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Summary record of the 1507th meeting

Topic:

Treaties concluded between States and international organizations or between two or more international organizations

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43. He reminded members that the Commission still had to consider the form in which the draft articles would finally appear.

The meeting rose at 12.55 p.m.

1507th MEETING

Tuesday, 27 June 1978, at 10.15 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Castañeda, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Question of treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/312, A/CN.4/L.269)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 39 (General rule regarding the amendment of treaties)

1. The CHAIRMAN invited the Special Rapporteur to introduce his seventh report on the question of treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/312), and in particular his draft article 39, which read:

Article 39. General rule regarding the amendment of treaties

A treaty may be amended by agreement between the parties. The rules laid down in part II apply to such an agreement except in so far as the treaty may otherwise provide.

2. Mr. REUTER (Special Rapporteur) said that his seventh report dealt with part IV of the draft articles, entitled "Amendment and modification of treaties". It contained three articles, which corresponded to three articles of the Vienna Convention on the Law of Treaties:[1] the first laid down a general rule on the amendment of treaties while the other two dealt with multilateral treaties only. The Commission must now consider how far it wished to extend to treaties concluded between States and international organizations or between two or more international organizations the consensual approach adopted in the Vienna Convention. That question had already arisen at the time the Commission had considered other articles of the draft, particularly those on reservations.

3. In regard to the general rule laid down in article 39, it certainly seemed that the Commission should keep to the consensual approach. On the other hand, for multilateral treaties, dealt with in articles 40 and 41 (A/CN.4/312), that approach was less indicated. It was clear from international practice that multilateral treaties were not often open to international organizations. Multilateral treaties concluded solely between international organizations were rare, while multilateral treaties concluded between States and international organizations, although more frequent, were not usually open treaties. Since the Commission had not excluded the case, however, particularly in article 9,[2] he had thought that he could submit provisions on multilateral treaties. His proposed text for article 40 was modelled on the corresponding article of the Vienna Convention, while for article 41 he proposed two variants that derived from two different approaches.

4. One member of the Commission had already told him privately that he was totally opposed to the provisions of article 39. To forestall those objections, he would point out that, in the case of amendment of treaties, the United Nations Conference on the Law of Treaties had made a point of excluding the application of a rule that had never existed in international law but that had often been invoked, namely, that of the *acte contraire*. That was why the expression "by agreement" had been preferred to the words "by treaty" in article 39 of the Vienna Convenion. Moreover, the Vienna Conference had rejected a draft article providing for the possibility of modifying a treaty by subsequent practice.[3] Limits had thus been set on the rule laid down in article 39 of the Vienna Convention.

5. Under the second sentence of article 39, the rules in part II of the draft applied to the agreement by which a treaty might be amended unless the treaty provided otherwise. The procedure for amending treaties was thus made subject to all those rules and, in particular, to the rule in article 6 concerning the capacity of international organizations to conclude treaties. Article 39 might seem inappropriate in so far as it would mean, if taken literally, that an international organization could derogate from article 6 when it concluded an agreement amending a treaty. In his view, such an interpretation would be contrary to elementary common sense. Since capacity always preceded the conclusion of agreements, there could be no question of an agreement modifying the capacity by virtue of which the agreement was concluded. Should the Commission consider that common sense was not enough, it would perhaps be advisable to in-

[1] For the text of the Convention (hereinafter referred to as the "Vienna Convention"), 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), p. 289.

[2] For the text of the articles so far adopted by the Commission, see *Yearbook... 1977*, vol. II (Part Two), pp. 96 *et seq.*, doc. A/32/10, chap. IV, sect. B, 1.

[3] *Yearbook... 1966*, vol. II, p. 187, doc. A/6309/Rev.1, part II, chap. II, draft articles on the law of treaties, with commentaries, art. 38.

clude a reference to article 6 in article 39. It would also be noted, in regard to the second sentence of article 39, that the reference to the rules laid down in part II meant in fact a reference to agreements that did not necessarily respect the rule of the *acte contraire*. Indeed, several articles in that part of the draft contained saving clauses such as "unless the treaty otherwise provides", "unless it is otherwise agreed" or "by any other means if so agreed". It was therefore clear that international organizations parties to a treaty could agree on rules other than those laid down in part II of the draft.

6. If the Commission were to consider that the rules of consensus should not apply to international organizations, despite the flexibility that must be preserved in the provisions of the draft, article 39 would be doomed. Many other articles would be doomed as well if that view were carried to extremes.

7. The CHAIRMAN, on behalf of the Commission, thanked Mr. Reuter for his excellent written report and lucid oral presentation. The draft articles and commentaries thereto were remarkable for their clear and concise treatment of a highly complex subject.

8. Mr. USHAKOV said that article 39 should not be modelled on the corresponding article of the Vienna Convention. Generally speaking, the provisions of that Convention could not be applied unaltered to the treaties with which the Commission was now dealing, except where complete assimilation was possible. The basic idea underlying article 39 of the Vienna Convention was that, as the rules in part IV of that instrument were residual rules for the States that had adopted them, the latter were free to derogate from them by agreement. The States that so derogated were those that had drafted and accepted the rules. It should be noted that the term "agreement" was far broader than the term "treaty", which applied only to an agreement concluded between States in written form and governed by particular rules of international law. Accordingly, under the Vienna Convention, a treaty might be amended by oral, or even tacit, agreement between the parties.

9. There was nothing to show that treaties to which international organizations were parties might be amended by the oral agreement of those organizations. Indeed, what oral procedure would an international organization have to follow in such a case? Could an organization orally amend a treaty by which it was bound by consent given in accordance with its own rules and formally confirmed by a decision of its competent organ? Might that organ or another organ amend a treaty so concluded by derogating from the rules laid down in part II of the draft? The second sentence of article 39 answered that question in the affirmative, but he very much doubted whether that was right. The draft articles were intended for States: States took part in drafting them and would subsequently sign and apply the convention to which they might give rise. International organizations might also be parties to the convention, but if so, would they be able to derogate from rules thus drawn up and, in particular, from article 6, concerning their capacity to conclude treaties?

10. In his view, an international organization could not derogate, by agreement, from the rules of its own constituent instruments. If it could, proof of the fact should be given in the commentary, for example by reference to practice or doctrine. It would in any case be necessary to show first that, as postulated in the first sentence of article 39, international organizations parties to a treaty might amend it by agreement. The Special Rapporteur stated in his commentary to that article that "the flexibility of the provisions of the Vienna Convention is unchallenged and is fully safeguarded in the present draft articles". That mere assertion was not sufficient to prove that such flexibility was possible in the case of treaties to which international organizations were parties. A State could always conclude an international agreement that derogated from its constitution and then modify the latter to meet the case, whereas an international organization would have to alter its constituent instrument before concluding a treaty that it would not otherwise be competent to conclude.

11. Sir Francis VALLAT observed that, throughout the draft articles, an attempt was being made to place restrictions on internaional organizations. That, to his mind, was misguided. International organizations, which were composed of States, were not children, to be told at every turn what they should or should not do. They should be left to do what they thought was right, in accordance with the powers and duties conferred upon them. Consequently, there seemed to be no fundamental reason why provision should not be made for international organizations to conclude agreements informally, in the same way as States were permitted to do. For example, an international organization might wish to modify a treaty and, for that purpose, adopt in its plenary body a resolution which, with the authority of that body, was communicated by its administrative head to the other party or parties to the treaty, together with an inquiry as to whether the change was acceptable. By that straightforward procedure, a treaty could be amended without the need to go through all the formalities for the conclusion of a new treaty in the strict sense. He failed to see why that should not be permissible.

12. He agreed entirely with Mr. Ushakov that an agreement was different from a treaty—intentionally so, if his recollection of the discussions leading up to the Vienna Convention was correct. In that connexion, it would be useful if the Special Rapporteur would explain why article 39 of the Vienna Convention provided that an agreement rather than a treaty should be the vehicle for amendment of treaties.

13. Mr. REUTER (Special Rapporteur) replied that in 1966 the Commission had chosen to be very flexible on the subject of treaties concluded between States; that was why it had used the term "agreement" in preference to the term "treaty". It should not be forgotten in that connexion that the Commission's draft articles on the law of treaties had contained an article 38 entitled "Modification of treaties by subse-

quent practice".[4] That article had been based on the finding of a tribunal, which had arbitrated in a dispute between France and the United States of America, that the practice of States might modify a treaty. The majority of the State participating in the United Nations Conference on the Law of Treaties had opposed article 38 for fear that officials responsible for the application of a treaty might yield to pressure and apply it in a way differing from that originally envisaged. In view of the disappearance of that article, the term "agreement" as it now appeared in article 39 of the Vienna Convention had a more limited meaning than that which the Commission had originally assisgned to it. To judge from the preparatory work of the Commission and of the Conference on the Law of Treaties, the term "agreement" now applied only to a written agreement.

14. If the Commission shared his view, it should say so in its commentary. He had refrained from raising that point in his seventh report because he had not wished to give a personal interpretation of the Vienna Convention.

15. As to the reasons why the Commission had prepared its article 38 on the law of treaties, they would be found in the commentary to article 35 on the same topic.[5]

16. Mr. USHAKOV said that the explanation given by the Special Rapporteur showed that the mere conduct of States might amend a treaty. He questioned whether the same was true of the conduct of international organizations. It was especially important to be clear what was meant by "conduct" in such a case, and whether the conduct might be that of a particular organ. For the moment, there was no evidence to suggest that a written treaty might be amended by the conduct of an international organization. The article under consideration should not be based on the preparatory work for the corresponding article of the Vienna Convention.

17. Mr. DÍAZ GONZÁLEZ said that if the Vienna Convention was to prevail, the article under study was fully justified. The fact that article 39 had been included in the Vienna Convention meant that States had accepted its wording. They would therefore be unlikely to change their point of view when the draft articles were discussed, particularly in view of the residual nature of the draft.

18. As the Special Rapporteur had pointed out, article 6 (Capacity of international organizations to conclude treaties) had already been approved and was the corner-stone of the draft. The exercise of that capacity was of course prior in time to the conclusion of a treaty; it also involved a constitutional issue, since such capacity was governed by the rules of the organization in question.

19. International organizations were a living reality and one of the most active elements in international life. They were composed of sovereign States and, subject to their constitutional rules, were able not only to conclude treaties and agreements but also to amend them. In his view, the activities of international organizations in their relations with States should not be limited; on the contrary, a somewhat more flexible approach should be adopted.

20. He therefore agreed fully with the Special Rapporteur's reasoning and also with article 30 as drafted.

21. Mr. RIPHAGEN said it was clear from the discussion that article 39 of the Vienna Convenion was open to different interpretations in the light of the preparatory work for the Convention and the rejection by the Conference of the draft article 38 submitted by the Commission. That created some difficulty, for the Commission was not in a position to interpret the Vienna Convention, nor could it pass over the matter in silence. Of necessity, therefore, it seemed that it would have to follow the Convention.

22. In his view, the second sentence, in particular, of article 39 of the Vienna Convention was not very happily phrased, since it probably provided not so much for derogation from part II of the Convention as for derogation from the first sentence of that article. Provision might be included in a treaty for that treaty to be amended without the express agreement of all the parties, by means of an "opting-out" procedure: any party that did not opt out within a certain period would be deemed to agree to the amendment. That would be a derogation from the first sentence of article 39. It was the kind of provision that often caused difficulty for countries with written constitutions; in the case of the Netherlands, for example, the constitution provided that no treaty would have binding force unless approved by Parliament. Consequently, some way would have to be found of adapting the provisions of the treaty to those of the national constitution. The same problem could arise in connexion with the constitutions of international organizations, although it might well be resolved in practice.

23. In the circumstances, therefore, while appreciating the difficulties to which Mr. Ushakov had referred, he considered that the Commission could only accept the article as it stood, with all its inherent ambiguity.

24. The CHAIRMAN, speaking as a member of the Commission, fully endorsed the remarks made by Mr. Díaz González, Mr. Riphagen and Sir Francis Vallat and was in favour of leaving the article as it stood. It had been the Commission's understanding from the outset that as far as possible the draft articles should be aligned with the Vienna Convention. If the Commission were now to depart from the Convention, it should have a very good reason for doing so—a reason grounded in State practice or some convincing doctrine. He knew of no such reason and therefore considered that the Commission should abide by the terms of the Vienna Convention.

[4] *Ibid.*

[5] *Ibid.*, pp. 232 and 233.

25. Mr. CASTAÑEDA said he had been convinced by the arguments put forward by the Special Rapporteur in favour of keeping draft article 39 in its existing form. He could see no essential legal reasons why the parties to a treaty should not be able to amend it by means of an agreement between themselves that had a form different form that of the treaty or why they should not be able to include in the treaty a provision to the effect that part II of the draft articles would not apply in specified cases.

26. He thought Mr. Ushakov had been right in saying that the situation with regard to treaties between international organizations or between international organizations and States was *a priori* very different from the situation with regard to treaties between States alone: decision-making by an international organization was always a collective process. Nevertheless, he agreed with the Special Rapporteur that the difference was not so great as to require separate régimes for States and international organizations, and that the provisions of the Vienna Convention could be applied in both cases.

27. The Commission should state clearly in its commentary to article 39—and, if possible, illustrate by a practical example—the reasons the Special Rapporteur had given for holding that view, and it should emphasize in particular his reference to article 6. While it would be permissible for the agreement of an international organization to the amendment of a treaty to which it was a party to be expressed in a form or by a means different from those employed for the original treaty, it was essential that the organization's agreement should comply with its relevant rules.

28. Mr. JAGOTA approved article 39 in its existing form. However, it was a text that required interpretation, and he wished to make some comments on that aspect of it.

29. The Special Rapporteur had said that he had chosen the term "agreement" deliberately, to show that consent to the amendment of the treaty could be expressed through some less formal means than consent to be bound by the treaty itself. But what was meant by "agreement"? Article 39 itself implied that there must be some element of formality in the expression of agreement, since it referred in its second sentence to the rules contained in part II of the draft articles. Furthermore, there was mention of the "negotiation and conclusion" of an agreement in article 40, paragraph 2 (*b*), the provisions of which must, in regard to the particular case of multilateral treaties, be subsumed in the general rule set out in article 39. He agreed with Mr. Ushakov that the term "agreement" could be taken to include oral agreement, if only because, unlike article 35, paragraphs 1 and 3, adopted by the Drafting Committee (A/CN.4/L.269), article 39 did not expressly refer to consent "in writing". On the other hand, the term "agreement" should presumably not be interpreted as applying to consent by mere conduct or acquiescence, for the Conference had rejected draft article 38, in which the Commission had proposed that an agreement might be amended by the subsequent practice of the parties to it. Nevertheless, the inclusion in article 39 of the words "except in so far as the treaty may otherwise provide" suggested that the parties to a treaty retained some freedom of choice as to the means of expressing their acceptance of amendments to it.

30. If the Commission did not say in its commentary that consent expressed otherwise than by absence of protest was necessary, the problem of the interpretation of the word "agreement" would persist. The best solution might be for each treaty to contain an amendments provision, but that was a matter on which a decision should be left to the General Assembly or to the conference responsible for giving final form to the text of a convention based on the draft articles.

31. Mr. FRANCIS asked whether he was right in thinking that article 39 would apply between two international organizations in the same way as between two States, and that article 40 would apply in the case of treaties between, for example, one State and two or more international organizations or between one international organization and two or more States.

32. Mr. REUTER (Special Rapporteur), replying to the question raised by Mr. Francis, said that a treaty between three entities was a multilateral treaty; it therefore came under the general rule laid down in article 39 and, where necessary, under articles 40 and 41.

33. The members of the Commission seemed to be in agreement on three points. To begin with, they agreed that it was necessary that article 39 should stand. They also agreed that an international organization was bound by its constituent instrument, in conformity with the principle laid down in article 6. But the same was true for States. However, in its commentary to article 51 of the draft articles on the law of treaties (Termination of or withdrawal from a treaty by consent of the parties), the Commission had taken the view that

> The States concerned are always free to choose the form in which they arrive at their agreement to terminate the treaty. In doing so, they will doubtless take into account their own constitutional requirements, but international law requires no more than that they should consent to the treaty's termination.[6]

What was true for States was true *a fortiori* for international organizations. The members of the Commission therefore seemed to agree that article 39 did not constitute a derogation from article 6.

34. They also seemed to agree on a third point, namely, that article 39 of the Vienna Convention required interpretation. Mr. Jagota had clearly shown that, in that article, the term "agreement" involved some minimum of formality, because of the terms of article 40, and that even if the term were to be interpreted as precluding agreement by mere acquiescence, it should none the less be retained, since article 40, paragraph 2 (*b*), made provision for the negotiation and conclusion of "any agreement for the amendment of the treaty".

[6] *Ibid.*, p. 249, art. 51, para. (3) of the commentary.

35. Some members of the Commission were in favour of reproducing article 39 of the Vienna Convention word for word, whereas others, like Mr. Ushakov, deemed it necessary to make certain changes in the wording. More particularly, they thought it should be emphasized that the rule laid down in article 6 was a basic rule and that nothing in article 39 was to be understood as derogating from it.

36. How was that idea to be expressed in the text of the article itself? A number of solutions were possible. It could be stated, as the Drafting Committee had stated in article 36, paragraph 3 (A/CN.4/L.269), that, in the case of an international organization, the agreement between the parties was to be governed by the relevant rules of that organization. Also, the phrase "the rules laid down in part II" could be replaced by the words "the rules laid down in articles 7 to 33" and the commentary could show that the express purpose of that change was to exclude article 6.

37. Mr. Ushakov had criticized the second sentence of article 39 on the ground that, among the rules laid down in part II, there was one—the rule in article 6—from which there could be no derogation, and he had therefore suggested that a reservation should perhaps be made for article 6. However, all the rules laid down in part II of the draft gave international organizations considerable freedom, as evidenced by the phrases "or agreed upon by the States and international organizations" (article 10, para. 1 (*a*)), "or by any other means if so agreed" (article 11, paras. 1 and 2), "when ... the participants in the negotiation were agreed" (article 12, para. 1 (*b*)), etc. Thus the second sentence of article 39 in fact indicated that the parties might stipulate stricter rules than those in part II of the draft.

38. In conclusion, he wondered whether the Commission should not make the term "agreement" clearer by saying that a treaty might be amended "by express agreement between the parties". Such express agreement could be verbal but it could not be an agreement by acquiescence. The point was whether the Commission wished to depart from the Vienna Convention in that respect. It could choose to do so by advancing a twofold argument: first, that, by discarding draft article 38, the Conference on the Law of Treaties had already excluded agreement by acquiescence in the case of agreements between States; secondly, that, even if the Conference had not categorically decided to exclude agreement by acquiescence in that case, it was necessary to do so in the case of agreements concluded with international organizations. However, the Commission might confine itself to a single argument, without embarking on an interpretation of the Vienna Convention, and point out that, in the case of international organizations, agreement by acquiescence was a dangerous formula and that for that reason alone, it was better to stipulate an express agreement, without however going so far as requiring a written agreement.

39. Mr. USHAKOV proposed that draft article 39 should be replaced by a text reading:

"1. A treaty may be amended by the consent of the parties. The rules laid down in part II apply to the establishment of that consent.

"2. The consent of an international organization party to the treaty is governed by the relevant rules of that organization."

40. That text was based on article 39 of the Vienna Convention but took account of the fact that international organizations were not States and, in regard to the conclusion of treaties, were bound by their constituent instruments and any other relevant rules of the organization concerned.

41. Mr. SCHWEBEL understood Mr. Ushakov to have taken the view that an international organizaton lacked the power to conclude a treaty unless its constituent instrument expressly authorized it to do so. Admittedly, the constituent instrument of an international organization usually mentioned the specific agreements that the organization might conclude, but he considered it reasonable to extrapolate from that a general power to conclude treaties. Moreover, he doubted whether, even if it had not been endowed with the power to conclude particular treaties, an intergovernmental organization could be said not to be entitled to conclude international agreements; it seemed to him that, as a body composed of States and enjoying international personality, an international organization had such power by reason of the customary international law of international organizations.

42. Mr. SUCHARITKUL recalled that the Commission had not yet included in its draft articles a provision that catered for the existence of many forms of international organizations and for the diversity of their constituent instruments. Mr. Ushakov had been right to point out that there were differences between States and international organizations, particularly with regard to capacity to conclude treaties, and that those differences sometimes extended to amendment of treaties. The Drafting Committee might wish to reflect on the fact that proposals to amend the constituent instruments of some international organizations were considered to have been accepted merely if there were no opposition to them.

43. Mr. Ushakov had also said, in a comment conflicting with the rule in the Vienna Convention and with the rule proposed by the Special Rapporteur, that the requirement for the approval of an amendment to a treaty might be downgraded from "agreement" to mere "consent". "Consent" however, might mean something far less formal than what was required by part II of the Vienna Convention or of the Commission's draft articles, and the Commission should therefore take account, when drafting its final version of article 39, of the historical examples of amendment by acquiescence, waiver of treaty requirements, estoppel, and modification of written agreements by conduct. He was inclined to envisage the question of treaty amendment in the same way as the Special Rapporteur.

44. Mr. USHAKOV pointed out that he had not asserted that the capacity of an international organiza-

tion to conclude treaties was governed by the organization's constituent instrument. He had simply pointed out what was stated in article 6, namely, that the capacity of an international organization to conclude treaties was governed by the relevant rules of that organization. However, under the definition given in article 2, paragraph 1 (*j*), "rules of the organization" meant, "in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the organization". Accordingly, an organization might conclude treaties only if its relevant rules permitted it to do so. It was not for the Commission but for international organizations themselves to decide whether, under their relevant rules, they could conclude treaties.

45. Mr. SCHWEBEL said that Mr. Ushakov's clarification had been very cogent and perfectly correct. However, if an international organization that had not been expressly endowed by its constituent instrument with the power to conclude a treaty found itself faced for the first time with the question whether it could subscribe to such an instrument, it would have no practice of its own to guide it. In the light of the manner in which international organizations generally behaved, he thought that an organization composed of States would have the power to conclude a treaty in such a case.

46. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 39 to the Drafting Committee.

It was so agreed.

The meeting rose at 1 p.m.

1508th MEETING

Wednesday, 28 June 1978, at 10.15 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Castañeda, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/312, A/CN.4/L.269)

[Item 4 of the agenda]

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

ARTICLE 40 (Amendment of multilateral treaties)

1. The CHAIRMAN invited the Special Rapporteur to introduce article 40 (A/CN.4/312), which read:

Article 40. Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States and international organizations, each one of which shall have the right to take part in:

(*a*) the decision as to the action to be taken in regard to such proposal;

(*b*) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State and every organization entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State or international organization already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(*b*), applies in relation to such State or organization.

5. Any State or organization which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State or organization:

(*a*) be considered as a party to the treaty as amended; and

(*b*) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

2. Mr. REUTER (Special Rapporteur) said that the main purpose of article 40 of the Vienna Convention,[1] which corresponded to the article under consideration, was to enable all the parties to a multilateral treaty to participate in the amendment procedure, to afford them an opportunity to become parties to the amended treaty on terms of equality and to provide for cases of States that did not accept the amendment and of those that became parties to the treaty after its amendment. Since all the principles set forth in that provision seemed applicable to treaties between States and international organizations or between international organizations, he had considered that he could propose a text which, except for drafting changes, was the same as that of article 40 of the Vienna Convention.

3. Mr. USHAKOV said that, generally speaking, he had much the same difficulties with article 40 as with the preceding article. Referring to the first phrase of article 40, paragraph 1, he wondered whether international organizations could really agree by treaty to rules concerning them that differed from the rules set forth in the draft articles. For example, could an international organization derogate by treaty from the rules of its own constituent instrument, such as those concerning its capacity to conclude treaties?

4. With respect to paragraph 2 (*b*), he wondered whether international organizations could take part in the negotiation and conclusion of any agreement for the amendment of a multilateral treaty. Could they really conclude such an agreement, even tacitly?

5. The term "agreement", which appeared, *inter alia*, in paragraphs 4 and 5 of the article, could be in-

[1] See 1507th meeting, foot-note 1.