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THE ANTARCTIC TREATY AS A TREATY PROVIDING FOR AN "OBJECTIVE REGIME"

Bruno Simma†

INTRODUCTION

In the doctrine of international law, recognition of the general principle of *pacta tertiis* has always been accompanied by the search for exceptions in the form of treaties that do create legal effects, rights or obligations, for third states. Discussion concentrates on so-called "status-creating," "dispositive" or "constitutive" treaties, and "treaties providing for objective regimes."† These terms characterize agreements that define the status of a state, a certain territory, or an international waterway by establishing a legal regime that is intended to be valid and binding *erga omnes*. Recognition of treaties of this kind, however, strains a consensual understanding of international law. The possible legal foundations of *erga omnes* effects of treaty obligations, therefore, are hotly disputed.‡

In the recent literature on this topic, the Antarctic Treaty§ is quite frequently cited as an example of either what an author believes to constitute a true objective treaty regime valid *erga omnes* or what he thinks other writers falsely believe to be one.¶

† Professor of International Law, University of Munich. The Author is indebted to his research assistant, Stefan Brunner, for invaluable help that went well beyond the compilation of materials.

‡ See, e.g., E. Klein, *Statusverträge im Völkerrecht: Rechtsfragen Territorialer Sonderregime* (1980). This paper applies part of Professor Klein’s theoretical framework, although this Author does not share the main thesis of the Klein study.


¶ This paper will not deal separately with the question of whether the Antarctic Treaty regime is a "regional arrangement" authorized under article 52 of the U.N. Charter. Charter of the United Nations, 1977 U.N.Y.B. 1181, art. 52. For a discussion of this issue,
Thus, René-Jean Dupuy wrote in 1960 that what had happened with regard to Antarctica was that

un collège international se comporte comme un ensemble gouvernemental et organise le statut d'une région. . . . Pour que ce statut soit valable pour les non-signataires, encore faut-il que ceux qui l'ont établi soient en état de le faire respecter. . . . Admettons qu'il s'agit d'un traité portant statut d'un territoire et, comme tel, opposable erga omnes. Accepté ou non, formellement ou tacitement, par le reste de la collectivité internationale, aucun élément externe à lui ne peut . . ., modifier sans leur accord, le rôle particulier des douze.5

The same view was expressed in a major Soviet textbook of international law which stated categorically that the Antarctic Treaty must be considered valid erga omnes.6 Interestingly, the leading Soviet international lawyer, Professor Tunkin, who had represented the Soviet Union at the Washington Conference, held a quite different opinion. Professor Tunkin maintained that the Antarctic Treaty intended "to create a regime which could become universally accepted. But there had been no intention of imposing that regime: any attempt to do so would have been illegal."7 A majority of commentators share this view.8

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The same divergence of opinions appears in official government pronouncements. For instance, in the 1984 study of the United Nations Secretary-General, Chile stated that “[by] virtue of its tacit or express recognition of the Antarctic Treaty, the entire international community is bound by the provisions governing claims in Antarctica.” Pakistan, in contrast, argued that the Antarctic Treaty “cannot be the basis of a legal regime binding the international community as a whole.”

Given this dispute within the international community, a closer study of third party effects of the Antarctic Treaty system does not seem to be a purely academic exercise. With a regime on Antarctic mineral resources taking shape and the issue on the agenda of the U.N. General Assembly, the political and economic significance of the question becomes obvious. The 1959 system seems to approach its decisive challenge.

The “Antarctic Club” has taken various steps to open up the Treaty system to newcomers and to relax conditions for consultative membership. But it appears that the majority of U.N. member states shows no inclination to change sides. There is a need to know, therefore, whether, and eventually in which respects, those states, legally speaking, have to take cognizance of the present and the future Antarctic Treaty regime.

The analysis in this paper develops in two steps. First, the paper specifies three theoretical approaches that have been suggested to account for *erga omnes* effects of objective treaty regimes. This discussion also evaluates the relevance and persuasiveness of these approaches when applied to the Antarctic Treaty and its regime. In the second part of the paper, a few observations on the position of third states toward a future regime on Antarctic mineral resources worked out by the “Antarctic Club” will be put forward.

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10. *Id.* at 34.


12. The Author assumes that his readers will be familiar with the provisions of the 1959 Treaty and their factual background, particularly with the “purgatory of ambiguity” embodied in article IV, and with article X on third states. *See generally* Barceló, *The International Legal Regime For Antarctica*, 19 Cornell Int’l L.J. 155 (1986).
The theoretical approaches to a possible *erga omnes* effect of objective regimes in general and their application to the Antarctic Treaty system in particular may be classified briefly as follows. The first group of theorists includes several prominent Special Rapporteurs of the International Law Commission. They have tried to solve the problem of *erga omnes* effect by treating it as a special concept within the law of treaties and by finding a solution through an exception to the *pacta tertiis* rule. A second group of scholars has developed what Lord McNair called "public law theories" which assume a quasi-legislative competence of certain states to regulate a territorial issue with validity *erga omnes*. Finally, a third school examines the effects of various processes upon third states vis-à-vis treaties intended to establish "objective" territorial regimes. These processes include recognition, acquiescence and estoppel, historic consolidation, and formation of customary international law.

I. THE LAW OF TREATIES APPROACH

The law of treaties approach culminated in the efforts of the International Law Commission (ILC) to draw up what was to become the Vienna Convention of 1969. The first proposal to address treaties providing for objective regimes as an exception to the *pacta tertiis* rule was enunciated in Sir Gerald Fitzmaurice's Fifth Report of 1960. Sir Gerald was prepared to accept binding effects of treaties vis-à-vis non-parties as an outflow of two principles. The first principle acknowledges a general duty of states to respect, recognize, and accept the consequences of lawful and valid international acts entered into between other states, which do not infringe the legal rights of states not parties to those acts. The second principle dictates that the act of user implies consent to the conditions of use.

The draft articles relevant in this context are Sir Gerald's articles 14, 17, 18 and 18. Articles 17 and 18 embody the first principle of "status *erga omnes*." Article 14 expresses the second principle of implied consent. Paragraph 1 of article 14 covered treaties concerning the territory of another state; paragraph 2 referred to territory placed by treaty under an international regime of common use "in circum-

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13. For a similar approach, see Wolfrum, Book Review, 24 GYIL 533 (1981) (distinguishing between a "contractual approach," a "real rights and obligations approach," and a "law-making theory").
16. Id. at 77, 87, 93, 98.
17. Id. at 79.
18. Id. at 80.
19. Id.
stances causing the treaty to have, or to come to be regarded as hav-
ing, effect *erga omnes.*”

Sir Gerald himself was not really sure how to distinguish article 14, paragraph 2 cases from those provided for in article 18 regarding the obligation of the third state to conform to the treaty conditions as to user. Sir Gerald explained the difficulty of distinguishing these two cases as follows:

In practice, it can no doubt be said that where all the States having, in respect of a given region or area, territorial rights or claims to such rights, or a possible basis of claim, or otherwise directly interested, have established by treaty a regime of permanent or quasi-permanent user . . . , in such a way that the position of other States is not prejudiced or impaired, nor their general international law rights affected, it is extremely likely that the treaty will be regarded, as being effective *erga omnes.*

According to Sir Gerald, the Antarctic Treaty constituted an article 14, paragraph 2 situation.

The fundamental problem with the Fitzmaurice articles, however, is that the draft articles beg the most important question: they presuppose the validity *erga omnes* of certain treaty regimes. The draft articles fail to address the problem of whether a regime like the Antarctic Treaty system could have a binding effect upon third states at all, and if so, on what grounds. Article 14, paragraph 2, the “Antarctica article,” imported an *erga omnes* test “perhaps somewhat illogically,” as Sir Gerald himself admitted. According to Sir Gerald, the legitimacy of an *erga omnes* effect of a territorial regime depends upon the participation of all states interested in the regime’s establishment or entitled to participate in it. Whether we assume that Antarctica still has the status of a *terra nullius* or assume that it is a common space, this condition of participation by all interested states does not seem to have been met in 1959 or since. Article 14 embodies the principle that one may enjoy the benefits only if one is prepared to bear the burdens in return. But this principle cannot reasonably be applied to Antarctica if free access were enjoyed by all states at any rate.

The draft articles proposed to the ILC by Sir Gerald were not discussed in the Commission. But his successor as Special Rapporteur on the law of treaties, Sir Humphrey Waldock, raised the issue again in his Third Report of 1964. In that report, Sir Humphrey proposed an article 63 on “Treaties providing for objective regimes,” again, a

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20. *Id.* at 79.
21. *Id.* at 93.
22. *Id.* at 93-94.
23. *Id.* at 93.
25. *Id.* at 26-27.
provision expressly designed to account for the Antarctic Treaty.26

Sir Humphrey observed that certain types of treaties create objective legal regimes for particular areas, either at once or at least within a short period of time.27 In order to qualify for such effects _erga omnes_, however, such a treaty must, according to the Special Rapporteur, have been concluded with the intention to create in the general interest obligations and rights relating to a particular region.28 Further, any states having territorial competence with reference to the subject-matter of the treaty must either be a party to the treaty or at least have consented to the provisions in question.29

According to the Special Rapporteur, if a treaty regime meets these requirements, it deserves to be endowed with effect _erga omnes_ as speedily as possible. Therefore, in paragraph 2 of article 63, Sir Humphrey sought to provide the means necessary to satisfy these requirements.30 He suggested that the consent requirement could be met by express or implied consent plus a presumption of implied consent if a third state did not protest against or otherwise manifest its opposition to the regime within a given period of time (Sir Humphrey himself proposed 5 years) after the treaty's registration.31 Sir Humphrey maintained that if the Commission did not include the proposed article 63 in its draft, the accretion of effects _erga omnes_ to an objective regime

would have to be left to be covered by custom which was necessarily a slower process. His intention in drafting article 63 had been to provide legal machinery for accelerating the process of recognition of such a regime as part of the established international legal order. In that type of situation, it could be said that tacit recognition ought to be regarded as being established quite quickly, as it has been [!] in such cases as the Antarctic Treaty and the Austrian State Treaty.32

Commenting on the Antarctic Treaty in particular, Sir Humphrey maintained that

[although the parties had included an accession clause in the treaty . . . , there was a clear intention to create an objective legal regime for Antarctica . . . . Accordingly, it would be inadmissible for any State not a party to the treaty to claim that Antarctica was _res nullius_.33

If one reads these lines together with the preconditions for the objective character of a treaty regime presented in article 63, one must

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26. _Id._ at 29, 30.

27. _Id._

28. _Id._ at 33.

29. _Id._

30. _Id._ at 26-27.

31. _Id._ at 33.


33. _Id._ at 105; _cf_. Report of the Secretary-General, _supra_ note 9, part I, para. 158 (discussing the question of a “legal regime”).
conclude, with all due respect to Sir Humphrey, that the Special Rapporteur did not take into account fully the complexity of the Antarctic Treaty. It seems that Sir Humphrey placed great emphasis on the concepts of free access for scientific purposes and demilitarization, but that he did not consider sufficiently the intricacies of article IV of the Antarctic Treaty.

A reading of paragraphs 3 and 4 of article 63 reinforces this observation. These provisions would have entitled third states that had expressly or impliedly accepted the regime not only to invoke the provisions of the regime and to exercise any general right which its terms and conditions may confer, but also to participate in the amendment or revocation of the regime.

It is obvious that the Contracting Parties of the Antarctic Treaty never intended to grant third states such sweeping rights. For instance, if one applied Sir Humphrey's proposal to article IV, paragraph 2 (the "constitution" of Antarctic cooperation), third states would not only have been bound by the prohibition of new claims, but would also have been entitled to invoke this prohibition against the claimant contracting parties. In this way, the "constructive ambiguity" of article IV, paragraph 2 would have worked in favor of third states. It is clear, however, that because the Antarctic Treaty does not purport to settle the territorial question, any entitlement of third parties in this field could only be detrimental to the system's operation.

Article 63 was widely criticized by members of the Commission. According to Tunkin, the parties to the 1959 Conference had not intended to impose a regime in Antarctica, and draft article 63 "created more problems than it solved." Rosenne, on the other hand, contended that the provision belonged to the lex lata. Verdross stated that the article was in no way revolutionary because it was based entirely on the idea of consent—which is not the whole truth, of course, if the presumption of implied acceptance embodied in paragraph 2(b) is taken into account: a clause that drew the vigorous opposition of Jiménez de Aréchaga, according to whom states "would undoubtedly prefer the present situation, in which they remained legally unconcerned by what constituted for them res inter alios acta, retaining their freedom to take a position with respect to any such

35. Compare the discussion about the "pooling" of claims as a possible breach of a treaty obligation (article IV, paragraph 2) in 1 W.M. BUSH, ANTARCTICA AND INTERNATIONAL LAW: A COLLECTION OF INTER-STATE AND NATIONAL DOCUMENTS § 61(f)-(i) (1982).
37. Id. at 104.
38. Id. at 99.
treaty only if and when the need to do so arose." This is indeed the very heart of the matter.

In the end, article 63 was deleted. The ILC discussion was summarized in the following part of the commentary to the Commission's draft article 34 of 1966 (now article 38 of the Vienna Convention):

The Commission considered whether treaties creating so-called "objective regimes," that is, obligations and rights valid *erga omnes*, should be dealt with separately as a special case . . . . Some members of the Commission favoured this course, expressing the view that the concept . . . existed in international law and merited special treatment in the draft articles . . . [T]hey cited the Antarctic Treaty as a recent example of such a treaty. 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.

The ILC majority thus considered that validity *erga omnes* could result by application, first, of the principle now embodied in article 36 of the Vienna Convention. Under article 36, a treaty may create rights for third states if the original parties so intend and if the third state assents thereto. This assent is presumed as long as the contrary is not indicated. In addition, validity *erga omnes* may arise by conferring the status of international customary law upon a treaty under the process recognized in article 38 of the Vienna Convention. According to the Commission, these two approaches furnished a legal basis for the establishment of treaty obligations and rights valid *erga omnes*, "which goes as far as is at present possible."

The Commission did not include in the provisions fundamental to the validity *erga omnes* concept its draft article 31 (now article 35 of the Convention) on treaties providing for obligations for third states, although the focus of such regimes certainly seems to be on obligation. But article 35 requires that a third state expressly accept such an obligation in writing; and a written acceptance, of course, would dissolve the legal intricacy of an "objective regime."

Let us apply the relevant provisions of the Vienna Convention (articles 35-38) to the Antarctic Treaty to determine whether a third-party effect can be established. It appears that some of the Treaty obligations, including those expressed in article I, article IV, paragraph 2, and article V, are indeed phrased in objective terms and could thus, in theory, be intended to establish an obligation for third states. Such a reading would not render article X useless, as Professor Cahier

39. Id. at 101.
41. Id.; see also Rozakis, Treaties and Third States: A Study in the Reinforcement of the Consensual Standards in International Law, 35 Zeitschrift fur Auslandisches Öffentliches Recht und Völkerrecht [ZaöRV] 1, 7-13 (1975).
42. Rozakis, supra note 41, at 13.
assumed,\textsuperscript{43} because article X could well be construed as establishing a special treaty obligation concerning sanctions operating only \textit{inter partes}.

But even if these articles of the Antarctic Treaty had been drafted with the intention of binding third states, third states would not have accepted the articles expressly. Neither does the Antarctic Treaty confer enforceable rights on third states. The Treaty indicates that its parties were sensitive to the wider interests of the international community, but there is "no independent or intrinsic evidence of an intent to elevate these interests into an enforceable right."\textsuperscript{44} Furthermore, the obligations that the Treaty imposes should not be considered as mere conditions for the exercise of certain rights, such as free access for scientific purposes or the right to accede.\textsuperscript{45}

To summarize, under the law of treaties as reflected in the Vienna Convention, the Antarctic Treaty cannot produce validity \textit{erga omnes}, because silence of third parties cannot be taken as assent.\textsuperscript{46} The possibility that customary law could provide the basis for such third-party effects will be examined after a discussion of the "public law theories."

\begin{itemize}
\item \textsuperscript{43} Cahier, \textit{supra} note 8, at 664-65.
\item \textsuperscript{44} Triggs, \textit{The Antarctic Treaty Regime: A Workable Compromise or a "Purgatory of Ambiguity"?}, 17 CASE W. RES. J. INT’L L. 195, 201 n.28 (1985).
\item \textsuperscript{45} Treaty obligations could also become binding on non-parties through the latters’ tacit accession to the instrument. This possibility was acknowledged, although in a rather reserved way, by the International Court of Justice (ICJ) in the \textit{North Sea Continental Shelf} judgment. \textit{North Sea Continental Shelf} (Ger. v. Den.), 1969 I.C.J. 4, 25-26 (Judgment of Feb. 20) [hereinafter cited as Continental Shelf]. But this concept does not appear to be applicable to the Antarctic Treaty: the contracting parties did not envisage the process of tacit accession, nor did any third state manifest an intention to adhere to the Treaty in such a way. Moreover, the feasibility of tacit accession does not find support in state practice. Upon closer reading, the ICJ really seemed to have in mind a special case of estoppel. \textit{See infra} notes 78-82 and accompanying text.
\item \textsuperscript{46} When the International Law Commission discussed territorial regimes in the context of state succession, see Vienna Convention on Succession of States in Respect of Treaties, art. 12, U.N. Doc. A/CONF.80/31, it referred to the discussion of draft article 63 concerning treaties providing for objective regimes. \textit{See supra} note 40 and accompanying text. The Commission reaffirmed that the objective character of such a regime did not result from the treaty itself, but rather from its execution. [1972] 2 Y.B. INT’L L. COMM’N 305-06, para. 29. According to the Commission, the term “territory” was intended to denote any part of the land, water, or air space of a state. \textit{Id.} at 308, para. 39. Furthermore, article 12 of the Convention on Succession of States, \textit{supra}, speaks of rights and obligations “established by a treaty.” At the Vienna Conference leading to the adoption of the Convention (1978 Session), the Soviet delegate expressed the view that the proposals of the Informal Consultations Group concerning article 12 were based on a “general understanding within the group that no succession of States would affect the demilitarization of certain areas of territory . . . or international regimes such as that which applied in Antarctica.” 2 Official Records 133-34, para. 27. In light of the above discussion, this statement cannot be understood as dealing with third-party effects in general, but—at least with respect to the Antarctic Treaty—only with contracting parties’ succession into treaty obligations.
\end{itemize}
II. THE "PUBLIC LAW THEORIES"

Public law theories proceed from the "quasi-legislative" authority of certain states to make a territorial treaty regime binding upon third states. Third parties are not bound by the treaty itself, but by the exercise of competence to settle a matter with effects *erga omnes*. The public law theory found its classic expression in Lord McNair's individual opinion in *International Status of South West Africa*, in which he stated:

From time to time it happens that a group of great Powers, or a large number of States both great and small, assume a power to create by a multipartite treaty some new international regime or status, which soon acquires a degree of acceptance and durability extending beyond the limits of the actual contracting parties, and giving it an objective existence. This power is used when some public interest is involved . . . .

The question is, of course, where this power of the contracting parties to act "in a semi-legislative capacity for the whole world," as Lord McNair put it on another occasion, comes from.

As Professor Klein's study shows, it has been derived from an alleged function of the great powers "établir un véritable droit objectif" from the idea of *negotiorum gestio*; from the participation or *placet* of those states that have territorial sovereignty and jurisdiction over the area concerned; from an analogy to the realization of general interests of the international community by the United Nations; or from a special attribution of competence to the contracting parties of a status-creating treaty.

This last-mentioned view is shared by Professor Klein himself. Because his theory is the most recent and most sophisticated among the "public law" approaches, it will be examined in further detail.

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49. E. KLEIN, supra note 2, at 195.
50. See generally Krüger, Geschäftsführung ohne Auftrag für die Völker gemeinschaft, in FESTSCHRIFT FÜR BILFINGER 169 (Mosler & Schreiber eds. 1954) [hereinafter cited as Mosler & Schreiber].
51. See E. KLEIN, supra note 2, at 116-22 (referring to Spitzbergen and Antarctica as prominent examples of *terra nullius*).
52. Id. at 198-209. For a discussion of the concept of representation, see Reuter, *Principes de droit international public*, 103 RECUEIL DES COURS 425, 448-49 (1961).
53. Ballreich, *Völkerrechtliche Verträge zu Lasten Dritter*, in Mosler & Schreiber, supra note 50, at 1, 19. See also Ballreich, *Treaties, Effect on Third States*, 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 476, 480:

If the contents of a treaty are appropriate, and are intended only to serve the common good, then article 35 should no longer be taken as meaning a clear prohibition. The obligation of the third State, which in such cases is an obligation of toleration rather than an obligation of performance, would then take effect. The special interests of the third State would also not suffer unduly as it would still have the option to express rejection.
According to Professor Klein, the first condition for the existence of any objective treaty regime is the intention of its parties to serve the general interest. The second condition is the assertion by the contracting parties of their power to settle the matter in the general interest with effect *erga omnes*. Professor Klein calls this assertion the *Ordnungsbehauptung* of the parties. Article X of the Antarctic Treaty is mentioned as a prominent example.54

Because the *Ordnungsbehauptung* is imbued with a heavy dose of legitimacy (general interest, territorial jurisdiction, etc.), its development from "inchoate" to full title to legislate *erga omnes* deserves some assistance. Professor Klein provides this assistance by means of a presumption:

Since an express attribution of the power to settle a matter *erga omnes* can only seldom be ascertained, it is above all decisive whether there is a presumption that the power has been attributed and under which circumstances it applies. From the assertion made by the contracting parties to serve the general interest and from the participation of the power which has territorial competence for the settlement, there results such a strong legal claim that the attribution of the asserted competence must be admitted by those States which have not objected to this claim.55

In short, the overpowering legitimacy of the claim creates a presumption that silence gives consent. Thus, the *Ordnungsbehauptung* is granted validity *erga omnes*. In Professor Klein's view, the Antarctic Treaty furnishes an example *par excellence* of this process.

According to Professor Klein's theory, a third state would at least have the faculty to reject the assertion to make law *erga omnes*; for that state, these rules would then remain *res inter alios actae*. Other authors, however, do not even put so modest an obstacle in the way of an *Ordnungsbehauptung*. Professor Mosler, for example, discussed this issue in his 1974 General Course at the Hague Academy. Although he admitted that "[i]t would certainly be an exaggeration to say that third States are bound by the situation established by such a treaty...", he went on to state: "But it may be that the interest either of the whole community of States or of the States of a certain region in the maintenance of such a status is so clear that much can be said in favour of there being an obligation to acquiesce in it."56

54. E. Klein, *supra* note 2, at 356. Guyer maintains a similar position; he admits, however, "I understand the legal objections to this concept, but I believe that the problem we are faced with here is not only a legal problem, but also one of legitimacy, i.e. a 'metajuridical' problem." Guyer, in Vicuña, *supra* note 5, at 278-79. Cf. I. Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 266 n.2 (3d ed. 1979): "[N]evertheless the treaty bears some resemblance to treaties classified as 'constitutive or semi-legislative' by Lord McNair.... Cf. also article X of the Antarctic Treaty: ... This provision could be read as a clear admission that non-parties are not bound by the Treaty itself."


56. Mosler, The International Society as a Legal Community, 144 Recueil des Cours 1, 236 (1975) (emphasis added). Other scholars have stressed the principle of effectiveness.
When applied specifically to the Antarctic Treaty, the "public law" construction has been employed for different purposes. First, the purpose is to recognize something short of sovereignty, maybe functionally limited sovereignty, *erga tertios*, without necessitating a solution of the sovereignty issue within the treaty framework. Second, the theory leaves the parties free to abolish the treaty. Third parties would have no right either of revocation or amendment (although it has been suggested that the parties could not alter the regime with complete freedom). Third, the obligation of third parties would consist merely of toleration rather than affirmative performance. Further, the theory has been used both for the denial of third states' rights and as a basis of some "rights" of outsiders just because of the third party construction.

The scope of this paper does not allow a full critique of the public law theories. Such a critique, however, might concentrate on the following points:

First, the construction of quasi-legislative competences of the Contracting Parties with respect to Antarctica could, in light of article IV, only work *erga tertios*, i.e., not against and between the claimant States. There would, in effect, not be one status for Antarctica but rather two: one for the Contracting Parties themselves and one valid *erga tertios*.  

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57. This approach is clearly preferable to a real-rights approach based on *absolute* title.

58. This effect explains why this theory is preferred to "customary law approaches" with their inherently reciprocal relationships, see infra Part III, and to solutions within the framework of the law of treaties, see supra note 24, at 27 (Sir Humphrey Waldock's proposed article 63, paragraphs 3 and 4).

59. Mosler, supra note 56, at 236.

60. See Ballreich, *Treaties*, supra note 53.

61. See Delbrück, Comment, in Wolfrum, *Antarctic Challenge* supra note 5, at 119-20. The trust construction (Consultative Parties as trustees of the world community) can be seen as an attempt to counterbalance third party effects with a *quid pro quo* for outsiders. For the view that the trust concept already constitutes the *lex lata*, see Wolfrum, *The Use of Antarctic Non-Living Resources: The Search for a Trustee*, in *id.* at 143, 162-63 [hereinafter cited as Wolfrum, Search for a Trustee]; Riedel, Comment, in *id.* at 180-81. The trust concept is correctly discussed as *lex ferenda* in Barnes, *supra* note 8, at 288-89.

62. This construction would bypass the requirements for the existence of *absolute rights*, which must be effective *erga omnes*. A *numerus clausus* of real rights probably exists. See Burton, *supra* note 8, at 441-42 n.108 ("Strictly speaking, a group of states could possess such jurisdiction only by virtue of a condominium or joint exercise or sovereignty over territory. . . . The Antarctic Treaty itself does not establish a condominium"). Furthermore, the maintenance of national positions in the sovereignty dispute is inconsistent with a true exercise of joint sovereignty by Antarctic Treaty parties. Consequently, Burton concludes that the "functional equivalent of a condominium has not been achieved by all interested states pooling through an international treaty their respective jurisdictions to prescribe and enforce law governing their respective nationals." *Id.*
Second, a duty not to make claims in Antarctica during even a prolonged transitional period does not amount to a grant of territorial status. It is only a modus vivendi on the surface of an unresolved but "frozen" dispute. As a consequence, even the question of whether the relationship toward third parties is based on claims to sovereignty or on some joint rights of the Consultative Parties remains unsolved.63

The Consultative Parties would be empowered to create an objective regime for Antarctica if they had territorial sovereignty over the area.64 Some of these parties, however, do not recognize the claims of others. The Antarctic Treaty not only leaves this issue unsettled, but it "shelves" the conflicting claims and respective positions. This was the conditio sine qua non for the Treaty's very conclusion. Therefore, the Antarctic Treaty itself stands in the way of an assumption of erga omnes effects through territorial competence. Clear-cut legal relationships toward third states could be achieved only by "melting" the frozen territorial issue and either returning to the claims situation virulent before the Treaty or establishing a condominium.65

Third, the construct of an Ordnungsbehauptung is designed to overcome the pacta tertiiis rule which is a consequence of the principle of sovereign equality.66

Fourth, the proposition that "the stronger the claim, the more rejection can be expected," is as logical as the proposition that "the stronger the claim, the less mere silence can be taken as consent." If rights are based on the silence of third parties, these perceived rights must be construed restrictively because "tacit consent" cannot be presumed easily.

Fifth, an attribution of competences "once and for all" does not reflect reality. The Antarctic legal system has gradually evolved and broadened in scope. The system could more adequately be described as a process of integration, despite diametrically opposed legal positions.67

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63. Barnes, supra note 8, at 288 ("conscious parallelism").
64. This situation exists, for example, for Norway under the Spitzbergen Treaty. See Hambro, Some Notes on the Future of the Antarctic Treaty Collaboration, 68 AM. J. INT'L L. 217, 224 (1974).
65. So far, however, claimant states have tried to uphold the "conscious parallelism." See id. at 224-25.
66. Wolfrum, Search for a Trustee, supra note 61, at 162.
67. The basic problem is that of reciprocity. One commentator advocates that a "once and for all" attribution of competences is compatible with this principle:
   If such forbearance on the part of States which are not currently parties to the Antarctic Treaty system is to be a reality there has to be a quid pro quo. It seems to me that the proper nature of such a quid pro quo is that future developments of the Antarctic Treaty System should consist of the extension of the existing system of obligations to deal with future problems.
Heap, supra note 5, at 108. Another commentator, however, argues that it "would be unrealistic to believe that these States, perhaps the most numerous of all, would acquiesce in
Sixth, in practice, the Consultative Parties have done anything but assert strong legal claims. Instead of asserting a forceful Ordnungsbehauptung, they have tried to keep a low profile.\textsuperscript{68} We shall return to this point later.

Seventh, if Contracting Parties that are not Consultative Parties are not bound by the “legislative competence” of the Consultative Parties through Recommendations, third states are, à fortiori, under no obligation in this respect.\textsuperscript{69}

\section*{III. THE “SUBSEQUENT PRACTICE” APPROACH IN THE FACE OF A CHANGE IN PARADIGMS}

We now turn to the last group of theories. According to these theories, the informal processes of customary law, historic consolidation, recognition, acquiescence, and estoppel can transform a contractual regime for a certain territory into a body of rules valid \textit{erga omnes}.

It has already been mentioned that, in the opinion of no less an expert body than the International Law Commission, a treaty regime intended to be “objective” might acquire \textit{erga omnes} effect through the operation of customary international law—a process which Sir Humphrey Waldock attempted to speed up by his draft article 63. Doubts can be raised, however, whether this could work (or could have worked) in the case of the Antarctic Treaty.

In his valuable work, \textit{Antarctica and International Law}, W.M. Bush summarized the following arguments in support of the view that the Antarctic Treaty now reflects customary international law. First, there was pre-existing state practice concerning freedom of scientific investigation and avoidance of military involvement. It could be argued, therefore, that the Antarctic Treaty crystallized these earlier practices into customary law. Second, there existed a world interest in the Treaty’s subject-matter. Third, participation in the Treaty could be regarded as widely representative of the international community, the Consultative Parties thus including all the states whose interests are specially affected. Finally, there has been an absence of objection to the Treaty (at least until 1983).

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\textsuperscript{68} See Note, \textit{Thaw in International Law? Rights in Antarctica Under the Law of Common Spaces}, 87 \textit{Yale L.J.} 804, 836 nn.149-50 (1978) (Consultative Parties tried not to raise the red flag for other states).

\textsuperscript{69} Cf. Recommendations III-VII and Explanatory Statement Concerning Recommendations III-VII. See F.M. Auburn, \textit{supra} note 8, at 165-70; Boczek, \textit{supra} note 8, at 386-87.
In contrast, several arguments have been put forward against this view. One argument asserts that the Treaty is of an interim nature. Article IV imposes a moratorium on claims. It does not purport to regulate the question permanently. There is no provision on resource allocation. In addition, jurisdictional questions are only partly regulated.

Another critique notes that there is no clear indication that the Consultative Parties have regarded any of the Treaty provisions as reflecting customary law, which they could legally enforce against third States.70

As the International Court of Justice stated in its North Sea Continental Shelf judgment, there is no doubt that a process by which a treaty generates customary law is possible and does from time to time occur. But the Court hastened to add that "this result is not lightly to be regarded as having been attained."71

The Court stated as the foremost requirement that the treaty provision concerned "should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law."72 Admittedly, the quality of a treaty rule as being of a fundamentally norm-creating character has meant many things to many writers, but everyone will agree that if one had to look for a textbook example of a treaty provision that is not potentially norm-creating, article IV of the Antarctic Treaty would certainly be first choice.

The relevant question is whether provisions of the Antarctic Treaty could have become binding as general—rather than as particular, local, or regional—customary law.73 It could be argued that even the second alternative, which is the crystallization of respective custom inter partes, is foreclosed because of the basically interim character of the 1959 Treaty. This interim nature, reflected most prominently in article IV, embraces the Treaty as a whole, including demilitarization and management of Antarctic affairs. Furthermore, the Treaty is open for revision and subject to withdrawal.

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70. W.M. Bush, supra note 35, at 102-03.
71. Continental Shelf, supra note 45, at 41-42.
72. Id.
73. For an equivocal position on this topic, see Bilder, supra note 8, at 202. The correct view has been stated as follows:

At least a claimant dare not lower its guard completely in the matter of Antarctic political questions unless and until this new treaty is acknowledged to be general international law applicable to all nations. At such time the legal status quo provisions would prevent even non-parties from acquiring any additional titles, thus granting a certain latent political, if not operational, prerogative to the twelve original signatories, plus "active" acceding states.

Hayton, supra note 4, at 366.
All indications suggest that the Consultative Parties to the Treaty did not want to bind themselves beyond the Treaty either toward other contracting parties or toward the world at large. In other words, they wanted to retain the option of asserting their interests "by all means" should the Treaty operation and cooperation break up. This feature of the Antarctic Treaty system seriously reduces the possibility that both the Treaty itself and the subsequent activities of the Consultative Parties qualify as "state practice" or as expression of an opinio juris on the part of the states whose interests are specifically affected.

Furthermore, what would be the exact content of the alleged customary rules? The attribution of an administrative competence as in the case of the "public law" theories? This attribution would be meaningless among the Consultative Parties themselves. Moreover, how would the position of third states be affected? It is true that none of these states appears to have objected to the Treaty of 1959 and the subsequent practice of the Treaty parties, at least until the issue was successfully brought before the U.N. But can this silence and inactivity of third states be taken as tacit acceptance and as an opinio juris? I doubt it very much. The purpose and intent of the parties to the 1959 Treaty were not that broad. The parties agreed to set aside conflicting views about territorial sovereignty, to exclude Antarctica from the arms race, to encourage and facilitate scientific cooperation, and to protect the Antarctic environment. These states mainly assumed burdens because the Treaty provisions they agreed on overwhelmingly consisted of obligations and not of rights. Since 1959, the Consultative Parties have taken utmost care to avoid the impression that they were "carving Antarctica up for their own benefit."

When the parties to a treaty assert constantly that their activities are in the interest of all and that they do not desire to derive any benefit from their activities which they do not already have (or claim to have), the natural, spontaneous reaction of third states is a "let's wait and see" attitude. When a more immediate interest is at stake, third states are likely to accede to the treaty, without the necessity of acceptance or protest. Their silence, therefore, cannot be qualified as tacit acceptance of an obligation, i.e., as submission to a customary law regime initiated by the Antarctic Treaty. In the words of Jiménez de Aréchaga, "[third states] remained legally unconcerned by what constituted for them res inter alios acta, retaining their freedom to take a position . . . only if and when the need to do so arose." And the need for third states to become legally concerned simply did not arise.

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as long as the general attention did not flip to the mineral side of the medal which the “Antarctic Club” awarded itself.

As a result, the Antarctic Treaty regime has not acquired an “objective” character, or validity _erga omnes_, through the operation of customary law. The principal reason for this result is the absence of a _dum logi debut_ situation. This absence marks a notorious red thread through the application of the remaining theories.

Rights of the Consultative Parties could have become valid _erga omnes_ through historic consolidation resulting from the Consultative Parties’ effective administration of Antarctica and the lapse of a considerable time.\(^7\)\(^6\) This approach, however, does not work with respect to the Antarctic Treaty. No common claim or title to the region exists upon which historic consolidation could operate. Historic consolidation certainly cannot operate on the basis of a bifocal approach. The start of such a process would presuppose, for claimant countries, a transfer of slices of sovereignty to the Consultative Parties as a whole and their joint administration. The Consultative Parties could then assert sovereignty unambiguously vis-à-vis third states. Such a transfer, however, has never taken place.\(^7\)\(^7\)

Therefore, the only method remaining to provide the Antarctic Treaty regime with some degree of validity _erga omnes_ would be tacit recognition through estoppel by silence or acquiescence. The present paper will not go into the theoretical problem of how these processes are to be distinguished from each other and again from that of formation of customary law. In fact, many customary obligations have probably arisen through acquiescence.\(^7\)\(^8\) In other situations, however, passivity or toleration of claims which usually call for protest will not grow into custom. As Hersch Lauterpacht has pointed out, the far-reaching effect of creating legal obligations by silence and inaction is an essential element in the promotion of stable international relations, and is intended to prevent states from playing “fast and loose” with situations affecting other states.\(^7\)\(^9\)

Judge Alfaro described the starting point for acquiescence in his opinion in the _Temple_ case.\(^8\)\(^0\) The question is whether the conclusion and subsequent operation of a treaty gives rise to “circumstances when

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77. Barnes, _supra_ note 8, at 288; Burton, _supra_ note 8.
protest is necessary according to the general practice of States in order
to assert, to preserve or to safeguard a right.81

In the *Fisheries* judgment of 1951,82 the International Court of
Justice stressed the following prerequisites for the metamorphosis of
silence and toleration into "law-making" acquiescence: (1) notoriety
of claims challenging a legal situation or asserting alleged rights; and
(2) a general toleration of the claims by the international community
and prolonged abstention from reaction, especially by states particu-
larly interested, concerned, and affected.83 Under this statement of
the law, we must again conclude that general silence, or absence of protest
in the face of the Antarctic Treaty system, *cannot* be taken as a tacit
recognition of the system by third states.

What were the claims of the contracting parties; what rights did
they assert? None which they had not asserted before—on the con-
trary, these claims were "frozen" by article IV of the Treaty. Cer-
tainly third states could not and cannot rely on this provision as such.
However, article IV is of certain relevance in this context. Thus, when
the Seventh Antarctic Treaty Consultative Meeting (1972) considered
activities in the Treaty area by states that are not Contracting Parties,
an explicit reference was made to article IV.84

Moreover, the sovereignty problem affects the relationship
toward third parties as a matter of mere logic. The Treaty is aimed
essentially at the preservation of the *status quo*: article IV froze the
sovereignty issue without settling it. Neither claimant states nor non-
claimant states wanted to perfect an absolute title.85 It might well be

81. *Id.* at 45.
83. *Id.* at 138-39. See also Müller, *supra* note 79.
84. See Final Report:
    *Activities of Countries not Contracting Parties.*
15. The Meeting considered the question of possible substantial or continuing
activities or territorial claims in the Antarctic Treaty Area by states that are
not Contracting Parties to the Treaty.
16. It agreed that, in such circumstances, it would be advisable for Governments
to consult together as provided for by the Treaty and to be ready to urge or
invite as appropriate the state or states concerned to accede to the Treaty,
pointing out the rights and benefits they would receive and also the responsi-
bilities and obligations of Contracting Parties.
17. The Meeting recalled the principles and purposes of the Treaty, in particular
that the Antarctic Treaty Area should continue to be a zone of peace and
scientific cooperation and should not become the scene or object of interna-
tional discord. In this connection the Meeting drew attention to the provi-
sions of article IV of the Treaty.

Reprinted in W.M. Bush, *supra* note 35, at 266. In 1975, the 8th Antarctic Treaty Con-
sultative Meeting reaffirmed the principles set forth in these paragraphs in Recommendation
VIII-8, *Id.* at 321-22.
85. See Peterson, *supra* note 8, at 400 ("By failing to locate sovereignty clearly, it leaves
open the possibility of shifting to any other regime at any time").
argued that such a contradictory situation created by a policy of "conscious parallelism" does not provide an operative basis for acquiescence.

However, even if we assume that acquiescence had actually arisen under the Antarctic Treaty, it would never result in a "once and for all" attribution of competences. The acquiescence test, therefore, would have to be applied on a state-by-state basis at every stage of the regime. The Treaty provisions on the content of the Antarctic regime were drafted carefully to avoid any assertive edges to which third-state opposition could attach. The leitmotiv by which the "Antarctic Club" has tried to "sell" its system to an increasingly attentive world has always been to point out the considerable amount of money and energy the "Club" has invested to keep Antarctica a safe and clean place for all. Therefore, from their silence toward the activities of the "Club", no obligation has arisen for non-parties to the Antarctic Treaty system to respect the regime. Non-parties remain free to challenge the regime's operation.

These statements, however, should be qualified in two ways. First, the situation in Antarctica is changing. The present analysis may require adjustment to accommodate future developments. Second, it may be possible that individual non-parties have gone beyond quietly tolerating the operation of the Antarctic system by recognizing or accepting it in one way or another.

These conclusions are consonant with those of a recent article by Professor Triggs who studied the question of acquiescence by Third World countries in the context of the United Nations Conference on the Law of the Sea (UNCLOS). According to Professor Triggs, the failure to raise the issue of an Antarctic minerals regime at UNCLOS did not lead to acquiescence:

Until very recently, developing states . . . have had no reason to take any interest in Antarctica other than to voice what is possibly a general concern that the Antarctic environment should be protected. Until the last twenty years, such states have had no legal grounds on which to protest . . . . Only with the development of the notion of a common heritage has it become possible for a developing state to put forth the argument that, as it is part of the common heritage of mankind, Antarctica is now, or should become, res communis.

Professor Triggs added, however, that because both the common heritage principle and the outlines of the "Antarctic Club's" minerals

86. Barnes, supra note 8, at 288.
87. See supra note 62 (discussing the doubts regarding this position); see also Hambro, supra note 64, at 225-26; Barnes, supra note 8, at 288.
88. See Wolfrum, Search for a Trustee, supra note 61, at 162 (the Consultative Parties "must seek to accommodate the interests of the world community and to receive again respective general acceptance for the new regime"). See also supra note 67 (discussing the related problem of reciprocity).
89. Triggs, supra note 44, at 223.
regime are now acquiring contours, further failure to object to these plans could raise an estoppel. It appears that Professor Triggs has a good point. There really is no need to strengthen it by introducing the common heritage principle.

What we are observing is, indeed, a change of the legal paradigms for Antarctica. The essence of the Antarctic regime created twenty-five years ago has already been described: demilitarization, freedom of scientific exploration for all, and protection of the environment. These features represent obligations and burdens without any tangible benefits exclusively for the "Antarctic Club." In addition, article IV relaxes the sovereignty controversy between claimant and non-claimant parties and suggests a low profile toward third states. Article X could not be considered very provocative in light of the Treaty's principles and purpose; utilization of resources was not at stake then.

Outsiders are now challenging the Antarctic system. The opponents want to share the eventual riches of Antarctica without assuming the burdens of consultative or even simple Treaty membership. They raise their voices against the old territorial claims, against any third-party effect of the Treaty, and against the two-tiered structure of participation in the Treaty ("nur wer kann, darf," or, "only those who can, may"). They want to renegotiate the Antarctica regime in the United Nations.

Against these attempts, the "Antarctic Club" members are struggling to uphold the traditional paradigm. Their concern found a most vivid expression in the statement of the British U.N. delegate who said:

I challenge those who appear to be dissatisfied with the system to show any obligation which the Treaty Consultative Parties have undertaken which it would not be in the interests of any outsider to undertake if he became active in Antarctica: I challenge them further to show anything which the Antarctic Treaty Consultative Parties have done which is inconsistent with the real interests of an outsider now or with interests of future generations.90

The question, however, is whether the future minerals regime will continue this lofty course. The main problem lies in the fact that the current negotiations for such a regime pose a far greater challenge to sovereignty claims than does the existing law on environment and living resources.91 Thus, the question that remains unanswered is: will it be possible to fashion a regime acceptable to the claimant states without privileging them to a degree unacceptable to non-claimants and third states?

90. Statement by Dr. Heap, supra note 74.
91. Triggs, supra note 44, at 203.
CONCLUSION

There is no question that the "Antarctic Club" is, morally and legally, called upon in the first place to ensure the establishment of a minerals regime consistent with the principles and purposes of the Antarctic Treaty. But from this primary responsibility would in no way follow a right of the "Club" to write another first place for itself into the substance of that regime. Therefore, if in the course of negotiations the Pandora's box that article IV has so far kept closed should be opened and its content infect the regime with the element of "first come, first served" successfully bridled in 1959, third states would be under no obligation—moral or legal—to accept it. It could not be maintained that the states of the Third World, by not having protested against Recommendation XI-1 in time, have already acquiesced in a minerals regime bearing club characteristics. Such a view would fail to grasp that, from the moment the question of Antarctica appeared on the U.N. agenda, the fate of any regime negotiated within the Antarctic Treaty framework will no longer be decided upon through the play of claims and tolerances by states ut singuli.

92. But see Rich, supra note 76, at 714-15 (suggesting that, in the face of consistent silence, "some form of estoppel" should operate against third parties).