

" Dr. Yasseen (ILC) in his personal capacity agreed that there was a lacuna in articles 10 and 11 as pointed out by the delegates of India and Japan, and agreed that some provision could be made to cover the position contemplated by the delegate of India." ⁵¹

(Note : The Sub-Committee on draft articles 1 to 22, appointed by the Committee, stated in its report :

"The Sub-Committee examined articles 10 and 11 together and reached the conclusion that it might be preferable to state first the general rule that States are bound by treaties on ratification and that the exception is that they would be bound by treaties upon signature only if they so expressly state in the treaty. The Sub-Committee is also of the opinion that the drafting of these two articles should cover all the cases without leaving any lacuna or creating any doubt. For these reasons, the Sub-Committee would like to modify the two articles so as to read as follows :—

"Article 10 (this corresponds to article 11 of I. L. C.'s text)

Consent to be bound by a treaty expressed by ratification, acceptance or approval

1. The consent of a State to be bound by a treaty is expressed by ratification when :

- (a) The treaty provides for such consent to be expressed by means of ratification ;
- (b) Such consent is not expressed by signature alone as provided in article 11 ;
- (c) The representative of the State in question has signed the treaty subject to ratification ; or

⁵¹ Ibid., p. 6, para 11.

- (d) The intention of the State in question to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

Article 11 (this corresponds to article 10 of I. L. C.'s text)

Consent to be bound by a treaty expressed by signature

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when :

- (a) The treaty provides that signature shall have that effect;
- (b) The intention of the State in question to give that effect to the signature appears from the full powers of its representative.

2. For the purposes of paragraph 1 :

- (a) The initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed ;
- (b) The signatures *ad referendum* of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.

The representative of Japan is of the opinion that article 11 mentioned above should read as follows :

Consent to be bound by a treaty expressed by signature

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when :

- (a) The treaty provides that signature shall have that effect ;
- (b) It is otherwise established that the negotiating States were agreed that signature should have that effect ;
- (c) The intention of the State in question to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. For the purposes of paragraph 1 :

- (a) The initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed ;
- (b) The signature *ad referendum* of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty."

"The Committee next discussed the provisions of articles 10 and 11 in the light of the Sub-Committee's recommendations. The Delegate of India stated that the Committee should set out the principle only, and should not attempt to redraft these articles as that might lead to unnecessary complications. The Delegate of Ghana stated that he accepted the Sub-Committee's recommendations on articles 10 and 11 as re-numbered in the Sub-Committee's Report. He appreciated the point of view of the Japanese delegate on article 11 as renumbered, but felt that it would introduce some degree of uncertainty. The Delegate of Indonesia favoured the retention of the text of these articles as in the ILC's draft. The same view was expressed by the Delegates of Iraq and Japan. The Delegate of Pakistan said that the principles enunciated in the Sub-Committee's Report were acceptable to him. The Delegate of the U.A.R. suggested that in order to fill the lacuna, which

was pointed out by the Delegate of India during the discussions in the Committee on these articles, something should be said in these articles to provide that States shall be bound by treaties upon ratification, and that if they would like to be bound by treaties upon signature they should expressly say so.

"After some further discussion it was decided that the Committee should merely point out the lacunae which existed, and leave it to the Conference of Plenipotentiaries to draft the actual text of the provision.

"The Delegate of Ghana moved that the words "or was expressed during the negotiation" should be deleted from the provisions of article 10. 1(c) and article 11. 1(c). The Delegates of Iraq and the U.A.R. supported the view expressed by the Delegate of Ghana. The Delegate of India stated that he was in favour of the omission of these words from article 10. 1(c), but as to article 11.1(c), the question whether these words should be omitted also from that article depended on what the Conference of Plenipotentiaries proposed to do with regard to linking up of articles 10 and 11. The Delegates of Ceylon, Indonesia, Japan and Pakistan on the other hand wished to retain these provisions as in the ILC's draft."⁵²

(Note : The Committee, in its comments annexed to its Interim Report on the Law of Treaties, stated :

"The majority in the Committee considers that there is a lacuna in these provisions, as no provision has been made to cover cases which do not fall either within article 10 or within article 11. It is felt that such cases are considerable and that a provision should be made, if possible, by linking up the two articles to cover cases which are not covered by the present text of these articles.

The majority is also in favour of the deletion of the words "or was expressed during the negotiation" in article 10.1 (c).

52. Minutes of the 8th Meeting, held on 27th December, 1967, pp. 5 and 6, paras 11, 12 and 13.

The minority in the Committee is in favour of retention of the present text of the Draft Articles.”)

Article 15

(The delegate of India) “also wished the Committee to consider the provisions of article 15 and suggested the deletion of clauses (a) and (b) of that article...”⁵³

(The delegate of Japan) “suggested deletion of article 15”.⁵⁴

(The delegate of Ghana) “generally favoured the retention of article 15 in its present form...”⁵⁵

(Note : The Sub-Committee on articles 1 to 22, appointed by the Committee, stated in its report :

“The Sub-Committee is of the opinion that this Article should be deleted. The State should not become bound by a treaty which has not yet come into force. If, however, the Committee takes the view that this Article should be retained, the Sub-Committee would suggest that the first sentence should be modified so as to read as follows :

“A State should refrain from acts tending to frustrate the object of a proposed treaty;” etc.”)

“The Committee next considered the provisions of Article 15 in the light of the Sub-Committee’s Report. The Delegate of Ghana stated that he agreed to the retention of this Article as in the ILC’s draft subject to the deletion of paragraph (a) of this article. The Delegate of Indonesia wished the text of

53. Minutes of the 4th Meeting, held on 21st December, 1967, p. 3, para 6.

54. Ibid., p. 3, para 8.

55. Ibid., p. 6, para 11.

this article to remain as in the ILC’s draft. The Delegate of India favoured the deletion of both clauses (a) and (b). The Delegate of Iraq favoured the retention of the ILC’s draft. The Delegate of Japan agreed to the deletion of paragraph (a). The Delegate of Pakistan wished the draft to remain as it is. The Delegate of U.A.R. was also in favour of deletion of paragraph (a). The Observer for the International Law Commission speaking in his personal capacity stated that Article 15 dealt with a new norm of International Law, but it was for the Committee to decide whether the provisions of this Article went too far. The Delegate of Ceylon, after hearing the views of the Observer from the International Law Commission, also agreed that paragraph (a) of this Article should be deleted. After some further discussion it was finally agreed that the majority in the Committee would recommend the deletion of paragraph (a) of Article 15 and that the rest of the Article would remain as in the International Law Commission’s draft.”⁵⁶

(Note : The Committee, in its comments annexed to its Interim Report on the Law of Treaties, stated :

“The Committee considers this article to contain a new norm of international law which could be supported as progressive development of international law.

The majority in the Committee is, however, in favour of deletion of clause (a) of this article, as in its view the object of a proposed treaty might not be clear during the progress of negotiations. Some of the delegations are of the view that a provision like clause (a) of this article may hamper negotiations for a treaty.

Some members, however, are in favour of the retention of the present text.”)

56. Minutes of the 8th Meeting, held on 27th December, 1967, pp. 6 and 7, para 14.

Article 16

"...With regard to article 16, the delegate (of Iraq) was in favour of a provision for reservations unless such reservation was incompatible with the nature of the treaty obligation" ⁵⁷

(The Delegate of Ghana) "wanted the Committee to consider whether the traditional rule relating to reservations to treaties should be followed" ⁵⁸

Articles 21 and 22

(The Delegate of India) "expressed the view that provisions of articles 21 and 22 appeared to be contradictory....." ⁵⁹

Article 23

"The Delegate of Ceylon.....regarded the principle of *pacta sunt servanda*, as embodied in article 23, as being fundamental to international legal order, and as such he did not favour any exception to the principle. However, he recognised the need for the said principle being applied in conjunction with other fundamental principles of international law which are equally important, namely, the peremptory norms of international law (*jus cogens*) as embodied in Article 50, the doctrine of supervening impossibility as provided in Article 58, and the doctrine of the fundamental change of circumstances as embodied in Article 59 of the Draft Articles....." ⁶⁰

57. Minutes of the 4th Meeting, held on 27th December, 1967, p. 3, para 7.

58. Ibid., p. 5, para 11.

59. Ibid., p. 3, para 6.

60. Minutes of the 5th Meeting, held on 22nd December, 1967, pp. 1 and 2, para 3.

".....As regards Article 23, the Delegate of Ghana proposed deletion of the phrase "and must be performed by them in good faith" from the provision of that Article. He regarded the phrase to be unnecessary since, in his view, the essence was that the treaty is binding and is performed... ⁶¹

".....Commenting upon Article 23, the Indian Delegate said that even if the phrase "must be performed by them in good faith" is deleted, as was suggested by the Delegate of Ghana, the rest of the provision will still have the same meaning, since the matter of good faith is already implied in the obligation to implement a treaty. He favoured the retention of Article 23 in its present form, since this would give a legal source to the obligation of good faith....." ⁶²

".....The Japanese Delegate favoured retention of Article 23 in its present form....." ⁶³

"The Delegate of Pakistan favoured retention of Article 23 in its present form....." ⁶⁴

(The Delegate of U.A.R.) "favoured retention of Article 23 in its present form....." ⁶⁵

"Dr. Yasseen (International Law Commission) regarded Article 23 to be one of the most important articles and he favoured its retention in its present form, since it served as the legal source of the principle of good faith in the context of the law relating to treaties....." ⁶⁶

61. Ibid., p. 2, para 4.

62. Ibid., p. 2, para 6.

63. Ibid., p. 4, para 8.

64. Ibid., p. p. 4, para 9.

65. Ibid., p. 4, para 10.

66. Ibid., p. 5, para 11.

Article 25

".....While commenting on Article 25, (the delegate of Ceylon) did not think there was room for the contention that transactions entered into prior to independence would continue to apply to former colonial territories after independence....." ⁶⁷

".....As regards Article 25, (the delegate of Ghana) regarded the phrase "the entire territory" to be superfluous. ⁶⁸

"Dr. Yasseen (International Law Commission)..... regarded Article 25 to be a reasonable article....." ⁶⁹

Article 26

(The delegate of India) "suggested a reconsideration of Article 26 by the Sub-Committee, particularly on the question of the effect of an obligation created by a new treaty on an obligation created under an earlier or later treaty on the same subject. This, according to him, had relevance to the provisions of Article 37. He suggested a consideration by the Sub-Committee of the relationship between Articles 26 and 37....." ⁷⁰

"Dr. Yasseen (International Law Commission)..... suggested an examination of Article 26 by the Sub-Committee, and stated that the Commission had spent a long time in the consideration of that article....." ⁷¹

(Note : The Sub-Committee on draft articles 23 to 38, appointed by the Committee, stated in its report :

67. Ibid., p. 2, para 3.

68. Ibid., p. 2, para 4.

69. Ibid., p. 5, para 11.

70. Ibid., p. 3, para 6.

71. Ibid., p. 5, para 11.

"6. Provisions applicable to the amendment or revision of treaties and the conclusion of later treaties relating to the same subject matter were necessarily inevitable when circumstances changed requiring appropriate variations in the text of a treaty. If it was intended that the subsequent change in relation to the same subject matter was in substitution of the earlier agreement, or was so incompatible with the earlier version that the two were incapable of being applied together, the former treaty was effectively terminated or suspended according to Article 56.

7. But if the divergence or variation from the original version in relation to the same subject matter was not deemed by the parties to be inconsistent or was expressly made subject to such earlier treaty, the two treaties are regarded as successively co-existing. In relation to such successive treaties relating to the same subject matter Article 26 distinguished between (a) cases where there was complete identity of parties in regard to the successive treaties—(clause 3); and (b) cases where all the parties to the earlier treaty were not parties to the later treaty—(clause 4). In regard to the case in (a), there was in effect a *pro tanto* amendment of the first treaty. In regard to case (b), Article 26 envisaged three separate positions: (i) as between States which were parties to both the earlier and the later treaty only such parts of the earlier treaty as were compatible with the later treaty were saved; (ii) as between a State which was a party to both the earlier and the later treaty and a State which was party only to the earlier treaty, the earlier treaty prevailed; and (iii) as between a State which was party to both treaties and a State party only to the later treaty, obligations *inter se* were governed by the later treaty. The Sub-Committee respectfully agrees with the rules so formulated and recommends their endorsement by the Committee."

Articles 27, 28 and 29

".....While commenting upon Articles 27, 28 and 29 relating to the rules of interpretation of treaties, (the Delegate

of India) pointed out that the basic rule of interpretation is embodied in clause (1) of Article 27. He was of the view that the provisions of clause (3) of that Article were not complete, as he considered that reference to "preparatory work", which will throw light on the intention of the parties should also be included in this paragraph, sub-clause (d), rather than be given an altogether subsidiary or supplementary position in Article 28 as in the present draft. If a suitably drafted new clause (d) is added to Article 27 in paragraph (3), Article 28 could be deleted.....⁷²

".....As regards Article 29, (the Delegate of Pakistan) felt that there was some lacuna in the provisions of the Article, in as much as it did not provide for a situation where there was a conflict between two authenticated versions....."⁷³

(The Delegate of U.A.R.) "did not regard the provisions of Articles 27, 28 and 29 to be complete, in as much as the element of real intention of the parties to a treaty was missing therefrom. He suggested inclusion of a new provision in article 27 which would make the real intention of the parties the most important criteria in the matter of interpretation of treaties....."⁷⁴

"Regarding the rules of interpretation as embodied in Articles 27, 28 and 29 (Dr. Yasseen of the ILC) stated that Article 27 embodied the view that the text of a treaty is the most important source of ascertaining the real intent of the parties. He pointed out that the texts of the articles 27 and 28 did not overlook the necessity of determining the real intention. As regards the preparatory work, he was of the view that even though it was one of the means of ascertaining

72. Ibid., p. 3, para 6.

73. Ibid., p. 4, para 9.

74. Ibid., p. 4, para 10,

the real intention, yet it does not appear very helpful. It is generally agreed that although clear in the preparatory work, an idea cannot be retained unless it is somewhat reflected in the text. He pointed out that in some of the municipal laws reference to preparatory work, for the purposes of interpretation, is not permitted.

"While commenting on Article 29, he said that the exception provided in clause 3 referred to the last phrase of clause 1....."⁷⁵

"The U.A.R. Delegate regarded it necessary to state in article 27 that the basic rule of interpretation is based on seeking the real intention of the parties to a treaty....."⁷⁶

(Note : The Sub-Committee on draft articles 23 to 38, appointed by the Committee, stated in its report :

"2. The Sub-Committee acknowledged the fact that there was a cleavage of opinion in regard to how the question of interpretation of treaties should be approached. There was on the one hand those who considered the task of interpretation to be the elucidation of the text of a treaty and on the other those who held the view that the discovery of the true intention of the parties to be the paramount function of interpretation. While it is basic to the whole process of interpretation that the goal should be the ascertainment of the true intention of the parties, the Sub-Committee concluded that the primary emphasis should be placed on the intention as evidenced by the text, that is to say, the actual terms of the treaty, and that it would not be either necessary or desirable to state specifically in Article 27 that the object of interpretation was the discovery of the intention of the parties. This was manifest from the formulation of the general rule in

75. Ibid., p. 5, para 11.

76. Ibid., p. 6, para 14.

clause 1 which was a succinct statement of the essential rule. By the further elaboration of what was meant by the expression "the context" in clause 2 and by the indication of additional sources of interpretation in clauses 3 and 4, the International Law Commission draft has taken full account of the paramountcy of the element of intention. The Sub-Committee, therefore, feels (subject to the reservation made by the Indian delegate alone which is discussed in the following paragraph) that the draft rules of interpretation are quite adequate to the ascertainment of intention and are a coherent body of rules, emphasising the unitary character of the interpretative process.

3. Although the representative of India suggested the assimilation of Article 28 to Article 27, as a new sub-clause (d) to clause 3 of Article 27, the majority felt that the distinction contemplated in the two Articles should be maintained. They felt that a formulation of the rule which did not stress sufficiently the primacy of the text in relation to extrinsic sources of interpretation would tend to considerable uncertainty and that there should be no room for recourse to preparatory material if the textual reading established a clear meaning in accordance with the rules specified in Article 28. While we appreciate that no rigid distinction is possible and that a nexus exists between the several sources, we are unable to accord preparatory material a parity of status with the primary criteria mentioned in Article 27 and think that the two Articles should be separate and distinct.)

".....As regards Article 28 of the Draft Articles, the Delegate of Ghana suggested the deletion of the words "to confirm the meaning resulting from the application of Article 27". He also wished para 4 of Article 27 to be deleted. The Delegate of Indonesia agreed with the views of the majority in the Sub-Committee that no amendments or modifications to Articles 27 and 28 were required. The Delegate of India

preferred the inclusion of "preparatory work" as a source of determination of real intention of the parties, and wished it to be included as clause (d) in paragraph 3 of Article 27. In his view, the provisions of article 28, relating to "preparatory work", assign it a secondary place in the interpretation of treaties, and he suggested that "preparatory work" be included in article 27 so as to make it a primary means of interpretation and that article 28 could then be deleted. The Delegate of Iraq favoured retention of the article in the form drafted by the International Law Commission. The Delegate of Pakistan preferred the present distinction between primary and secondary means of interpretation as embodied in articles 27 and 28 of the draft articles and wanted them to be retained in the present form. The Delegate of U.A.R. wanted it to be specifically stated that the main aim of interpretation is to look for the real intention of the parties. The Delegate of Ceylon preferred the present distinction between the primary and secondary means of interpretation as made in articles 27 and 28 of the Draft Articles and emphasised that the real intention of the Parties should be determined from the text of the treaty".⁷⁷

(Note : The Committee, in its comments annexed to its Interim Report on the Law of Treaties, stated :

"The Committee discussed the provisions of these two articles in great detail. There was some difference of opinion in the Committee in regard to how the question of interpretation of treaties should be approached. There was on the one hand those who considered the task of interpretation to be the elucidation of the text of a treaty and on the other hand those who held the view that the discovery of the true intention of the parties to be the paramount function of interpretation. One view expressed was that the provisions of these articles do

77. Minutes of the 25th Meeting, held on 28th December 1967, pp. 2 and 3, para 6.

not sufficiently take into account that the main aim of interpretation is to look for the real intention of the parties and that these articles should be suitably modified to bring out that position. Another view that "preparatory work" as a source of determination of real intention of the parties should be included in Article 27 so as to make it a primary means of interpretation and that this source should not be assigned a secondary place in Article 28. A suggestion was, therefore, made for assimilation of Article 28 to Article 27 as a new sub-clause (d) to clause 3 of Article 27.

The majority whilst appreciating that it is basic to the whole process of interpretation that the goal should be the ascertainment of the true intention of the parties concluded that the primary emphasis should be placed on the intention as evidenced by the text, that is to say, the actual terms of the treaty and that it would not be either necessary or desirable to state specifically in Article 27 that the object of interpretation is the discovery of the intention of the parties. According to the majority view, this is manifest from the formulation of the general rule in clause (1) which is a succinct statement of the essential rule. They feel that by the expression "the text" in clause (2) and by the indication of additional sources of interpretation in clauses (3) and (4), the International Law Commission's draft has taken full account of the paramountcy of the element of intention. The majority, therefore, is of the opinion that the draft rules of interpretation as formulated by the International Law Commission are quite adequate to the ascertainment of intention and are an inherent body of rules emphasising the unitary character of the interpretative process. The majority is also of the view that the distinction contemplated in Articles 27 and 28 should be maintained. They feel that a formulation of the rule which does not stress sufficiently the primacy of the text in relation to the extrinsic sources of interpretation would tend to considerable uncertainty and that there should be no room for recourse to preparatory material

if the textual reading establishes a clear meaning in accordance with the rules specified in Article 27. The majority is further of the view that though no rigid distinction is possible and that a nexus exists between the several sources, it is unable to accord preparatory material a parity of status with the primary criteria mentioned in Article 27 and is of the opinion that the two articles should be separate and distinct.")

Articles 30, 31 and 32

"The Delegate of Ceylon.....favoured the retention of Article 32 as formulated in the Draft." ⁷⁸

"Commenting on Article 32, (the Delegate of Pakistan) favoured a formulation of the Article, as would provide for the point of time at which the expression of a contrary intention by the third party has to be indicated....." ⁷⁹

".....As regards Articles 30, 31 and 32, (the Delegate of U.A.R.) suggested that if the word "express" is added between "without its" and "consent" in Article 30, Articles 31 and 32 can be dispensed with." ⁸⁰

"Dr. Yasseen (International Law Commission)..... pointed out that articles 30 to 32 were the product of a compromise between divergent views in the International Law Commission, as some members in the International Law Commission wanted to separate the rights from obligations, and that that was the reason for the existence of these three separate articles....." ⁸¹

78. Minutes of the 5th Meeting, held on 22nd December, 1967, p. 2, para 3.

79. Ibid., p. 4, para 9.

80. Ibid., p. 4, para 10.

81. Ibid., p. 5, para 11.

".....The Delegate of Ghana reiterated his earlier suggestion for the inclusion of the word "express" before the word "consent" in Article 30. As regards Article 32, he suggested deletion of the last sentence in clause 1, and the inclusion of the word "expressly" before "assents thereto". The Delegate of India agreed with the Delegate of Ghana in regard to his suggestion for the amendment of Articles 30 and 32....." ⁸²

".....As regards Article 30 (the Delegate of U.A.R.) suggested that the rights or obligations concerning third parties must be based on the express consent of those parties. He regarded this point to be a crucial point for the Asian and African States....." ⁸³

(Note : The Sub-Committee on draft articles 23 to 38, appointed by the Committee, stated in its report :

"4. In regard to the question of rights conferred on third States, the Sub-Committee is of the view that, as in the case of obligations, the express consent of such third State should be a condition precedent to their creation. Whatever may be the true position in regard to stipulations for the benefit of a third party in systems of municipal law, in international relations the express consent of such third State should, in our opinion, be required even in the case of the conferment of rights, consistently with the principle of the sovereign equality of all States.

5. The Sub-Committee also felt that such a requirement would also reduce any uncertainty in regard to the question whether a third State has assented to the conferment of the right. In our view the insistence on consent by the third State or States would in the case of multilateral treaties tend to the

82. Ibid., p. 6, para 12.

83. Ibid., p. 6, para 14.

effective participation of all States in treaties of a law-making character. The Sub-Committee also felt that if express consent of the third State was stipulated as a requirement it would help to reduce the danger of the creation of rights which carry with them contingent obligations to which such third State may well be deemed to have assented by its silence. Accordingly, the Sub-Committee recommends the amendment of Article 32 by the deletion of all the words commencing : "and the State assents thereto" to the end of paragraph 1 and the substitution therefor of the words : "and the State has expressly consented thereto." The Sub-Committee also recommends the amendment of Article 30 by the interpolation of the word "express" before the word "consent".)

"As regards the treaties and the rights and obligations of the third States, the Delegate of Ceylon was prepared to accept the amendments to articles 30 and 32 as suggested by the Sub-Committee. The Delegate of Ghana was not sure whether or not, to support the proposal regarding addition of the word "express" before "consent" in Article 30. However, he favoured an amendment as would provide for a time limit for repudiation of the rights and obligations by a third State concerned. The Delegate of Indonesia agreed with the recommendation of the Sub-Committee on the said articles. The Delegate of India also preferred the recommendation of the Sub-Committee. The Delegate of Iraq preferred the retention of the draft articles as formulated by the International Law Commission. The Delegate of Japan did not agree to the amendments proposed by the Sub-Committee to the draft article 32, and he preferred its retention in the present form. The Delegate of Pakistan was not in favour of qualifying the word "consent" as used in articles 30 and 32. The Delegate of the U.A.R. preferred the Sub-Committee's recommendations." ⁸⁴

84. Minutes of the 9th Meeting, held on 28th December, 1967, pp. 3 and 4, para 7.

(Note : The Committee, in its comments annexed to its Interim Report on the Law of Treaties, stated :

"The Committee considered the provisions of this group of articles which deal with the rights and obligations of third States. The majority in the Committee is of the view that Article 32 be amended by deletion of the words "and the State assents thereto. Its assent shall be presumed so long as the contrary is not indicated" and substitution therefor of the words "and the State has expressly consented thereto". The majority is also of the opinion that Article 30 be amended by interpolation of the word "express" before the word "consent". The majority is of the opinion that as in the case of obligation the express consent of such third State should be a condition precedent to the creation of a right also. Whatever may be the true position in regard to stipulations for the benefit of a third party in the systems of municipal law, in international relations, the express consent of such third State should be required even in the case of the conferment of rights consistently with the principle of sovereign equality of States. The majority feel such a requirement would also reduce any uncertainty in regard to the question whether a third State has assented to the conferment of the right and insistence of such consent by the third State or States would in the case of multilateral treaties tend to the effective participation of all States in treaties of a law-making character. The majority is also of the view that if express consent of the third State is stipulated as a requirement it would help to reduce the danger of the creation of rights which carry with them contingent obligations to which third State may well be deemed to have assented by its silence.

The minority, however, is of the view that the draft articles as drawn by the International Law Commission are adequate.")

Article 34

"..... As regards Article 34, (Ceylonese delegate's) position was that though recognition of a rule of customary

international law was an essential element in the formation of custom as a source of international law, it was not necessary to state it in this Article."⁸⁵

Articles 35, 36 and 38

"The Delegate of Pakistan said that he agreed with the view of the Delegate of Ceylon that treaties should be in writing as that would ensure against any element of uncertainty and this would apply to amendments to treaties also. In this connection he invited the attention of the Committee to articles 35, 36 and 38 which, in his view, were objectionable as the provision of those articles would appear to permit modifications of treaties orally."⁸⁶

"As regards Article 38 relating to modification of treaties by subsequent practice, (the Delegate of India) mentioned that part of it had already been referred to in Article 27, para 3 (b) in connection with aids to interpretation. He enquired as to what would be the conditions for the application of Article 38 and whether it would be subject to Article 37, when only a few States decided to modify the treaty; he suggested an examination of these questions by the Sub-Committee."⁸⁷

".....The Japanese Delegatesuggested the deletion of Article 38."⁸⁸

"The Delegate of Pakistan.stressed the need for an amendment to an existing treaty to be in writing. His view

85. Minutes of the 5th Meeting, held on 22nd December, 1967, p. 2, para 3.

86. Minutes of the 4th Meeting, held on 21st December, 1967, p. 4, para 9.

87. Minutes of the 5th Meeting, held on 22nd December, 1967, p. 3, para 7.

88. Ibid., p. 4, para 8.