, in fact, there is an indirect conventional link among all of these states. So it is not in accordance with the general rule contained in the Vienna Convention, that "Third State" means "a State not a party to the Treaty" [12]

Sometimes also a State not bound by a provision of one treaty might nevertheless become bound by it through accepting such an obligation under another treaty. For example, in the case of the "Treatment of Polish Nationals in Danzing", the Permanent Court considered the position of the Free City of Danzing in relation to Article 104, paragraph 5, of the Treaty of Versailles, to which it was not a party, but which it was considered to have accepted by the independent complex of instruments establishing the Free City and regulating the legal position as between it and Poland. The Court said in conclusion: "It is certain . that the Free City . . having accepted the convention which the Principal Allied and Associated Powers had negotiated in pursuance of the terms of Article 104 of the Treaty of Versailles, thereby accepted that article."[13]

Treaties providing for obligations for third States pacta in detrimentum tertii

Developing the general rule that without a third State's consent a treaty cannot create either obligation or right for such State, the Vienna Convention formulated the following principle concerning treaties providing for obligation for third States: "An obligation arises for a third State from a provsion 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."[14]

12. Article 2 and 1 h of the Vienna Convention.
13. P.C.I.J. Publications (1923), Series A/B No. 44, p. 30.
14. Article 35.

This rule underlines two conditions which have to be fulfilled before a third State non-party to the treaty - can become bound:

1) the States parties to the Treaty must have intended the provision in question to be the means of establishing an obligation for the State not a party to the Treaty.

2) the third State non-party to the treaty must have expressly agreed to be bound by the obligation.

In effect, there is a second collateral agreement between the States parties to the treaty on the one hand, and the third State on the other. Hence a juridical basis of the latter's obligation seems to be not the treaty itself but the collateral agreement. However, the case remains one where a provision of a treaty concluded between certain States becomes directly binding upon another State which is not and does not become a party to the treaty.

The operation of the rule expressed in this article, may be illustrated by the approach of the Permanent Court to Article 435 of the Treaty of Versailles in the Free Zones Case. Switzerland was not a party to the Treaty of Versailles, but the text of this article had been referred to her prior to the conclusion of the Treaty. The Swiss Federal Council had further addressed a note to the French Government informing it that Switzerland found it possible to "acquiesce" in Article 435, but only on certain conditions; making reservation, *inter alia*, as to the statement of this article that the provisions of the old treaties, conventions, etc., were no longer consistent with the present situations.[15] The Court, rejecting the French contention that Article 435 abrogated these old treaties and conventions, pointed out that Switzerland had not accepted that part of Article 435: ". . . In any event, Article 435 of the Treaty of Versailles is not binding on Switzerland, which is not a Party to this Treaty, except to the extent to which that country has itself accepted it; as this extent is determined by the note of the Swiss Federal Council of May 5th 1919 .; as it is by this action and by this action alone that the Swiss Government has "acquiesced" in the provisions of Article 435, namely, "under the conditions and reservations" which are set out in the said note."[16]

In relation to the problem of obligations arising for third States, there are certain particular situations possible where a treaty purports to impose liabilities or to create a situation unfavourable for a third State. It is possible, for instance, that the parties having under the treaty assumed certain obligations, undertake in addition that they will use their best endeavours to secure similar conduct on the part of third States. This is precisely the principle embodied in Article 2, paragraph 6, of the United Nations Charter: "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles[17] so far as may be necessary for the maintenance of international peace and security."

The somewhat similar provision is embodied in the Treaty on Antarctica (signed in Washington on 1 December 1959) by which the parties undertake to "exert appropriate efforts . . to the end that nobody engages in any activity in Antarctica contrary to the principles or purpose of this Treaty." It is also interesting that this provision expressly says that "the appropriate efforts" to be exerted by the parties are to be "consistent with the Charter of the United Nations" so the situation may be really curious in the case of a State which is neither a party to the Antarctica Treaty nor a member of the United Nations.

In such cases the fact that the third State is not and cannot be under any direct obligation in the matter, not being a party to the treaty concerned, does not itself absolve the parties to the treaty, so far as they are able and can do so without any illegality, from endeavouring to secure that the third State confines its action or conduct to the provisions of the treaty. It must nevertheless be emphasized that such treaty provision cannot create any actual obligations for the third State.

15. i.e. asserting the obsolescence and abrogation of the free zones.

16. P.C.I.J. Publications (1929), Series A No. 22, pp. 17-18; ibidem (1932), Series A/B No. 46, p.1 41.

17. Contained in Article 2 of the U.N. Charter.

Another problem arises in the case of the treaty provisions imposed upon an aggressor State, for instance, the provisions of the Potsdam Agreement concerning Germany. During the discussion in the Commission, the question was raised of an application of the present article to such provisions. The Commission noted that the case of an agressor State would fall outside the principle laid down in that article. At the same time, the Commission observed that Article 49 of its draft[18] prescribes the nullity of a treaty procured by the coercion of a State by the threat or use of force only "in violation of the principles of the Charter of the United Nations." Hence a treaty provision imposed on an agressor State, providing that the action was taken in conformity with the Charter, would not therefore infringe Article 49 of the draft. According to the comments made by some Governments, the Commission decided to include in the draft a separate Article 70, containing a general reservation in regard to any obligation in relation to a treaty which arises for an aggressor State in consequence of measures taken in conformity with the Charter.[19]

The question of revocation or modification of obligations which have arisen for a third State is settled by the Vienna Convention as follows:

> "The obligations 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."[20]

This rule seems to be clearly correct if it is the third State which seeks to revoke or modify the obligation. But where it is the parties who seek particularly to revoke the obligation, the need of the necessity to obtain the third State's consent is less simple. In a case where the parties were simply renouncing their right to call for the performance of the obligation, it might be urged that the consent of the third State would be really superfluous. Any difficulty in such case seems to be certainly very unlikely to arise. The feeling of the International Law Commission was probably 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.

Treaties providing for rights for third States - pacta in favorem tertii

Although, as has been said before, there was almost general agreement of the Commission that there is no exception from the rule of the third State's consent in the case of obligations, a division of opinion arose as to the question whether a treaty may of its own force confer a right upon a non-party. One group of members considered that, if the parties so intend, a treaty may have this effect, although the non-party is not, of course, obliged to accept or exercise the right. Another group of members considered that no actual right exists in favour of the non-party unless it is accepted by it.

This division of opinion in the Commission resulted directly from a controversy regarding the effects of stipulations in favour of third States - a controversy which still exists among writers on international law. Though there is general consent among them that treaties may stipulate benefits in favour of third States, there is still much controversy about whether an act of acceptance by the third party is necessary in order to be invested with a right to the benefit stipulated.

There were, for instance, some views that the so-called stipulation in favour of third States is nothing more than an offer addressed to the beneficiary whose acceptance complete s the second and supplementary agreement.

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18. Article 52 of the Vienna Convention (" . . violation of the principles of international law embodied in the Charter of the United Nations").

19. Art. 75 of the Vienna Convention: "Case of an aggressor State - 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"

20. Article 37, 1.

When this offer is accepted by the third party to which it is addressed, a second agreement is made, and the favoured State is no longer a third party but a contracting party. This position was expressed in the separate opinion of Judge Negulesco in the Free Zones Case:

> "It is possible, in an international convention, to stipulate right in favour of a third State. But whereas, according to such municipal laws as allow of such stipulation, the third Party has a right by virtue of the stipulation itself, in international law the States having made such a stipulation mutually undertake to conclude together with the third State - a supplementary agreement which will be appended to the agreement originally made."[21]

However, as de Arechaga noted:

"This offer theory reproduces in international law, with a delay of fifty years, the first attitude of some civil law writers who tried to explain the stipulatoin "in favorem tertii" in municipal law through the concept of two successive contracts This theory should be rejected in international law, because the acceptance of the benefit cannot be deemed to constitute the consent to a second agreement."[22]

It seems that the so-called acceptance does not create the expression of consent to second agreement but is only an act of appropriation of rights derived from the treaty which contains the stipulation in favour of third States, because the third State has the option of appropriating the right or of renouncing it. Acceptance in this case, therefore, may be described as an indication that the right is not disclaimed by the beneficiary.[23]

The Vienna Convention, developing the general rule of Article 34 that "a treaty deos not create. . .rights for a third State without its consent", takes a little different position than in the case of obligations, and provides in Article 36, paragraph 1, that the assent of the State is to be presumed so long as the contrary is not indicated. Such form of this provision has been considered by the Commission desirable in order to give the necessary flexibility to the operation of the rule in cases where the right is expressed to be in favour of States generally, or of a large group of States.

In this connection, the Commission noted a well-known fact that a number of favoured States may be different. In some cases the stipulation is made in favour of individual States as, for example, provisions contained in the Treaty of Versailles in favour of Switzerland[24] and Denmark[25]. In some instances it is made in favour of a group of States, as in the case of the provisions contained in the Peace Treaties after the Second World War,[26] which provided that the defeated States should waive any claims arising out of the war in favour of certain States not parties to these treaties. Further, the United Nations Charter stipulates, for instance, that non-members have a right to participate in the discussion of disputes in which they are involved (Article 32) or to bring such disputes before the Security Council or the General Assembly (Article 35). Finally, in other instances the stipulation is in favour of States generally, as in the case of provisions concerning freedom of navigation in certain international rivers, and through certain maritime straits and canals.[27]

In relation to these facts, the Vienna Con-

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21. P.C.I.J. Publications (1929), Series A No. 22 pp. 36-37.
22. E.J. de Arechaga, "Treaty Stipulations in Favour of Third States", *American Journal of International Law* (1956) vol. 50, p. 352.
23. Compare with the view expressed in the Havana Convention on Treaties of 20 February, 1928, Article 9 of which reads: "The acceptance or non-acceptance of provisions in a treaty, for the benefit of a third State which is not a contracting party, depends exclusively upon the latter's decision."
24. Articles 358 and 374 of the Treaty of Versailles.
25. Article 109 of the Treaty of Versailles.
26. See Treaties of Peace with Finland (Art. 29), Italy (Art. 76), Bulgaria (Art. 28), Hungary (Art. 32) and Rumania (Art. 30) - *American Journal of Internatoinal Law* (1948) vol. 42, supplement.
27. E.g. the Hay-Pauncefote Treaty between Great Britain and United States of 1901, and the Hay-Varilla Treaty between the United States and Panama of 1903, provided that the Panama Canal shall be open to vessels of commerce and of war of all nations, although Great Britain, the United States and Panama were the parties.

vention provides the possibility of the accord of a right "to the third State, or to a group of States. ., or to all States".[28]

Providing only the presumption of the assent of favoured States, the Convention gives cardinal importance to the intention to accord a right by the parties to the treaty:

> "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. "[29]

Only when the parties have such intention, a legal right, as distinct from a mere benefit, may arise from the provision.

The question of such intention was also raised previously, as for example, in the judgment of the Permanent Court in 1932 in the Free Zones case, where it said:

> "The question of the existence of a right acquired under an instrument drawn up 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."[30]

Also, Article 18 (b) of the Harvard Research provided that a third State was entitled to claim the benefit if the appropriate stipulation had been made "expressly for the benefit of a State which is not a party or a signatory to the treaty."[31]

In exercising the stipulated right according to Article 36, paragraph 2, of the Vienna Convention, a beneficiary State must comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty as, for instance, in the case of territorial State laying down relevant conditons for the exercise of the right of free navigation in an international river or maritime waterway.[32]

Restrictions that such conditions have to be provided in the treaty, or established in conformity with it, do not mean, obviously, the possibility of an interpretation that it restricts the power of the parties to the treaty to amend the right conferred on third State.

The Vienna Convention provides the possibility of such amendment as a revocation or modification of the stipulated rights.

As to the question whether the parties to the treaty may amend or abolish the stipulation by subsequent agreement, without the assent of the beneficiary, there were three positions taken by writers on international law.

A more restrictive view is that the third State may profit from the benefit as long as the stipulation remains in force, but it does not possess a legal right, since it cannot directly claim its enforcement, and the contracting parties are free to amend or abolish at any time the provision conferring the benefit without the consent of the third State.[33]

A second position holds that the third State is entitled to profit by the benefit and to claim it directly, as long as the stipulation remains in force between the parties to the treaty. In this view, therefore, the benefit may also be abolished by subsequent agreement among the contracting parties, without the consent of the third State.[34]

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28. Article 36, para. 1.
29. Ibidem
30. P.C.I.J. Publications (1932), Series A/B No. 46, pp. 147-8.
31. See supra, note 10.
32. See also Article 35(2) of the U.N. Charter, which 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 only if it accepts in advance, for the purposes of the dispute, "the obligations of pacific settlement provided in the present Charter"
33. L.A. Podesta Costa, *Manual de Derecho International Publico* (2nd ed., Buenos Aires 1947) para. 157s L.M. Moreno Quiutana,*Derecho International Publico* (Buenos Aires 1950), G. Salvioli, "Les Règle; Générales de la Paix", *Recueil des Cours. . .*, (1933) vol. 46, p. 29-30.
34. E.g. Art. 18(b) of the Harvard Research: "If a treaty contains a stipulation which is expressly for the benefit of a State which is not a party or a signatory to the treaty, such State is entitled to claim the benefit of that stipulation so long as the stipulation remains in force between the parties to the treaty."

A third position admits that, if the contracting parties have such intention, they may confer a right on a third party, which such party is entitled to claim as its own and which cannot be withdrawn except with its assent.[35]

It seems, according to the above-mentioned views that the existence of a right acquired under an instrument drawn between other States is a question to be decided in each particular case, that a third State cannot claim the right except in the case where the parties have wished to assume an obligation towards such third State. This was also the position taken by the Permanent Court in its definitive judgment in the Free Zones Case, rendered in 1932.[36]

Sometimes this question is decided specifically in the treaty itself. For example, according to Article 386 of the Treaty of Versailles, the judicial remedy of direct access to a right granted by Article 380[37] was established explicitly for any interested state, even if it was non-party to the Treaty.

The intention of granting a definitive, irrevocable right may be explicit or result implicitly from various circumstances. If, for instance, in a treaty of peace, a state is obliged to renounce a part of the territory in favour of a new state based on this territorial renunciation, this arrangement could not attain its purpose unless it is established as a definitive and irrevocable right of that third State.[38]

On the other hand, the lack of intention to grant an irrevocable right may also be inferred from the history and circumstances of the treaty. For example, the U.S. Senate eliminated from the original draft of the Hay-Pauncefote Treaty, relating to free navigation in the Panama Canal, provisions for ratification to and accession by third States. Because this elimination was made with the intent of avoiding the assumption of a legal obligation towards third States, it seems that this regime, therefore, can be modified by subsequent agreement among the parties.

In the 1964 draft the Commission took the position that in the case of a right as well as in the case of an obligation arising for a third State from a provision of a treaty, such "provision may be revoked or amended only with the consent of that State unless it appears from the treaty that the provision was intended to be revocable"[39].

However, during a later discussion of this subject, the Commission took note of the view of some Governments that the above-mentioned 1964 text went too far in restricting the power of the parties to revoke or modify a stipulation in favour of the third State, and in giving the latter a vote over any modification of the treaty provisions[40]. It could also be an element discouraging the creation of rights in favour of third States, for fear that it might hamper their freedom of action in future. Taking account of these elements, the Commission reformulated the rule in the 1966 draft so as to provide that a third State's right may not be revoked if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.[41]

In these circumstances, the irrevocable character of the right is therefore one to be decided in each particular case by establishing the case either from the terms or nature of the treaty provision or from an agreement or understanding arrived at between the parties and the third State.

However, the rule providing that in effect, a third State's right may in general be revoked or modified without its consent, with an

35. J.L. Brierly, "Règles Générales du Droit de la Paix", *Recueil des Cours* (1936) Vol. 58, p. 221; F.L. Oppenheim, op. cit. p. 927; E.J. de Arechaga, op. cit. pp. 344-345.

36. P.C.I.J. Publications (1932), Series A/B No. 46, pp. 147-8.

37. ". . . 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."

38. E.g. the Treaty of Peace of 8 October 1828 between Argentina and Brazil, from which Uruguay emerged as an independent state.

39. Article 61 of the 1964 draft.

40. Report . . . Supplement No. 9 (A/6309/Rev. 1) vol. II p. 60.

41. Similarly, Article 37, para. 2, of the Vienna Convention.

exception made only when it is established that the right was intended not to be revocable or subject to modification, sounds rather strange in contrast to the principle of necessary consent of the third State to revoke its obligation.

CONCLUSION

The Vienna Convention does not propose any special provision on treaties creating so-called objective regimes in international law, as for example, some of the abovementioned treaties providing for free navigation in international rivers or maritime waterways, or treaties for the neutralization or demilitarization of particular areas or territories, which obligations and rights may come to be valid *erga omnes*.[42] Recognizing the role played by custom in sometimes extending the application of rules contained in a treaty beyond the contracting States, the Convention provides that nothing in its articles "precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such" [43] Although this provision is the last one in the section concerning the treaties and third States, it seems that in effect it touches upon the most important question in this subject. In the face of great development of international relations and mutual connections between the States, the traditional concepts such as *pacta in favorem tertii* or *pacta in detrimentum tertii* are no longer relevant. The legal character of modern international treaties becomes less simple and more complicated. Usually the treaties now create simultaneously rights as well as obligations for States which are not parties to them.[44] Furthermore, serious difficulties arise in the field of defining the third States. Sometimes the States not parties to the treaty are engaged in the process of negotiating it, e.g. because they are being consulted by the parties or are sending observers to preparatory conferences.[45] Although the rules elaborated in the Vienna Convention have, undoubtedly, their importance, it seems that the most important role is now and will be in the future connected with the problem of conventional rules becoming binding as customary rules of international law or as the so-called *ius cogens*, i.e. peremptory norms of general international law.

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42. E.g. the Hague Convention regarding the rules of land warfare held by the International Military Tribunal of Nuremberg to enunciate rules which had become generally binding rules of customary law.

43. Article. 38.

44. E.g. the Potsdam Agreement, which created obligations of territorial cession for defeated Germany and, simultaneously, analogous rights for Poland. Neither Germany nor Poland were parties to this Agreement.

45. Poland, for example, was in this situation in relation to the Potsdam Agreement.