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STATE BOUNDARIES AND THIRD STATES – ISSUE OF OPPOSABILITY. REMARKS ON THE POLISH-WEST GERMAN NORMALIZATION TREATY OF 1970

Abstract: *The Western boundary of Poland was established by the Potsdam Agreement of 1945 and confirmed by the Boundary Agreement between Poland and the GDR of Gőrlitz of 1950. Poland exercised administration with respect to the adjudicated territories, but she made efforts to get the boundary recognized and confirmed by the FRG. This happened on the basis of the Warsaw Treaty of 1970. Boundary treaties are usually considered as objective regimes. It is disputable whether the Warsaw Treaty of 1970 can be classified as such a regime.*

Keywords: Potsdam Agreement, Polish-German border, objective regimes in international law, treaties and third parties

INTRODUCTION

The treaty between Poland and the Federal Republic of Germany of 7 December 1970 on the basis for the normalization of their mutual relations was intended to create a legal framework for the development of relations between the two countries, and at the same time between the two political blocs in Europe. The disputed border was the axis of the ideological, economic and political conflict between Western Europe and the allies of the Union of Soviet Socialist Republics (USSR).

The assumption of power in Germany by the SPD-FDP coalition in 1969 made it possible for the interested states to establish mutual relations. However, the key issue for deepening cooperation was the resolution of the territorial dispute that

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had existed between the two countries since the end of the Second World War. Both Poland and Germany played politics with the border issue. The policy of the ruling communists in Poland was perfidious, as they used the uncertain situation of the Polish western border to justify the need to maintain an alliance with the USSR (read: subjugating Poland within the Eastern Bloc).

1. THE POLISH-GERMAN BOUNDARY: 1945-1950-1970

1.1. The Potsdam Agreement

The Allied heads of states decided at the Yalta (Crimea) summit in February 1945 that Poland would lose its former Eastern territories in favour of the USSR (i.e. those annexed by the Soviets in 1939), based on the policy of fait accompli. Poland would however be compensated with substantial accessions in the West by moving its western frontier farther west at the expense of Germany. The precise course of the border was to be decided later.

By the time the Allied leaders assembled again in Potsdam in July-August 1945, the Eastern territories of Germany were effectively occupied by the Red Army, and the Soviet authorities had transferred the administration of the lands to a pro-Soviet Polish provisional government. Although the United States and Great Britain strenuously protested against this unilateral action, they accepted it and agreed to the placement of all the territory east of the Oder-Neisse Line[1] under Polish administrative control (except for the northern part of East Prussia, which was incorporated into the Soviet Union).[2] Successive Polish governments cited the Potsdam Agreement as the basis for their final border decision. In turn, Germany tried to prove that the solution adopted in Potsdam was not final. Interestingly, both sides had serious weighty arguments to support their positions. It is enough to state that according to the German position, the Potsdam Agreement was not binding upon Germany, as Germany was absent at the conference and never recognized its consequences. Moreover, the so-called "German Eastern territories" were put under Polish administration, not Polish sovereignty, and territorial decisions were left to be determined by a future peace settlement. On the other hand, Poland maintained that Allies had the power and authority to decide on the German boundaries; that the territories transferred to Poland were described as former German territories;

[1] Former German territories east of a line running from the Baltic Sea through Swinemunde, and thence along the Oder River to the confluence of the western Neisse River and along the western Neisse to the Czechoslovak frontier, should be placed under Polish administration.

[2] According to the Potsdam agreement, the section of the western frontier of the USSR which is adjacent to the Baltic Sea should pass from a point on the eastern shore of the Bay of Danzig to the east, north of Braunsberg-Goldep, to the meeting point of the frontiers of Lithuania, the Polish Republic and East Prussia.

that they were excluded from the Soviet occupation zone; and that the population of German ethnicity in Poland should be resettled to Germany.[3]

The decisions and regulations quoted above show that both parties presented good arguments in favour of their legal positions. All subsequent agreements concerning territorial issues in Polish-German relations referred to the line established at Potsdam as the basis of the frontier. It was however very difficult to propose an acceptable legal basis for the territorial transfer. A rational explanation was that it was an adjudication by the Great Powers. Their leaders issued a declaration on 5 June 1945 by which they took a supreme power over Germany. Although the Allied Powers did not intend to annex Germany,[4] they reserved the right to decide on the shape of the territory of the German state, including the tracing of German boundaries.[5] This was done at Potsdam. The fact that no German government took part in the conference did not matter. Firstly, there was no legitimate German government representing the German state at that time. Secondly, the rights of the Allied Powers with respect to Germany were not contractual, but stemmed from the unconditional surrender of the German state. However, the US Secretary of State J. Byrnes undermined the final character of the Oder-Neisse boundary in September 1946 by referring to a possible future peace settlement. Poland then became very active in its attempts to obtain a confirmation of its Western boundary.[6]

Poland exercised the administration of territories described in Polish legislation as the areas north and west of the pre-war boundary with Germany on the basis of the

[3] For more on different aspects of the legal disputes between Poland and Germany, *see e.g.* K. Skubiszewski, *Poland's Western Frontier and the 1970 Polish-German Treaties*, 67(1) American Journal of International Law 23 (1973); L. Gelberg, *The Warsaw Treaty of 1970 and the Western Boundary of Poland*, 76(1) American Journal of International Law 119 (1982); W. Czapliński, *The New Polish-German Treaties and Changing Political Structure in Europe*, 86(1) American Journal of International Law 163 (1992); W.M. Góralski (ed.), *Polish-German Relations and the Effects of the Second World War*, PISM, Warszawa: 2006, *passim*; J. Kranz, *Polish-German Legal Controversies – An Attempt at Synthesis*, in: W.M. Góralski (ed.), *Breakthrough and Challenges*, *20 Years of the Polish-German Treaty on Good Neighbourliness and Friendly Relations*, Elipsa, Warszawa: 2011; J.A. Frowein, *Legal Problems on the German Ostpolitik*, 23(1) International and Comparative Law Quarterly 105 (1974); J.A. Frowein, *The Reunification of Germany*, 86(1) American Journal of International Law 152 (1992); C. Arndt, *Legal Problems of the German Eastern Treaties*, 74(1) American Journal of International Law 122 (1980); K. Hailbronner, *Legal Aspects of Unification of the Two German States*, 2 European Journal of International Law 18 (1991).

[4] According to K. Skubiszewski, a customary right of subjugation fully justified a taking of control over Germany.

[5] In the advisory opinion in the *Jaworzina* case (B, No. 8, p. 20) the Permanent Court of International Justice (PCIJ) stated that the peace treaties concluded after the First World War provided that the victorious powers reserved a right to fix boundaries of new states established in result of the dismemberment of Germany, Austria and Hungary; and that this competence should be exercised by the Assembly of the League of Nations or/and the Conference of Ambassadors.

[6] In the judicial practice of the Hague courts there is a clear trend toward finding that state parties acting towards a delimitation of boundary intend to proceed in as complex and durable as possible way. *See* the advisory opinion of the PCIJ in the *Mosul* case (*Art. 3, para 2 of the Treaty of Lausanne*, PCIJ Publ. Seria B,

Potsdam agreement. According to K. Skubiszewski,[7] the notion of administration can be understood in various ways. In some cases it equates to sovereignty (like in case of Cyprus on the basis of the treaties of Constantinople and Berlin of 1878, annexed by the UK in 1914); while in other cases it should not be interpreted as a transfer of sovereignty (like in the cases of Saarland in 1919, or the Italian colonies in Africa after the conclusion of peace treaty with Italy in 1947). While as regards the Polish case Skubiszewski interpreted "administration" in favour of Polish sovereignty, his arguments however are not convincing. In modern legal writing a clear distinction is drawn between administration and sovereignty.[8]

The purpose of the administration over the former German territories was to meet the needs of the Polish population, and to integrate the newly-acquired northern and eastern territories with the rest of the country. Administration was exercised in several steps. A decree of 13 November 1945 on the administration of the so-called "recovered territories"[9] established private legal relations; it was confirmed by the judgment of the Polish Supreme Court of 5 September 1946 and resolutions of panels of 7 judges of the Polish Supreme Court of 21 May and 11 June 1948. The law in force in Poznań (the biggest and most important town in pre-war western Poland, albeit with a long German legal tradition dating back to the era of the partitions of Poland) was expanded into the former German eastern territories. Following the expiration of a military administration in Poland on 17 December 1945, the organization of public administration and the judiciary of the Poznań region was also expanded to include areas north and west of the pre-war border.[10] The judgment of the Polish Supreme Court of 26 March 1946 held that all Polish nationals residing in the recovered territories were subject to Polish law. This decision was important, as it opened the way toward the regulation of nationality in the recovered territories. In accordance with the Potsdam agreement, the population of German origin would be resettled to Germany. The first general census of 14 February 1946 demonstrated that the number of Germans in the

No. 12, at 20 [1925]); the judgment of the International Court of Justice (ICJ) in the case of *Sovereignty over Certain Frontier Land (Belgium/Netherlands)*, ICJ Rep 1959, pp. 209, 221-2; and as to modern jurisprudence *see* Case concerning Territorial Dispute (Libyan Arab Jamahiriya/Chad), ICJ Rep 1994, pp. 6, 24. *See also* G. Nesi, *Boundaries*, in: M. Kohen, M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law*, Edward Elgar, Cheltenham: 2018, pp. 220-221. The said directive should apply in case of a boundary established by third parties.

[7] K. Skubiszewski, *Administration of Territory and Sovereignty: A Comment on the Potsdam Agreement*, 23(1/2) Archiv des Völkerrechts 31 (1985).

[8] R. Wilde, *International Territorial Administration*, Oxford University Press, Oxford: 2008; B. Knoll, *The Legal Status of Territories Subject to Administration by International Organizations*, Cambridge University Press, Cambridge: 2008, *passim*.

[9] This expression was used by the communist state for propaganda purposes, in order to show an alleged historical title to the territories acquired after the Second World War.

[10] Postwar Polish legislation did not refer to nor describe new boundaries.

newly-acquired territories amounted to 2 million persons, while the number of Poles was ca. 2.8 million (1.3 million of immigrant population and 1.5 million of natives). There was a numerous Polish minority in Germany before the Second World War, and most of them remained in their residences; while new inhabitants expulsed from the former Polish territories annexed by the USSR arrived (on the basis of international agreements concluded by Poland with its eastern neighbours). Members of the Polish minority were subjected to an ethnic verification, and subsequently they were granted Polish nationality and allowed to remain in Poland. On the other hand, a number of Germans were forced to stay in Poland and they were also granted Polish nationality. The reasoning behind this was pragmatic: Polish immigrants in the recovered territories were unable to operate the machines and industrial devices left by the Germans,[11] and they needed their assistance. The process of granting Polish nationality was completed by the Polish Nationality Act of 8 January 1951. Finally, on 18 February 1955 the Polish Council of State (*Rada Państwa*, the collective supreme state agency) passed a resolution on the cessation of a state of war between Poland and Germany.

It can be concluded that Poland exercised effective power with respect to the former German territories within the framework of their administration. Referring to the development of international law, we can speak about *effectivités*, considered by some authors as an indispensable factor of a territorial power.[12] The problem of exercising effective control over a territory arises however most often in situations where the power exercising effective control does not have legal title to the territory in question. In judicial practice however (which doesn't say a lot owing to intertemporal issues), the ICJ has rejected most arguments based on human, economic, historical or geographical factors relied upon by the parties to the dispute. Its decisions have been based largely on questions of legal title, as well as the principle of uti possidetis iuris.[13] If there is legal title, *effectivités* play a confirmatory role. On the other hand, if the legal title is controversial or competing claims are present, *effectivités* become more decisive. *Effectivités* are therefore relative.

[11] A Polish-Soviet agreement of 16 August 1945 on a compensation for damages suffered during the Nazi occupation also referred to the Potsdam agreement as a foundation of reparations, including in the territorial dimension. The Soviets excluded items situated in the territory of Poland from confiscation.

[12] For more on the role of effectiveness as a premise of title to territory, *see* M.N. Shaw, *The International Court of Justice and the Law of Territory*, in: C.J. Tams, J. Sloan (eds.), *The Development of International Law through the International Court of Justice*, Oxford University Press, Oxford: 2013, pp. 151ff, Nesi, *supra* note 6, at 215.

[13] With respect to intertemporal reasons, we can refer to, for example, the judgment of the ICJ in *Temple Preah Vihear (Merits)* case, ICJ Rep 1962, p. 6, 15: "The Parties have also relied on other arguments of a physical, historical, religious and archaeological character, but the Court is unable to regard them as legally decisive." In the contemporary case law, *see Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, ICJ Rep 2008, p. 12.

The fate of the Polish-German border was unclear. Lawyers from Western occupation zones persistently protested against any territorial changes concerning Germany. The concept of a continuous existence of the German Reich as a passive subject of international law dominated in German constitutional law (and consequently in the German approach to international law), at least since 1948. Communist-dominated politicians in the Soviet occupation zone were also unwilling to accept any territorial losses in the east of the country, as those changes would have been difficult to accept for the population. Finally, some of the Polish legal writing argued that the transfer of the German Eastern territories was not final, and the area would perhaps be returned to Germany after the conclusion of a peace treaty.

1.2. The agreements of Görlitz/Zgorzelec

The creation of two German states in 1949 changed the international situation. On 6 June 1950 the governments of Poland and the German Democratic Republic (GDR) adopted a common declaration on delimitation of the established and existing international boundary.[14] It also envisaged the adoption of further agreements concerning, in addition to a formal delimitation of the boundary, questions such as border checkpoints, river navigation rights, and the establishment of a small open border zones.

The declaration was confirmed and developed by an agreement of 6 July 1950[15] on delimitation and demarcation of the boundary. Its preamble referred to the Potsdam protocol, in which the boundary was established. It also stressed that it should be the basis for the stabilization and strengthening of friendly cooperation, notwithstanding the war experiences. This reference can be considered as acceptance of a certain form of international responsibility on the part of the GDR for war damages. Art. 1 of the said agreement described the course of the border, referring to the wording of the Potsdam protocol. This line should constitute a boundary between Poland and Germany (and not the GDR). According to Art. 2, the delimitation also covered air space, water rights, and underground property rights. The parties obligated themselves to the demarcation of the frontier, and a special commission was established for that purpose. The demarcation act was signed at Frankfurt/Oder on 27 January 1951.[16]

The conclusion of the Görlitz/Zgorzelec agreement created a number of difficulties. The East German authorities considered themselves legitimate to represent the

[14] A monumental work by J.H.W. Verzijl, *International Law in Historical Perspective*, vol. 3, Brill/Nijhoff, Leiden: 1970, p. 166, refers to para. IXB of the Potsdam Agreement as a provisional agreement, developed in the treaty of Görlitz/Zgorzelec.

[15] Journal of Laws 1951, No. 14, item 106.

[16] Both instruments were published in UNTS 319, p. 93 (first in 1959).

democratic, post-war order of Germany. The agreement did not constitute a treaty of cession of a part of German territory; instead it only confirmed the solution agreed upon in Potsdam. The validity of the agreement was undermined by the lack of recognition of the GDR by the Western world. According to the West German government, the border line established in Görlitz/Zgorzelec was only a temporary administrative border and was subject to revision by a final peace treaty.[17] The Federal Republic of Germany (FRG) rejected any agreement concerning borders concluded by the GDR. This position was supported by the three Western powers, i.e. the USA, United Kingdom and France, who passed a special declaration on 12-18 September 1950.[18] The Western Powers declared that pending all-German democratic elections and the possible (re)unification of the country, the FRG government was the only freely and democratically elected German authority,[19] and therefore the body uniquely capable to represent Germany on the international plane, and that the Görlitz agreement was not opposable to the German state.[20]

1.3. The Warsaw Treaty of 1970

West Germany continued to refuse to recognize the boundary line until 1970. In 1969, however, the Social-Democratic Party (SPD) won the parliamentary elections and appointed a new government led by Chancellor W. Brandt. He started a new Eastern policy directed at improving relations with the Eastern European states. In effect, two important treaties were signed in 1970: the first with the Soviet Union (12 August), and the second with Poland (7 December). The former agreement concentrated on the non-use of force in mutual relations. As to the latter one, the parties to the normalization treaty of 7 December 1970 presented different approaches to their obligations. Poland claimed that the treaty had a triple meaning: it regulated the boundary issues; it was equivalent to recognition by the FRG, and it created the basis for the normalisation of mutual relations (whatever that meant). On the other hand, the FRG emphasized the renunciation of the use of force in bilateral relations, and the inviolability of frontiers.[21]

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[17] In fact all instruments of the Allied powers referred to a peace settlement and not a peace treaty. The conclusion of peace treaties was foreseen with the Axis powers only.

[18] 10 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 667 (1950).

[19] Nota bene, democracy was not an indispensable premise for recognition of a state, in particular in the 1950s.

[20] A. Klafkowski, *Granica polsko-niemiecka po II wojnie światowej* [Polish-German border after the Second World War], Wydawnictwo Poznańskie, Poznań: 1970, at 18, stated that the Görlitz agreement would be the basis of the Polish-German boundary even in the case of possible unification of Germany. This opinion – expressed by one of the most eminent lawyers connected with the Polish government – was surprising, as Poland (together with other states of the Soviet bloc) at that time rejected the possibility of the unification of Germany.

[21] Art. 3 recognized as inviolable all boundaries in Europe, including the Oder-Neisse line as Western boundary of Poland.

The Warsaw Treaty of 1970 is relatively short. It was composed of a short Preamble (five paragraphs) and five articles, four of which contained stipulations relevant from the perspective of international legal relations between the parties. Art. I confirmed that the existing frontier along the rivers Oder-Lausitzer Neisse constituted the Western boundary of Poland. The parties declared that they do not have mutual territorial claims. In Art. III both parties obligated themselves to undertake the normalization of bilateral relations. The treaty also confirmed the principle of non-use of force, peaceful settlement of disputes, and respect for preceding international agreements. Art. I was of crucial importance: it confirmed the existing border, referring to the Potsdam protocol as the basis therefore.

The concept of a pact confirming existing boundaries was not new. In the Rhenish Pact of 16 October 1925, Germany, France, Belgium, the UK and Italy mutually guaranteed the frontiers established in the treaty of Versailles. The pact did not create any new obligations. From a legal point of view, the lack of a guarantee for the German-Polish boundary also established by the treaty of Versailles did not modify Germany's legal position with respect to said border.

The normalization treaty of 1970 played an important political and legal role.[22] It paved the way for the Helsinki process of the Conference on Security and Co-operation in Europe. In this article we do not deal with that issue. Instead we concentrate upon the importance of the treaty from the point of view of general international law. In particular we ask the question: What were the effects of the Warsaw Treaty in relations with third states?

2. THE *PACTA TERTIIS* PRINCIPLE IN THE LAW OF TREATIES

It is interesting to ask why Poland strived to conclude an agreement with the FRG in order to confirm a boundary which had earlier been established by the Potsdam protocol and a bilateral agreement with the neighbouring State? Poland recognized the GDR and considered both German republics as new States. In the eyes of the Polish government there was no link between the Oder-Neisse boundary and the FRG.

The principle *pacta tertiis nec nocent nec prosunt* is obvious and widely-accepted in international law. It means that every international arrangement is binding exclusively between its parties, and does not have any effect upon third States. The rule, codified in Art. 34 of the Vienna Convention on the Law of Treaties (VCLT), is

[22] For a contemporary evaluation of the 1970 Treaty in mutual relations between Poland and Germany *see* J. Barcz, K. Ruchniewicz (eds.), *Akt normalizacyjny. 50 lat układu o podstawach normalizacji stosunków PRL-RFN of 7 December 1970* [The normalization act. 50 years of the Normalization Treaty between PPR and FRG], Elipsa, Wrocław-Warszawa: 2021, passim.

undoubtedly customary law.[23] In principle, exceptions are provided in some of the following provisions of the Convention. We can only agree with Sir Gerald Fitzmaurice that rules governing treaties and third parties are so fundamental, self-evident, and well-known, that they do not really require the citation of much authority in their support.[24] This stance was confirmed by Sir H. Waldock in his Reports for the ILC.[25] The first monograph on the topic (R. Roxbourgh, *International Conventions and Third States*) was published in 1917.

One could assume that every international agreement should be opposable by third parties, which are however under an obligation to respect all arrangements. All States are under a duty to recognize and respect situations of law or of fact established by lawful and valid treaties which tend by their nature to have effects *erga omnes*. The States should also abstain from frustrating or hindering the application and execution of treaties concluded by other States.

Such a general presumption would be disputable. According to Art. 35 VCLT, treaties can provide for obligations for third States. An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be a means of establishing the obligation and the third State expressly accepts that obligation in writing. The consent of the third party is a precondition of an opposability of such obligation. An exception to that rule has been provided in Art. 38 VCLT. Rules in a treaty can become binding on third States through international custom – if such customary rule meets all the criteria necessary for the formation of customary norms. Finally, a mandatory obligation would limit a possible scope of recognition, which is a prerogative of a sovereign State.

3. OBJECTIVE REGIMES AND THE LAW OF TREATIES

Notwithstanding Art. 38 VCLT, a question can be posed whether there are any other categories of treaties being exceptions to the *pacta tertiis* rule. Those treaties

[23] As illustration we quote some examples only. In the *Free Zones of Upper Savoy and District of Gex* case the PCIJ held that "Article 435 of the Treaty of Versailles is not binding upon Switzerland, who is not a Party to that Treaty, except to the extent to which that country accepted it" (PCIJ Publ. Series A/B, No. 46, at 141). The same court stated in the *Certain German Interests in Polish Upper Silesia* case that "[a] treaty only creates law as between the States which are parties to it; in case of doubt, no rights can be deduced from it in favor of third States" (PCIJ Publ. Series A, No. 7, p. 29). A similar statement can be found in the advisory opinion on *Customs Régime between Germany and Austria* (PCIJ Publ. Series A/B No. 41, 48 (1931)), with respect to the Treaty of St. Germain, and in the *Island of Palmas* case before the Permanent Court of Arbitration ("whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third powers") RIAA 2, at 842 (1928). We quote also Lord McNair, *Law of Treaties*, Oxford University Press, Oxford: 1961, p. 309.

[24] G. Fitzmaurice, *5th Report*, 2 Yearbook of International Law Commission (1960), p. 69 (84).

[25] H. Waldock, *3rd Report*, 2 Yearbook of International Law Commission (1964), p. 6.

by their very nature can produce effects upon third States. One of such categories of treaties concerns "objective regimes".[26] The VCLT does not refer to this concept, proposed by learned writers and accepted in practice (although examples in judicial practice are rare). The validity of objective regimes was indirectly confirmed by Arts.11 and 12 of the Vienna Convention on Succession of States in respect of Treaties (VCSST).

The notion of an objective regime was proposed by the subsequent Special Rapporteurs on the law of treaties, G. Fitzmaurice and H. Waldock (in their reports of 1960 and 1964, respectively). It covered the effects of treaties concerning the use of maritime or land territory of a State, region etc. if the intention of the parties is to create in the general interest obligations and rights relating to a particular region, State, territory, locality, river, waterway, or to a particular area of sea, seabed, or airspace. The parties to the specific treaty may include among their number any State having territorial competence with reference to the subject-matter of the treaty. The treaty should be effective *erga omnes,* i.e. the parties to the treaty need to decide that the regime created by the treaty should be respected by third States. After discussion, the International Law Commission rejected the inclusion of objective regimes into the draft Convention for two reasons: firstly, it might undermine the principle of sovereign equality of States; and secondly all issues dealing with objective regimes were covered by what became Arts. 34-38 VCLT.

The concept of objective regimes has often been invoked in international practice. The jurisprudence of the Hague courts referring to the concept includes: the *ss. Wimbledon* case (in respect of the status of the Kiel Canal); the Advisory Opinion on *Reparation for injuries suffered in the service of the UN* (as to the opposability of the international legal personality of the organization); Art. 2(6) of the UN Charter in respect of non-member States, in the *Gabčikovo-Nagymaros* case; the Antarctic Treaty of 1959 (in particular its Art. X); the *Aland Islands* case (concerning the opposability of the convention concluded in 1856 between Russia, France, and Great Britain, to Sweden and Finland), and numerous others.[27] In all those cases the parties to the treaties concerned intended to establish a political status for the

[26] S. Subedi, *The Doctrine of Objective Regimes in IL and the Competence of the UN to Impose Territorial or Peace Settlements upon the States*, 37 German Yearbook of International Law 162 (1994); F. Salerno, *Treaties Establishing Objective Regimes*, in: E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention*, Oxford University Press, Oxford: 2011; C. Fernández de Casadevante Romani, *Objective Regime*, in: *2010 Oxford Public International Law*, available at http://opil.ouplaw.com (accessed 30 June 2022); M. Fitzmaurice, *Third Parties and the Law of Treaties*, 6 Max Planck Yearbook of United Nations Law 37 (2002), pp. 66ff.

[27] *See* para. 6; A.D. McNair, *The Law of Treaties*, Oxford University Press, Oxford: 1986 (in particular Chapter XIV Dispositive and Constitutive Treaties); Fitzmaurice, *supra* note 26, pp. 84ff.; Ph. Cahier, *Le problème des effets des traités à l'égards des Etats tiers*, RCADI 140 (1974), p. 589. As to Polish authors, *cf.* A. Wyrozumska, *Umowy międzynarodowe. Teoria i praktyka* [International treaties. Theory and practice], Prawo i Praktyka Gospodarcza, Warszawa: 2006, at 313.

respective territories and/or regimes of a (possibly) permanent nature. On the other hand, the treaties referred to are so various that it would be very hard to enumerate rules common to all of them.

An important element of objective regimes is that they must be opposable *erga omnes*. This means that all States have an interest in respecting the obligations resulting from the treaty. Such an interpretation is strictly connected with the formula presented in the judgment of the ICJ in the *Barcelona Traction* case. However, it seems that the expression used by the ICJ was closer to a peremptory norm of international law, and reflected the substance of *jus cogens*. The notion of obligations *erga omnes* is today connected with the implementation of international responsibility of States and poses the question of the right of third States (non-parties to the treaty) to claim reparation for violations. McNair proposed another explanation. According to Waldock's definition, international agreements through which states parties dispose of their real rights do not establish objective regimes if no general interest of the international community is involved. Treaties establishing objective regimes must affect situations or rights that are not (or not any more) considered disposable due to the existence of a prevailing general interest in the certainty of the law. As the objective regime established by the treaty needs to be unique and indivisible, it necessarily affects third states. These kinds of treaties produce *erga omnes* effects only because they involve real rights, and not because they serve a common interest of the international community.[28]

4. BOUNDARY TREATIES AS OBJECTIVE REGIMES

Boundary treaties are concluded between the neighbouring States. This manifest truth was confirmed by the ICJ in the *Libyan Arab Jamahiriya/Chad* case, in which it stated that "[t]he fixing of a frontier depends on the will of the sovereign States directly concerned."[29] The consent of the parties concerned is the only criterion for the legality of territorial changes.

The parties concluding a boundary treaty intend to create a possibly permanent solution.[30] By definition it is not eternal, because a boundary treaty can be amended at any time by the parties, but not by third parties.

Art. 11 VCSST confirms the special status of boundary treaties in international law.[31] It is however uncertain whether this particular category of treaties can be con-

[28] A.D. McNair, *Treaties Producing Effects "Erga Omnes"*, in: *Scritti di diritto internazionale in onore di T.Perassi*, vol. II, Giuffre, Milano: 1957, at 23. *See also* McNair, *supra* note 27, at 256-257.

[29] Case *concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, ICJ Rep. 1994, at 23 (para. 45).

[30] *Temple of Preah Vihear* case, ICJ Rep., p. 34.

[31] The special status is further confirmed by two additional factors. Firstly, boundary treaties are excluded from the operation of the *rebus sic stantibus* rule. Art. 62 VCLT refers in this respect to treaties establishing

sidered as objective regimes. It can be argued that establishing, tracing, and respecting an interstate boundary always constitutes an action in favour of international peace and security, and therefore is in the collective interest of the international community. On the other hand, however, the fate of the boundary is separate from the fate of the boundary treaty. The objective nature of the regime concerns rather the boundary itself, and not the treaty constituting its basis.[32]

A list of authors confirming the *erga omnes* character of boundary treaties is long and includes S. Bastid,[33] M. Shaw,[34] J. Tyranowski,[35] C. Fernandez de Casadevante Romani,[36] and C. Laly-Chevallier.[37] The same conclusion was reached by several authors in the context of Arts.11 and 12 VCSST, for example by S. Subeda,[38] M. Fitzmaurice,[39] and P. Reuter.[40]

An express confirmation of the nature of boundary treaties as an *erga omnes* regime can be found in the award concerning *Territorial Sovereignty and Scope of the Dispute between Eritrea and Yemen*.[41] According to the award, the treaty of peace of Lausanne was (in the technical sense) *res inter alios acta* as to Yemen, which was the bearer of the territorial title. The parties of the Treaty of Lausanne could not have transferred territorial title elsewhere without the consent of Yemen. Boundary and territorial treaties made between two parties are *res inter alios acta* vis-à-vis

a boundary. In the *Frontier Dispute (Burkina Faso/Mali)* case, the ICJ stated that Art. 62 covered both delimitation treaties and treaties ceding or attributing territory. However, it did not concern agreements concerning the status of territory. Secondly, boundary treaties cannot be terminated nor withdrawn from unilaterally by any party.

[32] The ICJ stated that "[o]nce agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasized by the Court. States' territorial regime must remain objective, which of course would not be the case if treaties establishing a boundary were likely to be terminated [e.g.] by application of the *rebus sic stantibus* theory." *See* the *Case concerning Territorial Dispute (Libyan Arab Jamahiriya/Chad*), cited above, at 37 (para 72).

[33] S. Bastid, *Les traités dans la vie internationale*, Economica, Paris: 1986, p. 155.

[34] M. Shaw, *Boundary Treaties and Their Interpretation*, in: E. Rieter, H. de Waele (eds.), *Evolving Principles of IL. Essays in Honour of Karel C. Wellens*, Brill, Leiden: 2012, pp. 239ff.

[35] J. Tyranowski, *Sukcesja państw a traktaty w sprawie granic* [The succession of states and treaties concerning boundaries], Wydawnictwo Naukowe UAM, Poznań: 1979, at 114.

[36] C. Fernandez de Casadevante Romani, *supra* note 26, para 15.

[37] C. Laly-Chevallier, *Commentary Art. 36 VCLT*, in: O. Corten, P. Klein (eds.), *The Vienna Conventions on the Law of Treaties, Commentary*, Oxford University Press, Oxford: 2011, para. 14.

[38] S. Subeda, *The Doctrine of Objective Regimes in International Law and the Competence of the United Nations to Impose Territorial or Peace Settlements on States*, 37 German Yearbook of International Law 162 (1994), in particular at 173 (in very firm and categorical, although disputable, words: "Boundary treaties, because of their sensitivity in international relations, have always been considered a classic example of objective regimes") and 181.

[39] Fitzmaurice, *supra* note 26, at 77.

[40] P. Reuter, *Introduction au droit des traités* (3rd ed.), PUF, Paris: 1995, p. 113.

[41] Award of 9 October 1998, RIAA vol. XXII, pp. 209-332, para. 153. The Arbitral Tribunal was composed of Professor R.Y. Jennings, President Judge S.M. Schwebel, Dr. A.S. El-Kosheri, Mr. K. Highet, Professor R. Higgins.

third parties. But this special category of treaties also represents a legal reality which necessarily impinges upon third states, because they have effect *erga omnes*. On the other hand, the ICJ rejected the *erga omnes* nature of the boundary treaty in the case concerning *Frontier Dispute (Burkina Faso/Mali)*,[42] in which it found that a possible boundary treaty between both States would not be opposable to Niger.

There is a problem related generally to *pacta tertiis*, but particularly important in the case of objective regimes. First, the agreement that organizes (imposes) the objective regime confers rights and obligations on third countries. Most often, the rights and obligations are closely related. The VCLT in Arts. 35-36, provides for a procedure that conditions the effectiveness of agreements with third countries on their consent. Objective regimes are not exempted from these provisions.[43] If this view is correct, all countries subject to the objective regime should be required by the parties to the agreement to accept their obligations in writing. Meanwhile, the practice as regards the legal situation of third countries has departed from such a formalized requirement. It is unclear whether consent should take the form of an express consent, or can be a weaker and less formal assent. Moreover, one can encounter the opinion that the construction of consent to submit to an objective regime is similar to acquiescence as a condition for the opposability of the emerging customary norm. Protest is of key importance in relieving the state of its obligations in this situation. This proposal is very tempting and in line with the informal nature of international law, but at the same time it should be borne in mind that the jurisprudence of international courts implies the principle that restrictions on state sovereignty cannot be presumed.

States have a certain freedom to react to international agreements concluded by other states, especially when it comes to protecting their rights. In a decentralized system of international law, each state assesses its own legal situation and, if necessary, may take such measures as it deems necessary to protect its rights.[44] In this case, protest remains the basic tool, although the use of countermeasures cannot be ruled out, in accordance with the rules governing the international responsibility of States. Contrary to the views of some doctrines, the possibility of counteracting the conclusion and application of an agreement in the event of its breach of other

[42] ICJ Rep 1986, p. 554, at 577-578, para. 46.

[43] Wyrozumska, *supra* note 27, p. 314.

[44] *Cf.* arbitral award, *Air Service Agreement* case, RIAA 18, 416, para. 81: "Under the rules of present-day international law, and unless the contrary results from special obligations arising under particular treaties, notably from mechanisms created within the framework of international organisations, each State establishes for itself its legal situation vis-à-vis other States. If a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through 'countermeasures'."

international obligations by the parties to the agreement seems doubtful. The exception is the breach of *erga omnes* obligations provided for in Art. 48 of the Draft articles on Responsibility of States for Internationally Wrongful Acts.

Even if we accept a view that boundary treaties can be considered as objective regimes, the question arises whether this is correct in respect of all boundary treaties.

J. Tyranowski[45] drew a distinction between three categories of boundary treaties:

a. treaties establishing boundaries, and therefore confirming a title to territory. This category is very large and includes i.a. peace treaties containing provisions on territorial arrangements;
b. treaties complementary to the establishment of a boundary. It is unclear whether treaties confirming the frontier (including recognition) belong to this category, especially if concluded with third States.
c. treaties establishing a special regime of the boundary. They can contain provisions providing for a recognition or confirmation of the boundary, and a detailed description (demarcation) of the frontier.[46]

Seen from the above perspective, the 1970 Warsaw Treaty cannot be classified as a boundary treaty. Its significance lies in the recognition of the border by a third country (in relation to the creation of the border), which is a condition for normalization. It is much easier to accept the thesis that the boundary system is based on the Görlitz agreement and it is opposable *erga omnes*.

5. THE ODER-NEISSE BOUNDARY AND THIRD STATES

Notwithstanding possible *erga omnes* character of boundary treaties under international law, Poland undertook numerous attempts to get her Western frontier confirmed (recognized) by third States. It seems that the Polish government was aware of the relatively weak legal basis of the border, even though the Polish title became stronger and stronger with the lapse of time. In particular, Poland expected the Great Powers to confirm the Potsdam decision. It was quite easy to obtain such a statement from the USSR in several legal instruments, including in particular Art. 5 of the Polish-Soviet treaty of 8 April 1965 on friendship, cooperation and mutual assistance. As to other communist States, reference to the Oder-Neisse boundary

[45] Tyranowski, *supra* note 37, p. 112.

[46] A number of rules concerning boundary treaties can be found in the modern jurisprudence of the ICJ on territorial disputes, referred to by H. Thirlway, *Territorial Disputes and Their Resolution in the Recent Jurisprudence of the International Court of Justice*, 31 Leiden Journal of International Law 117 (2018); Shaw, *supra* note 36; M.G. Kohen, *La relation titres/effectivités dans la jurisprudence récente de la Cour internationale de justice (2004-2012)*, in: D. Alland et al. (eds.), *Unité et diversité de droit international. Ecrits en l'honneur du Professeur Pierre-Marie Dupuy*, Brill, Leiden: 2014, p. 599.

can be found in a treaty with Czechoslovakia of 13 June 1958 which was based on the Potsdam agreement, as well as the treaty of friendship concluded with the GDR on 15 March 1967. Some other treaties (including an agreement with Romania of 6 April 1967, and with Hungary of 16 May 1968) provided for guarantees of the inviolability of borders and territorial integrity of Poland, although they did not refer directly to the Oder-Neisse boundary. As to the Western States, France supported the final character of the Poland's Western boundary (we refer here to e.g. a speech of General Ch. De Gaulle in the Polish Parliament on 8 September 1967). The USA and UK did not question the boundary, but on several occasions they referred to the rights and responsibilities of the Four Powers with respect to Germany as a whole, which suggests that the issue of the border remained somehow open. The position of the Four Powers in relation to the Polish-German boundary was finally settled with the conclusion of the 2+4 Treaty on 12 September 1990.

FINAL REMARKS

The German Bundestag ratified the Warsaw Treaty on 17 May 1972. On the same day it passed a resolution stating that the treaty concerned the renunciation of the use of force in mutual relations; that it was a kind of a modus vivendi; and that a future unified Germany would not be bound by the treaty. The resolution was necessary in order to satisfy the requirements of German constitutional law. However it was illogical, taking into account the concept of the identity of state in international law. The FRG claimed to be a state identical to the German Reich (i.e. the German state created in 1871). The identity of the state consists in the identity of international law and obligations, and not in the physical identity of all elements of the state (territory, population, state authority). Thus, in the Warsaw Pact Germany confirmed the border on behalf of the German state (separate from East Germany, which was a new state), and a possible future sovereign resulting from the (then) hypothetical unification of both German states would be bound by this recognition decision. Such reasoning was confirmed by the 2+4 Treaty, as well as the Polish-German treaty of 14 November 1990 on the confirmation of the existing Polish-German boundary. *Nota bene*, the significance of the 1990 treaty between Poland and the (reunified) FRG is the same as the 1970 Warsaw Treaty between Poland and the "old" FRG.