# Part Two

# ANALYTICAL REVIEW OF THE PROCESS: REPORT OF THE SECRETARY-GENERAL

# Deuxième partie

# RÉEXAMEN ANALYTIQUE DU PROCESSUS : RAPPORT DU SECRÉTAIRE GÉNÉRAL

# Part Two

# ANALYTICAL REVIEW OF THE PROCESS: REPORT OF THE SECRETARY-GENERAL

## I. INTRODUCTION

1. At the thirty-second session of the General Assembly, the Sixth Committee considered an agenda item entitled "Review of the multilateral treaty-making process", proposed for inclusion in the agenda by Australia, Egypt, Indonesia, Kenya, Mexico, the Netherlands, and Sri Lanka. In the communication requesting inclusion (A/32/143 and Corr.1), those States proposed that the United Nations carry out a review of the many methods of multilateral treaty-making employed in the United Nations and under its auspices with a view to determining whether the methods employed were as efficient and economical as the needs the world community required and circumstances permitted. On the basis of the Committee's report (A/32/363), the Assembly adopted resolution 32/48 on 8 December 1977 by which it requested the Secretary-General to prepare a report on the techniques and procedures used in the elaboration of multilateral treaties with a view to its submission to the Assembly at its thirty-fourth session; invited Governments and the International Law Commission to submit by 31 July 1979, for inclusion in the report, their observations on this subject; requested those specialized agencies and other interested organizations which were active in the preparation and study of multilateral treaties, and the United Nations Institute for Training and Research, upon request, to lend any necessary assistance; and decided to include in the provisional agenda of its thirty-fourth session the item entitled "Review of the multilateral treaty-making process".

2. In implementation of resolution 32/48, the Legal Counsel addressed communications to 15 United Nations offices outside the Office of Legal Affairs requesting an account of treaty-making techniques and procedures employed within the framework of their respective responsibilities. To assist in the preparation of such accounts, these communications were accompanied by a set of general guidelines. At the same time, the Legal Counsel addressed a somewhat similar request to all specialized and related agencies and to 22 other world-wide and regional inter-governmental organizations known to be active in treaty-making. These requests, too, were accompanied by another set of guidelines. Finally, reminders concerning the observations requested by the Assembly in paragraph 2 of the resolution were sent to all Governments, and arrangements were made to place an appropriate item on the agenda of the thirtieth session of the International Law Commission (ILC).

3. In response to the above-mentioned communications, the following substantive replies were received:

(*a*) Observations from nine Governments, the texts of which will be issued in addendum 1 to the present report;[1]

(*b*) Observations from the International Law Commission, which were prepared by a Working Group initially established at the thirtieth session of the Commission and reconstituted at the thirty-first session and which were approved by the Commission at is 1580th meeting, on 31 July 1979;[2] these observations will be issued in addendum 2 to the present report;

(*c*) Reports from 13 United Nations offices and from 25 specialized agencies and other international organizations, listed in the annex below;[3] because of the limitation on the length of Secretariat reports, it is not possible to set out herein the full texts of the replies received or even a detailed analysis thereof, in particular because (as pointed out in paras. 5-15 below) relatively few generally applicable features appear.

4. Because only three sets of governmental observations had been received within the given time-limit, which itself had been set rather too late to permit the Secretary-General to take them into account for a report to be considered at the thirty-fourth session of the General Assembly, he proposed to the General Committee at that session that consideration of this item be postponed until the thirty-fifth session of the Assembly. The Committee agreed to recommend to the Assembly that the item be removed from the agenda of its thirty-fourth session. However, during the discussion of the annual report of ILC in the Sixth Committee, several representatives commented on the observations the Commission had prepared.[4]

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## II. GENERAL FEATURES OF MULTILATERAL TREATY-MAKING

### A. WITHIN THE ORGANIZATION OF THE UNITED NATIONS

5. In less than 35 years some 200 multilateral treaties have been concluded within the United Nations, i.e. by United Nations organs or by diplomatic conferences convened by the United Nations, of which about one quarter constitute mere amendments or extensions of, or subsidiary protocols to, other agreements (some of which had been concluded within the League of Nations). An examination of the various procedures previously or currently employed within the United Nations to prepare these treaties discloses extensive diversity. Among the significant bases on which these procedures can be differentiated is the extent to which they are established and structured or *ad hoc* in nature, the extent to which they involve expert and representative bodies, and the extent of the involvement of the General Assembly.

6. Thus treaties are promulgated[5] by the General Assembly, after detailed consideration at a single session or at a long series of sessions in one or more Main Committees or even in two Main Committees meeting jointly or after a more *pro forma* review of a draft formulated by some other body. Such a body may be a principal organ (such as the Economic and Social Council or the Secretariat) or a standing expert group (such as the International Law Commission or the Commission on Human Rights); on occasion it could be a smaller representative organ, whether specialized—such as the United Nations Commission on International Trade Law (UNCITRAL) or the Legal Subcommittee of the Committee on the Peaceful Uses of Outer Space, or non-

specialized—such as the Preparatory Commission for the United Nations, or *ad hoc*—such as the *Ad Hoc* Committee on the Drafting of an International Convention Against the Taking of Hostages. Other treaties were promulgated directly by the Economic and Social Council, by a regional commission or by a subsidiary organ thereof (such as the Inland Transport Committee of the Economic Commission for Europe) or even by the Secretary-General. However, the greatest number of treaties were promulgated by plenipotentiary conferences convened by the Assembly, the Council, the United Nations Conference on Trade and Development (UNCTAD), the United Nations Environment Programme (UNEP), the International Trade Centre, etc. In turn, most of these conferences (with the notable exception of the Third United Nations Conference on the Law of the Sea) have based their work, which sometimes was short and *pro forma* but often thorough and extended to several sessions, on a draft text prepared by some other body, such as those just referred to in connection with the instruments adopted directly by the Assembly.

7. Seemingly the only generalization possible is that multilateral treaty-making in the United Nations is almost always (except for some regional or specialized instruments of a most restrictive nature) a multistage process. The first stages of the formulation of an instrument are generally entrusted to some restricted body—a small committee of governmental representatives, an expert group or even the Secretariat, but the final stages always involve a representative body, whether an organ or a conference, whose membership generally coincides with the potential scope of participation in the proposed instrument. However, so many potential combinations of such organs have been tried in practice that it is neither practicable nor useful to list them all. However, a step-by-step examination of many of the procedures so far used in the United Nations, as well as in other organizations, has been attempted in section III below.

8. It should, nevertheless, be noted that the Organization of the United Nations, unlike some of the other organizations referred to in paragraphs 16 to 19 below, does not have any fully structured, complete treaty-making procedure, i.e. one that starts with the formulation of an instrument at a given time and with fair predictability results after the lapse of a specified period (typically two to four years), in a complete instrument ready for governmental acceptance. There are several reasons for this lack of fully structured procedures. The first reason is the diversity of subject matter with which the Organization deals. This in part results from the fact that, when particular fields are identified in which a substantial amount of treaty-making activity is to be developed, a specialized agency or another world-wide or regional intergovernmental organization is likely to be established for that purpose, leaving the central organization mostly concerned with non-homogeneous subjects. Secondly, the types of problems thus left to the United Nations tend to be broader or more controversial, such as disarmament, human rights, the progressive development and codification of international law, the general restructuring of international, political and economic relations, and the creation of new specialized organizations to carry out particular functions. Finally, the membership of the United Nations is more diverse than that of most organizations, such as the many regional or restricted functional ones, and even com-

pared to other world-wide organizations the United Nations membership reflects more a striving towards universality than commitments to any specific narrower goal. A diversity of subjects, submitted to a membership with varied interests and priorities, makes it impractical to evolve rigid and broadly applicable treaty-making procedures.

9. There are, however, some examples of at least partly structured multilateral treaty-making procedures in the United Nations. The most prominent of these is, of course, the ILC whose patterns of work derive in part from the Commission's Statute (General Assembly resolution 174 (II) of 21 November 1947) and which are described in greater detail in the Commission's observations prepared in connection with the present report (see Part Four, I.G.5 below). These procedures normally involve, within the Commission, three stages (preliminary consideration, first reading, second reading), each with several steps (for a total of nine); however, the length of these stages, and in particular that of the first reading, is not specified, so that the total length of the process is entirely undefined. Furthermore, the next stage or stages, i.e. consideration by the Assembly at one or more sessions and possibly reference to a single or multi-session plenipotentiary conference, must be decided in each case *ad hoc* by the Assembly.

10. The resolution establishing UNCITRAL (resolution 2205 (XXI) of 17 December 1966) is far less detailed, especially as to the procedure to be followed by that Commission (see Part Four, I.L. below). Nevertheless, in the dozen years of UNCITRAL operation, during which time drafts formulated by that Commission have resulted in the promulgation of three conventions, certain more or less regular practices have emerged. Such practices, even though not as firmly established as those of the ILC, still admit of some generalization. After a decision by UNCITRAL that a particular subject warrants further study, possibly with a view to preparation of a multilateral treaty, the Commission assigns it to a working group. Before and between the stages of deliberations of the working group, the secretariat carries out background research on existing law, both national and international, often on the basis of replies received to questionnaires addressed to States. It may even prepare preliminary draft texts. The working group uses these materials and others generated by its members, and through small informal negotiating groups and later more formal drafting committees it starts to evolve a set of draft articles. When the working group has established a draft text, the secretariat is asked to prepare an explanatory commentary. After a first consideration of the entire subject, the working group proceeds to a second reading, during which an attempt is made to achieve a complete, coherent and largely agreed text, which is then subjected to a thorough editorial review with the assistance of a drafting committee. When this work is completed, the draft text is approved by the working group and circulated for comments to Governments and interested international organizations, together with the commentary. Thereupon, UNCITRAL receives the draft approved by the working group, with the reports of the group sessions at which the draft had been discussed, an updated commentary and final clauses prepared by the Secretariat, comments by Governments and international organizations, and an analysis of those comments by the Secretariat. The Commission itself considers the draft text during a particular session, directly or in a committee of the whole, and with the assistance at the

final stages of a drafting committee approves a revised text to be submitted by the General Assembly for consideration by a plenipotentiary conference.

11. Human rights is an area in which the United Nations has from its very beginning been very active as a treaty-maker and in which specialized organs have been established (in particular the Commission on Human Rights) that assist in this legislative process (see Part Four, 1.A. below). Nevertheless, from an examination of the procedures used in the elaboration of over a dozen instruments (including a few that are still unperfected), no general pattern emerges. The process may be initiated in a principal organ (the General Assembly or the Economic and Social Council) or in a subsidiary one; a diplomatic conference originally convened inside or outside the Organization to deal with some related question may set the process in motion. The initial drafts may be prepared by the secretariat, an *ad hoc* group of experts, a Government or a standing specialized organ, such as the Commission on Human Rights. These drafts are passed to the Council which may forward them directly to the Assembly or may do so only after detailed consideration by one of its sessional Committees. The Assembly may consider such instrument at one or at as many as a dozen sessions, in the Third Committee alone, in both the Third and the Sixth Committee or in some joint meeting or organ of the two.[6] The entire process may take a period of time from a little over a year to one or more decades. Furthermore, some instruments that originated in a United Nations organ have ultimately been elaborated and promulgated in some other organizations of the United Nations system or at a conference not convened by the Organization.

12. In a field of more recent origin, the regulation of activities in outer space, a highly structured procedure has evolved by which at present five multilateral treaties have been promulgated and several more draft instruments have already received extensive consideration (see Part Four, 1.J. below). The main components of this process are successive considerations of proposed texts in a series of annual meetings, by working groups of the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space, by the Legal Sub-Committee and by the Committee—all of which have the same composition—and finally by a Main Committee of the General Assembly.[7] In the Outer Space Committee and its subsidiary organs all decision are taken by consensus, and at any give session several treaty instruments are normally considered. Even before a given treaty is completed, the report of each organ to the next senior one discloses any process made and gives the latter organ the opportunity to give guidance in the preparation of the instrument at the next session—a possibility that is particularly significant when exercised by the competent Main Committee of the General Assembly in which States are represented that are not members of the outer space Committee. In this field, too, the total length of the process in respect of any given instrument is entirely indefinite; in part this may be a consequence of the consensus rule—which, however, appears to result in accelerating the national acceptance of and thus the entry into force of the ultimately promulgated instruments.

13. In a still more recently evolved area, environmental protection, the seven multilateral agreements so far promulgated (one general and six essentially regional ones) were developed without direct participation of the General Assembly; indeed, for the most part, established organs played only an

indirect role in this process (see Part Four, I.M. below). Although the initiation of the procedure was in each case authorized by the Governing Council of UNEP, the preparatory work was accomplished in part by a mixture of governmental and secretariat experts, drawn from UNEP and from other bodies of the United Nations system, working individually or in small groups and periodically convened in interagency or inter-government consultations. The final instruments were adopted at plenipotentiary conferences, which introduced relatively few changes in the texts presented to them. It should be noted that UNEP conceive of this entire process not as an isolated exercise in treaty-making but rather as an important component in the development of comprehensive and effective action plans, which also involve environmental assessment, environmental management, and institutional and financial arrangements. The result is that the treaty instruments merely provide the legal basis for a co-operative effort to which Governments and international organizations have committed themselves.

14. Although certain types of treaties of world-wide applicability, such as those formulated by UNCTAD organs or conferences, are promulgated without the participation of the General Assembly, this is more typically true of regional agreements, such as the environmental instruments referred to above and espccially of the treaties promulgated by the regional commissions. Of these, the Economic Commission for Europe (ECE) has been particularly prolific over the years, especially in the field of transport (see Part Four, I.E. below). In that field, work on a new instrument is generally started in a subsidiary body of the Inland Transport Committee of ECE, such as the Group of Experts on Customs Questions Affecting Transport, the Group of Experts on Road Traffic Safety, the Working Party on Road Transport, or the Group of Experts on River Law. In several instances the first drafts of private law conventions have been drawn up by the International Institute for the Unification of Private Law (UNIDROIT (see Part Four, III.I. below)) and in others by the European Conference of Ministers of Transport. After expensive consultations with the members of the Commission, conventions concerning Europe are generally adopted and opened for signature directly by the Inland Transport Committee; instruments of a world-wide scope are, however, submitted to plenipotentiary eonferences convened by the Economic and Social Council, or by the Council in conjunction with other inter-governmental organizations, such as the International Maritime Organization (IMO).

15. Other regional commissions have engaged in other types of treaty-making using different procedures. For example, the Economic and Social Commission for Asia and the Pacific has assisted in the formulation of seven treaties establishing regional economic, financial or commodity organizations, in addition to an agreement on trade negotiations (see Part Four, I.D. below). Because of the diversity of the subject matters of these eight agreements, the formulation of each was carried out by a diverse set of standing and *ad hoc* inter-governmental and expert organs. Thus the Agreement Establishing the Asia and Pacific Coconut Community resulted from successive proposals and studies, starting with the 1967 Inter-governmental Consultations on Regional and Subregional Plan Harmonization and Economic Co-operation, followed by subregional consultations on a Regional Plan Harmonization on Coconut, Coconut Products and Oil Palms, and then Inter-governmental Consultations

on the Asian Coconut Community, which promulgated the Agreement. The adoption of several other agreements of this type was characterized by a co-operative effort of the Commission and its secretariat, with those of organs of the United Nations system (such as UNCTAD and UNDP) and specialized agencies (such as the Food and Agriculture Organization of the United Nations), with financing for meetings provided by UNDP.

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### B. WITHIN OTHER INTER-GOVERNMENTAL ORGANIZATIONS

16. The treaty-making activities of no other inter-government organization match those of the United Nations in quantity or diversity, nor yet in the multitude of approaches and procedures used. Indeed, most organizations utilize only a single procedure or a narrow range of procedures in their treaty-making activities, whether these activities are extensive or only occasional. However, considered collectively, the world-wide and regional international organizations do produce a far greater number of treaties than does the United Nations itself, and both the nature of these instruments and the procedures used to formulate and promulgate them show as great a diversity as those discussed above. It is actually possible to match rather closely many of the overall procedures used in the United Nations with those used outside and vice versa. This statement does not hold for certain specific techniques that have evolved in or become characteristic of particular organizations. Inasmuch as some of these techniques may be instructive in connection with corresponding procedures in the United Nations, they will be described in section III below.

17. One significant exception to the assertion that all types of treaty-making procedure are also reflected by practices within the United Nations is the existence of highly structured procedures designed to produce treaty instruments through a relatively rigid series of steps carried out with specified and thus predictable timing. Within the United Nations system the prime example of such a procedure is the adoption of international labour conventions through the International Labour Organisation (ILO) by means of its "double-discussion" procedure (see Part Four, II.D. below). This procedure, the foundations for which are established in the ILO Constitution and which is further described in the Standing Orders of the International Labour Conference, involve the following steps:

(*a*) The formal point of origin of each international labour convention is the inclusion, by the Governing Body of ILO, of the subject matter of the proposed convention in the agenda of an annual session of the International Labour Conference;

(*b*) As soon as possible after the decision on inclusion, the International Labour Office (the secretariat of the ILO) prepares a preliminary report setting out the law and practice in different countries and any other useful information, together with a questionnaire asking for reactions to specific provisions that might be included in the proposed instrument;

(*c*) On the basis of the replies received, the Office prepares a second report indicating the principal questions which require consideration by the Conference;

(*d*) The first reading in the Conference usually takes place in a specially constituted tripartite technical committee, constituted of an equal number of representatives of Governments, and of representatives of employers plus workers. After some general discussion there follows a provision by provision discussion, during which amendments are considered. A drafting sub-committee is then set up, consisting of one representative of each of the ILO constituencies, the reporter(s) of the committee and the legal adviser of the conferences. The report of the sub-committee is first considered and adopted by the committee and then by the Conference;

(*e*) Immediately after the Conference has completed its work, the Office prepares the text of the draft convention, based on the report adopted by the Conference, and circulates it to Governments with a request for amendments. On the basis of replies a further report is prepared;

(*f*) At the second conference convened to consider a proposed convention, the work proceeds as at the first reading, with the exception that at the time the report of the technical committee is considered by the plenary each clause is considered separately for adoption. The adopted clauses are then submitted to a conference drafting committee (usually consisting of the President, the Director-General, the Legal Adviser and members of his staff and the members of the technical committee's drafting sub-committee) which reviews the substantive provisions and adds the final provisions (which are standard for most ILO conventions). The text that emerges from the drafting committee is then presented for a final vote to the conference, at which time further amendments can only be considered under very severe restrictions; a two-thirds vote is required for adoption.

This entire "double-discussion" procedure thus takes up to 30 months. In a few circumstances, a single discussion procedure is used, either for instruments considered by special maritime sessions of the International Labour Conference or for conventions that merely revise existing instruments.

18. Another international organization that has a highly structured treaty-making process is the Hague Conference on Private International Law established in 1893 but operating since 1951 under a new Statute since which time it had by 1977 promulgated some 26 treaty instruments (see Part Four, III.P. below). This organization, specifically designed to formulate treaties, has evolved a somewhat rigid cycle for this function. It takes just slightly longer than the four-year interval between its conferences.

(*a*) Approximately nine months before each conference, a special commission meets to establish a list of topics for future consideration. The secretariat then prepares a short feasibility study for each topic. At the conference, one sessional committee formulates a list of future topics, on the basis of which the Netherlands Standing Government Committee on Private International Law decides on the timing of the work on each topic to be considered;

(*b*) Once a topic has been selected, a member of the secretariat prepares a research study and draft questionnaire for Governments, designed to obtain information and to elicit opinions;

(*c*) Negotiations start with a meeting of governmental legal experts, lasting about a week and resulting in a set of written conclusions drawn up by a small drafting committee or by the secretariat;

(*d*) Drafting generally does not start until the second meeting in order not to limit prematurely the range of options. At this meeting a drafting committee of five or six experts is established, the purpose of which is to prepare the substantive clauses in English and in French, leaving the preparation of formal clauses for the conference;

(*e*) The draft text is considered at the next session of the conference, at which time each proposed instrument is considered by a separate committee constituted more broadly than the intersessional groups. Another committee elaborates the final clauses for all the instruments under consideration at that session;

(*f*) If it is not possible to complete a particular convention at the quadrennial conference, a special commission may be convened to do so later;

(*g*) When the text of the convention has been adopted, a date for opening it for signature is set, usually about a year later. During the interval a full report on the convention is prepared, consisting of a fully cross-indexed record of every meeting at which the instrument was discussed and the texts of all relevant working documents.

19. Although the over-all procedures employed by a number of other international organizations could be analysed and presented here, this would not seem to be of great utility, in part because the appropriateness of any procedure, general or *ad hoc*, rigid or loose, depends on the subject matter concerned and on particular circumstances (such as the membership of the organization). Furthermore, there is no adequate method of evaluating, on an abstract basis, the relevant success of any of these procedures. Such an evaluation would have to take into account the following:

(*a*) The adequacy of the process in formulating treaties as and when required by the particular international community in question;

(*b*) The quality of the treaties produced, i.e. their adequacy in meeting the needs to which they are addressed—a matter not susceptible of measurement, except subjectively by the rate by which ratifications are deposited and thus entry into force is achieved;

(*c*) The cost of the process in terms of the expenses imposed on States directly or through their contributions to the international organization concerned, which depends in part on the length of time required to produce each treaty.

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## III. SPECIAL FEATURES OF MULTILATERAL TREATY-MAKING PROCESSES

20. Although over-all evaluations of treaty-making processes are thus not feasible and a recitation of all such procedures is not possible within the compass of a report of reasonable length (although that might be done in a treaty-makers manual, the preparation of which was suggested in the observations of several Governments), particular examples can be cited of specific procedures that have proven useful as parts of certain treaty-making processes. To facilitate comparison, these examples are grouped according to the relevant stages of the treaty-making process.

## A. INITIATION OF TREATY-MAKING

21. Depending on the degree to which a given treaty-making process is structured, the initiation of the process may be a formal, clear-cut and definite stage. For purposes of analysis it is possible to distinguish certain steps or aspects.

### 1. *Proposal*

22. Experience both in the United Nations and in other inter-governmental organizations shows that proposals for new treaty instruments originate with many different types of sources; for example, Governments (individually or jointly), subsidiary organs, expert groups, the Secretariat, conferences convened to deal with other related subjects, treaty organs and other inter-governmental or non-governmental organizations. Furthermore, when the "source" is any type of collective body, it is always, at least in principle, possible to trace the proposal back to the originator in that body. It thus does not appear possible to attribute to the origin of the proposal any particular significance in respect to the devolution of the subsequent treaty-making process, or to suggest any practical changes in procedures relating to the making or reception of such proposals.

23. In this stage, organs of the United Nations serve as initiators of proposals that are taken up by other international organizations or as recipient of suggestions from other organizations. In this connection it may be noted that while certain organs of the United Nations, in particular the General Assembly and the Economic and Social Council, are entitled to make formal recommendations to other international organizations,[8] which the latter may be required to take into account, other organizations can generally only make suggestions to the United Nations. However, the Organization has not so far used its central position or its power of recommendation to suggest any systematic reorganization or even co-ordination of the international legislative process.

### 2. *Pre-initiation studies*

24. In a number of organizations and even in some United Nations organs, particularly in those with a firmly structured treaty-making process—i.e. one that, once set in motion, is expected to result in the formulation of a treaty—extensive studies are carried out before a formal decision is taken to initiate the process. The purpose of such studies is to ascertain the need for the enterprise and its likely success and the optimum method of approaching it. Experience seems to show that the proper use of such studies makes it less likely for an organization to embark on treaty-making projects that must later be abandoned or that extend for undue periods.

25. Some examples of the use of such preliminary studies are the following:

(*a*) When UNCITRAL considers inclusion of a particular subject in its work programme and the priority to be assigned and the method of dealing with it, the Commission usually has before it preliminary studies prepared by its secretariat, sometimes with the assistance of outside consultants.

(*b*) Before UNEP embarks on the process of formulating a treaty, its secretariat prepares a summary of the existing state of the environmental problem to which such treaty is to be addressed.

(*c*) The Committee of Ministers of the Council of Europe generally decides on the inclusion in the programme of work of the task of formulating a new convention on the basis of a report by a committce of experts on the advisability and feasibility of undertaking that enterprise.

(*d*) In UNESCO, the secretariat prepares, on the basis of an authorization in the programme and budget of the organization, a preliminary study relating to the legal and technical aspects of the possibie regulation on an international basis of a particular technical question; the completed study is then examined by the Executive Board which decides on inclusion of a suitable item in the provisional agenda of the General Conference.

(*e*) As described in paragraph 18 (*a*) above, the secretariat of the Hague Conference on Private International Law prepares a short feasibility study on each topic that a special commission, meeting in anticipation of a quadrennial conference, has decided might be considered in the future. These feasibility studies are considered in the sessional committee of the conference charged with developing the future programme of work.

### 3. *Formal initiation of treaty-making*

26. In certain organs and organizations with well-structured treaty-making procedures the initiation of the treaty-making process is a well-defined, formal step. In others, such as in respect of most treaties formulated by the use of *ad hoc* procedures decided by the General Assembly, the process is often initiated in a rather tentative way, to be reinforced or weakened at successive sessions as reports submitted to the Assembly confirm or cast doubt on the desirability and feasibility of the enterprise. Following are some examples of processes involving formal decisions by specified organ before thc treaty-making process can begin:

(*a*) In ILO the formal step is the placement of a suitable item on the agenda of the International Labour Conference: this step is almost always taken by the Governing Body, though the Conference itself may do so in respect of the agenda for the next annual Conference.

(*b*) Similarly, in UNESCO, the Executive Board decides on the basis of the studies referred to in paragraph 25 (*d*) above whether to include a suitablc item in the provisional agenda of the General Conference.

(*c*) In the Customs Co-operation Council, the formal decision is taken by the Council on the proposal of its Permanent Technical Committee.

(*d*) In UNIDROIT, the first step in the formulation of a treaty is inclusion of an item in the triennial work programme of the Institution, which is adopted by its Governing Council and approved by its General Assembly.

(*e*) In the Council of Europe the formal decision is taken by the Council of Ministers acting on the programme of work.

### 4. *Decision as to type of instrument*

27. In embarking on the process that may lead to the formulation of a multilateral treaty, an international organization may be faced with various

alternatives as to the type of instrument to be developed. A decision on that matter may also affect the nature, or at least some aspects, of the process by which it is to be formulated. In some instances that decision is, on formal grounds, required to be made at an early stage. For example, the General Conference of UNESCO must decide, before committing the organization to the process of formulating an international regulation of a given subject, whether such regulation should take the form of a recommendation or of a convention, both of which are provided for in article 4 (4) of the UNESCO Constitution. Similarly, in ILO, a decision must be made whether to aim for regulation by convention or by recommendation, or, as is frequently done, by a combination of both types of instruments.

28. On the other hand, certain legislative exercises in the United Nations are characterized by deliberately postponing a decision about the nature of the instrument that is to emerge from a particular negotiation. This has been especially true of certain negotiations conducted within UNCTAD, for example in respect of the transfer of technology (on which at present a code of conduct is being developed) and the control of restrictive business practices (on which the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (TD/RBP/CONF/10) were recently adopted on the understanding that they might later be replaced by a treaty). Similarly, various alternative instruments have been considered within the purview of the Centre on Transnational Corporations in respect of the problem of corrupt practices; these instruments include an international agreement, model national laws, voluntary guidelines for non-governmental organizations and a code of conduct for inter-governmental organizations.

29. In connection with the choice of instrument to be formulated, a special practice of the United Nations, and in particular of the General Assembly, deserves notice. Frequently, before formulating a treaty on a given subject, especially in the human rights but also in other areas, the Assembly adopts a declaration on that subject. Such a solemn instrument may be designed to ameliorate the situation to which it is addressed more quickly than by means of or pending the completion of a long-range treaty-making project. Likewise, it may constitute a guideline for such a project or assist in testing in practice certain principles before they are firmly embodied in a treaty. Examples of such declarations that were later followed by treaties include the Universal Declaration of Human Rights (resolution 217 A(III))[9] and the United Nations Declaration on the Elimination of All Forms of Racial Discrimination (resolution 1904 (XVIII));[10] in other instances treaties are still being formulated that correspond to certain declarations, such as the Declaration on the Rights of the Child (resolution 1386 (XIV)) and the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (resolution 3452 (XXX)) and the Declaration of Principles Governing the Sea-Bed and Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction (resolution 2749 (XXV)).

## B. FORMULATION OF MULTILATERAL TREATIES

### 1. *Initial draft*

30. Once the treaty-making process has started, an initial draft of all provisions or at least of the substantive provisions of the proposed instrument must be prepared. In respect of the timing of this step, treaty-making organs have adopted widely different approaches, with some intermediate positions as follows:

(*a*) Drafting sometimes starts at the earliest possible point. For example, in ILO the initial questionnaire, which is prepared well before consideration of a potential convention by an International Labour Conference, already requests governmental reactions to precisely formulated provisions which, collectively, are designed to constitute the kernel of the proposed instrument.

(*b*) In other organizations, the start of the drafting process is delayed as long as possible, so as not to inhibit or influence the free exchange of views on the subject by channelling attention too much towards particular formulations. For example, in the Hague Conference, drafting is normally started only at the second session of the competent special commission after a previous extensive discussion among experts. The same approach was used in the United Nations in the work of the *Ad Hoc* Inter-governmental Working Group on the Problem of Corrupt Practices.

31. Following are various sources from which the initial draft can originate:

(*a*) The initial draft is sometimes prepared outside of the formal treaty-making process, even before initiation of that process. For example, drafts may come from Governments, inter-governmental or non-governmental organizations.

(*b*) In some instances, particularly those in which a draft is prepared at an early stage of the process, the draft of all or of crucial portions of the text originates with the secretariat. Thus, for example, in UNCITRAL the initial secretariat studies submitted to the competent working group often include draft provisions to be cousidered for inclusion in the proposed instrument. In ILO the initial secretariat questionnaire tests possible formulations of key provisions.

(*c*) In other organs and organizations, particularly where preliminary consideration is by an expert rather than by a representative organ, the initial draft is usually prepared by a member of that organ. For example, in ILC the initial drafts of almost all provisions are presented by the special rapporteur on the item, as part of his reports to the Commission.

### 2. *Negotiation*

32. The process of negotiation permeates all the procedures relating to the formulation of a multilateral treaty. In some instances, this process starts even before presentation of the initial draft to the first organ to consider it. Negotiations may begin before a formal decision to initiate the treaty-making process is taken by the organization concerned; that decision, therefore, becomes merely an episode in those negotiations. Similarly, the negotiating

process may extend through the approval of the text in principle by the last negotiating organ to consider it, into and through the last stages of editorial revision, and into the post-adoption stage when changes in an instrument may be considered in order to make it more acceptable or to facilitate its ratification by States. However, for the purpose of this study, that part of the negotiating process will be considered that extends from the presentation of the first draft provisions to the formal adoption of the treaty instrument.

33. The negotiating process generally takes place in a succession of organs, usually hierarchically arranged, starting with smaller groups, often composed of experts, and moving towards larger organs composed of government representatives. Sometimes, however, in particular in respect of politically sensitive instruments, this relatively straight-line progression becomes discontinuous. This is so in those instances in which the formulation of an instrument is entrusted to a plenary or to an open-ended group whose membership ultimately proves too numerous for the practical conduct of sensitive negotiations. Small formal or informal negotiating groups are then formed, and they in turn report back to the larger organ that established them.

34. In those situations where the treaty-making process starts in a select group, whether expert or representative, the composition of such a standing group can be subject to variation in several ways. In some instances, such as the Committee on the Peaceful Uses of Outer Space, the composition of the group is varied only by increasing its size from time to time (from 27 in 1959 to 47 in 1977). In other instances, such as ILC and UNCITRAL, there is a regular turnover in the group by limiting the length of the electoral term (typically from 4 to 6 years).

35. The time-span of formulation during the negotiating process can vary depending on the treaty-making body. In some instances, in particular in respect of basically political treaties such as those relating to disarmament, but also in respect of technical ones such as those considered by ILC or the Outer Space Committee, negotiation takes place at a series of discrete sessions, which individually are not (and generally are not expected to be) long enough to reach complete agreement. Instead, each question to be considered is taken up at the stage at which it has last been considered; it is advanced as far as possible and a report is prepared which is submitted either to a senior organ or, in effect, to the next session of the same body. Thus the formulation of an instrument proceeds slowly, by accretion. In other organs, such as in meetings of UNCITRAL, the ILO Conference, the Hague Conference or UNIDROIT, an attempt is made to complete at a particular session the full negotiation of one or more instruments; only exceptionally is an incomplete negotiation put off for a further session or for a special organ.

### 3. *Consultations with Governments and others*

36. Since most treaty instruments are ultimately adopted by an organ of governmental representatives and ratified or accepted by Governments, the process of formulating a proposed treaty should ensure its acceptance by Goverments. In addition, other international organizations that cannot participate directly in its formulation may have particular knowledge or points of view in respect of a proposed treaty. Consequently, various techniques, includ-

ing the following, have been developed to maintain contacts during the treaty-making process with the Governments of potential parties and with other entities with relevant expert knowledge:

(*a*) Circulation of questionnaires at various stages of the treaty-making process, including the very beginning before formulation of drafts (e.g., at the preliminary stage of consideration by the ILC or the Hague Conference) and at later stages when progress in formulating an instrument has been made. The responses to such questionnaires are tabulated by the secretariat and taken into account by the organ charged with advancing the proposed text;

(*b*) Distribution for comments of the partly or completely formulated treaty (e.g., at the end of the first reading by the ILC); comments are classified and taken into account;

(*c*) Preparation by an expert or smaller representative organ of a report for submission to a senior representative organ, which considers it during its session; the comments made in such consideration are communicated to the organ charged with formulating the treaty (e.g., the procedure in formulating outer space treaties, as described in para. 12 above). This is done unless the formulation of a given instrument takes place very rapidly, i.e. at a single session;

(*d*) Finally, direct consideration of the treaty at one or more stages by organs consisting of governmental representatives, in which observers from other bodies are often and indeed more and more frequently allowed to participate.

### 4. *Drafting committees*

37. In the reports received in preparation of the present study, many organs and organizations stressed the important role of drafting committees in the formulation of multilateral treaties. Indeed, practically all organs that formulate treaties, whether expert or representative, at one or more stages submit the text for consideration by such a committee. Practically the only bodies that do not do so regularly are Main Committees of the General Assembly.

38. There is no uniformity about the formation of drafting committees. In many instances, for example in the International Labour Conference, both at the technical committee and the plenary stage, the drafting committees are kept very small. In United Nations conferences, on the other hand, there has been a certain tendency towards larger drafting committees, in part reflecting the increase in the membership of the organization and in part the increase in the number of working and official languages.[11] With reference to their composition, an attempt is made to include in the drafting committee representatives fluent in those languages in which the treaty is being formulated. A deliberate attempt is also made to have various legal systems represented on the committee. Finally, in some instances, such as in ILO and ITU, drafting committees also include secretariat experts; even when this is not so, secretariat members often play an important role in servicing committees consisting only of governmental or expert members.

39. Although the use of drafting committees is almost universal, there is no uniformity about the extent of their functions. In most United Nations codification conferences, drafting committees are responsible for preparing

drafts and giving advice on drafting as requested by the Conference or by a main committee and to co-ordinate and review the drafting of all texts adopted. In other organs and conferences, such as the Inter-governmental Committee to Draw Up a Constitution for UNIDO as a Specialized Agency (Vienna, 1976-1977), a Legal Drafting Committee was established, which had primary responsibility for preparing all the essentially legal provisions of the draft Constitution, as well as for giving normal advice on drafting to the other organs. Indeed, in some instances, the entire task of formulating texts on the basis of discussions in larger organs is entrusted to a drafting committee. On the other hand, in some instances the competence of a drafting committee is severely restricted, such as in the Third United Nations Conference on the Law of the Sea, in which the drafting committee was explicitly cautioned not to "reopen . . . substantive discussion on any matter" and to "co-ordinate and refine the drafting of all texts referred to it, without altering their substance"; finally it was specified that the committee had "no power of or responsibility for initiating texts" (A/CONF.62/30/Rev.2, Rule 53(1), see also Part Four, I.K. below).

### 5. *Languages*

40. Although certain organizations, such as the Hague Conference, still promulgate treaties that are authentic only in English and French, most international organizations have increased the number of official and working languages and consequently the number of languages in which treaties are authentic. In particular, treaties promulgated by the General Assembly in recent years have all been authentic in six languages: Arabic, Chinese, English, French, Russian and Spanish.

41. Where a treaty is to be authentic in more than one language, the negotiation of the text proceeds simultaneously in all those languages, i.e. at each stage of preparation or revision of a draft text this is done in all the languages in question. In some instances, however, an expert or restricted representative organ preparing a treaty works only in some of the languages in which the treaty will be authentic; thus both ILC and UNCITRAL conduct their work and prepare their texts solely in English, French, Russian and Spanish. It is only when the reports of these organs are prepared for presentation to the General Assembly that the texts contained in these reports are translated into Arabic and Chinese, and this is done without the supervision of the body which originally prepared the draft. The text in all six languages is then reviewed by the General Assembly (with or without the assistance of a drafting committee) or by a plenipotentiary conference (which always has a drafting committee).

42. The procedure whereby the law of the sea Conference reviewed the six linguistic versions of the informal composite negotiating text deserves mention (see also Part Four, I.K. below). Instead of conducting meetings of the entire Drafting Committee, the text in each language was first reviewed by the members of the Drafting Committee belonging to that particular language group, each of which proposed improvements in that version; problems that affected several languages were then considered by the co-ordinators of the language meetings under the direction of the Chairman of the Committee.

Only after that work did the Drafting Committee itself consider the text, taking into account the conclusions of the linguistic groups and of the meetings of the co-ordinators.

### 6. *Final clauses*

43. A number of organizations active in treaty-making, and in particular in the case of treaties that are somewhat homogeneous in subject-matter and potential participation, have prepared standard or model final clauses to be included in such instruments. These organizations include ILO, the Hague Conference on Private International Law and the Council of Europe, which in 1963 adopted two sets of model final clauses (which at present are in the course of being reconsidered), for use respectively with conventions requiring ratification or acceptance, and agreements that merely require signature.

44. The Treaty Section of the United Nations Office of Legal Affairs prepared a Handbook of Final Clauses (ST/LEG/6), which was published in August 1957 and covered clauses in the following categories: (*a*) method by which States may become parties; (*b*) entry into force; (*c*) specification of which States may become parties; (*d*) duration of validity; (*e*) methods by which States cease to be parties; (*f*) territorial application; (*g*) application under domestic law; (*h*) reservations; (*i*) arbitration, interpretation and settlement of disputes; (*j*) amendment; (*k*) revision; and (*l*) depositary and authentic texts. This publication has not since been updated and is now out of print. However, on an annual basis, the final clauses of all new treaties of which the Secretary-General becomes depositary are published in a Supplement to Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions, Annex: Final Clauses (ST/LEG/SER.D/1, annex).

### 7. *Records and commentaries*

45. Most international organizations engaged in treaty-making provide for the maintenance of either verbatim or summary records of the deliberations of all formal representative organs that consider a treaty. Such records are, however, not necessarily maintained for expert groups, nor for closed or informal meetings of representative organs. Recently, the Economic and Social Council and the General Assembly have decided, as cost-cutting measures, to eliminate, at least on an experimental basis, the keeping of summary records by most subsidiary organs, including those engaged in treaty-making (see E/1980/INF.3, paras. 20-22). An exception to this rule was made by the Assembly in its decision 34/418, at the request of the Sixth Committee, in favour of ILC, but not, for example, in favour of UNCITRAL.

46. Whether or not a subsidiary organ maintains verbatim or summary records, and whether or not it is a representative or an expert body, it normally prepares and submits to a senior organ a report on its deliberations at a particular session. For bodies that are normally engaged in treaty-making, these reports often include important ancillary documents, such as the texts of studies, comments or drafts proposals considered by the subsidiary body, and reports from subsidiaries of that body. Again, recent directives of the General Assembly have tended to reduce the completeness of such reports by proscribing the attachments of certain types of subsidiary documents.

47. In a number of organs engaged in formulating treaties, commentaries are prepared as part of the negotiating process. For example, UNCITRAL usually requests the Secretariat to prepare a commentary for use by the working group considering the first draft of a treaty, and a revised and updated version later forms part of the documentation available to the Commission itself. However, such commentaries are rarely "adopted" or "approved" by a representative body itself, in any event not by the body that finally adopts the treaty.

48. In the Hague Conference a complete report on the consideration of each adopted treaty is written by the secretariat, under the supervision of an expert body immediately after adoption but before the treaty is opened for signature—a delay for that purpose of as much as a year. The report is intended to assist the potential parties to the treaty in considering its acceptance. Other organizations also subsequently collect and publish part or all of the *travaux préparatoires* of treaties for whose promulgation they were responsible. For every United Nations codification conference, whether convened in respect of an ILC or UNCITRAL draft, all the official records of the conference, including the summary records of its principal organs, the background documents and the proposals submitted to the conference and the reports generated within it, are collected and published. However, these records are generally not fully indexed, nor do they contain materials from the stages earlier than the conference, except to the extent that these are reflected in the reports submitted to it. UNITAR has embarked on a project, with outside financing, to collect the *travaux préparatoires* of a number of important treaties originated by the United Nations, starting with the principal human rights conventions.[12]

### 8. *Conflicts with other treaties*

49. As the body of international law created by multilateral treaties increases, greater and greater problems arise about possible conflict between treaties already in force, whether on a world-wide or regional or otherwise restricted basis, and new proposed instruments. Naturally, identification of the existing instruments that bear on the subject matter of a proposal is always part of the research performed at some stage of the treaty-making process by the secretariat of the organization concerned. This task is particularly important in fields such as international labour legislation because of the large number of treaties that ILO and other bodies have already originated in this area. The ILO secretariat has therefore developed a particularly careful practice of identifying such treaties, including both those within its own organization and those concluded or under consideration outside, about which information is received pursuant to the arrangements referred to in paragraph 50 (*b*) below.

50. At least two systematic efforts are currently being made in the United Nations system to secure information about the treaty-making and related activities of a number of organizations. For example, UNCITRAL at its third session requested the Secretary-General to submit reports to the annual sessions of the Commission on the current work of international organizations on matters included in the current programme of work of the Commission. Pursuant to that request, annual reports have been submitted each year since 1971 (A/CN.9/59, 71, 82, 94 and Add.1 and 2, 106, 119, 129 and

Add.1, 151, 175, 192 and Add.1 and 2). The 1980 version reports on the activities of four United Nations organs, three specialized and related agencies, five other inter-governmental organizations, two non-governmental organizations and one other organization. To cite another example, in 1974 and again in 1980 the Administrative Committee on Co-ordination (ACC) called on the United Nations system organizations to exchange among themselves information about treaty instruments under preparation in any of their organs, and asked the United Nations Office of Legal Affairs to send annual reminders to the legal offices of the other organizations. This information is not routinely communicated to the General Assembly or to any other representative organ, but important treaty texts prepared within organizations of the United Nations system are reproduced in the *United Nations Juridical Yearbook*.

## C. ADOPTION OF MULTILATERAL TREATIES

### 1. *Organ*

51. The formal adoption of a multilateral treaty normally takes place in a representative organ whose membership more or less corresponds to the potential participation in the treaty in question. A minor exception arises in respect of treaties adopted by the General Assembly, which typically are now open for participation by all States, including non-members of the United Nations. Only in a few instances has the Assembly acceded to the request of a non-member State to participate in the formulation of such a treaty.[13]

52. Normally two types of organs adopt multilateral treaties, either the most representative principal organ of the organization (e.g., the United Nations General Assembly or the International Labour Conference) or a plenipotentiary conference. However, exceptions arise, such as several within the ambit of ECE. Thus, most of the Commission's transport treaties are promulgated by its Inland Transport Committee, while in at least one instance a treaty was promulgated at a plenipotentiary meeting of the Commission itself. That was the 1961 European Convention on International Commercial Arbitration.[14]

53. In most instances the organ that adopts an international treaty consists only of inter-governmental representatives. The International Labour Conference constitutes a long-standing prominent exception to this rule, since the Conference, as well as other representative organs of ILO, consists of a number of governmental representatives (two for each member State) and of an equal number of employer plus worker representatives (one for each member State).

### 2. *Special procedural rules*

54. Certain organizations that specialize in multilateral treaty-making, such as the Hague Conference and UNIDROIT, have organs whose rules of procedure are specifically attuned to the various steps required for consideration and adoption of such treaties. However, some other organizations, for which the adoption of multilateral treaties is an important but not the sole activity, have adopted special rules of procedure for this purpose. For exam-

ple, FAO has included in the General Rules of the Organization a special rule on conventions and agreements. In addition, in 1957 it adopted "Principles and Procedures which should govern Conventions and Agreements concluded under Articles XIV and XV of the Constitution and Commissions and Committees established under Article VI of the Constitution". UNESCO in 1950 adopted "Rules of Procedure concerning Recommendations to Member States and International Conventions covered by the terms of Article IV, paragraph 4, of the Constitution". ILO has adopted Standing Orders for both its Conference and its Governing Body that contain provisions relating to the consideration and adoption of international labour conventions.

55. Although the General Assembly has not adopted any such special rules, it has annexed to its Rules of Procedure certain "Recommendations and suggestions of the Special Committee on Methods and Procedures of the General Assembly" approved by the Assembly, and a report on "Methods and procedures of the General Assembly for dealing with legal and drafting questions", both of which contain non-binding procedural suggestions relevant to the consideration and adoption of multilateral treaties.

### 3. *Voting majorities*

56. Various types of voting majorities have been or are required for the adoption of multilateral treaties in organs or conferences empowered to do so:

(*a*) Simple majority, as provided for in the immediate post-World War II period by several United Nations conferences;

(*b*) Two-thirds majority for all substantive decisions of plenipotentiary conferences, including the adoption of the text of an international agreement, as is now specified in article 9 (2) of the Vienna Convention of the Law of Treaties of 1969.[15] In the General Assembly itself, the voting majority required depends on whether the treaty relates to an "important question" within the meaning of Article 18, paragraph 2, of the Charter of the United Nations, or whether the Assembly takes a decision, pursuant to Article 18, paragraph 3, to decide certain questions relating to a treaty by a two-thirds majority;[16] the Assembly has not, however, decided that in general the adoption of all international treaties should require such a qualified majority;

(*c*) Absolute affirmative majority (i.e. a simple majority of all potential voters) to reinforce the two-thirds majority requirement, which is calculated on the basis of those casting affirmative or negative votes (e.g., the law of the sea conference and the Council of Europe);

(*d*) Consensus on matters such as the formulation and adoption of multilateral treaties; some rules of procedure (e.g., those of the law of the sea conference) specifically require that before a decision is taken by a vote, every effort at reaching a consensus first be exhausted;

(*e*) In a few instances, some bodies and conferences have provided that all decisions be taken by consensus (e.g., the Committee on Disarmament) or they simply omit all rules relating to the taking of decisions so that these can only be taken by consensus or unanimity (e.g., the Rules of Procedure of the United Nations Conference on Prohibitions or Restrictions of Use of Certain

Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (A/CONF.95/2)).

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## D. POST-ADOPTION CONCERNS

57. Both the reports of organizations and the governmental comments indicate an increasing concern with the non-ratification or the slow ratification of multilateral treaties, resulting in delays in their entry into force, in restricting the number of participating States for an excessive number of years, and even in the failure of certain treaties to enter into force at all. This was discussed extensively in a UNITAR study.[17] That study discussed a number of reasons for this phenomenon, including problems relating to the provisions of a particular treaty, as well as both particular difficulties in the domestic ratification process in certain States and general difficulties arising for all States out of the large number of treaties being generated by the international community.

### I. *Facilitating acceptance through method of formulating treaties*

58. One reason for few or slow acceptances of certain multilateral treaties is the fact that, even though they were adopted by the requisite procedures and majorities in a duly qualified organ, the texts thus negotiated and adopted were not truly acceptable to many States. Consequently, certain organizations have consciously tried to improve the negotiating process with a view to arriving at texts that are more assuredly aeceptable to most of the potential parties. In addition, it has been suggested that the increasing tendency to formulate and even to adopt treaties by consensus (see paras. 12 and 56 (*d*) and (*e*) above), which necessarily requires more extensive negotiations and more care in meeting the requirements of all potential participants, is more likely to result in generally acceptable instruments.

59. In addition to improving the negotiating process, other means have been developed for increasing the flexibility of multilateral treaties so as to improve the possibility of States becoming parties to them even though they may not be in full agreement with all provisions or willing and able to assume identical obligations. One common device used to increase the flexibility of treaties is the admission of reservations, either by an explicit provision allowing all or a wide range of reservations or implicitly through the depositary practice, such as that mandated by the General Assembly in its resolutions 598 (VI) and 1452 B (XIV) for treaties of which the Secretary-General is depositary and as foreseen in articles 19 to 21 of the Vienna Convention on the Law of Treaties. However, certain organizations, such as ILO prefer not to admit reservations to the instruments they develop.[18] Instead, to permit flexibility, in particular for the benefit of developing States, other devices have been developed, such as allowing: (*a*) ratification of a convention by parts; (*b*) exclusions from the scope of a convention of a particular sector raising special difficulties of application; (*c*) initial ratification on the basis of a more limited scope, or a lower level of protection, in accordance with a scale specified in the convention; and (*d*) specification by States of the level of application accepted by them, subject to a minimum required by the convention.

### 2. *Follow-up on State action*

60. The general rule remains that, once a multilateral treaty has been promulgated by an organ or conference of an international organization, the organization then takes no substantive interest in the steps to bring the treaty into force that must be taken by individual States, except to the extent that the organization may act as depositary and carry out the formal steps required in that capacity. However, it is not unusual for the originating organization to commend a treaty to its members and to other potential parties, and from time to time to adopt additional resolutions addressed to all such States urging them to take the steps necessary to participate in the treaty; or to require its administrative head to report to it periodically as to the progress made in bringing a treaty into force for as many parties as possible.

61. In certain instances, the interest taken by organizations in treaties they originate goes beyond the periodic expression of interest and imposes certain requirements on the members of the organization. For example, both the ILO and the WHO Constitutions require member States (*a*) to submit treaties duly promulgated by the organization to the national organs competent to decide on their formal acceptance; and (*b*) to report on the actions they have taken to accept treaties promulgated by the organization.

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## E. SUPPLEMENTING AND UPDATING TREATIES

62. One feature of multilateral treaty-making on which a number of organs and organizations commented is that the modern age requires the conclusion of more and more treaties in technical and other fields where the conditions to which the treaty is addressed or the nature of the obligations to be undertaken may change relatively rapidly. For this purpose the normal purpose of changing multilateral treaties, by concluding what is in effect a new treaty among the States parties to the original instrument,[19] is too slow, involved and uncertain a process. Consequently, many organizations have developed special devices to facilitate the adjustment of treaty provisions among which are the following:

(*a*) UNEP has formulated certain treaties that specify solely general obligations and administrative matters, but that rely on protocols or technical annexes, some of which may be formulated later than the principal instrument and which may in any event be amended more easily than the principal treaty (e.g., the Convention for the Protection of the Mediterranean Sea against Pollution (Barcelona, 1976)).

(*b*) The Working Party on Facilitation of International Trade Procedures specifically recommended that the ECE response to the Secretary-General's questionnaire on the present subject should include the recommendation that standardized trade documents (which must be uniform but which may have to be changed frequently) should not form an integral part of the text of the treaty that requires their use, but that the treaty should allow changes in the content and layout of such documents to be effected by a decision taken by a competent organ of the organization under whose auspices the treaty was negotiated.

(*c*) ILO conventions routinely contain a provision providing for supersession in respect of parties that become parties to later conventions on the same subject (for example, art. 38 of the ILO Convention (No. 121) concerning benefits in case of employment injury[20]). In addition, some recent ILO conventions have contained simplified amendment procedures (see art. 31 of the above-mentioned ILO convention).

(*d*) The international postal régime established under the auspices of UPU consists of the Universal Postal Convention, which is binding on all member countries of the Union (see Part Four, II.H. below). This act contains the common rules applicable to the international postal service and the provision governing letter-post items. The other branches of the international postal service (parcels, money orders, cheques, collection of payments, etc.) are the subject of optional Arrangements. These two types of Acts are treaties in the full sense of the word.

(*e*) Certain fisheries conventions provide that recommendations made by authorized organs are binding on all participating States, unless they specifically opt out by an appropriate and timely notification; if the number of States that do so exceeds one third of the parties, the recommendation ceases to be binding on any of them (for example, arts. VIII and IX of the Convention on the conservation of the living resources of the Southeast Atlantic (see Part Four, III.H. below).[21]

(*f*) An International Convention on the Simplification and Harmonization of Customs Procedures was concluded in 1973, under the auspices of the Customs Co-operation Council (see Part Four, III.D. below). The Convention, prepared over a period of several years, has 30 Annexes which can be accepted independently of each other. This procedure is very flexible, in that it allows States to choose those Annexes whose obligations they are prepared to accept. It has also made it possible for the Annexes to the Convention to enter into force progressively, without it being necessary to wait for them all to be completed. Moreover, there is a simplified procedure for amending the Annexes.

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NOTES

[1] See Part Three of the present publication.

[2] *Official Records of the General Assembly, Thirty-fourth Session. Supplement No. 10* (A/34/10), paras. 184-195.

[3] Not reproduced here. These contributions are produced in part four of the present publication.

[4] These comments were summarized in the report of the Sixth Committee to the General Assembly (A/33/419, paras. 259-260) and at greater length in a topical summary of the discussion of the ILC report prepared by the secretariat for the use of the Commission (A/CN.4/L.311, paras. 249-254).

[5] In this report, the term "promulgated" is used in the sense of adoption of the text and opening of the instrument for signature or other forms of acceptance.

[6] In one instance an entire treaty, the Optional Protocol to the International Covenant on Civil and Political Rights (resolution 2200 A (XXI), Annex) was formulated by the General Assembly.

[7] Up to the thirty-second session of the General Assembly, this was the First Committee; when, after the tenth special session, all non-disarmament questions were

transferred from that Committee, outer space questions were assigned to the Special Political Committee.

[8] Such power derives from articles 58; 62, para. 1; 63, para. 1; and 64 of the Charter of the United Nations and from the relationship agreements concluded with specialized and other related agencies.

[9] This resolution was followed by the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (resolution 2200 A (XXI), annex).

[10] This resolution was followed by the International Convention of the Elimination of All Forms of Racial Discrimination (resolution 2106 A (XX), annex).

[11] For example, the Third United Nations Conference on the Law of the Sea has a Drafting Committee of 23 members (A/CONF.62/30/Rev.2, Rule 53(1)), and the 1977 Conference on Territorial Asylum (Geneva, 1977) had a Drafting Committee of 31 (A/CONF.78/12, para. 12).

[12] See *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 14* (A/34/14, para. 76).

[13] For example, Switzerland took part in consideration by the Sixth Committee of the Convention on Special Missions (resolution 2530 (XXIV), annex) at the twenty-third and twenty-fourth sessions and, with more limited rights, of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (resolution 3166 (XXVIII), annex) at the twenty-eighth session.

[14] United Nations, *Treaty Series*, vol. 484, No. 7041, p. 349.

[15] For the text of the Convention, see A/CONF.39/11/Add.2 (United Nations publication, Sales No. E.70.V.5), pp. 287-301.

[16] For example, the decision taken at the twenty-third session of the Assembly on the Draft Convention on Special Missions.

[17] Oscar Schachter, Mahomed Nawaz and John H. Fried, *Toward Wider Acceptance of United Nations Treaties* (New York, Arno Press, 1971).

[18] See Written Statement of the ILO, in International Court of Justice *Pleadings*, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, pp. 216-287.

[19] Vienna Convention on the Law of Treaties of 1969, articles 39 to 41.

[20] United Nations, *Treaty Series*, vol. 602, p. 259.

[21] United Nations, *Treaty Series*, vol. 801, p. 101.