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Summary record of the 1549th meeting

Topic:
<multiple topics>

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ties if international organizations were to lose certain rights by acquiescence through conduct. Indeed, he was not altogether in favour of such a rule even in the case of States.

29. One of the many practical problems involved was that it was difficult to determine to whom the conduct of an international organization should be attributed. For example, to take the case of a loan from IBRD, it could be argued that failure by the local representative to press for repayment by the due date amounted to acquiescence, so that the Bank forfeited its right. But what would be the position when the matter came up before member States, and who would be responsible for meeting the loss? Similarly, although under most headquarters agreements with the host State international organizations enjoyed exemption from taxation, in some instances taxes might be levied initially but subsequently refunded. If, however, an international organization failed to request such a refund, that could be construed as conduct indicating that it had decided to forgo its right. Again, what would the position be when such an international organization had to justify its conduct, and the considerable amounts of money involved, before its member States?

30. In that respect, he could only agree that organizations differed in their decision-making process and structure from States, and should therefore not be equated with the latter for the purposes of draft article 45. He therefore supported variant B.

The meeting rose at 11.35 a.m.

1549th MEETING

Monday, 11 June 1979, at 3.5 p.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Organization of work (*continued*)*

1. The CHAIRMAN informed the meeting of the Enlarged Bureau's recommendation that the Commission should again, for the current session, set up a Planning Group of the Enlarged Bureau to consider the future programme and methods of work of the Commission and report thereon to the Enlarged Bureau. The Group would be composed of Mr. Pinto (Chairman), Mr. Díaz González, Mr. Francis, Mr. Njenga, Mr. Reuter, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, M. Tsuruoka, Mr. Ushakov, Sir Francis Vallat and Mr. Yankov. As usual, any member of the Commission wishing to do so could attend the meetings of the Planning Group.

2. If there was no objection, he would take it that the Commission decided to accept the recommendation of the Enlarged Bureau.

It was so decided.

3. The CHAIRMAN said that the question of treaties concluded between States and international organizations or between two or more international organizations, which the Commission had taken up on 6 June, would be examined until 26 June. The Special Rapporteur for that topic would be away on 18 and 19 June and the Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses would be away for a few days during the period 20-26 July originally scheduled for consideration of the latter topic. The Enlarged Bureau therefore recommended that the meetings of 18 and 19 June should be reserved for the second of those topics. The meetings in the period 20-26 July, which the Rapporteur for that topic could not attend, might be reserved for considering the first report of the Special Rapporteur for the topic of jurisdictional immunities of States and their property.

4. If there was no objection, he would take it that the Commission decided to accept the proposal of the Enlarged Bureau, in which case the programme of work adopted by the Commission at its 1539th meeting on the proposal of the Enlarged Bureau would be amended accordingly.

It was so decided.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/319)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 45 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty)[1] (*continued*)

5. Mr. DÍAZ GONZALEZ said that, in view of the logical sequence followed by the Special Rapporteur throughout the draft articles, he favoured the text of variant A for article 45.

6. In the case of an international organization, the treaty agreement machinery provided for in the rele-

* Resumed from the 1539th meeting.

[1] For text, see 1548th meeting, para. 6.

vant rules of the organization was necessarily brought into play in both variant A and variant B, implicitly in the former and explicitly in the latter. Article 2, paragraph 1 (*j*),[2] defined the term "rules of the organization", and as early as article 6 the draft indicated that the rules in question were the rules in force in respect of the organization's treaty-making capacity. Also, article 36, paragraph 3, indicated what was necessary for expressing the assent of a third organization, by referring specifically to "the relevant rules of that organization".

7. As pointed out in the Special Rapporteur's report (A/CN.4/319), the rights of an international organization were better protected than those of a State. The rules of the organization were to be followed because in principle the organization could act only in accordance with those rules; but the weakness of international organizations was in fact more apparent than real, since an organization's conduct was dictated by its rules alone, regardless of whether article 45 referred to them.

8. Because of the fundamental differences between them, an international organization and a State could not be equated as subjects of international law. An international organization had no more privileges than those granted to it by its member States under the organization's constituent instrument. Many of the differences had of course grown less marked over the years. In that connexion, it was sufficient to recall that, in its advisory opinion of 11 April 1949 on *Reparation for injuries suffered in the service of the United Nations*, the International Court of Justice had acknowledged that the existence of the United Nations was inescapable for all States throughout the world, whether or not they had recognized the Organization.[3] Moreover, it was interesting to note the Court's opinion that 50 States, representing the vast majority of the members of the international community at that time, had had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone.[4]

9. Mr. SUCHARITKUL said that there was a considerable difference of views among the Commission. Some members wished to protect international organizations because they were weaker than States, whereas others were reluctant to give organizations a privileged status and, in order to preserve equality between States and international organizations, proposed that it should not be open to States to acquiesce by reason of their conduct.

10. No doubt the protection of the weak, which was a fundamental principle of international law, should be placed in the forefront. But the notion of weakness could be understood more clearly in terms of another principle of international law, that of the equality of States. In that connexion, he recalled the Buddha's reply to a disciple who had asked him why absolute equality did not exist among human beings: "Observe your two hands; each has five fingers. But look carefully again. Are they equal?" There was certainly no equality in the world, either among States or among international organizations, or between States and international organizations. However, in an era when States could appeal to international institutions, inequalities and injustices were doubtless less blatant than in the past.

11. Because the scope of acquiescence was vague, the weak must be protected against its operation. A distinction must be drawn between acquiescence and subsequent conduct or positive behaviour. Acquiescence might consist of mere tacit consent. It should therefore be made clear in what well-defined circumstances international law considered that there was agreement by acquiescence. Various General Assembly resolutions, such as those concerning the permanent sovereignty of States over their natural resources, decolonization and friendly relations among States, helped to narrow down the notion of acquiescence, which was so dangerous for the weak.

12. It was certainly difficult to compare a State's weakness with that of another State or the weakness of an international organization with that of another international organization or of a State. Nevertheless, some subjects of international law were weaker than others and they should not all be placed on an equal footing, with the idea of agreement by acquiescence excluded even in the case of States, as proposed by Mr. Jagota.

13. Mr. FRANCIS had no hesitation in endorsing the text of variant B. Articles 46 to 50 and articles 60 and 62, referred to in article 45, would give every State and international organization the right to be released from treaty obligations in certain circumstances; article 45 itself sought to establish a rule whereby that right could not be invoked. At the previous meeting, Mr. Pinto had pointed to the differences of basic organization and structure between international organizations and States. International organizations and States were alike only to the extent that they were subjects of international law; it should always be remembered that international organizations were the creations of States and operated within specific areas of competence in accordance with the rules imposed on them. It was therefore essential to bear in mind at all times the basic differences between international organizations and States and to emphasize the consequences of those differences, as had been done, for example, in articles 19 and 19 *bis*, concerning the formulation of reservations.

14. The differences were apparent from the terms of article 7, concerning full powers and powers, and must be reflected in article 45 as well. If, in the course of treaty negotiations, the Minister for Foreign Affairs of a State and the executive head of an international organization informed each other of the limitations

[2] See 1546th meeting, foot-note 4.

[3] *I.C.J. Reports 1949*, p. 174.

[4] *Ibid.*, p. 185.

imposed upon them but then proceeded to go beyond their mandate and conclude a treaty, the State in question could normally refuse to be bound by the treaty, which would come into force upon signature, because the limitations imposed on the Minister for Foreign Affairs had been communicated to the other party. However, if the State in question did not assert its right to repudiate the treaty within the requisite period, it would be bound by the treaty under subparagraph (*b*) of article 45. The situation would not be the same in the case of the executive head of the international organization, which would not be bound by the treaty as rapidly as the State, for the simple reason that it was accepted in practice that international organizations and States operated in different ways. The international organization, even though it might wish to support the good intentions of its executive head, would necessarily find that the latter had failed to act in conformity with the rules of the organization in signing the particular treaty. In that instance, the act of the Minister for Foreign Affairs would be binding on the State, but the act of the executive head of the international organization would not be binding on the organization, because his competence was circumscribed by the relevant rules of the organization.

15. Reference had already been made to the weakness of international organizations, which might lie in the seeming inflexibility of their rules. If it was assumed, for instance, that a State and an international organization were represented in treaty negotiations at a lower level than that of the Minister for Foreign Affairs of the State and the executive head of the international organization, and the negotiations involved fraud, as provided in draft article 49, or corruption of a representative, as provided in draft article 50, the Minister for Foreign Affairs might none the less decide that the treaty should be honoured. It was quite clear that, under article 45, the State would be bound by that treaty. On the other hand, if the executive head of the international organization decided, notwithstanding the fraud or corruption, to authorize approval of the treaty, the international organization would not be bound by the decision of its executive head—despite the fact that he undoubtedly represented it—because the relevant rules of the organization would not have been complied with.

16. Those examples showed that article 45 should make allowance for the differences between States and international organizations in their decision-making processes.

17. Mr. USHAKOV preferred variant B, but it did not resolve all the problems. He stressed the need to spell out the meaning of the phrase "after becoming aware of the facts", which applied both to States and to international organizations in the article under consideration. If an organ of a State was aware of a certain fact, that State was assumed to be aware of it, since the sovereign authority was one. For example, if a State concluded a treaty of financial assistance with another State and subsequently learned that the latter had acted fraudulently, then, if the Ministry for Foreign Affairs of the Former State continued to furnish the agreed financial assistance, it was bound by the conduct of its Ministry even if the latter had acted *ultra vires*. On the other hand, if the general assembly of an international organization decided to grant financial assistance to a State and the financial services of that organization continued to provide the assistance even though it had been established that the beneficiary State had behaved fraudulently, it was not possible to invoke the conduct of the organization or of its general assembly. There was no equivalent, for an international organization, of the sovereign authority of States. Each organ of an international organization acted within the strict limits of its competence, and was not bound by the conduct of its financial services. The conduct of an international organization was expressed more in its deliberations, its documents and above all the decisions of its organs.

18. Article 45 of the Vienna Convention [5] enabled a State, by express agreement or by conduct, to derogate from certain of the provisions concerning the invalidity of treaties, namely articles 46 to 50, but not articles 51 to 53. Consequently, through the operation of article 46 (Provisions of internal law regarding competence to conclude treaties), a State could waive a rule of its internal law of fundamental importance, such as a rule of constitutional law. He did not think such a possibility should be allowed for an international organization. The relevant rules referred to in subparagraph (*b*) of variant B were those that concerned the conclusion of treaties, and they should not be placed on the same footing as the rules relating to the amendment of the constituent instrument of an organization. Accordingly, not only articles 51 to 53 but also article 46 should be excluded from the operation of article 45.

19. Instead of regarding international organizations as weaker than States, or conversely, as equal to States, it would be better to acknowledge that they were in quite a different situation from States. If that were not so, the Vienna Convention would apply to them and the draft in course of preparation would serve no purpose. With regard to treaty-making capacity, for example, organizations differed from States since, under draft article 6, that capacity was governed by the relevant rules of the organization. An organization might not be authorized to conclude treaties, but every State could do so, not because of its internal law but because of the general principle stated in article 6 of the Vienna Convention. Account should therefore be taken of the fact that international organizations could act only in conformity with their relevant rules. To say that an international organization could act contrary to its regulations, whether by its express agreement or by acquiescence, would jeopardize its very existence, since the constituent instrument of an organization represented the basis of its functions and powers.

20. Mr. SCHWEBEL said that his philosophy with respect to the draft articles was to minimize the differ-

[5] See 1546th meeting, foot-note 1.

ences between States and international organizations in their treaty-making capacity and procedures; he adopted that approach because he was in favour of strengthening international organizations and their role in international life. He doubted whether international organizations would be strengthened by draft articles which sought to place restrictions on their capacity to conclude treaties which were not placed on States. He did not believe that the weaker-party criterion could be applied with consistency. There might be cases in which an international organization was stronger than a State. Was a debtor State in dire need of foreign exchange stronger or weaker than IMF? He was not sure that he agreed with Mr. Ushakov that the representative of an international organization could not bind that organization within the scope of his apparent as well as of his actual authority. Similarly, he doubted the validity of the argument that international organizations were restricted, in their treaty-making capacity, to their rules. The powers of international organizations were not simply those expressly set forth in their constitutions. It had to be borne in mind that, through practice, through liberal and constructive interpretation of their constituent instruments, international organizations could grow and acquire power, and it should be possible for that power to be used in the sphere of treaty-making as well as in other spheres.

21. For those reasons, he was in favour of variant A, although he realized that a substantial case could be, and had been, made for variant B.

22. Mr. VEROSTA said that it served no purpose to compare international organizations with States in an attempt to determine whether they were weaker than States. International organizations were never anything but what States wished them to be, and their founding States remained their masters. The treaty-making capacity of States derived from express rules of their constitutional law, whereas international organizations had had to struggle for treaty-making capacity, which States had granted them for reasons of convenience alone. There was no reason to fear that making a distinction between States and international organizations placed the latter in a position of inferiority, as they would always have the powers conferred on them by their constituent instruments or by the decisions of their organs, which meant, in the final analysis, by their member States. Moreover, no provision of the draft could prevent States from giving an organ extremely wide powers.

23. All in all, variant B was the only acceptable solution, but it might be amended on the lines indicated by Mr. Ushakov. It was impossible to go against the wishes of the member States of an organization and prevent them, for example, from authorizing an organ freely to conclude any treaty whatsoever. Yet it was important to alert certain organizations to the dangers threatening them, which the consideration of article 45 had served to highlight.

24. Mr. QUENTIN-BAXTER said that it could be argued in favour of variant B that article 45 of the Vienna Convention reflected the sovereignty of States, and that the simple fact of the non-sovereignty of international organizations justified differentiating between States and international organizations. It could also be pointed out that articles 46 to 50 all concerned aspects of the treaty-making process, and that precisely in relation to that process there was a tendency to require a greater degree of formality from international organizations than from States. Variant B implied that, in regard to the issues that might arise under articles 46 to 50, States were forewarned that in their dealings with international organizations they should protect their own interests by ensuring that the organization which was their treaty partner observed all the formalities required by the conclusion of the treaty.

25. Looking further than that, however, it might be thought that the problem before the Commission with respect to article 45 was only a forerunner to the quite fundamental problem of the formulation of article 46. If organizations could be regarded as mere mechanisms, it was clear that the Commission must, in articles 45 and 46, provide much more restrictively for organizations than for States. He had doubts, however, about the extent to which that view corresponded to the realities of contemporary international life.

26. He had a certain regard for the middle way, suggested in foot-note 8 of the Special Rapporteur's report (A/CN.4/319), which would provide one solution in relation to articles 46 to 50 and another in relation to articles 60 and 62. Article 60 dealt with a situation in which there was a material breach of a treaty. According to the Vienna Convention, a material breach of a treaty consisted, *inter alia*, in the violation of a provision essential to the accomplishment of the object or purpose of the treaty. In relations between States, article 45 would clearly have a beneficial effect in such a case, since, apart from any question of responsibilities, it would allow the relationship between the States parties to continue as if the breach had not occurred. The same considerations might be important in relations between a State and an international organization. Even in relations with international organizations, it would seem to be in the interests of co-operation and respect for treaties that the parties, including international organizations, should be able to continue as if the breach had not occurred, making provision for such penalties for a breach as they thought appropriate, and that, after a period, practice of that kind should be as binding in the case of international organizations as it was in the case of States.

27. In conclusion, although he appreciated the arguments in favour of variant B, he had some doubts about its appropriateness, at least in relation to articles 60 and 62.

28. Mr. REUTER (Special Rapporteur) said that the Commission had approached the question dealt with in article 45 from the point of view of the resemblances and differences between States and international organizations. None of the members had maintained that the situation of international organizations was exactly the same as that of States, but some—

Mr. Jagota, Mr. Díaz González and, to a certain extent, Mr. Schwebel—had been more conscious of the resemblances and had favoured the solution proposed in variant A, which was based on an assimilation of the two situations; others had paid more attention to the differences and had opted for the solution proposed in variant B, which posed the principle of different treatment for international organizations and for States.

29. There was however, yet a third possibility, which neither he himself nor members of the Commission had mentioned, namely, to narrow the gap between States and international organizations by deleting subparagraph (*b*) of the Vienna Convention text, for States and international organizations alike.

30. In that connexion, he recalled that the United Nations Conference on the Law of Treaties had considered a proposal to delete subparagraph (*b*) of the text of the future article 45, and that the proposal had been rejected by only 48 votes to 19, with 27 abstentions, at the 67th meeting of the Committee of the Whole.[6] Moreover, in rejecting the International Law Commission's draft article 38,[7] which would have allowed a treaty between States to be modified by State practice, the Conference had shown a certain reluctance to recognize that, no matter what the conduct, it could be considered as acquiescence. Also, some of the States which had ratified the Vienna Convention had entered reservations on subparagraph (*b*) of article 45. Lastly, under the constitution of all South American States, international agreements could not enter into force without approval by the parliaments of those States. That rule was doubtless violated in practice, but it nevertheless existed.

31. Consequently, even if the Commission rejected that third solution in favour of variant B, it should bear it in mind and beware in its commentary of going too far in its attempts to justify the changes made with regard to international organizations in the rule set forth in article 45 of the Vienna Convention. For it would be dangerous to base those changes on too great a difference between States and international organizations by setting the weakness of some against the strength of others, since such an argument would imply the existence of rules or interpretations which at present were not recognized by all States.

32. Personally, he did not think it would be wise to adopt the third approach, but he had felt obliged to draw attention to it on account of its importance.

33. As Mr. Verosta had pointed out, the real political problem did not lie in the weakness of international organizations, but in the disparity between the secretariats of those organizations and their organs composed of government representatives. But secretariats of international organizations tried to help Governments to find compromises and resolve their problems. It would therefore be dangerous, in his opinion, to adopt provisions that might stifle any initiative on the part of secretariats of international organizations.

34. As Mr. Quentin-Baxter had pointed out, articles 60 and 62 differed in character from articles 46 to 50, for they touched on the question of responsibility. It was conceivable that, contractually, a ground for invalidating a treaty might be maintained despite a particular conduct, but that did not dispose of the question of responsibility.

35. Like Mr. Ushakov, he considered that article 46 contained the crux of the problem, which emerged in advance in connexion with article 45. He also agreed with Mr. Ushakov that it was the organs competent to bind the State or international organization that must become aware of the facts and acquiesce. In that respect it was surprising that, in the decision given in 1963 concerning the interpretation of the aviation agreement of 27 March 1946 between France and the United States of America,[8] the arbitral tribunal had expressed the view that, by their conduct, minor officials of technical services could modify an agreement concluded by State organs empowered to conclude treaties. It was therefore necessary to specify, with regard to international organizations, which organ must become aware of the facts and at what level the conduct must be situated. He shared Mr. Ushakov's way of thinking on that point, but differed from him concerning the importance to be attached to the conduct of the organization.

36. Thus, if an international organization concluded a treaty incompatible with a fundamental rule of its constitution and if one of its principal organs, composed of representatives of the member States, became aware of the fact and decided not to amend the constitution and the relevant rules of the organization and not to raise the matter, the organization would continue to apply the treaty. One could say, as Mr. Ushakov did, that such an approach did not change anything and that the treaty remained invalid since, in order for it to be valid, the organization would have to modify its constituent instrument so as to adapt it to the treaty.

37. If the Commission adopted that extreme position, however, it would come up against another problem, that of prescription. In that connexion, he recalled that at the Conference on the Law of Treaties, Guyana and the United States of America had proposed an amendment to the future article 45 providing for a time-limit beyond which a State would no longer have the right to invoke a ground for invalidating a treaty.[9] It was the provision in subparagraph (*b*) which

[6] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), pp. 164 and 165, document A/CONF.39/14, para. 382, sect. (i), (*b*), and para. 386(*a*).

[7] *Ibid.*, p. 158, document A/CONF.39/14, paras. 342–348.

[8] See *United Nations, Reports of International Arbitral Awards*, vol. XVI (United Nations publication, Sales No. E/F.69.V.1), p. 5.

[9] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (*op. cit.*), p. 164, document A/CONF.39/14, para. 382, sect. (ii), (*a*).

had enabled that amendment to be rejected, for the rule that the conduct of the State amounted to acquiescence produced the same effect as prescription.

38. With regard to international organizations, if the Commission decided that the grounds for invalidating a treaty, and in particular the reason dealt with in article 46, should remain operative even where the organization had behaved as if it had acquiesced in the validity of the treaty, it would be necessary to introduce a rule on prescription, in order to compensate for the disappearance of the rule concerning conduct which had appeared in subparagraph (*b*) of the article of the Vienna Convention.

39. It was also necessary to take account of another situation, concerning which the Commission should enter a proviso in its commentary. If the competent organ of an international organization, having become aware of a ground for invalidating a treaty, decided by a majority vote not to raise the matter and to continue to perform the treaty, and then suddenly altered its policy owing to a change of majority resulting from the admission of new member States, the question of the responsibility of the international organization would arise. The Commission should therefore reserve that question, since it could not resolve it either in the draft articles under condideration or elsewhere, given the fact that it was not at present examining any set of draft articles on the responsibility of international organizations. The same problem would arise in connexion with article 46.

40. With regard to the question of security of international relations, the Constitution of the Fifth French Republic contained a rule that France could ratify a treaty at variance with its Constitution, but only if it amended the text of the Constitution before ratifying the treaty. The treaty establishing EEC contained a similar provision, whereby the Community could conclude a treaty that was incompatible with its charter, but only on certain conditions: on the initiative of certain of its organs, the opinion of the Court of Justice could be requested and, in the case of a negative opinion, the treaty could enter into force only after the constituent instrument was amended. [10]

41. In conclusion, if the Commission decided, in choosing variant B, not to apply to international organizations the rule in subparagraph (*b*) of the article of the Vienna Convention, it would have to provide a clause relating to prescription. But it would not be able to resolve that problem until it had considered article 46.

42. Mr. USHAKOV said he was aware that some international organizations indulged in practice which conflicted with their rules. But that state of affairs could be acknowledged without there being a general rule asserting that an international organization could, by its practice, contravene its own rules.

43. Mr. REUTER (Special Rapporteur) observed that, although some international organizations had a very rigid constituent instrument, others might have more flexible rules. While recognizing, like Mr. Ushakov, that it was impossible to lay down a general rule expressing that flexibility, he nevertheless thought it possible to draft a carefully worded rule that would leave each international organization free to allow for a customary practice in its relevant rules. Custom should not be excluded for all international organizations, and the Commission should guard against adopting an excessively rigid formula that would hamper their development.

The meeting rose at 6 p.m.

[10] See Treaty establishing the European Economic Community (United Nations, *Treaty Series*, vol. 298, p. 3), article 228.

1550th MEETING

Tuesday, 12 June 1979, at 10.5 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/319)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 45 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty) [1] (*concluded*)

1. Mr. JAGOTA observed that at the previous meeting the Special Rapporteur had suggested the possibility of a third solution for article 45, which would consist of variant A without subparagraph (*b*). That third solution was attractive, since the deletion of subparagraph (*b*) would mean that, if States and international organizations that were parties to a treaty wished to ignore a fact that could be invoked as a ground for invalidating the treaty and to maintain the treaty in force, they must so agree expressly through an exchange of notes or letters, rather than implicitly by conduct or acquiescence. The Drafting Committee

[1] For text, see 1548th meeting, para. 6.