

United Nations Conference on the Law of Treaties

Vienna, Austria
Second session
9 April – 22 May 1969

Document:-
A/CONF.39/SR.14

Fourteenth plenary meeting

Extract from the *Official Records of the United Nations Conference on the Law of Treaties, Second Session (Summary records of the plenary meetings and of the meetings of the Committee of the Whole)*

“ if the treaty so provides ” implied that there was already an agreement, but the parties could have agreed in some manner other than in the treaty.

76. The PRESIDENT said that the point made by the representative of Tanzania would be considered by the Drafting Committee.¹⁰

Articles 29 was adopted by 101 votes to none.

77. The PRESIDENT said that the Conference had successfully disposed of the most controversial and difficult subject in the whole field of the law of treaties, the question of the interpretation of treaties. The section on interpretation had been condensed into a few formulas which had been adopted unanimously by the Conference. When the section had first come before the International Law Commission, many had felt that it might be unwise for the Commission to embark on a codification of so difficult a subject. He himself had taken a more optimistic view and was most grateful to the Conference for having proved him right. He wished to pay a particular tribute to the Expert Consultant whose patience and hard work had contributed so much to the gratifying result achieved.

The meeting rose at 5.20 p.m.

¹⁰ No change was made by the Drafting Committee.

FOURTEENTH PLENARY MEETING

Wednesday, 7 May 1969, at 10.45 a.m.

President: Mr. AGO (Italy)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 (continued)

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE (continued)

Statement by the Chairman of the Drafting Committee on articles 30-37

1. Mr. YASSEEN, Chairman of the Drafting Committee, said that articles 30 to 34 constituted Part III, section 4, of the draft convention (Treaties and third States) and articles 35 to 37 Part IV (Amendment and modification of treaties). Part IV had contained an article 38, entitled “ Modification of treaties by subsequent practice ”, which had been deleted by the Committee of the Whole.¹ The Drafting Committee had made only a few changes in the titles and texts of articles 30-37.

2. In the text of article 31, the Drafting Committee, in the light of an observation in the Committee of the Whole, had deleted the word “ third ” before the word “ State ”. It had also put the verb “ accept ” in the present tense in the concluding part of the sentence.

¹ See 38th meeting of the Committee of the Whole, para. 60.

3. The Drafting Committee had slightly altered the text of article 34, as approved by the Committee of the Whole following the adoption of the amendments submitted by Syria (A/CONF.39/C.1/L.106) and Mexico (A/CONF.39/C.1/L.226). In that text, the words “ recognized as such ” qualified only “ a customary rule of international law ”, but the Drafting Committee had found, when considering the Mexican amendment, that the intention had been to mention in article 34 the sources of law specified in Article 38 of the Statute of the International Court of Justice, and to apply the word “ recognized ” not only to customary rules but also to the general principles of law. The words “ recognized as such ” had therefore been placed at the end of the sentence. The title of the International Law Commission's text no longer fitted the wording approved by the Committee of the Whole, which referred both to international custom and to general principles of law. The Drafting Committee had therefore amended the title to read: “ Rules set forth in a treaty becoming binding on third States as rules of general international law. ”

4. The PRESIDENT invited the Conference to consider articles 30 to 37, as approved by the Committee of the Whole and reviewed by the Drafting Committee.

Article 30²

General rule regarding third States

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

Article 30 was adopted by 97 votes to none.

Article 31²

Treaties providing for obligations for third States

An obligation arises for a State from a provision of a treaty to which it is not a party if the parties intend the provision to be the means of establishing the obligation and the State expressly accepts that obligation.

5. Mr. PHAM-HUY-TY (Republic of Viet-Nam), introducing his delegation's amendment (A/CONF.39/L.25), said that the establishment of an obligation for a State which was not a party to a treaty was an important matter. Because of its importance, the obligation must be accepted by the third State in a form which could not give rise to any misunderstanding and which involved no risk of tendentious interpretation. The words “ expressly accepts ” could be understood in the widest sense as embracing acceptance by solemn declaration or any other form of oral acceptance which did not provide the necessary safeguards. It was therefore desirable that third States, and particularly developing countries, should express their willingness to accept an international obligation in writing only. His delegation regarded

² For the discussion of articles 30 and 31 in the Committee of the Whole, see 35th and 74th meetings.

An amendment to article 31 was submitted to the plenary Conference by the Republic of Viet-Nam (A/CONF.39/L.25).

any other form of acceptance as inadequate. It had therefore proposed the addition of the words "in writing" after the words "that obligation".

6. Sir Francis VALLAT (United Kingdom) said that he appreciated the reasons for the amendment by the Republic of Viet-Nam, but he thought it ran counter to the fundamental principle of international customary law underlying the convention, namely that States were free to bind themselves otherwise than by written treaties. Acceptance of the amendment would represent a departure from that principle and would restrict the freedom of States to accept contractual obligations otherwise than in writing. The United Kingdom delegation was therefore unable to vote in favour of the amendment.

7. Mr. NASCIMENTO E SILVA (Brazil) said he agreed with the United Kingdom representative.

8. Mr. YASSEEN (Iraq) said that he had some sympathy with the argument which the United Kingdom representative had advanced against the amendment. However, the situation was an exceptional one, because article 31 concerned the obligations arising for a third State as a result of treaties concluded by other States. All appropriate safeguards had to be provided in such a case. The International Law Commission had realized that, since it had inserted the word "expressly". But he was not certain whether that word was sufficient, and his delegation would therefore vote in favour of the proposed amendment.

The amendment by the Republic of Viet-Nam (A/CONF.39/L.25) was adopted by 44 votes to 19, with 31 abstentions.

Article 31, as amended, was adopted by 99 votes to none, with 1 abstention.³

Article 32⁴

Treaties providing for rights for third States

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

2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

9. Mr. USENKO (Union of Soviet Socialist Republics), introducing the amendment submitted by Hungary and the USSR (A/CONF.39/L.22), said that article 32 established a rule whereby a right arose for a State from a provision of a treaty when the

parties to that treaty were prepared to accord it that right, and the State assented thereto. There was, however, an important exception to that rule which was not mentioned either in article 32 or in any other article in the convention. It was the rights of States enjoying most-favoured-nation treatment, with which the amendment was concerned. It would be recalled that under the terms of a treaty containing a most-favoured-nation clause, each of the States parties to that treaty was obliged to accord the other parties forthwith the rights and privileges it accorded or would accord to other States with regard to the matters covered by the treaty, independently of the consent of the parties to the treaty.

10. There was no doubt that the most-favoured-nation system was a source of State rights arising from treaties to which the States concerned were not parties, and such an eminent jurist as Anzilotti, after reviewing the various cases in which rights could arise for third States, wrote: "Of particular importance in international relations is what is known as the most-favoured-nation clause, by virtue of which a State acquires the right to claim for itself the advantages stipulated in conventions concluded by other States."⁵ In Karl Strupp's "Dictionary of International Law", treaties on most-favoured-nation treatment were even described as "typical" treaties granting rights to third States.⁶ It was a characteristic and most important exception to the rule stated in article 32. The most-favoured-nation clause had an important place in agreements concluded between States and might be said to serve as a basis for world-wide international economic relations.

11. Besides, the most-favoured-nation system was the only possible basis for the grant of the preferences which the developed countries must accord unilaterally to the developing countries under the decision taken by the United Nations Conference on Trade and Development (UNCTAD). Most-favoured-nation treatment was the basis for preferences in the sense that preferences represented more favourable treatment than most-favoured-nation treatment. If there was no most-favoured-nation treatment it was impossible to determine what a preference was, because there was no basis for comparison. That was why UNCTAD had supported the most-favoured-nation principle at its session in 1964 and had confirmed it during its second session at New Delhi. The principle was applied not merely in international economic relations, but in other agreements connected with other spheres of international life.

12. The question arose whether article 32 could not be interpreted as directed against States enjoying most-favoured-nation treatment, because most-favoured-nation treatment created rights for a third State independently of the consent of the parties to the treaty, whereas article 32 provided for the grant of those rights only with their consent. The matter had

³ An amended text was adopted at the 28th plenary meeting.

⁴ For the discussion of article 32 in the Committee of the Whole, see 35th and 74th meetings.

An amendment was submitted to the plenary Conference by Hungary and the Union of Soviet Socialist Republics (A/CONF.39/L.22).

⁵ D. Anzilotti, *Corso di diritto internazionale*, 4th ed. (Padua, 1955), vol. I, pp. 358 and 359.

⁶ Karl Strupp, *Wörterbuch des Völkerrechts*, ed. H.-J. Schlochauer (Berlin, 1962), vol. III, p. 546.

arisen in the International Law Commission, which had expressed the unanimous opinion that article 32 was not to be interpreted as infringing the rights of States enjoying that treatment.⁷ In its statement at the 35th meeting of the Committee of the Whole the USSR delegation had already observed that article 32 should only be adopted subject to that interpretation. No delegation had disputed that statement, which showed that the USSR delegation had soundly expressed the consensus of the Committee of the Whole.

13. The purpose of the amendment, therefore, was to insert into the convention a provision which had been approved unanimously by the International Law Commission when it drafted article 32 and confirmed by the Committee of the Whole when it considered the article. The amendment brought a clarification essential for avoiding any confusion in the future. The officials responsible for applying the convention could not be expected to inquire in each particular case in what way article 32 should be interpreted; they would not be able to do that without consulting the preparatory work. Consequently they must be given a clear text in the convention.

14. Some might perhaps object that the International Law Commission was currently engaged in drawing up a convention on the most-favoured-nation clause and that it would be better to await the results of its work. His delegation believed, however, that the question was so important that a provision stating that article 32 did not affect the rights of States which enjoyed most-favoured-nation treatment should be included in the convention. Delegations of Western countries had on occasion submitted amendments which the Soviet Union delegation considered as self-evident but it had not opposed them. His delegation hoped that all delegations would display a similar understanding and that the amendment would be referred to the Drafting Committee.

15. Mr. ŠMEJKAL (Czechoslovakia) explained that his delegation had at the outset not felt altogether sure that article 32 needed to be rounded off by means of a provision such as that proposed by Hungary and the USSR. The Czechoslovak delegation had had in mind especially the fact that the International Law Commission had confirmed without the least ambiguity that article 32 could not affect the application of the most-favoured-nation clause.

16. On mature reflexion, however, the Czechoslovak delegation had been convinced that the matter was of such importance that the International Law Commission's opinion — which, moreover, had not met with any objection in the Committee of the Whole — should be incorporated in some way in article 32.

17. The wording proposed by Hungary and USSR could not in any way prejudice the results of the special study on which the International Law Commission was currently engaged. It merely involved taking note of a factual situation and created no difficulty of a

theoretical nature. If drafting problems nevertheless arose, it should be possible, with the help of the Drafting Committee, to find a solution acceptable to all. The amendment would make article 32 clearer and would be exactly in keeping with the ideas already expressed by the representative of Czechoslovakia at the 35th meeting of the Committee of the Whole.

18. Mr. KHASHBAT (Mongolia) said that paragraph 1 of article 32, which accorded rights to third States subject to their assent, laid down a perfectly sound rule, but that rule raised the question of the rights of States enjoying most-favoured-nation treatment. It was a question affecting the interests of a number of States, most of them developing countries. It was of such importance that it had been discussed at length by the United Nations Conference on Trade and Development in 1964, and General Principle Eight of the Final Act of UNCTAD stated very clearly that the most-favoured-nation clause should be observed in international trade.⁸ At the first session of the United Nations Conference on Trade and Development 78 delegations had voted for that principle and only 11 against it. Not a single delegation from a socialist or a developing country had cast a negative vote. That showed clearly that the vast majority of the members of the international community attached particular importance to the most-favoured-nation system and regarded it as one of the fundamental principles of the development of international relations.

19. Moreover, none of the States which had opposed the statement of the principle had challenged the importance of the clause; they had all raised purely formal and rather artificial objections, none of which had been sustained by UNCTAD.

20. The question was also the subject of a special study by the International Law Commission — a further proof of its importance. The Commission had already made it clear that article 32 of the draft convention on the law of treaties must in no case affect rights deriving from the most-favoured-nation system.

21. The Mongolian delegation therefore supported the amendment submitted by Hungary and the Soviet Union.

22. Mr. OTSUKA (Japan) said that, in his delegation's view, the question of most-favoured-nation treatment did not come within the scope of article 32. It was true that under the most-favoured-nation clause a third State X might appear to be a beneficiary of a right under a treaty concluded between two other States A and B. However, that status as a beneficiary was more apparent than real, for the benefit accruing to State X did not arise from the treaty which contained the substance of the benefit in question but from the agreement which contained the most-favoured-nation clause. The treatment in question was extended to State X, which was only a third party to the treaty, by virtue of a provision in the agreement between

⁷ See *Yearbooks of the International Law Commission, 1964*, vol. II, p. 176, para. 21, and 1966, vol. II, p. 177, para. 32.

⁸ See *Proceedings of the United Nations Conference on Trade and Development*, vol. I (Final Act and Report) (United Nations publication, Sales No.: 64.II.B.11), pp. 10 and 11.

States A and X and not by virtue of the treaty between States A and B. In fact, the treaty between States A and B did not provide for the treatment to be extended to the third State X.

23. The Japanese delegation therefore believed that the amendment by Hungary and the USSR had no relevance to article 32, and it would accordingly vote against that amendment.

24. Mr. BEVANS (United States of America) said that he would vote against the amendment by Hungary and the USSR. The insertion of the proposed new paragraph in article 32 would merely create confusion, in the sense that States would seek to avail themselves, under article 32, of rights which the provision in no way intended to accord them. Most-favoured-nation treatment was enjoyed by virtue of provisions specifically agreed to between the States parties to a treaty. Article 32, on the other hand, dealt with the rights and obligations of States which were not parties to a treaty. The proposed amendment was therefore unnecessary.

25. Mr. TABIBI (Afghanistan) said that the most-favoured-nation system was applied all over the world and in a number of different fields. Consequently its application should not be restricted; on the contrary, it should be encouraged. His delegation would therefore vote for the amendment.

26. Mr. RUEGGER (Switzerland) said that he believed, like the representative of Japan, and for similar reasons, that an express reference to the most-favoured-nation system — which was, of course, of the greatest importance — would be out of place in article 32, for methodological reasons, and also because it would mean taking up a special and quite separate topic. The benefit of most-favoured-nation treatment, which moreover was sometimes questionable, would not necessarily be claimed by the third State on every occasion. Furthermore, the wording proposed by the Drafting Committee for article 32 fully covered the legal situation, since article 32 laid down a general rule.

27. In the circumstances, although Switzerland had some sympathy with the arguments advanced by the Soviet Union delegation, he thought it might perhaps be sufficient if the President merely took note of the statements made by the USSR delegation at the 35th meeting of the Committee of the Whole, referred to in paragraph 21 (d) of the report of the Committee of the Whole (A/CONF.39/L.14), and at the present meeting, in order to dispel any doubts on the matter.

28. Mr. BOLINTINEANU (Romania) said that he considered the new paragraph proposed by Hungary and the USSR to be a useful addition to the provisions of article 32. It was a fact that the most-favoured-nation system had certain special features which gave it a legal status of its own, distinct from the machinery of the provisions relating to third States dealt with in article 32. However, the most-favoured-nation clause was sometimes erroneously regarded in practice and by writers as another form of the provisions in favour of third States. The amendment by Hungary

and the Soviet Union drew attention to the fact that the most-favoured-nation clause gave rise to a special legal system differing from that applied under article 32, and thus the amendment would remove the possibility of any confusion between the two institutions. Consequently the Romanian delegation supported the amendment.

29. Mr. HARASZTI (Hungary) said he wished to make it clear that the sole purpose of the amendment he was proposing to article 32, jointly with the Soviet Union representative, was to prevent article 32 from being interpreted in a way that might hinder the application of the most-favoured-nation clause. He realized that some representatives considered that the amendment was not essential because articles 30 to 34 did not refer to the most-favoured-nations system. But as doubts might arise about the application of that system, the amendment was necessary because it would make the convention much clearer.

30. Mr. ROSENNE (Israel) said that, while not in any way wishing to under estimate the importance of the most-favoured-nations clause, he could not support the amendment because, firstly, it dealt with only part of the problem, and secondly, it prejudged the study of the topic to be undertaken by the International Law Commission, with the assistance of a Special Rapporteur who was in fact the Chairman of the Hungarian delegation, the United Nations Commission on International Trade Law, in accordance with decisions of the General Assembly and other competent bodies.

31. If however the Conference considered it essential to repeat the International Law Commission's reservation on the point in paragraph 32 of the introduction to the report on its eighteenth session,⁹ one possible solution might be to reproduce the comments of the International Law Commission in the final act of the conference, either in the form of a resolution, or as a separate statement. As the sponsors of the amendment had emphasized the interpretative purpose of their proposal, a solution of that kind should satisfy them.

32. Mr. SMALL (New Zealand) said that a State derived its rights solely from the express provisions of a treaty to which it was a party, and not from other treaties. Consequently the amendment by Hungary and the Soviet Union was not strictly relevant to article 32.

33. As it was generally understood that article 32 in no way infringed the rights that States might derive from the most-favoured-nations system, a solution on the lines of that suggested by the representative of Israel would be preferable.

34. The PRESIDENT suggested that the meeting be suspended to enable delegations to consider the suggestions which had been made.

The meeting was suspended at 12 noon and resumed at 12.10 p.m.

⁹ See *Yearbook of the International Law Commission, 1966*, vol. II, p. 177, para. 32.

35. Mr. KHLESTOV (Union of Soviet Socialist Republic) said that representatives seemed to be unanimous in recognizing that the provisions of article 32 as submitted by the Drafting Committee did not affect the interests of States under the most-favoured-nation system. There were, of course, several ways of recording that unanimous interpretation, and the delegations of Hungary and the USSR would have preferred it to be expressly stated in the article. That, however, was more a matter of form than of substance. Subject to that interpretation, the delegations of Hungary and the USSR would not press for a vote on their amendment and would vote for article 32 without change.

36. The PRESIDENT invited the Conference to vote on article 32, it being understood that paragraph 1 did not affect the interests of States under the most-favoured-nation system. He noted that, subject to that reservation, Hungary and the USSR withdrew their amendment.

*Article 32 was adopted by 100 votes to none.*¹⁰

*Article 33*¹¹

Revocation or modification of obligations or rights of third States

1. When an obligation has arisen for a third State in conformity with article 31, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When a right has arisen for a third State in conformity with article 32, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

Article 33 was adopted by 100 votes to none.

*Article 34*¹²

Rules set forth in a treaty becoming binding on third States as rules of general international law

Nothing in articles 30 to 33 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law or a general principle of law, recognized as such.

37. Mr. KHASHBAT (Mongolia) introduced the amendment to article 34 submitted by his delegation (A/CONF.39/L.20). The amendment was designed simply to make the text more precise; if the last line read “general principle of *international law*”, that would avoid any possible confusion with internal law, which could not be a direct source of the law of

treaties. Moreover, the use of that word would be consistent with the general system followed in the convention, in which the distinction between “internal” and “international” law was drawn wherever necessary; that was confirmed by the actual title of article 34, which expressly referred to “rules of general international law”.

38. Sir Francis VALLAT (United Kingdom), introducing his delegation’s amendment (A/CONF.39/L.23), pointed out that article 34 was essentially a saving clause intended to prevent the preceding articles from being construed possibly as excluding the application of the ordinary rules of international law. Article 34 had never been intended as a vehicle for describing the origins, authority or sources of international law, and still less was it intended to open the door to doctrinal differences about the role of general principles of law in the structure of international law as a whole. Views on such matters differed and the Conference should avoid trying to deal with them in an article which should be serving an entirely different purpose.

39. Unfortunately, the text of the article had become heavy and complicated. The Drafting Committee had felt it was precluded from undertaking any substantial revision and the plenary Conference was now required to provide a satisfactory answer. The United Kingdom delegation believed that the drafting technique already used in article 3 and article 77 provided the clue to that answer, for those articles too had saving clauses designed to preserve the rules which would apply “in accordance with international law, independently of the treaty”.

40. If those words were adapted to the needs of article 34, as the United Kingdom amendment suggested, the rather controversial phrase “as a customary rule of international law or a general principle of law, recognized as such” would be deleted. The text would be simpler, the wording would be brought into line with the corresponding paragraphs of articles 3, 77 and 40, and it would be possible to avoid the difficulties which would inevitably arise from the adoption of the amendments submitted by Mongolia (A/CONF.39/L.20) and Nepal (A/CONF.39/L.27).

41. Mr. GALINDO-POHL (El Salvador) said that in its commentary the International Law Commission had stated that article 34 constituted a general reservation designed to preclude an excessively broad interpretation of articles 30 to 33 and to negative any possible implication from those articles that the convention rejected the legitimacy of the process whereby treaty rules might become binding on non-parties as customary rules of international law. However, the Commission had also pointed out that in none of those cases could it properly be said that the treaty itself had legal effects for third States.

42. His delegation considered that it would have been sufficient, in order to avoid interpretations of articles 30 to 33 that were incorrect or too broad, to explain the point in the commentary to those articles or to the articles relating to the process of drawing up a treaty.

¹⁰ An amended text was adopted at the 28th plenary meeting.

¹¹ For the discussion of article 33 in the Committee of the Whole, see 35th and 74th meetings.

¹² For the discussion of article 34 in the Committee of the Whole, see 35th, 36th and 74th meetings.

Amendments were submitted to the plenary Conference by Mongolia (A/CONF.39/L.20), the United Kingdom of Great Britain and Northern Ireland (A/CONF.39/L.23) and Nepal (A/CONF.39/L.27).

43. In any case, his delegation's views on the techniques of codifying international law did not permit it to accept the inclusion of an article whose sole object was to avoid possible errors of interpretation.

44. If article 34 was intended to cover a situation in which the obligation of third States resulted from a treaty, its inclusion in the convention would be justified. But the International Law Commission had stated categorically in paragraph (2) of the commentary that for third States the source of the binding force of the rules formulated in a treaty was custom, not the treaty. Consequently article 34 related to custom; but the Conference was called upon to codify treaty law, not customary law, and consequently the article went beyond the purpose that had been laid down for the Conference.

45. The International Law Commission had stated in the same paragraph of its commentary that it had not formulated any specific provisions concerning the operation of custom in extending the application of treaty rules beyond the contracting States. Article 34 did not state directly and explicitly that custom could extend the application of treaty rules to third States, but it implied and admitted that such a possibility could arise and that, consequently, any treaty, even a bilateral treaty, could be transformed into rules of customary law.

46. Many experts on international law held that the provisions of a treaty could become binding on third States; that was the meaning of article 34. The delegation of El Salvador considered, however, that it was not the rules of a treaty that could have that effect, but its content. As treaty rules, the provisions of a treaty could only produce effects between the parties, but the content of such provisions could give rise to a concordant practice on the part of third States if those States considered that the content of the rules was likely to enable them to solve certain problems of international relations. Such a distinction between treaty rules and their content was by no means merely academic. Sometimes rules were established that were said to be of mixed origin; in other words they were treaty rules as far as the contracting parties were concerned and customary rules in the case of third States.

47. Acts performed in applying a treaty could not be invoked as precedents for the creation of custom, since they arose out of compliance with treaty obligations. Nor could the signing of a treaty, whether or not it was followed by ratification, be invoked as a precedent. The treaty as such and as a set of rules could not serve as a precedent, in the technical sense of the term, for the formation of custom.

48. His delegation could not accept the view that treaties in force between only a few States representing a small fraction of the international community could be transformed into customary rules of international law and become binding on States which, for one reason or another, had not wished to accede to them. The issue was not whether a treaty of that kind had been ratified by a minority or majority of States, but rather to draw a distinction between the sources of obligations

deriving from customary law and those deriving from treaties, and to oppose the tendency to extend the scope of treaty rules.

49. It was undeniable that some rules, such as those contained in the Conventions respecting the laws and customs of war on land and the Regulation of Vienna on the precedence of diplomatic representatives, had been confirmed by the practice of States which had not acceded to those international instruments. The point was that, for States parties to them, those Conventions gave rise to obligations, whereas for third States those obligations derived only from the practice which they themselves had introduced. Accordingly, although the content of those rules was the same, the source of their validity was different: for some States they were rules of treaty law, whereas for others they were custom.

50. In presenting its amendment (A/CONF.39/C.1/L.106) at the first session, the Syrian delegation had argued that for a rule to become binding upon a third State, that State must recognize it as a customary rule of international law.¹³ But the Syrian amendment had not achieved the desired aim, for under present international law a general customary rule was binding on a State even if that State had not accepted it, and the intention of the amendment had apparently been that the obligatory character of a general custom depended on recognition by each State that it had that character. The Syrian delegation's intention was not clearly expressed in the Spanish version of article 34. In Spanish the impersonal expression "*reconocidos como tales*" did not relate to "third States"; for that purpose it would be necessary to use an active verb and say "*llegue a ser obligatoria para un tercer Estado como norma consuetudinaria de derecho internacional cuando aquél la reconozca como tal*". But, even if that idea was clearly expressed, article 34 would create serious problems. The rule would be ambiguous because there were various forms of "recognition", which could be express or tacit, by action or by omission. Moreover, the fact that custom developed rapidly in modern times compelled States to exercise greater caution with respect to a rule which might be binding on them without their consent.

51. His delegation supported the Mongolian amendment (A/CONF.39/L.20) because the addition of the word "international" clarified the text. Jurists, basing themselves on the reference to "the general principles of law recognized by civilized nations" in Article 38 of the Statute of the International Court of Justice, held that those principles, unless otherwise defined, were the general principles of internal law to be found in all systems of law which had attained a certain level of development. That uncertainty should therefore be dispelled and it should be clearly stated that it was a question of the general principles of international law.

52. The United Kingdom amendment (A/CONF.39/L.23) removed the proviso inserted in article 34 at the first session. However, by emphasizing that the reference was to rules which could become binding upon a third State "independently of a treaty", the amend-

¹³ See 35th meeting of the Committee of the Whole, para. 69.

ment implicitly admitted that in such cases it was not a matter of the law of treaties.

53. His delegation regretted that the amendments by Finland (A/CONF.39/C.1/L.142) and by Venezuela (A/CONF.39/C.1/L.223), calling for the deletion of article 34, had been rejected at the first session.

54. His country did not recognize the extensibility of treaties, nor did it agree that the application of treaty rules constituted a precedent for the development of custom. Moreover, treaty rules could not be binding upon third States as customary law, because custom developed in its own way.

55. Mr. SINHA (Nepal) said he preferred the original wording of article 34 as drafted by the International Law Commission. The addition of the words "or a general principle of law recognized as such" made the text imprecise. The expression "general principle of law" in the context of article 34 did not seem to convey the generally accepted meaning of the term as embodied in the Statute of the International Court of Justice.

56. The general principles of law recognized by nations were not peculiar to international law and could also apply in internal law. The International Court had frequently referred to well-established principles, such as the rule that any judgement given by a court was *res judicata* and was therefore binding upon the parties to the dispute. It was obvious that international law applied many principles of internal law, such as those of good faith and abuse of rights.

57. The Nepalese delegation believed that a distinction should be drawn between those general principles of law which derived from internal law in general and constituted a separate source, and the principles of international law derived from custom or treaties.

58. His delegation had therefore submitted an amendment to article 34 (A/CONF.39/L.27) with a view to making the existing text clearer.

59. Mr. SHUKRI (Syria) said that article 34 as it stood was a mere statement of fact, for the rôle played by custom in extending the application of rules contained in a treaty beyond the contracting parties was undeniable. The rules contained in many general multilateral treaties, such as the Regulation of Vienna of 1815, the Declaration of Paris of 1856 and the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations, had become generally accepted rules of customary law and had consequently been applied by third States.

60. Likewise, the scope of application of a number of international treaties formulating general principles of international law had been extended beyond the contracting parties by virtue of the recognition of those principles by third States.

61. The underlying factor in both cases was the recognition given by third States to the principles and rules contained in such treaties. Without that recognition by third States, any attempt to extend the binding force

of a principle contained in a treaty beyond the contracting parties would not only infringe the fundamental rule, laid down in article 30 of the convention, that neither rights nor obligations were created for a third State; it would actually amount to the imposition of obligations on third States, and that would contravene the principle of the sovereign equality of States, the corner-stone of the structure of contemporary international law. That was why, at the first session, the Syrian delegation had submitted an amendment (A/CONF.39/C.1/L.106) which had been adopted by the Committee of the Whole.

62. The Syrian delegation did not think that the United Kingdom amendment (A/CONF.39/L.23) was an improvement on the existing wording, since it lacked clarity. What was meant by the words "that rule" which would be binding upon the third State in accordance with international law, independently of the treaty? The words "that rule" might imply a customary rule, a rule belonging to general principles of law. The idea behind the article was to state an exception to the rule that a treaty had legal force only for the contracting parties, and obviously the exception should be stated in the most unequivocal terms. If the United Kingdom amendment was intended to mean that "that rule" should be recognized as binding upon third States, then the text or article 34 should be kept, since it was clearer. If that was not the purpose of the amendment, it would run counter to the basic concept underlying article 34, namely that an obligation could be created only by consent.

63. Admittedly, it might be argued that the new formula would avoid the differences of opinion that might arise from the words "general principle of law" in the existing text. But that form of words was precisely the one used in Article 38 of the Statute of the International Court of Justice, and what was good for the Statute of the principal judicial organ of the international community was surely good for the law of treaties.

64. It might also be argued that the formula proposed by the United Kingdom delegation was in keeping with the formula adopted for article 77 of the convention. There was, however, a great difference between the two cases. Article 77 dealt with the non-retroactivity of the convention, whereas article 34 set forth a much wider rule, since it regulated the effect of treaties as custom-declaring instruments.

65. The Syrian delegation therefore preferred the Drafting Committee's text to the new wording proposed in the United Kingdom amendment. His delegation had no objection in principle to the Mongolian amendment (A/CONF.39/L.20).

66. Though his delegation appreciated the motive behind the Nepalese amendment (A/CONF.39/L.27), it could not support it.

The meeting rose at 1 p.m.