I. INTRODUCTION

Preface

The general principles of international law among others are treaties and conventions create legal effects to states parties to them. The ratification, accession, acceptance or approval creates rights and obligations to the states parties. In this sense, what about third party to the treaties or conventions. Are there any legal effects for states who are not parties to them? To what extent do treaties create legal effects for states who are not parties to them?

This writing will consist of three main parts namely introduction, body of the writing and conclusion. In the introduction, discussion will be focused on the definition of related words and terms. The discussion will also touch the main argument of the writing on third parties and international treaties. The body of writing will discuss theories of the third parties in international treaties. In this segment, some cases will be discussed to support the arguments. And in the last part, the writing will draw the conclusion summarized from the body of the writing.

The writing limits its scope of discussion only on legal effects for third states which are totally extraneous to the treaty in question. The writing does not include discussion on legal effects to the third parties on the category of negotiating states, contracting states and signing states. Secondly, the writing limits its scope of discussion only on third party that constitutes states and does not include international organizations.

There will be three arguments discussed in this writing namely: Treaties are not applicable to states not party to them without its consent; Provision of treaties provides rights and obligations for third parties if states parties intended the provision to be the means of establishing obligation and third states expressly accept that obligation; Provisions of treaties in question create legal effects to third states if the provision itself entered into customary international law.

Definition

The Vienna convention defines a treaty as:

[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.1

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Martin Dixon defines that a treaty can be regarded as a legally binding agreement deliberately created by, and between, two or more subjects of international law who are recognized as having treaty making capacity.\(^2\)

The Vienna Convention 1969 article 2 defines that: \(\text{[T]}\)hird State means a State not a party to the treaty.\(^3\)

Martin Dixon in his book defined that \(\text{[C]}\) ustomary international law is the law which evolved from the practice of customs of states.\(^4\)

II. INTERNATIONAL TREATIES AND THIRD PARTIES

a. Treaties are not applicable to states not party without its consent.

i. General Rule

The Theory of \(\text{pacta tertiis nec nocent nec prosunt}\) is a basic rule of customary international law. It look upon from the point of view that an agreement concluded between two or more parties is a res inter alios acta for the third party. The principle of not imposing obligations upon third party can be traced back to the Roman private law of contract which stipulated that “\text{Pacta non obligant nisi gentes inter quasi initia}”. For States other than the parties, a treaty is “\text{res inter alios acta, quae tertio nec prodest nec nocet}”.\(^5\)

The Principle of \(\text{pacta tertiis nec nocent nec prosunt}\) has been the reflection of the relationship between third parties and international treaties. This principle has not only been accepted unanimously by publicists, but supported by continuous practice. The principle of not imposing obligation upon a third parties on the contract could be found in modern municipal law of contracts of many countries such as the UK, the US, France, the Netherlands, Belgium, Italy and Germany.\(^6\)

The theory of international law as it emerged in the 17\(^{th}\) century and which was in essence an interstate law based on the sovereignty and equality of its participants. The consensual nature of international law, implied that states can only be bound by what they have expressly consented to themselves. The consensual nature of international law, implied that states can only be bound by what they have expressly consented to themselves.\(^7\)

The Vienna Convention of the Law of Treaties 1969 codified this principle in its article 34, as follows: \(\text{[A]}\) treaty does not create either obligations or rights for a third State without its consent.\(^8\)

\(^3\) Vienna Convention a the Law of Treaties, P. 3
\(^4\) Dixon, Ibid, P. 28
\(^5\) Tertiis and Third States, Article 18, (Comment) American Journal of International Law, Vol. 29, Supplement: Research in International Law (1935, P. 918
\(^6\) Ibid, P. 919
\(^7\) Francks, Eric, Dr. Prof., Pacta Tertiis and the Agreement for the implementation of the Provisions of the UNCLOS Relating to the Conservation & Management of Straddling Fish Stocks & Highly Migratory Fish Stock, (2000), P. 5
\(^8\) Vienna Convention on the Law of Treaties 1969, Section 4: Treaties and Third States
ii. Case Study 1
The Decision of Municipal Court on The Principle of Non-Applicability of Treaties to Third Party in the Case Of Trampler V. High Court of Zurich Year 1925

The principle of inadmissibility of treaties to third States is supported by the practice of national courts. The decision of the Swiss Federal Tribunal on December 11, 1925, in the case of Trampler v. High Court of Zurich proved that treaties are not applicable to third parties. The Court proceedings are as follows:

Two Frenchmen sued Mr. Trampler, a German national, on the issue of the payment of debt in 1925 before the High Court of Zurich in which Mr. Tampler had lived since World War I. According to the Code of Procedure or Zurich, the competent tribunal is that of the place of domicile of the defendant. In the proceedings, Mr. Trampler (the defendant) objected the competency of the Zurich Court and invoked Article 296 of the Treaty of Versailles on Debt. The Treaty of Versailles stipulates that the proceedings of its kind should be exclusively the competence of a special jurisdiction.

In its decision, the Court dismissed Mr. Trampler’s argument of the incompetency of Zurich Court. Furthermore, the Court also dismissed the legal argument of the applicability of Treaty of Versailles submitted by Mr. Trampler (the defendant) as Switzerland was not party to that Treaty.

Case Study 2
The Decision of International Court on the Principle of Non Applicability of Treaties to Third Parties In the Case of Eastern Bank Ltd V. Turkish Government, Year 1927

The decisions of International courts have affirmed the principle of not applicability of a treaty on third states without their consent. The Anglo-Turkish Mix Arbitral Tribunal of December 28, 1927 reaffirmed the principle of pacta tertiis nec nocent nec prosum in case of Eastern Bank Ltd V. Turkish Government.

The case proceedings was as follows:

The Anglo-Turkish Mix Arbitral Tribunal was established and was requested to decide the case between the Eastern banks of the UK (the claimant) against the Turkish Government (the defendant). Both Turkey and the UK are parties to the Treaty of

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9. It mend that the competent court in this case was Switzerland court.
Lausanne on Peace. Article 58 of the Treaty stipulated that the contracting parties mutually give up all claims of loss and damage suffered by their nationals “as the result of act of war, or measures of requisition, disposal or confiscation. On the other hand, Article 65 and 66 of the Treaty imposed upon the contracting parties the duty to restore property which was still in existence and capable of being identified or it proceed if it had been liquidated. Eastern Bank (the claimant) requested for the restoration of certain negotiable instruments taken away by Turkish officials in Nov 1914. In support of his contention, the Eastern Bank as the claimant invoked article 297 h of the treaty of Versailles against the Turkish Government.\(^\text{12}\)

The Tribunal decided that:

\[\text{[T]he Recognition by Turkey of the Treaty of Versailles was merely intended as a recognition of the fact that certain peace treaties concluded prior to the Treaty of Lausanne had put an end to the state of war between former allies of Turkey and Western Powers. It could not be regarded as an authorization to apply, the disposition}\]


\(^{13}\) Ibid P. 439

Objective Regimes

There is one notable theory, objective regime theory, in which some lawyers and scholars invoked the theory as the basis for establishment of legal effects between treaties and third parties. Objective regimes is a theory that applies to a particular type of treaties such as establishing freedom of navigation in international rivers and maritime waterways; treaties which provide for neutralization or demilitarization of particular territories or areas. Some lawyers and scholars are in different opinion on the objective regimes in which some of them argued that treaties that have objective regimes character are applicable automatically to the third parties with or without consent.

The most convincing explanation on the said issue was made by Lord McNAir and the ILC. Lord McNAir in his book “The Functions and Differing Legal Character of Treaties (1930)” observed that certain kind of treaties produce effects beyond the parties to those treaties is recognized, but it can not be said that they finally

found a place in any well recognized juridical category. There has been a tendency to regard them as explicable of the grounds either a) that the parties to them intend to offer contractual rights to third states, which may in course of time be willing to accept them by express or implied assent, or b) that third states acquire rights under them (for instance, in case of treaties concerning navigation on river or through canals) by virtue of the operation of custom.  

Furthermore, the ILC argued that the VCLT has provided clear mechanism to explain the legal nature of objective regimes, in particular alleged automatic objective effect of certain types of treaties. The ILC added that article 36 para 1 stipulates the situation in which the parties to a treaty intend to grant a right on third state in general. Para 2 of Article 36 defines a situation when, a conferment of rights is accompanied by a certain obligation, which does not need to be accepted in writing by third states. The legal situation is as follow: there has to be an intention to confer rights on third party; the rights may be conferred on its own; or it may be conferred with a duty to exercise a certain obligation, which is a condition for the exercise of these rights.

b. Obligations for Third Parties

It is clear in the above mentioned paragraph that provisions of treaties is not applicable to third parties without their consent. The principle of consent of third states of the applicability of obligation and right against third states is related strongly to the very basic principle of international law namely sovereignty, equality and non-interference.

The manner of formulation of Article 34 of VCLT indicates that it is drafted in less absolute terms. There is an explanation that a treaty may create rights and obligations for a third state but under the condition of consent of the third states. Under the VCLT Article 35, the obligation shall be imposed on the third states under two conditions namely, first; the states parties to the treaties intended to establish the obligation for a state not party, and second; the third parties agree to be bound by it.

The provision of Article 35 is based on the principle of consent. It stipulates that [an] obligation arises for a third State from a provision of a treaty if the parties to the treaties intended the provision to be the means of establishing the obligation and third state expressly accepts that obligation in writing.

Some elements to be understood clearly is the consent expressed by third parties is to a specific provision rather than the entire treaty. Another element to be noted here is that the acceptance of third parties to the applicability of provisions of the treaty in question should be expressed in writing.

15. Ibid, P 69
16. Opct P 75
17. opcit P. 14
c. Rights for Third Parties

Third party to the treaty may enjoy rights arise from the conclusion of a treaty. This rights are regulated in the VCLT Article 35, as follows: [a] right arises for a third State from a provision of a treaty if the parties to the treaty intended the provision to accord that rights 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 provides.\textsuperscript{19}

There are conditions to be fulfilled in order for a right to arise for third State from a provision of a treaty applicable for third states.\textsuperscript{20} They are; the treaty intended to rise the right to third states; secondly, the third states give approval to the rights accorded to them by the treaty; third, the approval shall be taken for granted as the third states’ act is not contrary to it; fourth, if the treaty obliges that a third state should express its consent in certain way, the legal effect will only arise if this requirement has been fulfilled. If the treaty is silent on particular conditions, the assent may be presumed, providing there is no evidence to the contrary.\textsuperscript{21}

The International Court of Justice reaffirmed the need of assent of the applicability of a treaty to states not parties as stated in the North Seas Continental Shelf case:

In principle,\ldots, that is to say, a State which, though entitled to do so, had not ratified or acceded, attempted to claim rights under the Convention, on the basis of a declared willingness to be bound by it, or of conduct evincing acceptance of the conventional regime, it would simply be told that, not having become a party to the convention it could not claim any rights under it until the professed willingness and acceptance had been manifested in the prescribed form.\textsuperscript{22}

Some questions arise whether the rights are created by the treaty or by the beneficiary state’s act of acceptance. There are two theories on that matter: (first); theory of Collateral Agreement, (second); theory of Stipulation Pour Autrui.

The Collateral Agreement is an agreement established between states parties to the treaty, as one side, and third parties, on the other side and it appended to the main treaty. The said Agreement stipulates that both agreed on the rights arises by the treaty accored to the third parties. This supplement agreement will be appended in the Treaty. The International Law commission (ILC) upholds that theory. The ILC obliged two conditions for a treaty that bind by third parties, namely; (first) the parties to the treaty intended to establish the rights and, (second) the third parties agreed to be bound by it.

\begin{itemize}
  \item \textsuperscript{19} Vienna Convention on the Law of Treaties 1969, P 14
  \item \textsuperscript{21} Ibid, P. 46
  \item \textsuperscript{22} North Sea Continental Shelf Cases (Germany/Denmark; Germany/the Netherlands) 1969 ICJ Rep 3, 25-26 (Judgment of February 20)
\end{itemize}
The ILC stated that Collateral Agreement between the parties to the treaty on one hand and the third parties on the other hand has been established in this regard. The right of the third states does not rise by the treaty but by the Collateral Agreement.23

Judge Negulasco is also among the supporter of the theory of Collateral Agreement. In his Separate Opinion in the 1932 Free Zones Case, Judge Negulasco stated that:

[i]t is possible, in an international convention, to stipulate a right in favor of a third State. But whereas, according to such municipal law, as allows of such stipulation, the third party has a right by virtue of the stipulation itself, in international law the States having made such a stipulation mutually undertake to conclude together with the third state, a supplementary agreement which will be appended to the agreement originally made. With this object, the treaty may provide for the right of adherence by third Parties interested therein, and failing a stipulation of this nature, an agreement between the signatory states and the third State must be concluded.24

The second theory is based on the concept of Stipulation Pour Autrui. This theory supported was by de Arechaga. The concept stipulates that third party beneficiaries would enjoy rights, with an immediate effect. De Arechaga made analogy of the acceptance of third party in international treaty with the acceptance of third party in the municipal law. According to de Arechaga, acceptance of third party refers to the confirmation of already existing rights. The acceptance may be expressed by explicit acceptance, by tacit acceptance, or by conduct.25 De Arechaga indicated further that a collateral agreement does not exist. Furthermore, there is even physical impossibility for such a registration of collateral agreement in the UN.26

This writing supported the theory of Stipulation Pour Autrui. Since the Vienna Convention codified the general rules regulated how the assent or the approval could be expressed. The Article 36 regulates that the assent or the approval shall be taken for granted as long as the third parties who was granted the benefits does not act in contrary. However, if the treaty stipulates explicitly how the assent should be performed by third states, the applicability of the rights of the treaty could be conferred after the third party fulfill the requirement set by the treaty.

**Revocation, Modification Of Obligation Or Rights Of Third States**

There are some questions with regard to the abolishment of rights of third

24. PCIJ Series A, No. 22, 37-38
25. Arechaga, Eduardo Jimenez, Treaty Stipulation in favor of Third States, American Journal of International Law, Vo. 50, No. 2 (1956) P. 352
states. Do rights for third party may be abolished by the state parties to the treaty without the approval of the third parties in question? This writing argued that according to The Vienna Convention, right arisen for third states can not be revoked or modified unless otherwise two conditions have been fulfilled (first); the treaty stipulates that the rights was intended to be revocable, (and second); the consent of third state.

Case study:
The revocation of rights should be under the consent of third states in the case of Free Zones Case before the Permanent Court of International Justice

France and Switzerland brought the dispute on “Free Zones Case” before the Permanent Court of International Justice. Both states required the Court to decide on that case between 1929-1932. The case proceedings was as follows:

Various treaties, declarations and supplementary acts were concluded to create three free customs zones in 1815 on the French frontiers, for the benefit of Switzerland. Switzerland was not party to those various treaties in question. However, Treaty of Versailles Article 435 (Switzerland was not a party) stipulated that the treaty of 1815 and of the other supplementary Acts concerning the free zones of Savoy and the Gex District are no longer consistent with present condition. It means that France and other states parties intended to revoke the rights that have been granted to Switzerland. The French Agent argued before the Court that the third states have no right to claim that the abrogation of the Treaty depends on its consent. The Court decided in 1929 that … it would that its Order insofar as concerned the Zone of Gex was, I fact, based on a recognition of the principle that in this particular case Switzerland had a right on which she could rely, and therefore could not be deprived of it without her consent.

Rules in a Treaty Becoming Binding on Third States through International Custom

Customary international rules are rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act so. The act should be taken by significant number of states and not be rejected by significant number of states. A peremptory norm (jus cogens) is norm that can not be derogated. Norms that could be categorized as jus cogens are slavery, piracy, genocide, crimes against humanity and war of aggression.

How the norms and custom emerge as customary international law? According to the standard adopted by the ICJ in the 1969 North Sea Continental Shelf case, in order to become norms of customary international

27. Arechaga, Eduardo Jimenez, Treaty Stipulation in favor of Third States, American Journal of International Law, Vo. 50, No. 2 (1956), P. 343
law, provisions of a treaty would have to fulfill the following conditions: be a fundamentally norm-creating character, such as forming the basis of a general rule of law; have passed into the general corpus of international law; and be accepted as such by the opinio juris “as have become binding even for the countries which have never become, and do not become parties to the treaties”. The most common inter-relationship between a treaty and customary law is that a treaty codifies the already existing norms of customary law. On the other hand, a treaty may also crystallize an emerging rule of customary law.28

The Vienna Convention on the Law of Treaties 1969, Article 38, stipulates as follows: [N]othing 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.

The Article 38 describes the applicability of the provision of a treaty to third parties subject to the provisions or the treaty has already become customary international law. Its applicability to the third parties is not due to the jurisdiction of the treaty in question but merely third State bound by it by the custom.

Case Study (The applicability of the provision Vienna Convention on Consular Relations 1963 (VCCR 1963) to Singapore in the case of Nguyen Tuong Van)

The VCCR 1963 regulates relations among the states parties on consular matters. The Convention was concluded in 1963. Singapore has not been a party to the VCCR when the case of Nguye Tuan Van filed to the Singapore court.

The case reads as follows; The accused was charged with drug trafficking. According to the Singapore municipal law, the offence is punishable by death sentence. The counsel of the accused invoked the VCCR Year 1963 that Singapore authority did not abide by the VCCR to inform the representation of the accused right after the arrest of the accused. In that case, the legal counsel plea the court to release the accused due to the violation of the international treaty by the Singapore authority.

In this case, although Singapore is not a party to the Convention, Singapore confirmed with the prevailing norms of the conduct between States such as those set out under Article 36 (1). And Singapore authorities followed the conduct regarding the arrest of foreign national not due to the applicability of the treaty but as a part of Singapore’s observance on the customary international law which requires states to inform the consular representation on its national detention.

IV. CONCLUSION

Based on the Vienna Convention on the Law of Treaties (VCLT), the general rule regarding the legal effects of treaties to third States not party is that; treaties are not applicable to states not party to them without

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their consent. The consent is the main element of the manifestation of the fundamental principles of the sovereignty and independence of states. Treaties which established legal regimes and has erga omnes character such as establishing freedom of navigation in international rivers and maritime waterways are applicable to third parties if they have legal situation are as follow: there has to be an intention to confer a rights on third party; the rights may be conferred on its own; or it may be conferred with an duty to exercise a certain obligation, which is a condition for the exercise of this rights.

There is exception on the non-binding character of treaties against third parties. Treaty may create rights and obligations for a third state under two conditions namely, first; the states parties to the treaties intended to establish the obligation for a state not party, and second; the third parties agree to be bound by it.

There are conditions to be fulfilled in order for conferment of rights namely; the treaty intended to rise the right to third states; secondly, the third states give approval to the rights accorded to them by the treaty; third, the approval shall be taken for granted as the third states’ act is not contrary to it; fourth, if the treaty obliges that a third state should express its consent in certain way, the legal effect will only arise if this requirement has been fulfilled.

Rights arisen for third states can not be revoked or modified unless otherwise two conditions have been fulfilled (first); the treaty stipulates that the rights was intended to be revocable, (and second); the third parties gave consent on it. Treaties or provision of treaties are applicable to third parties if the provisions of the treaties have already become customary international law. It means that its applicability to the third parties is not due to the jurisdiction of the treaty in question but merely third state bound by it by the custom.

Reference
Arechaga, Eduardo Jimenez, Treaty Stipulations in favor of Third States, American Journal of International Law, Vol. 50 No 2 (April 1956) p 338-357


Treaty of Peace between the Allied and Associated Powers and Germany (1919)/Treaty of Versailles


North Sea Continental Shelf Cases (Germany/Denmark; Germany/the Netherlands) 1969 ICJ Rep 3, 25-26

(Judgment of February 20)