# ABHANDLUNGEN

## Treaties and Third States: a Study in the Reinforcement of the Consensual Standards in International Law

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A vivid manifestation of the sociopolitical differences dividing the old Western world from the new States and the socialist countries is the divergence in their attitudes towards matters of international law-creation and the obligatoriness of that law upon the members of the international community. The positions taken by the Western world, as they are reflected in a considerable part of its doctrine, indicate an attachment to the viability of custom, as a process of law-creation, and an effort of liberation of the legal rules from the quite austere confines of an extreme consensualism. Indeed, a number of international law authorities have advanced the opinion, usually supported by subtle argumentation, that the individual consent of a State to the content of a legal rule is not always indispensable for the rule to be binding upon it [1]); and that a presumption of general applicability

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[1]) The richness of the literature on that matter does not allow us to cite all the references of international law authorities on the question. We content ourselves with giving one characteristic excerpt from the writings of an eminent and quite influential publicist. In his learned study "Some Problems Regarding the Formal Sources of International Law" (in Symbolae Verzijl [1958], 164—5) Sir Gerald Fitzmaurice discusses *inter alia* the binding character of certain rules of international law established through channels independent of the subjective consent. He proposes the validity of natural law, as a formal source of international law and he considers that the "rule that a State or government cannot plead the provisions or deficiencies of its own internal laws or constitution as a ground or excuse for non-compliance with its international obligations... is not affected by any of the current controversies as to the relationship between international law, as a category, and internal law as another category;... The point about this rule is that it could not be other than what it is; it could not not be; and it is independent of any voluntarist element. No State subject to international law could ever have purported not to consent to it without in effect declaring itself not to be bound by international law at all, or rejecting that law as having obligatory force for the States supposedly subject to it. This is a rule of natural law, and belongs to that branch of it which, because of the absolutely necessary character of its rules, can fairly be regarded as constituting a formal source of law in the international field". See also *infra*, notes 57 and 78.



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(obligatoriness upon all States) is valid for rules of law satisfying certain requirements not perforce connected with the individual consent of each and every State of the community to that effect [2]). In the same vein, some writers have spoken of particular treaties having effects *erga omnes*; while others have contended that the establishment of a rule through a multilateral treaty, or a number of treaties, constitutes enough evidence (or, at least, quite substantial evidence) that the rule in question may be a general one, binding both upon the parties and the non-parties of the treaty or treaties containing it [3]).

On the other hand, however, the new States and socialist countries are working on the reinforcement of a more severe form of consensualism whose basic patterns are the supremacy of treaty law (binding, of course, only upon the parties to a treaty) and the elimination of easy inferences regarding the obligatoriness of rules of international law upon individual States [4]). Here, the future development of international legal relations is identified with the evolution of codification and written law, an attitude which is undoubtedly further enhanced by the increasingly evident need for detailed and exact law to deal with the growingly complex international exchanges.

The outcome of the confrontation of these two philosophies seems to favour, at least for the time being, the second group of States. Their posi-

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[2]) Holloway, Modern Trends in Treaty Law (1967), 559—60, writes in this respect: "... [A] distinction must be made between the ambit of operation of any customary rule and the phase or stage of its formation and development. The stringency of the criteria of appreciation of the existence of the subjective element would seem to depend on that distinction. Thus in the case of general custom in the sense that the practice has reached a degree of generality within the international community as a whole, as opposed to some regional practice, its application does not seem to be based on evidence that that particular State has expressly accepted the custom or participated in its formation. Its acceptance seems to be presumed. This is obviously because for a number of reasons a State or States may not have participated in the formation of a particular custom; for instance it may not have existed or its activity may not have extended to that sector of international practice". See also *infra*, note 78.

[3]) Cf. *infra*, note 78.

[4]) See, *inter alia*, Anand, The Role of the New Asian-African Countries in the Present International Legal Order, 56 AJIL 383 (1962); Mushkat, The African Approach to Some Basic Problems of Modern International Law, 7 Indian Journal of International Law 32 (1967); Shihata, The Attitude of New States towards the International Court of Justice, 19 International Organization 203 (1965); Sinha, New Nations and the Law of Nations (1967); Tunkin, Coexistence and International Law, 95 RdC 5 (1958); same, Droit international public (1965, translated from Russian); Udokang, The Role of New States in International Law, 15 Archiv des Völkerrechts 145 (1971).

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tion has apparently become a majority position; and their strong determination to impose it has not found any intractable resistance on the part of the rest of the States which are not, anyway, prepared to proceed to a bold reorientation of the constitutive elements of State sovereignty (and, hence, of the element of consent, as well) but only to minor and closely controlled liberalizations. An excellent illustration of the prevalence of the rigid consensual position over the elastic tendencies can be found in the formulas embodied in the rules of the Vienna Convention on the Law of Treaties [5]) dealing with "Treaties and Third States" [6]); while the preparatory work of that Convention, which led to the drafting and adoption of the articles in question, constitutes a quite eloquent record of the divergent lines followed by States in matters of law-creation and obligatoriness [7]).

The examination of the formulas contained in these articles and of the circumstances of their preparation reveals that the drafters of the Vienna

[5]) The Vienna Convention on the Law of Treaties [hereinafter the Vienna Convention] is a major codificatory work intended to become the instrument governing the conclusion and operation of treaties in the sphere of international relations. For the text of the instrument and its legislative history see Rosenne, The Law of Treaties. Guide to the Legislative History of the Vienna Convention (1970); or, for the text solely: UN Document A/CONF. 39/27; 63 AJIL 875 (1969); 29 ZaöRV 711 (1969).

[6]) Section 4 (Treaties and Third States) of Part III (Observance, Application and Interpretation of Treaties) of the Vienna Convention consisting of five articles: art. 34 (General rule regarding third States); art. 35 (Treaties providing for obligations for third States); art. 36 (Treaties providing for rights for third States); art. 37 (Revocation or modification of obligations or rights of third States); art. 38 (Rules in a treaty becoming binding on third States through international custom). The terms "treaty" and "third State" are used here with the connotation specifically given by art. 2 (Use of terms) of the Vienna Convention. Alinea (a) of para. 1 of that article specifies that "'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". Alinea (h) of the same paragraph reads: "'third State' means a State not a party to the treaty", while alinea (g) specifies that "'party' means a State which has consented to be bound by the treaty and for which the treaty is in force".

[7]) The text of the Vienna Convention was originally drafted (in the form of "draft articles") by the International Law Commission [ILC or the Commission] which worked for almost twenty years (in collaboration with the 6th Committee of the UN). After the completion of its work in 1966, the UN General Assembly convened a Conference of States for the consideration of the draft articles at Vienna. The Vienna Conference on the Law of Treaties [the Vienna Conference] devoted two consecutive sessions (1st Session, March 26 to May 24, 1968 — for summary records see United Nations Conference on the Law of Treaties Official Records [UNCLT Off. Rec.] A/CONF. 39/11 — 2nd Session, April 9 to May 22, 1969 in UNCLT Off. Rec. A/CONF. 39/11/Add. 1. See also Documents of the Conference [UNCLT Doc.] A/CONF. 39/Add. 2) to the consideration of the draft articles. In the first session the participating States amounted to one hundred and three States, while in the second session the number was increased to one hundred and ten States. These numbers reveal the extent to which the international community was consulted in the drafting of the law of treaties.

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Convention (namely the International Law Commission and the great number of the States which participated in the deliberations of the United Nations 6th Committee and the Vienna Conference) not only rejected some tendencies towards releasing international law from its strict consensual framework but, moreover, adopted a quite harsh line in this respect. Furthermore, given that the question of the effects or the impact of a treaty upon a third State has always been in the kernel of the overall problem of the obligatoriness of international law, the position of the drafters of these articles is also a very good indication (and the most coherent and recent one) toward that more general matter.

The present study shall examine, under two separate headings, the aggregate of the articles of the Vienna Convention dealing with "Treaties and Third States" [8]). Under the heading "Effects of Treaties on Third States", the present writer shall analyze the first four articles of Section 4 of Part III of the Vienna Convention (arts. 34 to 37) which deal with the conditions under which a treaty may create obligations or rights for third States; while under the heading "The Interplay of Treaties with Custom" he shall examine art. 38 which deals with the conditions governing the interplay of treaty law with customary law and the attendant creation of customary law under the influence of treaty rules.

## *Effects of Treaties on Third States: Articles 34 to 37 of the Vienna Convention*

All treaties produce effects on their parties. They may, depending upon the particular nature of their provisions, produce simple obligations or rights of what can be cautiously called contractual character, or rules of conduct of a normative character, or both contractual and normative rules [9]). It is through participation in them that treaties are generally intended to create law. For as has been traditionally accepted in international law, a treaty concluded between a number of States is, in principle and from the legal standpoint, a non-existent piece for third States, a *res inter alios acta* which can create neither obligations nor rights for third States.

This general proposition, namely that treaty rules are *inter partes* rules which *nec nocent nec prosunt* third States, has accompanied the operation of treaties since time immemorial. It is not only the influence of the law of contracts which has been constantly exerted upon the law of treaties dic-

[8]) Cf., *supra*, note 6.

[9]) These terms are used here out of convenience and as words of art more than law.

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tating, in their regard, an attitude analogous to that applying to domestic law contracts [10]); equally, if not more, decisive has been in this respect the fact that international law, the law of equal and sovereign States, is a predominantly consensual law. This means that for any rule of law to be or become binding upon a State there should be some manifestation of the latter's will to accept it as its law. The question of how this will is to be expressed or when it may be presumed that a State is bound by a rule of law is a purely technical one, its answer depending upon the particular sociopolitical mentality existing in any given period of the international relations. With respect to rules contained in conventional agreements, it is established that the consent of a State is manifested through its participation in such an agreement, and that this participation may be proved by the fact that a State has signed, ratified or acceded to that instrument [11]). In the absence of such proof a State is not deemed as being bound by the law that the treaty incorporates; at least not directly.

This phenomenon of absolute consensualism, as one may call the need of an express, usually formalistic, consent of a State to be bound by a conventional rule of law, has in fact been incorporated in the most recent codification of the law of treaties in two ways: as a positive statement according to which treaties are binding upon the States-parties consenting to be bound to their rules; and as a negative proposition stipulating that treaties do not bind third States. More specifically, art. 26 of the Vienna Convention enunciates that

> "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith" [12]).

While art. 11 of the same instrument specifies that

> "[t]he consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed" [13]).

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[10]) The rule *pacta tertiis nec nocent nec prosunt* has its origins in the domestic private law and goes back to the Roman law period. Cf. Ripert, Traité élémentaire de droit civil (de Marcel Planiol) II (2nd ed. 1947), 15 *et seq.* For the evolution of the concept in the context of the law of treaties see Nussbaum, A Concise History of the Law of Nations (1954), 196 et seq., and Schwarzenberger, The Frontiers of International Law (1962), 21 *et seq.*

[11]) For a discussion on the "[w]ays to express consent to treaties" see, Detter, Essays on the Law of Treaties (1967), 13 *et seq.*

[12]) The article is entitled "Pacta sunt servanda" and belongs to Section 1 (Observance of Treaties) of Part III of the Vienna Convention.

[13]) The article is entitled "Means of expressing consent to be bound by a treaty" and it belongs to Section 1 (Conclusion of Treaties) of Part II (Conclusion and Entry into Force of Treaties) of the Vienna Convention. It is a general provision followed by a

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Side by side with that positive formulation of the conditions of obligatoriness of treaty rules there is art. 34 of the Vienna Convention which represents the negative facet of the principle of consensualism. It reads:

"A treaty does not create either obligations or rights for a third State without its consent" [14]).

Beyond, however, complementing by its negative formulation the scheme of consensualism with regard to treaty law, the above article adds, at the same time, a new element to our discussion: it allows the assumption that there is a likelihood of creation of an obligation or right for a third State (while remaining a third State) through a treaty concluded between other States. However, for that obligation or right to be valid, the third State must consent thereto. Hence, art. 34 extends the scheme of consensualism to all possible channels through which a rule of a treaty may bind a State or States of the international community, and establishes a safety valve for the protection of third States from any unwanted obligations or rights which might be imposed on them by the parties to a treaty.

The general precept of art. 34 seems to have met with the unreserved agreement of all the drafting agents of the Vienna Convention. No member of the ILC or State at the Vienna Conference appeared to contest the fact that a treaty may be aimed at producing effects on third States through their consent [15]). However, although the general rule was not questioned, the sponsors of the Vienna Convention seemed unable to reach a consensus on the particular conditions under which a treaty, or certain of its provisions, may stipulate obligations or rights for non-parties to it. As a result, the main instances of disagreement which can be observed throughout the various stages of the drafting by the ILC and the Vienna Conference concern mostly the articles following art. 34, which specifically deal with the particularities of the creation of obligations and rights for third States [16]).

It appears that this divergence in the opinions of the legislative agents of the Vienna Convention was mainly due to the fact that they encountered legal problems with respect to which no consistent State practice or jurisprudence existed and, moreover, the doctrine followed various, not always

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number of other articles (mainly arts. 12—17) laying down the particularities under which the consent to be bound may be manifested. See also art. 2 para. 1, alineas (b), (f) and (g).

[14]) The article is entitled "General rule regarding third States".

[15]) See ILC Yearbook I for 733rd, 750th, 759th, 772nd, 851st, 852nd, 891st, 893rd meetings; also UNCLT Off.Rec. 35th and 74th meetings of the Committee of the Whole (1st Session) and 14th plenary meeting (2nd Session). Finally UNCLT Doc. 152 *et seq.*, for Reports of the Committee of the Whole (proposed amendments, etc.).

[16]) Cf. *infra*, 9.

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determinate, positions[17]). Indeed, the practice of States and the international jurisprudence seem to simply indicate the non-acceptance by international law of the possibility of an automatic creation of obligations or rights for third States (without their consent). Beyond that, however, a detailed determination of the exact conditions under which such obligations or rights may validly emerge is difficult to be found[18]).

In contrast now to this definite but not sufficiently elaborated position of the international law makers and jurisprudence, the doctrine has developed a number of propositions which seek to show that under exceptional circumstances obligations may be imposed or rights may be conferred by a treaty on a third State or a number of States even without their consent to that effect. Characteristic examples of this phenomenon can be found, according to these writers, in a number of treaties creating "objective regimes", namely treaties of communications, treaties establishing international organizations, etc.[19]).

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[17]) Almost every major textbook and treatise dealing with the question of treaties has examined the problem of their effects upon third States. See among others, Detter, *op. cit.* note 11, 100 *et seq.;* Jiménez de Aréchaga, Treaty Stipulation in Favour of Third States, 50 AJIL 338 (1956); Kojanec, Trattati e terzi Stati (1961); McNair, Treaties Producing Effects *Erga Omnes,* in: Scritti di Diritto Internazionale in Onore di T. Perassi (1957); Oppenheim, International Law vol. 1 (ed. by Lauterpacht [1955/67]), 925 *et seq.;* Roucounas, Les traités et les Etats tiers, 17 Revue hellénique de droit international, 299 (1964); Rousseau, Droit international public vol. 1 (1970), 182 *et seq.;* Roxburgh, International Conventions and Third States (1917).

[18]) Cf. Lauterpacht, Annual Digest and Reports of Public International Law Cases, *sub verbo* "Effect of Treaties on Third States"; Rousseau, *op. cit.* note 17, 184 *et seq.*, for conventional law, international and national jurisprudence and diplomatic practice. With respect to the international jurisprudence the best known cases which refer to the effects of treaties and third States are the following: *Certain German Interests in Polish Upper Silesia,* PCIJ Ser. A, No 7, 28—29; *Territorial Jurisdiction of the Commission of the River Oder,* PCIJ Ser. A, No 23, 18—21; *Las Palmas* (Arbitration), Reports of International Arbitral Awards vol. 2, 829; *Free Zones of Upper Savoy and the District of Gex,* PCIJ Ser. A, No 22; *et. al.* In that last case the Court gave an indication of the conditions required by international law for the valid creation of a right for a third State. It said: "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 which the latter has accepted as such".

[19]) Detter, *op. cit.* note 11, has made a systematic classification of the categories of treaties which, because of their subject-matter, are usually deemed to create obligations or rights for third States. She mentions the following classes of treaties: a. with respect

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In their effort, therefore, to draft the law on the conditions under which the general command of art. 34 would be valid, the drafters of the

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to obligations: (a) treaties on territorial rights and privileges (creation of a new State through a treaty); (b) the UN Charter which through its art. 2(6) creates obligations for non-parties; (c) constitutions of international organizations imposing through a majority rule decisions upon all the members; (d) conventions on Human Rights imposing obligations upon non-members, as the pronouncement of the World Court indicated in the advisory opinion on the *Reservations to the Convention on Genocide*. - b. with respect to rights: (a) provisions of treaties on waiver of rights (certain peace treaties waiving legal rights in favour of a particular State); (b) provisions relating to territorial regimes (treaties concerning territorial arrangements); (c) provisions relating to privileges of international organizations; (d) provisions on the right of accession (to treaties) of certain States. See also classification made by Rousseau, *op. cit.* note 17, the concept of the clause of the most-favoured-nation (for a bibliography on the clause see *infra* note 49) and, of particular importance, the much criticized notion of "objective personality" propagated by the Court in its advisory opinion on the *Reparation of Injuries Suffered in the Service of the United Nations* (ICJ Reports 174 [1949]). For the present writer these cases of treaties do not appear to create legal obligations or rights for third States with respect to which a claim of performance or abstention can be unconditionally asked either by the parties to these treaties (in the event of an allegedly automatic obligation) or by third States (in the event of an allegedly automatic right). These ostensible obligations or rights are usually duties or benefits based on socio-political relations and considerations. Indeed, as the case is also with physical persons, no State can exist in a social vacuum: it is a member of the international community at large; it geographically belongs to a particular area of this world where it is destined to co-exist with its neighbouring States. Its activities, therefore, overlap necessarily other States' activities and its interests coincide or conflict with other States' interests. In this interdependent world, a State has to accept a number of duties and to respect regimes which are legitimately created by other States. Accordingly, there may be cases where although a treaty retains its *res inter alios* character it may require a specific conduct from a third State which is embraced by the regime of the treaty and which, if not exactly obliged to abide by its law (so that a deviation from its stipulations would not constitute a breach of legal obligation), is nevertheless forced by considerations other than purely legal to follow the required course. In the same vein, a State may benefit from legal regimes which are created by a treaty to which it is not a party, but this mere fact does not suffice to make the benefits actual legal rights. (See, *inter alia*, the case "[i]n connection with the Hay-Pauncefote treaty between the United States and Great Britain, signed November 18, 1901, providing that the Panama Canal 'shall be free and open to vessels of commerce and of 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 changes of traffic, or otherwise', Secretary Hughes wrote that 'other nations... not being parties to the treaty have no right under it'" [Hackworth, Digest of International Law vol. 5, 221—22, cited at Briggs, The Law of Nations 871, 1952]). — There may be cases, it is true, where a genuine obligation exists for a third State; but in these cases there is consent to that obligation though not clearly discernible at once. For instance, in the case of a decision of an international organization binding upon all its members by a majority rule (mentioned in Detter, *op. cit.*) the consent of a member State to be bound by such decision, even if it does not favour it, was given through its becoming member of the constitution of the organization which stipulates for the "disappropriation" of the right of *ad hoc* veto and the prevalence of the majority rule. See, also *infra* the phenomenon of the interplay of treaties with custom.

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Vienna Convention could receive but very little help either from the vague and unorganized rules of custom governing State practice in this respect or from the diversified, albeit rich in argumentation, relevant theory; in fact, they embarked in the drafting of this law assisted only by the generally accepted premise that there might be cases where the rigidity of the rule *pacta tertiis nec nocent nec prosunt* might be relaxed.

In preparing the first drafts, the ILC decided to provide for two separate articles on the effects of treaties on third States, one on obligations and another on rights. This distinction was of course justified by the fact that the Commission wished to propound slightly different conditions for the creation of each of these effects. A third article was also drafted to cover the question of the conditions under which obligations or rights validly conferred may be revoked at a later date. All three articles were accepted by the Vienna Conference, at least as basic formulas. The discussion which follows will be based upon that distinction of the effects into separate categories and their incorporation into separate articles.

Obligations. Regarding the question of obligations, the Commission was quite careful to draft rather severe conditions under which a third State would be bound by the letter of a treaty. At an early stage, some of its members — including the fourth Special Rapporteur — made an effort to introduce in the draft articles the notion of "objective regimes" which would allow treaties, purported to create such regimes, to be automatically imposed upon third States without their consent [20]. However, that proposal was rejected by the majority of the members of the Commission.

The rejection of the idea of accepting into the domain of positive international law the theoretical notion of "objective regimes" constitutes a very good indication of the Commission's feelings as to the proper role of treaties in the domain of current international relations. The Commission, which, be it noted, has a notable record of successful drafting of codificatory rules [21], considered that even a limited "opening" that would allow some normative treaties (such as treaties of neutralization or demilitarization of particular areas, treaties providing for freedom of navigation in international rivers or maritime waterways) to constitute a source of law

[20]) See art. 64 of Waldock's third Report on the Law of Treaties (ILC Yearbook vol. II 26 [1964]). Also 738th — 740th meetings of the ILC in ILC Yearbook vol. I 96 (1964).

[21]) Cf. Jennings, Recent Developments in International Law Commission: Its Relation to the Sources of International Law, 13 ICLQ 385 (1964).

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for third States would not be accepted by a great number of States [22]. "Accordingly, it decided not to propose any special provision on treaties creating so-called objective regimes" [23].

Following that clarification, the Commission concentrated its efforts in an attempt to further safeguard the traditional role of treaties as a source of law only for the parties. Since the question of obligations was more delicate than that of rights, in the sense that for most States the likelihood of imposition of unwanted obligations upon them would be a far greater concern than the creation of regimes in their favour, the Commission gave a particular emphasis on the clarification, beyond any possible doubt, of the exceptional conditions under which such obligations might be generated. That effort of the Commission is strongly felt in its final draft article which reads:

> "An obligation arises for a State from a provision of a treaty to which it is not a party if the parties intend the provision to be a means of establishing the obligation and the third State has expressly accepted that obligation" [24].

The Commission thus subordinated the creation of an obligation for a third State to two supreme conditions: (a) the existence of an intention of the parties to the treaty to establish such an obligation, and (b) the express acceptance of the obligation by the third State. The difference between these two requirements, as laid down by the Commission, is obvious. With respect to the parties to the treaty, the existence of a mere intention suffices to create the necessary first condition. The Commission did not specify how this intention could be evidenced; consequently, it may be argued that

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[22]) In its final commentary to its draft articles the Commission summarized the positions of its members with regard to the concept of "objective regimes" in the following statement: "Some members of the Commission favoured [the inclusion of the concept of 'objective regimes' as a special case] expressing the view that th[at] concept... existed in international law and merited special treatment in the draft articles... Other members, however, while recognizing 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 [present art. 36, see *infra*] or from the drafting of an international custom upon a treaty... Since to lay down a rule recognizing the possibility of the creation of objective régimes directly by treaty might be unlikely to meet with general acceptance, the Commission decided to leave this question aside..." (UNCLT Doc. 51). It should be noted that the above cited comments were made with respect not to the draft article on obligations (31) or rights (32) but with respect to draft art. 34 on the "Rules in a treaty becoming binding through international custom". (See *infra*, 25).

[23]) UNCLT Doc. 51.

[24]) Draft art. 31, entitled "Treaties providing for obligations for third States".

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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.

We should open here a parenthesis in order to consider a question which may arise at this point, namely, whether normative treaties (with which the present study is mostly concerned) may be considered, by the mere fact of their being normative, as reflecting the intention of the parties to produce law for third States outside the scope of the participants. The answer should be unhesitatingly in the negative. First of all, not all normative treaties are aimed at creating more than strictly particular law for the parties. But even when a normative treaty is intended to produce general law or law for a large number of States — a fact which may be erroneously construed as evidencing the intention of the parties to create binding law for third States — it is usually intended to do so through participation in it and not through the scheme of effects on third States. It should not be forgotten that normative treaties do usually more than simply lay down rules of law. They actually build autonomous legal systems, a combination of substantive and procedural rules, whose proper function is safeguarded only through full participation and not through incidental obligations for third States with regard to certain of its provisions. For that reason, most of the modern normative treaties of a multilateral character make specific provision to facilitate wide participation [25]. There might be cases, however, where a normative instrument may be intended to produce obligations for third States. But that intention must be clearly evidenced by the circumstances pertaining to its adoption and operation or by its text; it cannot be inferred simply from its normative character and the wish of its parties for a wide participation.

With respect to the second condition regarding, this time, the third State, the Commission was extremely careful to phrase it with unquestionable clarity. In view of a strong likelihood of abuse, the original drafters avoided any wording which might compromise the need of the third State's unambiguous consent to be bound; thus, they discarded notions such as implied or tacit consent and preferred the quite certain "express consent". This means that in order for a State to be deemed bound by an obligation through a treaty to which it is not a party, it must have expressly, orally

[25] See, *inter alia*, arts. 26 and 28 of the Convention on the Territorial Sea and the Contiguous Zone; arts. 31 and 33 of the Convention on the High Seas; arts. 15 and 17 of the Convention on Fishing and Conservation of the Living Resources of the High Seas; arts. 8 and 10 of the Convention on the Continental Shelf; art. 48 of the Covenant on Civil and Political Rights; art. 81 of the Vienna Convention.

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or in writing, recognized that obligation. Most of the times, therefore, such an expressed consent would be directed towards the parties to the treaty (as an answer to a concrete proposal) thus leading to the conclusion of a separate agreement between them [26]).

However, despite the inclusion in the draft article of the words "expressly accepted" which are indeed the key words of the rule incorporated there, some of the States which participated in the Vienna Conference were not completely satisfied by the arrangement. Besides the fact that a number of them found unnecessary the drafting of separate articles for obligations and rights proposing their unification under the same conditions for both these effects [27]), some States felt, at a late stage of the discussions, the need for a further clarification of the letter of draft art. 31. While they did not criticize its first part (conditions for the parties), they considered that the term "expressly accepted" was not an adequate safeguard for third States against unwanted obligations. In an effort to make the text more explicit, the delegation of the Republic of Viet-Nam introduced an amendment, in the phase of the plenary meeting, proposing the addition of the words "in writing" to the only grammatically amended last phrase "the third State expressly accepts that obligation". In explaining the reasons which made that addition necessary the Vietnamese delegate said:

> "[T]he establishment of an obligation for a State which was not a party to a treaty was an important matter. 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. The words 'expressly accepts' could be understood in the widest sense as embracing acceptance by solemn declaration or any other form of oral acceptance which did not provide the necessary safeguards. It was therefore desirable that third States, and particularly developing countries, should express their willingness to accept an international obligation in writing only" [28]).

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[26]) In the commentary to that article the Commission pointed out that it "appreciated that when [the] conditions [of the draft article] are fulfilled there is, in effect, a second collateral agreement between the parties to the treaty, on the one hand, and the third State on the other; and that the juridical basis of the latter's obligation is not the treaty itself but the collateral agreement. However, even if the matter is viewed in this way, the case remains one where a provision of a treaty concluded between certain States becomes directly binding upon another State which is not and does not become a party to the treaty" (UNCLT Doc. 47).

[27]) Venezuela proposed the unification of all draft articles dealing with obligations and rights in one sole article. Para. 1 of that amendment (A/CONF.39/C.1/L.205) read: "Treaties do not create obligations and rights for third States except with their express consent and under the conditions they establish". That amendment was withdrawn at the 35th meeting of the Committee of the Whole.

[28]) UNCLT Off.Rec., 2nd Session, 14th plenary meeting.

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The adoption of that amendment [29]), even though by a narrow majority, marks an interesting point in the evolution of the law of treaties, for it establishes a radical departure from the scheme of informalism which has been traditionally quite acceptable in that law. Indeed, it is a well known fact that an agreement between two or more States does not necessarily have to be in the form of a written instrument in order to be valid. Both the offer and the acceptance constituting an agreement may be made informally, and therefore orally, and they are good in law so long as they represent the clear and untainted consent of the interested States [30]). By restricting the method of consent-giving under art. 35 only to the written form, the legislators of the Vienna Convention actually struck a serious blow to the informal agreements in international law.

The rigid provision of art. 35 is the second (in order of seriousness) manifestation of the prevalence of formalism in the Vienna Convention. The first and foremost is the very fact that the Vienna Convention itself applies only to treaties in written form [31]). While these facts do not prejudice, as such, the validity of informal agreements [32]), they nevertheless restrict their ambit and the likelihood of their further evolution so as to render them gradually inactive [33]). We therefore witness a growing formalism in the law of treaties which, at least in the case of art. 35, is inextricably connected with the notion of consent in whose service it is presumably aimed to be [34]).

R i g h t s. Coming now to the question of rights deriving from a treaty for third States, the Commission, which, as has been mentioned, drafted a separate article on that matter, found considerable difficulties in

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[29]) That amendment was adopted in the course of the 14th plenary meeting by 44 votes to 19 with 31 abstentions (A/CONF.39/L.35). Draft art. 31, as amended, was adopted at the same meeting by 99 votes to none, with one abstention.

[30]) Cf. R o z a k i s, The Conditions of Validity of International Agreements, 26 Revue hellénique de droit international (1973).

[31]) Cf. *supra* note 6.

[32]) Art. 3 of the Vienna Convention provides that "[t]he fact that the present Convention does not apply ... to international agreements not in written form, shall not affect: (a) the legal force of such agreements ..."

[33]) In fact, if the Vienna Convention comes into force and becomes the main source of the law of treaties for a large number of States, its scope (restricted to written treaties) will decidedly influence the minds of States in concluding agreements in that they will certainly prefer to be covered by the legal systems of the Vienna Convention than by the unsystematic and procedurally inadequate customary law of treaties.

[34]) Formalism is an excellent safeguard for the States' consent. The written form can ensure, beyond any reasonable doubt, that no misunderstanding can arise as to whether a State has given its consent with respect to a rule of law (proof: its signature, ratification, etc. upon the written text) or as to the exact content of its consent.

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reaching an agreement on the problem of when an actual right (not simply a benefit) arises for a third State. In effect, the Commission was divided into two camps following two different theoretical approaches: some members were of the opinion that "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. In other words, as with the case of an obligation they [held] that a right will be created only when a treaty provision is intended to constitute an offer of a right to the third State which the latter has accepted" [35].

On the other hand, some other members of the Commission, including the successive Special Rapporteurs, sustained the view that "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 that it is always a question of the intention of the parties in concluding the particular treaty. According to them, a distinction [had] to be drawn between a treaty in which the intention of the parties is merely to confer a benefit on the other State and one in which their intention is to invest it with an actual right. In the latter case they [held] that the other State acquires a legal right to invoke directly and on its own account the provision conferring the benefit, and does not need to enlist the aid of one of the parties to the treaty in order to obtain the execution of the provision. This right is not, in their opinion, conditional upon any collateral agreement between it and the parties to the treaty" [36].

The practical difference between these two theoretical positions — which, nevertheless, converged in their common acceptance that a genuine right may actually emerge from a treaty for a third State — was that while for the first group "the treaty provision constitutes no more than an offer of a right until the beneficiary State has in some manner manifested its acceptance of the right, ... [for] the other group the right arises at once and exists unless and until disclaimed by the beneficiary State. The first group, on the other hand, conceded that acceptance of a right by a third State, unlike acceptance of an obligation, need not be express but may take the form of a simple exercise of the right offered in the treaty. Moreover, the second group, for its part, conceded that a disclaimer of what they

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[35]) UNCLT Doc. 48.
[36]) *Ibid.*

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considered to be an already existing right need not be express but may in certain cases occur tacitly through failure to exercise it" [37]).

In view of these differences, the Commission was called to provide for an arrangement which could satisfy both groups. Having noted that in actual terms the differences, while undoubtedly existing, did not create an insuperable stumbling block, it proceeded to the final formulation of its proposal. Its final draft which was presented to the Vienna Conference for consideration and which, as it claimed, reflected past State practice without prejudging at the same time the doctrinal basis of the rule [38]), had as follows:

> "1. A right arises for a State from a provision of a treaty to which it is not a party if the parties intend the provision to accord that right either to the State in question, or to a group of States to which it belongs, or to all States, and the State assents thereto. Its assent shall be presumed so long as the contrary is not indicated.
>
> 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" [39]).

The above text did not succeed in satisfying all the members of the Conference. The discussions which ensued proved that a number of representatives were not prepared to agree with the conceptual approach of the Commission. The main divergences arose with regard to the second sentence of draft art. 32 ("[i]ts assent shall be presumed so long as the contrary is not indicated") and to three amendments submitted to modify or completely delete that sentence [40]).

The main concern of the States which wished to see a modification of the article seemed to lie in the fact that the wording of the last paragraph created a presumption of consent-giving which could be construed as allowing the bestowal of automatic rights to third States. They argued that such a presumption could come adversary to the interests of third States which did not want a right to be bestowed to them for a number of reasons,

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[37]) *Ibid.*

[38]) *Ibid.*, 49.

[39]) Entitled "Treaties providing for rights for third States". Numbered 32 in the final Report of the ILC.

[40]) Amendments were submitted by Finland (A/CONF.33/C.1/L.141, to delete second sentence of para. 1), Japan (A/CONF.39/C.1/L.218, to add "Unless the treaty otherwise provides" at the beginning of last sentence of para. 1) and the Netherlands (A/CONF.39/C.1/L.224, to replace, in para. 1, the word "arises..." by "may arise..." and to delete the words "and the State assents thereto. Its assent shall be presumed so long as the contrary is not indicated" at the end of the paragraph).

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or did not aspire to the development of a relationship with the parties to the treaty conferring such right or, even, did not want to sustain the possible obligations deriving from the treaty side by side with the right [41]).

However, although a number of States seemed to support the amendments to the relevant paragraph of art. 32, the majority of the participants looked favourably at the original wording of the Commission's draft. The last inhibitions and reservations were apparently dissipated by the statement of Sir Humphrey Waldock which contributed to convince the representatives of the innocuous (for their sovereign rights) character of the presumption contained in the draft article. In commenting on the amendment proposed by Finland [42]) he said:

> "[T]he Finnish representative had not been entirely correct about the position of the International Law Commission regarding article 32. There had been a division of opinion on a point of principle as to whether a treaty could of itself create rights without the consent of a third State. The Commission had had to seek common ground and at the same time to reflect the practice of States and take into account the needs of the international community.
>
> Assent of the third State had been stipulated as necessary, but the Commission had recognized that it could take different forms ... Articles 31, 32 and 33 must be read as a whole and article 32 assumed the simultaneous operation

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[41]) Characteristically the representative of Finland remarked, in supporting his country amendment: "[The derogation of article 32 from the general rule of article 30 (requiring the clear existence of consent for the creation of a right for third States)] might be dangerous, since it introduced an element of uncertainty into the system ... The third State might thus against its will become a so-called party to the treaty through pardonable negligence. States which had a small staff dealing with foreign affairs were often unable to follow and examine all the treaties concluded by other States. — Moreover, in many treaties rights were closely linked with obligations, as was apparent from paragraph 2 of article 32. If a third State reacted too late, the provisions of sub-paragraph (b) of article 42 [see final art. 45 entitled "Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty"] might be invoked, and it might be presumed to have acquiesced in the application of the treaty in question ..." (UNCLT Off.Rec., 1st Session, 35th Meeting of the Committee of the Whole). The Dutch delegate, in his turn, commenting on his proposed amendment, said: "If a treaty provided for a particular régime from which States which were not parties to the treaty might also benefit, it was not the assent of such third States, whether expressed or tacit, which created a relationship between the parties and those third States, but rather the fact that the third State had actually made use of that régime. For instance it would be strange if a treaty according a right to all States should, through the presumed assent of those States, create a relationship with States which might not even know that the treaty existed at all, or with States which would never be in a position to make use of the régime instituted by the treaty. In the latter case, even the expressed assent of the third State should not be regarded as confirming the kind of inchoate title provided for in paragraph 2 of article 33 ...". *Ibid.*

[42]) See *supra* notes 40 and 41.

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for article 31. In a case where a treaty provided for an obligation for a third State parallel to a right, that had equally to be accepted in addition to acceptance of the right. That situation was covered by articles 31 and 32, while paragraph 2 of the latter article dealt with the conditions of the exercise of the right. No State was bound to exercise the right" [43]).

He further said:

"[T]he conditions for the exercise of a right were laid down in article 32, paragraph 2. The situation would be more difficult when parallel obligations and rights ensued from a treaty, both of which had to be accepted before the right became established. In such cases both articles 31 and 32 would apply" [44]).

These remarks of the Expert Consultant made quite clear that which could, in any case, be logically inferred from the joint reading of the relevant articles of the Vienna Convention: namely, that there is no obligation for a State to exercise a right, and that no one can exert pressure upon it to make it do so; and, furthermore, that a distinction should be made between an obligation arising from a treaty, which also provides for a right for a third State, and a mere condition for the exercise of that right. In the first case, a third State may only undertake the obligation (parallel to the right) if it consents to that effect in writing (art. 35 of the Vienna Convention); in the second case, the State is bound to comply with the conditions of the exercise of the right, but certainly only as and when it actually exercises the right.

The question which can certainly arise at that point is whether an obligation parallel to a right is always easily distinguished from what is called a condition for the exercise of a right so as to allow a clear-cut distinction of legal treatment of the various cases. It seems to us that there might be cases where such an absolute distinction could not be made. In view of the seriousness of the situation and the predominant concern to protect a third State from unwanted implications with a treaty to which it is not a party, it seems that in all cases of objective doubt as to whether there is an obligation or a condition, namely as to whether art. 35 or art. 36, para. 2, should apply, it would be preferable (even at the detriment of a legalistic solution) to apply the severe requirements of the first article. This seems to be at least the position which reflects most the approach of States to the matter.

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[43]) UNCLT Off. Rec., 1st Session, 35th meeting of the Committee of the Whole.
[44]) *Ibid.*



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The majority of States seemed to be less concerned with the question of rights than with the question of obligations. Satisfied with the formulation of the general art. 34 of the Vienna Convention and the safeguard that it contained, as well as with the confirmed interdependence of the system of the rules concerning the effects of treaties on third States, they eventually rejected the main proposed amendments and adopted the formula of the Commission in its general lines with only minor amendments. The final article (36) adopted by the Vienna Conference retained all the characteristics of the draft article with some wording improvements and with the addition of the phrase "unless the treaty otherwise provides" at the end of the second sentence of the first paragraph as it was proposed by the Japanese amendment [45]).

The final text of art. 36 does not create any major interpretive problems if seen in the light of the preparatory work, the manifested will of the States therein, and its place in the system of the rules on the effects of treaties on third States. As far as the basic rule is concerned, a right may emerge for a third State when two conditions are fulfilled: first, the existence of an intention of the parties to accord a right to a third State or to a number of States. It seems to us that the search into the circumstances which may prove the existence of such intention differs qualitatively from the search into the intention of the parties with respect to obligations. Indeed, the preponderant evidential concern is, this time, the protection of the parties to a treaty allegedly conferring a right to a third State. In view of the fact that a right for a third State entails an actual obligation for the parties, the search in the latter's intention must be governed by the severity with which the question of the undertaking of obligations is determined by the Vienna Convention [46]). In order for an actual right to arise for a third State or States there must be clear and unambiguous proof of the intention of the parties in the text of the treaty or in some other document relating to it.

The second condition which must be satisfied in order for a right to emerge for a third State is that the latter must assent to that right. The

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[45]) The final text reads as a whole: "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".

[46]) See, besides arts. 34 to 36 which establish in a quite eloquent way the attachment of States to the consensual character of international law, the articles of the Vienna Convention relevant to the invalidity of treaties and more particularly arts. 46 to 52.

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word "assent" cannot mean anything less than consent. Since the general rule of art. 34, which governs the whole system of the effects of treaties on third States, requires the existence of the consent of a third State in order for a valid obligation or right to be bestowed to it, then art. 36 which constitutes a specification of that rule cannot but comply with its general precept. Otherwise there would be a hiatus between the general rule and its specification.

The consent required, however, in the case of a right for a third State is of the most rudimentary character: it is actually what we may call a presumed consent. Its existence can be proved by the mere establishment of the fact that a State or States on which that right has been conferred has never taken a position negating it. It must therefore be assumed that the right may validly exist even if the third State ignores the clear intention of the parties to a treaty to confer on it such right, from the moment that that intention is born and embodied in the treaty. Under such circumstances, of course, the right remains inactive. It can, however, be claimed by the third State not from the time of its becoming aware of it but from the time of the conclusion of the treaty, provided, of course, that the intention of the parties existed at that time. In any event, since the intention of the parties is the crucial factor in the determination of the time at which a right is conferred upon a third State — subject to acceptance or refusal — it might be said that such a right arises at the time that the parties to a treaty decide to confer it on a third State *through* that treaty.

On the other hand, no right must be deemed as conferred on a third State if the latter behaves in a way which shows that it does not accept that right. Again, the letter of the article does not seem to imply that express declaration of that State's refusal must take place. A simple indication of such refusal suffices. It goes without saying that a State which expressly or by its general attitude has denied the accordance of a right in its favour, cannot certainly claim its existence, at least insofar as its denial can be considered as evident.

Finally, it should be noted that the States conferring a right upon a third State by a treaty may determine by its text a different way through which the acceptance of that right must be expressed by the interested third State. They may, for instance, request that the third State must accept it by express consent or in writing or through the actual exercise of that right. The general provision of art. 36 of the Vienna Convention acquires, by that fact, a residual character. In other words, the specific requirements of a particular treaty apparently prevail over the general provision of art. 36. Consequently, in all cases where such requirements are determined by a

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particular treaty (or by some other source) no right arises for a third State unless it complies with these requirements.

Paragraph 2 of the article makes it clear that in the event that a third State actually exercises its right, it has to comply with the conditions laid down by the treaty or established in conformity with the treaty with respect, certainly, to the exercise of that right [47]). In explaining the inclusion of the phrase "in conformity with the treaty", which entails compliance with conditions which may not be contained in the text of the treaty, the Commission rightly observed that "[this phrase] take[s] account of the fact that not infrequently conditions for the exercise of the right may be laid down in a supplementary instrument or in some cases unilaterally by one of the parties. For example, in the case of a provision allowing freedom of navigation in 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 ..." [48]). Once again, it should be stressed that a condition, regardless of whether it is established by the treaty or by some other instrument, is connected with the exercise of that right and valid only if that exercise actually takes place and for as long as it takes place. Otherwise, any burden accompanying a right must be considered as an obligation and fall under the arrangement of art. 35 of the Vienna Convention. The question of whether a treaty produces an obligation parallel to a right or a mere condition for its exercise is a matter to be examined *in concreto* whenever such a problem arises.

In concluding the discussion on art. 36 of the Vienna Convention, it should be pointed out that a number of States at the Vienna Conference brought on the surface the question of the relevance of that article to the concept of the most-favoured-nation clause [49]). Afraid of the influence that the formula of art. 36 might have upon the function of that concept, they asked for some assurances that the article would not in any way interfere with its working and hamper it [50]). It would appear, however, that this

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[47]) See *supra*, 17.

[48]) UNCLT Doc. 49.

[49]) The purview of this study does not allow a detailed analysis of the question of the most-favoured-nation clause. For a comprehensive discussion of that question see, Schwarzenberger, International Law and Order (1971), 129; de Lacharrière, Aspects récents de la clause de la nation la plus fovorisée, 7 Annuaire français de droit international 107 (1961).

[50]) See the statement of the Russian representative at the 35th meeting of the Committee of the Whole (1st Session) in UNCLT Off. Rec. For the discussions at the plenary meetings see *ibid.*, 2nd Session. Also for a detailed reference to the work of the ILC and

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effort to intermingle the question of the most-favoured-nation clause with that of the effects of treaties on third States was quite superfluous. The problem of the most-favoured-nation clause is distinct from that of the rights for third States. In both cases, it is true, there is a State which seems to be favoured by a clause of a treaty to which it is not a party. But this is the only common point between the two cases. For the legal basis upon which the right for the "third" State rests differs substantially in each of them: In the case of a State enjoying a right conferred on it by a treaty as an effect, the basis of the right is the treaty conferring it and the intention of its parties to that effect; while in the case of a State enjoying a benefit from a treaty on the basis of the most-favoured-nation clause, the legal foundation of that benefit is the agreement between that State and another State (which is or becomes subsequently a party to a treaty with other States) through which the latter undertakes the obligation to extend to the former any regime created by a treaty to which it becomes a party, which is more favourable than the one provided by their prior agreement. As a *fictio juris*, it can be assumed that the "more favourable" provision of the subsequent treaty is transposed automatically to the prior agreement and becomes an integral part of it because of the existence of the most-favoured-nation clause. The basis of obligation and claim is not, therefore, the subsequent treaty and the will of its parties but the prior agreement conferring the status of the most-favoured-nation on a State, and the will of the State-party to both the prior and subsequent agreements to confer that status on the State in question. Consequently, we believe that the Conference was unnecessarily cautious in raising an issue which, by its very nature, was quite independent from the question of effects of treaties on third States.

Revocation or Modification of Obligations and Rights. Art. 37 of the Vienna Convention completes the system of rules dealing with the question of effects of treaties on third States proper. It settles down the problem concerning the way in which an obligation or right conferred by a treaty on a third State may be modified or revoked once it has been accepted by that State. The final article, which is almost identical to the draft proposed by the Commission, has as follows:

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the 6th Committee of the UN on a proposal of Jiménez de Aréchaga (752nd meeting of the ILC) to add a separate article on the question of the most-favoured-nation clause see Rosenne, *op. cit.* note 5, 231.

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"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" [51]).

In an earlier draft, the Commission dealt with both obligations and rights in a single paragraph which provided them with a uniform legal treatment. The Commission had considered that both these effects could not be revoked without the consent of the third State. However, that arrangement failed to win the approval of a number of Governments to which the Commission submitted its draft. Consequently, it decided to prepare two paragraphs to deal separately with obligations and rights [52]). Since the main objection of States to that draft was that the uniform treatment limited in a serious way the freedom of States-parties to change or revoke altogether a provision conferring a right on a third State, the Commission retained its original formula only with respect to obligations and drafted a second paragraph for rights providing a more flexible solution. The States at the Conference of Vienna seemed quite satisfied with the new arrangement and

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[51]) Entitled "Revocation or modification of obligations or rights of third States" and numbered as art. 33 in the ILC's final draft. The only difference between the ILC's draft and the text adopted by the Vienna Conference is that in para. 1 of the draft the word "mutual" was put before the phrase "consent of the parties to the treaty". That word was deleted because that "term was clearly defined in the text by the phrase that followed it" (UNCLT Off. Rec., 1st Session, 74th meeting of the Committee of the Whole). Amendments (withdrawn or rejected) were submitted by the Netherlands (A/CONF.39/C.1/L.225) to add to draft's para. 2 the phrase "and provided the State has actually exercised the right and complied with the conditions for its exercise" and by Philippines (A/CONF.39/C.1/L.211) for some minor wording changes.

[52]) In commenting on its decision to formulate two distinct rules the Commission said: "[A]lthough analogous, the considerations affecting revocation or modification of an obligation are not identical with those applicable in the case of a right. Indeed the respective positions of the parties and of the third State are reserved in the two cases. It also considered that regard must be had to the possibility that the initiative for revoking or modifying an obligation might well come from the third State rather than from the parties; and that in such a case the third State, having accepted the obligation, could not revoke or modify it without the consent of the parties unless they had otherwise agreed... The Commission also decided that the article should refer to the revocation or modification of the third State's obligation or right rather than of the provision of the treaty giving rise to the obligation or right; for the revocation or modification of the provision as such is a matter which concerns the parties alone and it is the mutual relations between the parties and the third State which are in question in the present article", UNCLT Doc. 50.

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did not proceed to any substantive alteration of the final draft of the Commission [53]).

Paragraph 1 of art. 37 deals exclusively with the question of revocation or modification of an obligation. The *sine qua non* requirement of its application is that the obligation must have arisen in conformity with art. 35. It is for the State invoking it to prove that an obligation has validly emerged for a third State and is still valid at the time of invocation. Furthermore, the rule of para. 1 is of a residual character, namely it applies only when the interested parties have not provided for another arrangement concerning the method of revocation or modification of the obligation.

The rule of the article covers the cases of both the parties to a treaty wishing to revoke or modify an obligation for a third State and of a third State wishing to proceed to a revocation or modification of its obligation under a treaty. The Commission observed on that point the following:

> "[T]his rule is clearly correct if it is the third State which seeks to revoke or modify the obligation. When it is the parties who seek the revocation or modification, the position 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 superfluous; and in such a case it is certainly very improbable that any difficulty would arise. But the Commission felt 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" [54]).

Contrary to the positive manner in which the rule of para. 1 is formulated, the text of para. 2 is stated in a negative form in order to show that the revocation or modification of a right by the sole action of the parties to a treaty conferring such right would be, most probably, a not-so-usual, almost exceptional case. If the rule were formulated in a positive manner it would provide that the consent of the third State is required for the revocation or modification of a right unless it was established that the right was intended (presumably by the parties) to be revocable or modifiable [55]).

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[53]) See UNCLT Off. Rec., 1st Session, 35th meeting of the Committee of the Whole.

[54]) UNCLT Doc. 50.

[55]) Proof for 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". *Ibid.*

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The formula of para. 2 represents a compromise of the Commission as a result of two basic concerns. In the first place, the rule should not be too strict but should allow the parties to a treaty enough room to revoke or modify a right that they conferred. On the other hand, the rule should not be too loose so as to create a constant danger of uncertainty and equivocality in the relationship existing between the State(s) entitled to a right and the States-parties to the treaty conferring such right [56]). By providing that consent is needed in all cases where there is no clear intention for the right to be revocable or modifiable, the Commission succeeded in drafting an article which secures the stability of the particular relations based on a conferred right without, at the same time, tying the hands of the parties should they wish to alter the legal regime favouring the third State. Indeed, States are free to provide in their treaty that the right is revocable or modifiable by their sole will, or to determine it otherwise alone or in agreement with the favoured State(s). In view of the novel character of the rule (which apparently settles this question for the first time in positive law) it should be expected that it will become the starting point of a new practice whereby States conferring a right through a treaty will, if they so wish, take the proper measures in time to ensure that no problem will arise for them with respect to its revocation or modification (addition of specific clause, agreement with the favoured State(s), etc.).

As can be noted, the question of revocation or modification of a right is considered only from the standpoint of the parties to a treaty wishing to take such action. No conditions are determined for the third State with respect to the revocation or modification of its acceptance of the right. That is not to say, however, that the third State cannot revoke or modify it. On the contrary, it can do so at any time on the basis of the letter of art. 36. As we recall, that article requires the assent of the third State in order for a valid right to emerge. Presumably that assent must be continuous: if the third State indicates its decision to withdraw its assent (by its attitude or by an express position), then one of the conditions for a valid existence of a right (intention of the parties, assent of the third State) is not any longer met and art. 36 ceases to apply and produce effects in the particular circumstances.

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[56]) In the words of the Commission "it was desirable that States should not be discouraged from creating rights in favour of third States, especially in such matters as navigation in international waterways, by the fear that they might be hampering their freedom of action in the future. But it was no less important that such rights should have a measure of solidity and firmness". *Ibid.*

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As an overall appraisal of the rules on the effects of treaties on third States (contained in arts. 34 to 37 of the Vienna Convention), one may say that these rules constitute not merely a declaratory codification of pre-existing law but a genuine law-making. Starting from the general lines dictated by past practice, jurisprudence and doctrine, the legislative bodies of the Vienna Convention drafted three articles establishing some specific conditions for the creation of effects which had been, until then, either unknown or fairly undeveloped and ambiguous.

Another observation which can be made is that, as can be inferred from the letter of the articles and the preparatory work, the drafters tried as much as possible to impose quite strict consensual standards concerning the creation of obligations and rights for third States and to efface all liberal theoretical tendencies in this area aluded to in the past. This is evidenced by the particular severity of art. 35 (on obligations) and the circumstances of its preparation (namely, the rejection of the concept of objective regimes, and the failure of the already severe draft of the Commission to satisfy the States). The same can be said about art. 36. Although the letter of this article is ostensibly less severe (given the limited risk involved for the third State) the more relaxed arrangement (presumed consent) which it provides gives nevertheless the third State the possibility to be the agent of its own free will.

## *The Interplay of Treaties with Custom: Article 38 of the Vienna Convention*

Article 38 of the Vienna Convention, entitled "Rules in a treaty becoming binding on third States through international custom" and constituting the last provision of the section on "Treaties and third States", acknowledges another faculty of treaties with respect to non-parties. That faculty, which has acquired a particular significance in the present era of expansion of normative treaties, consists *grosso modo* of the impact that the normative rules of a treaty may have upon the state of international law concerning the subject-matter with which they deal.

Indeed, it has been widely accepted both by theory and jurisprudence that a treaty provision embodying a rule of conduct influences third States and their law in two ways: first, by serving as an evidence of law and, second, by becoming a starting point for the generation of new law for third States *dehors* the treaty (or, of course, both) [57]. Since a treaty

[57]) The theory has advanced, particularly in recent years, quite diversified opinions concerning the scope of the interplay of treaties with custom, as a process of customary

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rule reflects the *opinio juris* of the parties with regard to its content, it constitutes a piece of evidence of what these States consider as law. In a decentralized legal system such as international law still is, that evidence seems to weigh equally with all other pieces of practice in the appraisal of the general *opinio juris* of States and eventually in the determination of the state of the rule of the treaty in the field of customary international law.

Furthermore, a treaty provision embodying a rule of conduct which is either a novel one in international law or codifies existing customary law in a more exact and concrete way may become a starting point for a new practice whereby third States may decide to use it in their relations and comply with its content without becoming parties to the treaty. This phenomenon is quite likely to occur particularly with respect to rules of treaties which are intended to produce law for the international community at large and which, for that reason, are drafted to satisfy the interests and aspirations of a large number of States and the long-run tendencies of the community; but even treaties of a limited purview of participation may have the same impact upon third States if they prove to provide rules of law conveniently fulfilling their needs and serving their goals.

Article 38 of the Vienna Convention exclusively deals with the second phenomenon, namely the treaty rule as a starting point for the generation of new customary law. It reads:

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law-creation. Based in essence upon a number of judicial decisions (cf. *infra* note 78) a number of writers have argued that the phenomenon of that interplay is an absolutely valid process of customary rules-creation; some of them are rather cautious in their pronouncements, while others went quite far in their judgment of the extent of influence that a treaty rule may have upon the status of the relevant customary law and its evidential force in proving the establishment or consolidation of a customary rule. It should also be noted that the doctrine has proceeded to a classification of treaties into various categories, each of them determining in a different fashion the scope of impact of treaty rules upon customary law. Thus treaties are classified on the basis *inter alia* of the type of law that they embody (treaties establishing new rules of international law and treaties declaratory of already existing international law); or on the basis of participation (bilateral, multilateral treaties); or on the basis of their stage of integration (treaties signed but nonratified, ratified, etc.). Among the rich literature on the matter the following studies seem to sufficiently exhaust the question of interplay: Baxter, Multilateral Treaties as Evidence of Customary International Law, 41 BYIL 275 (1965); same, Treaties and Custom, 129 RdC 31 (1970); D'Amato, The Concept of Custom in International Law (1971), 103 *et seq.;* Eustathiadès, Conventions de codification non-ratifiées, in: Festschrift für Wilhelm Wengler (1973); Shihata, The Treaty as a Law-Declaring and Custom-Making Instrument, 22 Revue égyptienne de droit international 51 (1966).

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"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, recognized as such" [58]).

Thus art. 38 refers to cases where (a) the treaty embodying the rule is in force between a number of States and (b) the rule produces law which, for the third State at least, did not exist before the treaty generated it [59]). In other words, as the wording of art. 38 indicates, the third State which becomes bound through the way of custom by the content of a rule incorporated in a treaty, was not bound by that rule either through custom or by another treaty to which it was a party, before the interaction of the sources took place. The rule which eventually became binding on the third State was set forth for the first time (as far as that State was concerned) in a treaty to which it was not a party. In introducing its draft article (34) on that subject the Commission made it quite clear that it intended to cover that specific phenomenon of the interplay of treaties with custom. It observed:

"The role played by custom in sometimes extending the application of rules contained in a treaty beyond the contracting States is well recognized. A treaty concluded between certain States may formulate a rule, or establish a territorial, fluvial or maritime régime, 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 neutralization 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" [60]).

It further explained:

"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 between themselves and the parties to the treaty, other States recognize 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 that this process

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[58]) The final ILC's draft read: "Nothing in articles 30 to 33 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law".

[59]) See *supra* note 57 for the gamut of distinctions.

[60]) UNCLT Doc. 50.

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should be included in the draft articles as a case of a treaty having legal effects for third States. It did not, therefore, formulate any specific provisions concerning the operation of custom in extending the application of treaty rules beyond the contracting States. On the other hand, having regard to the importance of the process and to the nature of the provisions in articles 30 to 33, it decided to include in the present article a general reservation stating that nothing in those articles precludes treaty rules from becoming binding on non-parties as customary rules of international law" [61]).

Few articles presented by the ILC to the Vienna Conference provoked the degree of controversy that draft art. 34 did. The representatives were separated into camps. The basic argumentation against or in favour of the rule revolved around three amending efforts which were made by some States with a view to altering the proposed draft of the Commission. The first amendment proposed the addition at the end of the draft article of the words "or as a general principle of law" [62]); the second amendment (actually two similar amendments) proposed the complete deletion of the draft article from the Vienna Convention [63]); finally, the third amendment proposed the addition, again at the end of the article, of the words "recognized as such" to qualify the phrase "as a customary rule of international law" [64]).

The proposed addition of the words "or as a general principle of law" to accompany the "customary rule of international law" was due to the fear of certain States that the omission of the general principles from the text of the article prejudged the question of the equality of the latter as a source of international law. The discussions which took place showed quite clearly that the proponents of that addition had virtually misunderstood the purpose and meaning of the draft. Indeed the draft article was not purported to deal with the question of the interplay of rules of treaties with all possible sources of international law (which, anyway, may be more than those specifically mentioned in art. 38 of the Statute of the International Court of Justice) but solely with the question of the interplay of treaties

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[61]) The Commission also remarked that "it desired to emphasize that the provision in the present article is purely and simply a reservation designed to negative any possible implication from articles 30 to 33 that the draft articles reject the legitimacy of the above mentioned process". *Ibid.*, 51.

[62]) Submitted by Mexico (A/CONF.39/C.1/L.226). For the draft article see *supra* note 58.

[63]) Submitted by Finland (A/CONF.39/C.1/L.142) and Venezuela (A/CONF.39/C.1/L.223). Czechoslovakia made also a written observation to that effect (A/CONF.39/5).

[64]) Submitted by Syria (A/CONF.39/C.1/L.106).

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with custom as a well established and known process of customary law-creation. After all, the draft article dealt with the impact of concrete treaty rules upon customary law and, as it was rightly observed, "a general principle of law could undoubtedly be conceived as being established on the basis of a rule, but that was hardly likely in practice. A general principle flowed from a legal order, from a whole set of rules. It could not be established on the basis of an article in a treaty without passing through the stage of custom" [65]).

Despite the hardly questionable logic behind such an argument, which in no way touches upon the question of the validity of the general principles of law as a source of international law, and the explanations given by the Expert Consultant [66]), the States eventually decided, though by a slim majority, to retain the proposed amendment [67]). That slim majority, however, was overturned at the stage of the plenary meetings by the tardy conviction of a larger majority that the article, if so amended, would become obscure and overcharged particularly because of the parallel adoption of the Syrian amendment [68]).

The second amendment which proposed the deletion of the draft article of the Commission altogether was based on the rationale that the rule of the article did not, first of all, have a place in a convention dealing with the law of treaties [69]). For some States, moreover, the letter of the article could be construed, as Venezuela pointed out in supporting its own amendment, as allowing "the imposition on third States of obligations to which they

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[65]) Observations made by the Iraqui representative at the 36th meeting of the Committee of the Whole (UNCLT Off.Rec., 1st Session). Sir Humphrey Waldock, as the Expert Consultant of the Vienna Conference, also adhered to that position by commenting the following: "It was hardly probable that a new principle stated in a treaty would become binding without passing through the stage of custom. A reference to the general principles of law was not, of course, contrary to the intention of the article. It was only because the question was covered by a reference to custom that the Commission had not felt it necessary to mention those principles. Article 34 was simply a reservation designed to obviate any misunderstanding about articles 30 to 33. It in no way affected the ordinary process of the formulation of customary law". *Ibid.*

[66]) *Supra* note 65.

[67]) UNCLT Off.Rec., 1st Session, 36th meeting of the Committee of the Whole (adopted by 38 votes to 28, with 28 abstentions).

[68]) The words were rejected by 50 votes to 27, with 19 abstentions.

[69]) See observations by Finland, UNCLT Off.Rec., 1st Session, 35th meeting of the Committee of the Whole. In supporting the proposed deletion, Turkey stressed that "[t]he object of the convention was to codify the law of treaties... Accordingly, there was no need to include any reference to the transformation of treaties into customary rules. That was a difficult question and should be treated separately. Article 34 would be more appropriate in a separate work of codification relating to the notion of custom". *Ibid.*

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had not consented" [70]). These arguments in favour of the deletion of the article found support in a number of States but the amendments were eventually rejected by a quite large majority [71]).

Only the third amendment had a better fate and was adopted by the States participating in the Vienna Conference and incorporated into the final text [72]). It also became, together with the rejected amendments regarding the deletion of the draft article, the central point of a discussion which touched upon the sensitive issues of not only the interplay of treaties with custom but also of the binding character of rules of international law.

The basic concern of a number of States which fomented the overall discussion around draft art. 34 was to clarify under what circumstances an individual State becomes bound by a rule of a treaty through the way of custom. From the very outset it was quite clear, as a result of the discussions on the previous draft articles on the effects of treaties on third States, and of the assurances of the Commission in its commentary to draft art. 34, that a rule of a treaty cannot become binding upon a State except through the channels of consent and custom; and that, furthermore, the process through which a rule of a treaty is transformed into a rule of customary law is not automatic (based, that is, on the mere existence of the treaty) but follows the usual course of custom-creation in international law. As the president of the Vienna Conference stated, the provision of draft art. 34 "related to the ... possibility that a rule originally embodied only in a treaty might subsequently, in the course of time, as one treaty followed another and other developments took place, become a rule of customary law, and that as a consequence a third State might later become bound by that customary rule which had its first origin in a treaty" [73]).

These general assurances, however, did not appear to satisfy a number of States which considered that although the basis of obligation was not the rule of a treaty as such but a similar rule of customary law created through the usual processes of custom, the draft text was still ambiguous and hence undesirable. To put the whole problem in its right perspective it should be explained that these States were not merely concerned with the question of when and how a rule of a treaty becomes a rule of customary law but also, and especially, with the very question of when and how a rule of cus-

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[70]) *Ibid.*

[71]) The amendments were rejected by 63 votes to 14, with 18 abstentions. *Ibid.;* 36th meeting of the Committee of the Whole.

[72]) The amendment was adopted by 59 votes to 15, with 17 abstentions. *Ibid.*

[73]) UNCLT Off.Rec. 2nd Session, 15th plenary meeting.

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tomary law becomes binding upon an individual State *in concreto*. In fact, the Vienna Conference resuscitated thus, through its discussions on that draft article, the age old problem of the binding character of the rules of customary international law.

The Syrian amendment could certainly be construed as an effort to simply ensure that a provision of a treaty may not become a binding rule for a third State until and unless it becomes generally recognized as an autonomous rule of customary law. Yet, the original intention of the proposing State went much beyond that simple clarification of the draft article's text into the more general question mentioned above. This contention is substantiated if one reads the arguments of the Syrian delegate in support of his country's amendment. We feel that they are worth citing here in their entirety:

> "[T]he purpose of his delegation's amendment was to state clearly that, for a rule to become binding upon a third State, that State must recognize it as a customary rule of international law. The International Law Commission had underlined that fact in the first two sentences of paragraph (2) of its commentary. More and more new States were joining the international community as subjects of international law with the same sovereign rights as other States and there was no question of imposing upon them customary rules in the formulation of which they had not taken part, particularly since some of the rules originated in treaties that were aimed at safeguarding the individual interests of particular States.
>
> For such rules to become binding on third States, particularly new States, their obligatory character must be recognized by the States in question" [74]).

The Syrian representative, as may be observed, did not simply intend to make clear through his country's amendment that a rule of a treaty can become binding upon a third State only if it becomes a rule of customary international law and as that kind of rule. Furthermore, he wished to ensure — and this flawlessly emanates from his words — that the rule must specifically be recognized by a third State in order to be binding upon it [75]).

That position was also shared by a number of States, mainly new States and socialist countries, which expressed their opinions during the deliberations on the draft article. The records show that their line of approach was a common one and that they agreed that the central issue over the draft article was to remove any misconception that rules of international law, of

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[74]) *Ibid.*, 1st Session, 35th meeting of the Committee of the Whole.
[75]) See 35th and 36th meetings of the Committee of the Whole. *Ibid.*

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whatever origin, may be imposed upon a State without its individual recognition of their validity in its regard [76]).

Other States, however, mainly belonging to the old world, were not quite eager to approve the disarming effects that the rigid approach of the individual recognition would have upon the customary rules of international law and the evidential dangers that such a position might involve. They consequently transferred the whole matter — without overtly rejecting the opposing tendencies — to the concept of general recognition (as distinct from the individual recognition) of a treaty rule as a rule of customary law; and they considered that general recognition of a rule, namely recognition by a great number of States, was enough to make that rule binding upon all and every State of the international community [77]). Thus, the Vienna Conference was sharply divided into two camps, the one favouring rigid criteria for the obligatoriness of the rules of international law, the other following a more liberal position.

The eventual adoption of the Syrian amendment does not indicate that the divergent approaches were finally reconciled; nor does it indicate that the rigid interpretation of the second camp necessarily prevailed over the more liberal one. The States did not reach an agreement on the matter and the text, anyway, is open-ended, comfortably allowing both interpretations to be considered as legitimate. This latter characteristic is unquestionably the text's main advantage as well as its weakness. It is its advantage because the rule contained in it may become adapted to changes of the sociopolitical

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[76]) Such conclusion may be drawn from the statements, for instance, of the representative of the Democratic Republic of Congo and the USSR. The first observed, *inter alia,* that "it would be ... necessary to give a precise definition of international custom. In particular, how many times must a usage be repeated in order to become international custom? And even assuming it was possible to define the specific elements constituting international custom, could a State be subjected to the traditional practices of other States, dictated by specific circumstances arising out of their interests and past struggles? That was why his delegation declared itself hostile to any idea likely to impose an obligation on third States in the name of international custom alone, without recognition and acceptance of that custom by the State concerned". *Ibid.* 36th meeting of the Committee of the Whole. The second representative said, after the Syrian amendment was adopted, that "in his opinion article 34 meant that norms of customary international law could become binding on a third State only if that State recognized that those provisions were binding upon it. They could obviously not become binding on a State which did not recognize those norms as having become binding on it". *Ibid.* Also, at the 74th meeting of the Committee of the Whole, Venezuela declared that it considered draft art. 34 "to be incompatible with the principle of sovereignty of States. Except where a rule of *jus cogens* was concerned, Venezuela would not assume obligations it had not formally accepted, still less obligations it had expressly rejected". *Ibid.*

[77]) See, *e.g.*, Italy, *ibid.*, 2nd Session, 15th plenary meeting.

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substratum determining the quality and degree of recognition required for a rule to become binding upon an individual State; it is its weakness because it leaves this matter to be determined by factors which will, necessarily, be outside the article's letter — and this in the present era of reorientation of the sources of international law. In any event, it seems that the text of the final article as it currently has may be construed as meaning either that for a rule of a treaty to become binding upon a third State the latter must specifically recognize it as such, or that a treaty rule can become binding upon a State if it has been transferred through a wide recognition into the domain of general customary international law.

What seems to be solely affected by the addition of the words "recognized as such" is the evidential power of a normative treaty enjoying wide (general) participation. As already mentioned, a normative treaty plays an evidential role in the determination of customary international law since it manifests the *opinio juris* of its parties *vis-à-vis* the rules which it contains. In that vein, it may be argued that a normative treaty enjoying general participation (the great majority of the States of the international community) constitutes in itself enough evidence that its rules have also passed into the domain of customary law. Such likelihood should, however, be deemed as excluded by the wording of art. 38. Since the article 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 fulfil 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. Thus, although treaties do not necessarily lose their evidential power in the determination of customary law, they are nevertheless confined, by the letter of art. 38, to the relative role of a contributing — but never the exclusive — factor.

Coming back to the question of choice between the liberal or strict interpretation of the word "recognition" it should be pointed out that despite the fact that a part of the doctrine would argue (supported by instances of international jurisprudence) that the liberal interpretation is more representative of the current approach of international law to that matter [78]),

[78]) Rousseau summarizes in a quite succinct and clear way the liberal position concerning the general customary law-creation: «En ce qui concerne le degré de généralité



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this writer is inclined to believe that the rigid one is more consonant with the spirit of art. 38 as revealed by the circumstances of its preparation and the general sociopolitical conditions which dictated the amendment to the Commission's draft. Indeed, as already seen, the study of the preparatory work, and specifically of the records of the Vienna Conference, witnesses that the *ratio* of the proposed amendment was, as Syria (and the States supporting her) expressly stated, to make it clear that no rule of law can be imposed upon a State if it was created through a process in which it has not participated. Although admittedly Syria's explanation cannot be

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exigé, la doctrine écarte ordinairement l'exigence d'unanimité pour ne retenir que le seul consentement des Etats qui se sont trouvés en situation d'avoir à l'appliquer et l'absence de protestation des autres. C'est cette idée qu'a énoncée la Cour internationale de Justice dans son arrêt du 20 février 1969 relatif aux affaires *du plateau continental de la mer du Nord* lorsqu'elle a indiqué que l'existence d'une coutume implique une ‹participation très large et représentative›, y compris celle des Etats ‹particulièrement intéressés› (Rec. 1969, p. 42). — De même les textes internationaux pertinents (art. 7 de la Convention XII de la Haye de 1907 et art. 38 du Statut de la C.P.J.I. et de la C.I.J.) considèrent comme règles coutumières les seules règles ‹généralement› — et non ‹unanimement› ou ‹universellement› — reconnues par les Etats civilisés. L'exigence du *consensus omnium,* formulée par quelques auteurs (cf. en ce sens l'opinion dissidente du juge français André Weiss sous l'arrêt de la Cour permanente du 7 septembre 1927 dans l'affaire du *Lotus,* série AB, no 22, p. 43) ne représente qu'un point de vue isolé. Ni la pratique ni la jurisprudence n'exigent donc, pour qu'une règle coutumière soit opposable à un Etat, que l'on relève des précédents établissant que cet Etat a expressément reconnu la dite règle coutumière.» (Droit international public vol. 1, 319). It should be noted, however, that the Court's decision mentioned by Rousseau (in the *North Sea Continental Shelf* cases) represents a conceptual approach of the judicial body which was not consistently followed in the past decisions. The World Court had followed in that respect varying directions under the evident influence of eminent judges. Thus, while in the *Asylum* case it followed a quite rigid formula of obligatoriness ("The party which relies on a custom ... must prove that this custom is established in such a manner that it has become binding on the other party ... that the rule invoked ... is in accordance with a constant and uniform usage practiced by the States in question and this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State" (ICJ Reports 1950); [this position was reiterated in the *Rights of the U.S. Nationals in Morocco* case (ICJ Reports 1952]), in the recent *North Sea Continental Shelf* cases (ICJ Reports 1969) the Court seemed to accept the creation of customary law through the interplay of treaties with custom and felt that under certain circumstances a treaty rule may become binding upon the entire community even in the absence of proof of one-by-one acceptance of the rule. The conditions required for a treaty rule to pass "into the general *corpus* of international law" could be summarized, according to the Court, as (a) that the treaty rule must be normative in character and (b) there must be "... State practice, including that of States whose interests are specially affected" and that the practice "should have been both extensive and virtually uniform ... and should moreover have occurred in such way as to show a general recognition that a rule of law or legal obligation is involved". See also Baxter, Treaties and Custom, 129 RdC 31 (1970), mainly 36—73, for an analytical discussion of the international jurisprudence.

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considered as the sole authoritative factor in the interpretation of a text which, as such, is rather obscure and open-ended, one should not, nevertheless, fail to pay full attention to it in attempting to construe the article. In any event, it seems to us that the amendment to art. 38 must be seen as constituting part and parcel of the overall effort of the new States and socialist countries to reinforce the consensual standards in international law and to thus successfully check the easy flow of rules of "western" origin, conflicting with their philosophies and their interests, into the sphere of their relations with other States.

Furthermore, there is an element in the very text of art. 38 which corroborates the intention of the drafters to accept the rigid rather than the liberal interpretation. The article refers to a "customary rule of international law" and not to a "general customary rule of international law" or to a "customary rule of general international law". In other words, its letter is intended to indiscriminately apply both with respect to a rule of general applicability and to a rule of regional or local scope [79]). Whereas one would accept that a treaty rule may become binding upon an individual State because that rule has become general in the sense that it has become binding upon the majority of States (through participation in a treaty or treaties, or through participation and independent State practice evidencing the adhesion of a large number of States to the content of the rule) on no account may one contend that a particular treaty may be deemed as generating a regional or local rule binding upon States of the same or different locality or sociopolitical affiliation. For while in the case of a rule that has become "general" its status presumably indicates the appropriateness of its content for general applicability (for all the States of the community), in the case of a rule which is embodied in a particular treaty of a regional or local character that presumption of appropriateness cannot be established even if the rule has been accepted by other "neighbouring" States through the process of custom. Such treaties serve strictly the needs of their parties and, consequently, the law that they generate is not, in principle, of general applicability and could not be legitimately imposed upon a third State unless specifically recognized by it [80]). Since, therefore,

[79]) See observations made by Greece and Switzerland at the 15th plenary meeting. (UNCLT Off.Rec., 2nd Session). These States proposed the addition of the word "general" to qualify the term "customary international law" so as to exclude the likelihood of an interpretation of that term as also covering regional and local law. That proposal, however, did not meet with success.

[80]) The ICJ has characteristically refused to accept in the *Asylum* case that rules on diplomatic asylum embodied in a number of treaties of regional purview and allegedly

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art. 38 of the Vienna Convention does not make any distinction between general law and regional law, it seems that it does not admit any real difference between them for its purposes; and that, consequently, what applies with respect to regional or local law equally applies to general law. This means that the rigid requirement of individual recognition which normally applies to the category of regional or local law is intended by art. 38 to also apply to cases of general rules [81]).

By accepting, however, the premise that individual recognition is requested for a rule of customary law to be binding upon a State (regardless of its origin) the problem is not definitely resolved. What remains to be further settled is the question as to the kind of recognition which is requested or, better, as to what we mean by individual recognition. Individual recognition may mean either express or tacit (implied) recognition. By express recognition we mean the acceptance of a rule as binding through an express act or declaration of a State to that effect; by tacit (implied) recognition we mean the recognition which is inferred from acts or actions of a State, or even from mere indications of its acceptance of a rule. The range of tacit recognition may certainly cover a very wide gamut, from quite evident manifestations of acceptance to quite remote and doubtful signs of such approval.

If the position propagated by the States in Vienna has to have any meaning at all we must admit that the term "recognition" should in principle mean express acceptance of a rule by a State. Tacit recognition must be regarded as a notion which should be used with great caution. It is of

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respected as customary rules by States of the same region (Latin America) have passed into the category of binding rules so as to be imposed even upon a State (Peru) which has not specifically recognized them. In dealing with such contentions (of Colombia) the Court said that "[it]cannot... find that the Colombian Government has proved the existence of such a custom. But even if it could be supposed that such a custom existed between certain Latin American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiating it..." (ICJ Reports 1950, emphasis added).

[81]) The term "customary rule of international law" may be used, it is true, to denote exclusively a rule of general customary international law. However, we think that this is not the case with respect to its meaning under art. 38. Beyond the fact that the drafting States were aware of the danger involved by that indeterminate wording (through the warnings of some representatives, see note 80), the very text of the Vienna Convention uses the word "general" when it is intended to deal only with rules of general recognition and applicability. This happens in art. 53 (entitled "Treaties conflicting with a peremptory norm of general international law") of the Vienna Convention, whose second sentence defines that "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole...".

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course beyond doubt that the conduct of a State must bind it with regard to the *opinio juris* that it indicates; but beyond that framework (express consent, direct conduct), presumptions of acceptance based on vague concepts of general applicability or unverified acquiescence and lack of protest should be rather avoided in the present era of development of international law. These notions should always be examined *in concreto*, in the context of the particular circumstances surrounding both the rule itself and the position of the State whose compliance or non-compliance with the rule is to be established. It may be contended that such inferences should not validly be invoked against an individual State but in one sole case: when a rule of international law has become general in the real and literal sense of the term, namely when there is unambiguous proof that the great majority of States (all but few) have accepted that rule as binding through their practice (and there is satisfactory evidence of their individual acceptance to that effect), and provided that there is no indication whatsoever that the State whose compliance with that rule is sought has ever exposed its opposition to the emergence and expansion of that rule [82]). Only under such circumstances may it be safely assumed that the individual State has recognized that rule, even in the absence of any external sign to that effect, because, first, the rule has proved to serve general needs and to go beyond political affiliations and interests, and, second, the individual State may

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[82]) In that respect see pleadings of Norway in the *Fisheries* case which, although pertaining to the creation of regional custom, seem to also apply to the question of obligatoriness of all customary rules under the present sociopolitical conditions. It said: "Clearly such refusal [of a State to accept a rule of law as binding] must not be confounded with a refusal to conform with an established rule binding on the States concerned; the rule of law being already obligatory for it, the refusal to apply it would constitute an illegal act. But if, either expressly or by a consistent and unequivocal attitude it has manifested the will not to submit to the rule at a time when this had not yet assumed, in regard to that State, the character of an obligatory rule, the State will remain outside its field of application". (ICJ Publications of the Pleadings, Oral Arguments, Documents, vol. 1, 382—83). A writer (Holloway) who recently dealt with the same problem felt that the opposition expressed by a State to a general rule must be recognized by the other States to be considered as valid. She says: "While a custom is in the process of formation, the express or clear manifestation of a State's consistent opposition produces one of two results: either it carries such weight or substance that it impedes the establishment of a general practice or the recognition of the existence of a binding customary rule; or else the opposition results in the establishment of a derogatory practice in favour of the objecting State, provided such departure from the general practice is recognized or at least acquiesced in by other States. In fact it would produce the same results as a reservation accepted by other States, in that it would not affect the existence of a binding rule. But if the non-acceptance does not carry weight or is not recognized by other States or even expressly opposed to, it will in time disappear or be overborne-*voluntas civilitatis maximae est servanda*" (*op.cit.* note 2, 561).

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securely be presumed as having knowledge of that rule and as being therefore able to timely raise its veto to its content.

The scheme of recognition proposed in the above lines seems to us to fit in well with the spirit of the amendment and the reason which motivated it. At the same time, although in principle quite strict, that scheme does not altogether exclude the presumption of general applicability but simply emphasizes the need of substantive and expanded State practice which can guarantee, beyond any reasonable doubt, the acceptance of a rule by all and each State of the international community.

In concluding, it should be noted that art. 38 of the Vienna Convention is only a reservation which is intended to protect the legitimate process of customary law-creation through the interplay of treaties and custom from misconceptions likely to arise in the construction of the articles on the effects of treaties on third States; therefore, it has a limited scope of application as such. It is nevertheless invaluable in that it establishes some guiding lines with regard to the mode of transformation of treaty rules into customary law. In that sense, art. 38 completes by its provision the legal system of the Vienna Convention dealing with the aspects of the relationship between treaties and third States; and thus it apparently adds its own weight of austerity to the overall system of these rules. A fact which helps us to further establish the intentions of the States which participated in Vienna.

## *A Final Note*

The study of the provisions on "Treaties and third States" and the records of the legislative course which led to their adoption is conducive to some general conclusions. The first remark which can be made is that international law is apparently returning to the safe haven of rigid consensualism with which, anyway, it has never really parted. The reattachment of the community to strict consensual standards results from the extraordinary increase of its members — which has affected the congruity of its foundations — and is fostered by the pressure of new States, or States with sociopolitical philosophies alien to those of the old world. As has been said, these States are not apparently prepared to accept unreservedly and indiscriminately a body of rules and principles which were intended to serve the needs of a relatively coherent society with cultural, social and historical affinities or, more generally, law which has not been created through processes in which they have participated. They seem prepared to accept individual rules of law, and they have actually done so in the years of their

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active participation in international exchanges, but not the entire corpus of international law [83]).

The fact that under such circumstances of rigid consensualism, a free-wheeling law-creation is admittedly barred does not in itself mean the end of progress in legal development or an international anarchy and lawlessness. On the contrary, one may say that it can assist the progress and abate lawlessness. For under the present sociopolitical conditions respect of consensualism may mean a greater preparedness on the part of a considerable number of States to take part in the processes of law-creation. Moreover, law which can be founded upon the common consent of all States is apparently just and effective. It is just because it enjoys the acceptance of all the members of the society regardless, of course, of how that acceptance was reached in the political sphere. It is effective because it emanates from the consent of all the States and may not therefore create *bona fide* problems of compliance. After all, in a society of radically divergent directions the danger of anarchy lies more in suspect presumptions intended to be used in *ad hoc* cases of claims of dubious law than in existing strict consensual law accepted by common compromise, striking a golden rule.

On the other hand, this strict consensualism will not necessarily last for ever. It is a phenomenon which is mainly owed to the existence of a significant hiatus in the positions of the countries of this globe in matters of political, economic and cultural patterns. It can certainly be relaxed as soon as a relative smoothing of the acute differences is achieved and fear and mistrust between nations subsides.

Another remark which can be made concerns the effect that this strict consensualism must apparently have upon custom as a basic process of international law-creation. Indeed, due to the increasing emphasis upon individual consent, custom is becoming more and more identified with treaties. In fact it is almost becoming as voluntarist a process as a treaty is; and, thus, easy inferences of customary law-creation are replaced by rigid re-

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[83]) It would be a gross exaggeration to contend that the new and socialist States reject all unexceptionally the old rules of international law and refuse to comply with them; quite the contrary. They have actually accepted a good number of them through their practice and their participation in international relations and organization (see Udokang, *op.cit.* note 4). What they seem to refuse is to be arbitrarily subjected to rules in whose creation they have not taken part or which they have not accepted expressly by their conduct. In consequence what they wish to see, as a safety valve for their interests, is "the recasting of existing and uncontested customary rules into a written form which would be possibly clear and simple; [and] ... a revision of contested rules and possible introduction of new ones" (Marek, Thoughts on Codification, 31 ZaöRV 489, 503 [1971]).

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quirements of proof. It is therefore evident that custom and treaties are approaching each other and that the former is loosing its relative advantage over the latter which lay in its being a less voluntarist process of law-creation.

At the same time, however, consensualism may rejuvenate custom and make it viable in the long run. In an international system where treaties will unquestionably play the role of the most usual tool of international legislation, custom may prove very valuable by playing the equally important role of assisting, as a universally recognized process, changes of law in all cases where the inelasticity of written law does not allow rapid modifications to cope with new needs.

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